

**FILED**

**MAR 04 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 290221**

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**RESPONDENT,**

**v.**

**PAUL RODRIGUEZ,**

**APPELLANT.**

---

**RESPONDENT'S BRIEF**

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**D. ANGUS LEE  
PROSECUTING ATTORNEY**



**By: Edward A. Owens, WSBA #29387  
Chief Deputy Prosecuting Attorney  
Attorney for Respondent**

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### **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

### **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the trial and conviction of the Appellant.

### **III. ISSUES**

A. Whether there was sufficient evidence to prove all the elements of the crime of attempting to elude a police vehicle as required by RCW 46.61.024(1).

B. Whether there was impermissible witness testimony regarding opinion allowed by the court that the defendant was attempting to elude the police vehicle.

C. Whether there was sufficient evidence to find the defendant guilty beyond a reasonable doubt of possession of a firearm in the first degree.

#### **IV. STATEMENT OF FACTS**

The defendant was found guilty, by a twelve person jury, of attempting to elude a police vehicle and unlawful possession of a firearm. (CP 27, 28). The defendant also stipulated to making a false or misleading statement to a public servant, possession of less than 40 grams of marijuana, and driving without a valid operator's license. (RP 4-7).

At trial, the State presented the following evidence. Sergeant Brian Jones of the Moses Lake Police Department was on duty on February 27, 2009. Sergeant Jones had a civilian riding along with him, the Mayor of Moses Lake, Ronald C. Covey. They were riding in a patrol car, equipped with window lights in the front and back of the vehicle, a shield separating the front and back seats, exempt plates, a spotlight and a siren. (RP 89, 136, 138).

Sergeant Jones was traveling westbound on Broadway. When Sergeant Jones approached the intersection of Broadway and Barbara Street, he looked over and observed the defendant, in a white Cadillac about 30 feet back of the stop line, was leaned to his side and fiddling with something. (RP 138, 139). Sergeant Jones turned onto Barbara Street. He slowed the patrol car to one to two miles an hour and drew parallel to

the white Cadillac. (RP 139). The defendant looked startled when he saw Sergeant Jones, then turned his head and drove forward on the roadway.

Sergeant Jones made a U-turn as the Cadillac continued to move toward the intersection. He had decided to contact him for being stopped in the middle of the roadway short of a stop sign and to make sure everything was ok. (RP 139). As Sergeant Jones turned his vehicle around, the defendant was accelerating at a high rate eastbound on Broadway Avenue, away from his location. (RP 139). By the time the patrol car reached the intersection of Broadway and Barbara Street, the Cadillac was several blocks beyond it. (RP 93). The Cadillac continued to accelerate, reaching speeds up to 60 or 70 miles an hour in a 40 mile an hour zone. (RP 145, 166).

The patrol car was approximately 200 yards behind as the Cadillac approached another intersection, braked and turned, cutting off oncoming traffic. (RP 166). Sergeant Jones did not activate the lights or sirens until his patrol car approached the intersection of Gibby Street and Broadway Ave. (RP 167). Sergeant Jones testified that he did not turn on his lights and siren until "As soon as I saw the actions of the Cadillac, he was no longer just trying to speed away from me, he was actively trying to elude me, and putting other people in danger." (RP 169).

Once on Gibby Street the defendant accelerated at a high rate of speed in a 25 MPH speed zone. (RP 172). The defendant then turned right at the intersection of Gibby Street and Lee Street which is where a city park is located. (RP 99, 172-174). As the defendant was fleeing down Lee Street, Sergeant Jones observed a black bag being thrown out the driver's side window by the driver. (RP 174). Sergeant Jones radioed for other patrol cars to go to the area and look for the black bag that was thrown from the defendant's vehicle. (RP 175).

Shortly after he had seen the bag thrown from the defendant's vehicle, Sergeant Jones discontinued the pursuit in a residential area, turning off his emergency lights and siren. (RP 180). Moments later, Sergeant Jones observed the white Cadillac farther ahead turning into a trailer park. (RP 180-181). As Sergeant Jones crested the top of the hill he observed the defendant step out from behind a trailer within the trailer park. (RP 181). Sergeant Jones then pulled into an adjacent lot next to the trailer park and pulled up within feet from where the defendant was last seen. (RP 182-183). The defendant saw Sergeant Jones approaching and took off running with the female that had been in the car with him. (RP 183). The police car video and the police radio were still activated from the initial pursuit and continued to be left on. (RP 183).

Sergeant Jones ran after the defendant and caught him within minutes. (RP 184-186). The defendant was then arrested and brought back to Sergeant Jones's police car and placed in the back seat. (RP 188). Plaintiff's Exhibit 24, the video taken from the police car during the chase, was shown to the jury. During this time the jury was able to see Sergeant Jones escorting the defendant back to the patrol car after the defendant was arrested. (RP 211-216; video time was at 17:50 – 17:51).

A black zippered canvas Adidas bag was recovered from under the front passenger side of a vehicle parked on the street in the area where Sergeant Jones had indicated that he had observed an item being tossed out of the defendant's vehicle. (RP 45-57). It contained a gun and some marijuana. (RP, 159, 160). A small ring and a baggie containing novelty women's jewelry were recovered from the front lawn of a home in the same location. (RP 118, 123).

After the trial was concluded, the jury found the defendant guilty of attempting to elude a police vehicle, and unlawful possession of a firearm in the 1<sup>st</sup> degree. The defendant was sentenced to a total confinement of 101 months as he has over 9 plus points.

## V. ARGUMENT

- A. THE STATE PROVED ALL THE NECESSARY ELEMENTS OF THE CRIME OF ATTEMPTING TO ELUDE A POLICE VEHICLE AS REQUIRED BY RCW 46.61.024 (1).

The defendant now argues that the second element of the crime of attempting to elude a police vehicle was not met. He now tries to persuade this court that the State did not provide any evidence during trial that Sergeant Jones was in a uniform when he attempted to stop him, thus, arguing that the evidence was not sufficient to prove the charge beyond a reasonable doubt.

In order to determine whether there was sufficient evidence to support Rodriguez's conviction, this Court will "view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Mitchell*, 169 Wn.2d 437, 443-44, 237 P.3d 282 (2010) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) (citing *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003))). A claim of insufficiency of the evidence not only requires that the Appellant admit the truth of the State's evidence, but also grants the State the benefit of all inferences that can reasonably be drawn from it. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing *State v. Green*,

94 Wn.2d 216, 222, 616 P.2d 628 (1980)). Additionally, appellate courts defer to the finder of fact (in this case, the jury) on issues of witness credibility. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

The defendant's trial was held in front of twelve sworn jurors. (RP 18). These twelve jurors sat through the entire trial and listened to each piece of evidence presented to them. This evidence included testimony from lay witnesses, officers, evidence found at the scene, as well as a video that showed the pursuit of the suspect's vehicle as well as the arrest of the defendant. At the conclusion of trial, the court properly instructed the jury on the elements of attempting to elude, as well as what direct and circumstantial evidence are and the weight to give them. (RP 241-242).

The instruction was taken directly from WPIC 94.02 and read:

To convict the defendant of attempting to elude a pursuing police vehicle as charged in Count 2, the State must prove each of the following elements of the crime beyond a reasonable doubt:

1. That on or about February 27, 2009, the defendant drove a motor vehicle.
2. That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
3. That the signaling police officer's vehicle was equipped with lights and siren;
4. That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;

5. That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and
6. That the acts occurred in the State of Washington.

Instruction No. 6 (RP 244-245)<sup>1</sup>

It is clear from the instructions given to the jury that they were aware, that in order to find the defendant guilty of the crime of attempting to elude a police vehicle, they needed to find that the defendant ... was signaled to stop by a uniformed police officer...(RP 244). Defendant asserts that there was no evidence to sustain the verdict the jury reached. The State disagrees. As stated in this brief earlier the jury was also given instructions on how to review the testimony of witnesses and the evidence that may be provided at trial. Jury Instruction No. 3 read; Witnesses and Their Testimony:

Generally, witnesses are “fact” witnesses, “opinion” witnesses, or both. Fact witnesses testify to what they saw, heard or otherwise observed, while opinion witnesses express opinions in addition to their observations.

Witnesses may give direct evidence or circumstantial evidence. Direct evidence is intended to prove the occurrence of the very things observed. Circumstantial evidence is intended to

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<sup>1</sup> See RCW 46.61.024(1): “Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and siren.”

prove not only what the witness observed, but, also, other facts from - - which you can infer from those observations, using only common sense and experience. The law does not require you to give direct evidence more weight than circumstantial evidence. Neither is necessarily more valuable or believable than the other.....(RP 241-242)

When reviewing the evidence that the State presented at trial, the jury had obtained facts and circumstances that supported their conclusion that the element showing the officer was in uniform was met. First, evidence is presented showing that Sergeant Jones was in a police vehicle. It had window lights in both the front and back of the vehicle, a shield separating the front and back seats, exempt plates, a spotlight and a siren. (RP 89, 136, 138). Second, the jury was able to see the chase when it reviewed the video that was presented at trial. It was clear to the jury that the defendant was attempting to elude the police vehicle. The evidence showed the defendant's reckless driving while maneuvering his vehicle in the attempt to get away from the officer. (Plaintiff's Exhibit 24).

The State argues that the jury saw the officer in his uniform when they viewed Plaintiff's Exhibit 24. When Sergeant Jones jumped out of his patrol car and started chasing the defendant, he left the video running. The video was pointed towards the trailer park and the road that ran within the park. (RP 216: State's Exhibit 24 at 17:46:53 – 17:50:29). During the viewing of that video, one could see the officer escorting the defendant

back to the area he ran from. In fact, Sergeant Jones specifically pointed out in the video where the defendant and Sergeant Jones were coming back into the video during direct examination by the State. (RP 216). At that moment the defense attorney, judge, and most importantly, the jury, observed the defendant being escorted by the uniformed officer Sergeant Jones.

The State would like to point out to this court that the defense attorney's own actions in the trial, or lack of actions, support the argument that he too saw Sergeant Jones in uniform. In defense attorney's closing he never argued to the jury that the second element of eluding had not been met. (RP 266-280). The State would also note to the court that there was no motion to dismiss the count of attempting to elude a police vehicle after the state rested. But most importantly the State would argue that the jury saw it and came back with a verdict of guilty, thus the inference that the officer was in a uniform can reasonably be drawn from the evidence presented.

**B. THERE WAS NOT IMPERMISSIBLE WITNESS TESTIMONY REGARDING AN OFFICER'S OPINION REFERENCE THE DEFENDANT'S ACTIONS.**

Sergeant Jones' testimony regarding his observations of the defendant's driving did not violate the defendant's Constitutional right to a

jury trial. The officer was clearly describing to the jury why he was reacting to the defendant's actions when attempting to stop him.

A witness is not permitted to offer an opinion on the guilt of the defendant, either by a direct statement or by inference. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Whether testimony constitutes an opinion on guilt will depend on the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence presented. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

“Lay opinion testimony is admissible if it is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.” *State v. Farr-Lenzini*, 93 Wn. App. 453, 462, 970 P.2d 313 (1999); See also ER 701. Appellate courts will “generally affirm rulings admitting lay opinion testimony when it has a solid factual basis and is based on direct personal observations which directly and logically support the opinion.” See, e.g., *Heatley*, 70 Wn. App. at 579-80 (officer's opinion that defendant was intoxicated to the point that he could not drive safely).

This court will review the trial court's decision regarding lay opinion testimony for an abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). However, even if the court abused its discretion, the error is still subject to a harmless error review.

Defense argues that because the officer testified that it appeared to him that the defendant was attempting to get away from him the State violated his constitutional rights to a fair trial. But this is not the case when the entire contact, or attempt to contact, is reviewed. The officer testified that he was going to contact the defendant as he was acting suspicious and wanted to make sure everything was ok. (RP 139-140). This statement by Sergeant Jones goes directly to the officer's direct personal observations and logically supported his conclusion of the suspicious activity. The Sergeant was testifying why the actions were suspicious and why he initiated the stop not what the defendant was trying to do or thinking.

The defendant also argues that Sergeant Jones violated his right to a fair trial when he next stated that he felt that the defendant was trying to get away from him when he witnessed the defendant driving at a high rate of speed and accelerating. (RP 166) The Sergeant next testified that, "as soon as I saw the actions of the Cadillac, he was no longer just trying to

speed away from me, he actively was trying to elude me, and putting people in danger.” (RP 169-170). Sergeant Jones was testifying to the actions that led him to the point of turning on his lights and siren and actively engaging in pursuit of the suspect. (RP 169-170). Sergeant Jones’ testimony regarding the defendant’s actions was relevant to explain why the Sergeant responded as he did.

The State would argue that if this court finds that the statements Sergeant Jones made in court regarding his opinion of the defendant attempting to elude him were a violation of the defendant’s constitutional rights the State would argue that the violations would be a harmless error at most.

Courts use two tests to determine whether constitutional error is harmless: the “contribution test” and the “overwhelming evidence test.” See *State v. Johnson*, 100 Wn.2d 607, 621, 674 P.2d 145 (1983), overruled on other grounds by *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). Under the contribution test, error is harmless if it can be said beyond a reasonable doubt that it did not contribute to the verdict. *Johnson*, 100 Wn.2d at 621. Under the overwhelming evidence test, constitutional error is harmless if it can be said beyond a reasonable doubt

that the untainted evidence necessarily leads to a finding of guilt. *Johnson*, 100 Wn. At 621.

Unlike the facts submitted by in the case cited by both the State and defendant in *State v. Farr-Lenaini*, 93 Wn.App. 453, 463, 970 P.2d 313 (1999), where there was only officer testimony in proving the eluding charges the case at hand has much more evidence. The State provided evidence from Sergeant Jones of the defendant's actions, the testimony of Ronald Covey in reference what he observed during the eluding, but most importantly and unlike, *Farr-Lenaini*, the State provided an in car video, Plaintiff's Exhibit number 24, which was taken during the elude and showed first hand the defendant's driving actions during this case. This is an in-car video that shows the entire pursuit by the officer and the actions the defendant took while attempting to elude Sergeant Jones. The State would argue that this tape is overwhelming evidence and by itself would lead to the verdict of guilty beyond a reasonable doubt.

C. THE STATE'S EVIDENCE WAS SUFFICIENT TO UPHOLD A CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE.

In order to determine whether there was sufficient evidence to support Rodriguez's conviction for unlawful possession of a firearm in the first degree, this Court will "view the evidence in the light most favorable

to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Mitchell*, 169 Wn.2d 437, 443-44, 237 P.3d 282 (2010) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) (citing *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003))). A claim of insufficiency of the evidence not only requires that the Appellant admit the truth of the State’s evidence, but also grants the State the benefit of all inferences that can reasonably be drawn from it. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980)). Additionally, appellate courts defer to the finder of fact (in this case, the jury) on issues of witness credibility. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

At the conclusion of trial, the court properly instructed the jury on the elements of unlawful possession of a firearm in the first degree. The instruction was taken from WPIC 133.02 and read :

To convict the defendant of the crime of unlawful possession of a firearm in the first degree as charged in Count 1, the State must prove each of the following elements beyond a reasonable doubt:

1. That on or about February 27, 2009, the defendant knowingly had a firearm in his possession or control;
2. That the defendant had previously been convicted of a serious offense; and

3. That the possession or control of the firearm occurred in the State of Washington.

Instruction No. 4 (RP 242-243)<sup>2</sup>

As also argued earlier in this brief, the court instructed the jury on weighing the evidence as well as the types of evidence which could be presented during trial. Jury instruction number 3 stated:

Jury Instruction No. 3 : Witnesses and Their Testimony:  
Generally, witnesses are “fact” witnesses, “opinion” witnesses, or both. Fact witnesses testify to what they saw, heard or otherwise observed, while opinion witnesses express opinions in addition to their observations.

Witnesses may give direct evidence or circumstantial evidence. Direct evidence is intended to prove the occurrence of the very things observed. Circumstantial evidence is intended to prove not only what the witness observed, but, also, other facts from -- which you can infer from those observations, using only common sense and experience. The law does not require you to give direct evidence more weight than circumstantial evidence. Neither is necessarily more valuable or believable than the other.....(RP 241-242).

A person knows of a fact by being aware of it or having information that would lead a reasonable person in the same situation to conclude the fact exists. RCW 9A.08.010(1)(b). Circumstantial and direct evidence are equally reliable to establish knowledge. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Also, “circumstantial

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<sup>2</sup> See RCW 9.41.040(1) (a): “A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.”

and direct evidence are equally reliable, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) .

The jury was able to review the evidence that was presented at trial. When accumulating the evidence as a whole, it shows multiple incidents of “slight corroborative evidence of inculpatory circumstances,” which the state agrees, “is sufficient to prove guilty knowledge.” *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). Examples of slight corroborative evidence include false or improbable explanations and providing the police with a fictitious name. *State v. Portee*, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946).

Here, sufficient evidence supported the jury’s conclusion that the defendant knew he possessed a firearm. First, Sergeant Jones observed the defendant throw something out of the driver’s window during the car chase. ( RP 174). This was seen in the video on (Plaintiff’s Exhibit 24) as the defendant’s vehicle was speeding down Lee Street towards Marina Drive. Second, Officers Fullbright, Perez, and Deputy Char responded to the location where the item was thrown and found a jewelry bag and a hand gun with fresh scrape marks on it. (RP 44-68). Third, when the defendant was arrested, he lied to the officer regarding his identity and

told Sergeant Jones he was a Jose Pena. (RP 188). Fourth, the defendant knew he had a previous serious violent conviction, (RP 10-11).

When reviewing the evidence presented at trial by the State, and viewing the evidence in a light most favorable to the State and all the inferences that can reasonable be drawn from them, the State would argue that it met its burden by proving the elements beyond a reasonable doubt.

### **VI. CONCLUSION**

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

Dated: March 3, 2011.

Respectfully submitted,  
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Edward A. Owens, WSBA #29387  
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