

FILED

Jul 21, 2016

Court of Appeals

Division III

COA No. 33855-0- State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON O. KEELE,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The State's evidence was insufficient to support a finding of guilt on the three crimes for which Brandon Keele was convicted.

Issue Pertaining to Assignment of Error

A. Was the State's evidence sufficient to prove guilt beyond a reasonable doubt on the three crimes for which Mr. Keele was convicted? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Mr. Keele went to jury trial on count 1: second degree assault, count 2: first degree malicious mischief, and count 3: attempting to elude a pursuing police vehicle with an endangerment of others enhancement. (CP 1; 10/22/15 RP 80). The only issue at trial was the identity of the person committing those crimes.

Washington State Patrol Trooper Michael Dufour was on duty October 4, 2014, patrolling the Cashmere area in a marked car and in uniform. (10/22/15 RP 87-90). He was traveling westbound on Highway 2 just after midnight when he heard on the radio that another trooper had made a traffic stop and the car took off on him. (*Id.* at 90-91). Trooper Dufour responded and picked up on a vehicle coming eastbound at him at a high rate of speed. (*Id.* at 91-92). He made a U-turn and chased the vehicle, which he estimated

was going about 100 mph. (*Id.* at 93). The traffic was light and they hit speeds up to 130 mph. (*Id.*).

The pursued vehicle went in between two cars traveling in the same direction on its way to Wenatchee. (10/22/15 RP 94). Trooper Dufour saw it make a right turn from the far left, cutting off another car. (*Id.* at 95-96). The car went through red lights and eventually headed off into Douglas County. (*Id.* at 97-99). The trooper put his spotlight on the vehicle and he could see the driver's head and the faces of the driver and passenger in the rearview mirror. (*Id.*). He was only a couple of car lengths behind at this point. (*Id.* at 99).

Trooper Dufour tried to pressure the driver into making a mistake as there was no car or pedestrian traffic. (10/22/15 RP 99-100). He was pursuing the vehicle, a Hyundai Tiburon, with his lights and siren on. (*Id.* at 100). There were two people in the car. (*Id.*). The Tiburon drove down the center turn lane and continued to blow stop signs. The trooper saw it do a quick turn toward a standing deputy's car. (*Id.* at 103). The Tiburon driver was going in the northbound lane driving south toward an oncoming car. (*Id.*). Trooper Dufour was ready to stop the pursuit as he had not been in

the area before and their speed was 45-55 mph in a 25 mph zone. (*Id.* at 104).

The trooper saw the Tiburon come at him in reverse with tires smoking. (10/22/15 RP 105). The vehicle hit his patrol car and the driver went forward and hit his car again. (*Id.*). The Tiburon driver then drove down a private driveway over an irrigation pipe that started spurting water. (*Id.* at 106). The Tiburon went over an embankment into a tiered flowerbed and high-centered. (*Id.* at 106). The driver revved the car, moved forward, hit the street ahead, and took off. (*Id.*).

After getting hit, Trooper Dufour's car was out of service as the steering was shot and the wheel bent. (10/22/15 RP 107). His car was disabled and the approximate repair cost was \$5,000. (*Id.* at 114-16). A deputy drove up, whereupon the trooper heard the car had been found after a search. (*Id.*). Trooper Dufour testified he could see the driver, who he identified as Mr. Keele. (*Id.*). Other troopers and deputies were involved in the pursuit. (*Id.* at 108-09). The passenger had been located, but Trooper Dufour did not talk to him. (*Id.* at 109). He looked at a DOL photo of Mr. Keele and identified him as the driver of the Tiburon. (*Id.* at 110). The trooper also identified him from a booking photo pulled on an East

Wenatchee police officer's mobile data terminal. (*Id.* at 111). He identified the passenger as well. (*Id.* at 114). No forensics were done on the Tiburon. (*Id.* at 121).

Trooper Leon Legros was involved in the October 4, 2014 chase. (10/22/15 RP 137). He made a traffic stop around midnight when he was working Highway 2 between Wenatchee and Leavenworth. (*Id.* at 139). A vehicle came up behind him doing 69 mph in a 60 mph zone so he pulled it over. (*Id.* at 140). The vehicle was a black Hyundai Tiburon. (*Id.*). He made contact on the passenger side and asked the driver for his license, registration, and insurance. (*Id.* at 140-41). The driver had no license. The trooper detected the odor of intoxicants. (*Id.* at 141). The driver was occupied with his phone and was not paying attention to Trooper Legros. (*Id.* at 142). He asked the driver to step out and he reluctantly began to do so. (*Id.*). The trooper was at the back corner of the car when the driver started the car, put it into gear, and drove off. (*Id.* at 143). He notified dispatch the car had fled and tried to overtake the Tiburon. (*Id.* at 144).

The car was going eastbound on Highway 2. (10/22/15 RP 144). Trooper Legros identified Mr. Keele as the driver of the Tiburon. (*Id.* at 146). The trooper lost the vehicle almost

immediately. (*Id.* at 147). About 5 minutes later, he heard other troopers were in pursuit so he headed toward Wenatchee. (*Id.*) The Tiburon eventually ended up in East Wenatchee and he finally got to where the vehicle was. (*Id.* at 148). He searched it and the driver and passenger were gone. (*Id.* at 149). The trooper found an expired driver's license for Jeff Morris, the passenger, who was the registered owner of the Tiburon. (*Id.*) Trooper Legros identified both Mr. Keele and Mr. Morris from DOL photos. (*Id.*)

Mr. Morris vaguely remembered the October 4, 2014 chase. (10/22/15 RP 163). He acknowledged he was the owner of the 2006 Hyundai Tiburon. (*Id.* at 164). He did not know Mr. Keele very well and had met up with him three times while out drinking and chasing girls. (*Id.*) The night of the chase, he was drinking at Oktoberfest in Leavenworth after driving there alone. (*Id.* at 165). He left with some friends, but Mr. Keele was not with him. (*Id.*) Mr. Morris said the last time he saw him was the beginning of summer 2014. (*Id.* at 166).

Mr. Morris was extremely intoxicated the night of the car chase. (10/22/15 RP at 167). He did not recall telling police Mr. Keele was driving. (*Id.*) He did not know who the driver was – just that he was supposed to be a valid driver who was not drunk. (*Id.*)

Mr. Morris remembered running away from the car as he did not want to be mistaken as the driver. (*Id.* at 168). When he gave a statement to the police, he was highly intoxicated. (*Id.* at 174). Mr. Morris testified Mr. Keele was not driving his car that night. (*Id.*).

Trooper Kirk Schneider was also involved in the chase. (10/22/15 RP 177-78). He saw some car going about 80 mph in a 60 mph zone when it passed him on the inside left shoulder while he had his emergency lights on. (*Id.* at 181-82). He was in an unmarked Ford Explorer and tried to catch up to the car, but could not. (*Id.* at 182). He saw Trooper Dufour do a U-turn and take chase as the primary unit. (*Id.* at 182). The Tiburon was going 100 mph and pulling away. (*Id.* at 183). There was other traffic on the road. (*Id.* at 183-84).

Trooper Schneider finally caught up in Douglas County, where he saw the car going in the center lane to pass traffic moving out of his way. The center lane was not one to be traveled on. (10/22/15 RP 186). The Tiburon went the wrong direction on the highway and made a left turn, almost hitting a car. (*Id.* at 187). But he lost the car again. (*Id.* at 188). He ended up at the location of Trooper Dufour, whose car was disabled after being struck by the Tiburon. (*Id.*). Trooper Schneider saw that Jeff Morris had been

brought back to the location. (*Id.* at 189). He overheard Mr. Morris say to another trooper he was 80% sure after seeing a DOL photo of Mr. Keele that he was the driver. (*Id.* at 196).

East Wenatchee Police Officer Carrie Knouff responded to a trespass call about 9 a.m. on October 4, 2014. (10/22/15 RP 202). A family had found a man sleeping on a couch in their yard. (*Id.* at 203). Officer Knouff woke him up. He had no ID and provided the name Josh R. Taylor, birth date October 16, 1980. (*Id.* at 206). The man was cooperative so he was free to go and did. (*Id.*). The officer knew about the chase the night before. (*Id.* at 207). She testified the guy sleeping was Mr. Keele. (*Id.* at 208). Doing a report on the trespass call, she saw Josh R. Taylor was an alias used by him. (*Id.* at 209-10). Officer Knouff saw an August 2014 booking photo of Mr. Keele and identified him as the sleeper. (*Id.* at 211). He was polite and cooperative. (*Id.* at 219).

Judy Nanamkin had known Mr. Keele for 13 years and met him when she moved to Twisp. (10/23/15 RP 230). They were just friends and he was like a brother. (*Id.* at 231). She remembered the time of the chase because she went to Barter Fair just outside of Tonasket and she had not been there for some years. (*Id.* at 233). The Fair was the last week of September and the first few

days of October 2014. (*Id.*). Ms. Nanamkin showed up on Friday around 7:30 p.m. and ran into Mr. Keele, his father, and Nicole Mullins about 9:30 p.m. (*Id.* at 205). She saw Mr. Keele from then to about 4:30 a.m. on Saturday. (*Id.* at 235, 237).

Steve Keele, the father, was at the Barter Fair in 2014. (10/23/15 RP 241). He went there about dusk on Friday night with Brandon and Nicole, his son's girlfriend at the time. (*Id.* at 244). Brandon Keele was at the Barter Fair on Friday night, when the chase took place. (*Id.* at 245).

Mr. Keele testified in his own defense. He knew Mr. Morris as he was his ex-girlfriend's ex-boyfriend. (10/23/15 RP 252). He had known him since around May 2014. (*Id.*). Ms. Mullins was Mr. Keele's ex-girlfriend. (*Id.* at 253). He testified he "whipped [Mr. Morris's] ass" over texts he wrote to Ms. Mullins. (*Id.* at 254). Mr. Keele went to Barter Fair in 2014, arriving 7:30 or 8 p.m. on Friday night, and stayed in a tent with Ms. Mullins. (*Id.* at 255). He said he was not driving Mr. Morris's car the Friday night of October 3, 2014 or early Saturday morning of October 4, 2014. (*Id.* at 259). The two were not getting along at that time anyway so he would not be in the car. (*Id.*). Mr. Keele was at work on Saturday morning. (*Id.*).

The jury found Mr. Keele guilty of second degree assault, first degree malicious mischief, and attempting to elude with an endangerment of others enhancement. (CP 82-85; 10/23/15 RP 307). Mr. Keele was sentenced within the standard ranges to total confinement of 84 months. (CP 98). Payment of LFOs was set at \$25/month at the suggestion of defense counsel with no objection by Mr. Keele. (CP 103). He also agreed to the restitution amount to the WSP. (11/2/15 RP at 339-40). Mr. Keele appeals. (CP 112).

III. ARGUMENT

A. The State's evidence was insufficient to support guilt beyond a reasonable doubt on the three crimes.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). So viewed, the State's evidence still fell short of showing by the requisite quantum of proof that Mr. Keele was indeed the driver of the Tiburon, the person who committed the crimes. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

The State must establish beyond a reasonable doubt the identity of the accused as the person who committed the offense. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). The “identification” of the Tiburon’s driver by the troopers was implausible considering the circumstances of the chase. Mr. Morris, who purportedly identified Mr. Keele as the driver, testified unequivocally at trial he was not driving. Moreover, he had an alibi that was confirmed by Ms. Nanamkin and his father.

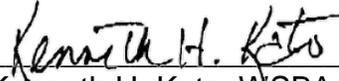
It is true that determining the identity of the accused is a question for the jury. *Id.* Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Here, the State did not prove the identity of the driver, thus requiring dismissal of the case. The State’s evidence was simply insufficient to prove the accused’s identity, an essential element, beyond a reasonable doubt. Mr. Keele’s convictions must be reversed and the charges dismissed. *Hill, supra.*

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Keele respectfully urges this Court to reverse his convictions and dismiss the charges.

DATED this 20th day of July, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on July 20, 2016, I served a copy of the Brief of Appellant by USPS on Brandon Keele, # 847505, PO Box 777, Monroe, WA 98272; and by email, as agreed, on Steven Clem at sclem@co.douglas.wa.us.

