

62241-2

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NO. 62241-2-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICKY M. ARNSTEN,

Appellant.

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2009 DEC 31 AM 10:43

BRIEF OF RESPONDENT

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I. ISSUES

(1) The defendant was charged with assault and attempting to elude a pursuing police vehicle. He submitted a proposed instruction that evidence of intoxication could be relevant to determine whether he acted with intent. Intent is an element of assault but not of eluding. The defendant did not submit an intoxication instruction relating to any element of eluding. Does the trial court's failure to give such an instruction constitute manifest error affecting a constitutional right, so as to allow the issue to be raised for the first time on appeal?

(2) There was evidence that the defendant had consumed drugs and alcohol several hours before the crime. There was no evidence showing that this consumption had any impact on his mental state. If the issue can be raised, was this evidence sufficient to require an instruction on intoxication as a defense to eluding?

(3) The defendant possessed a firearm in a car. When police tried to stop him, he attempted to elude them. In answering "no" to a firearm special verdict, the jury found that there was no connection between the firearm and the eluding. Did the trial court abuse its discretion in determining that the crimes of eluding and

unlawful possession of a firearm did not encompass the same criminal conduct?

(4) While attempting to elude police, the defendant drove over the hood of a police car. Did the trial court abuse its discretion in ordering the defendant to pay restitution for the resulting damage?

II. STATEMENT OF THE CASE

On the morning of October 18, 2007, police received a report that the defendant, Ricky Arnsten, had committed a robbery at Andy's Motel in Edmonds. Edmonds Police Detective David Honen went there to conduct a follow-up investigation. He asked Det. Stephen Morrison to accompany him. 2 RP 102-03, 199.

The two detectives arrived at the motel around 9:30 a.m. As they started to pull into the parking lot, they saw a car leaving. The car was driven by the defendant. Det. Honen observed that the driver matched the description of the suspect. He decided to follow the defendant. Because he was in plainclothes and driving an unmarked car, he radioed for a patrol car to make the stop. 2 RP 104-08, 200-02.

The defendant drove south along Highway 99 until he crossed into King County. King County Deputy Sheriff Eric White

pulled up behind the defendant at around 152nd and Aurora Avenue. Dep. White was in uniform and driving a marked patrol car. The defendant accelerated away. 2 RP 253-55, 258-59.

Dep. White signaled the defendant to stop, first with his strobe lights and later with his siren. The defendant did not stop. Instead, he drove at 55-60 mph in a 40 mph zone. It was raining hard, and the defendant's tires were spinning. On two occasions, the defendant drove into the opposing traffic lane to get past cars that were waiting at a stop light. During some of his turns, he started to fishtail. 2 RP 260-66.

Dep. White tried to stop the defendant by using a Pursuit Immobilization Technique (PIT). This involves ramming the suspect's car in a way that causes the car to spin out. It is intended to stop the car by shutting down the ignition system. 2 RP 263-64. The maneuver caused the defendant's car to spin 180 degrees, but it did not stall and the defendant continued driving. 2 RP 269-70.

The defendant drove into a Seven-Eleven parking lot. Dep. White rammed the defendant's car, pinning the driver's door closed. Dep. White got out of his car and drew his gun. He told the defendant to shut the car off, raise his hands, and get out. 2 RP 270-73. Instead, the defendant put his car into reverse. Det.

Honen had pulled up directly behind him. The defendant's car drove over the hood of the car occupied by Dets. Honen and Morrison. The back of his car went above the top of their car. 2 RP 273-75, 121-22, 215-17; 3 RP 321-22, 348-49, 373-75, 444.

The defendant then drove forward again. He appeared to be accelerating towards the window of the Seven-Eleven. There were people inside the store. Dep. White and another officer therefore shot the defendant. The defendant finally put his hands up and was taken into custody. 2 RP 278-80; 3 RP 379-90.

When police later searched the car, they found a .357 revolver on the front passenger seat, covered by a T-shirt. It was fully loaded with hollow point bullets. 3 RP 475-77, 482. The defendant had lost his right to possess firearms as a result of a conviction for first degree manslaughter. 5 RP 802-04.

The defendant testified that he had bought a car from James Harris, the alleged robbery victim. Mr. Harris had also asked the defendant for a gun. The defendant brought the gun to give to him, but Mr. Harris decided that he didn't want it. 5 RP 903-06, 938-39. Mr. Harris then falsely accused him of robbery. The defendant believed that he had been targeted by police in the past because they were unhappy about his successful challenge to a

murder conviction. When they tried to stop him on this occasion, he was scared, so he ran. He claimed that before he put his car into reverse, he looked behind himself and didn't see anything. 5 RP 923-29.

The defendant was charged with first degree robbery, attempting to elude a pursuing police vehicle, two counts of second degree assault, and first degree unlawful possession of a firearm. 2 CP 246-47. The robbery charge was dismissed at trial on the State's motion, due to lack of cooperation from the alleged victim. 5 RP 541-42. The jury acquitted the defendant of the two assaults. It found the defendant guilty of the eluding and the firearm charge. In a special verdict, it found that the defendant did not commit the eluding while armed with a firearm. 1 CP 72-76.

At sentencing, the court determined that the eluding and the firearm charge did not encompass the same criminal conduct. Sent. RP 1185. Counting the defendant's criminal history of four prior adult felonies and seven prior juvenile felonies, this led to an

offender score of 8 on each count.¹ 1 CP 13-14. The court imposed standard range sentences of 22 months for the eluding and 102 months for the firearm possession, to be served concurrently. 1 CP 17. It ordered restitution for the damage to the police car that the defendant backed over. 1 CP 5-7.

III. ARGUMENT

A. THE TRIAL COURT WAS NOT REQUIRED TO GIVE AN INTOXICATION INSTRUCTION WITH REGARD TO THE ELUDING CHARGE.

1. There Is No Constitutional Requirement That A Court Give An Intoxication Instruction When It Has Not Been Requested.

The defendant claims that he was entitled to an instruction on voluntary intoxication with respect to the eluding charge. He failed to take any exception to the trial court's failure to give such an instruction. Consequently, the issue is not preserved for review. It can be raised only if it involves a "manifest error affecting a constitutional right." State v. Salas, 127 Wn.2d 173, 181-83, 897 P.2d 1246 (1995); RAP 2.5(a)(3).

¹ One of the juvenile convictions was for attempted second degree robbery. The prosecutor conceded that this counted as a non-violent offense. Sent. RP 1170. This concession was erroneous. A conviction for an anticipatory offense should be scored the same as for the completed offense. Consequently, this conviction should have been scored as a violent offense. RCW 9.94A.525(4); State v. Knight, 134 Wn. App. 103, 106-09, 138 P.3d 1114 (2006), aff'd on other grounds, 162 Wn.2d 806, 174 P.3d 1167 (2008).

To obtain review under RAP 2.5(a)(3), the appellant must satisfy two requirements: (1) the error must be manifest and (2) it must be truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An error is "manifest" if it has "practical and identifiable consequences in the trial of the case." State v. Roberts, 142 Wn.2d 471, 500, 13 P.3d 713 (2000). If the consequences are purely abstract and theoretical, the error is not "manifest." State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

The defendant claims that he has a constitutional right to instructions on a defense. Assuming this is true at all, it would only be true if the defendant requests such an instruction. The trial court is not obliged to instruct on defenses that the defendant does not choose to raise. Under some circumstances, it can be constitutional error to do so, because it deprives the defendant of the opportunity to control his defense. State v. McSorley, 128 Wn. App. 598, 116 P.3d 431 (2005).

Proposed jury instructions are normally filed before trial. CrR 6.15(a). Events at trial often render some of the proposals unnecessary or imprudent. If a defendant truly wants a particular instruction, he should make this clear on the record by taking an

exception as required by CrR 6.15(c). Absent any clear objection on the record, there is no “manifest” showing of constitutional error, so as to justify considering the issue on appeal.

In the present case, the defendant never even requested an intoxication instruction with respect to the eluding. He filed a set of proposed instructions that included the following:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be relevant in determining whether the defendant failed to act with *intent*.

1 CP 142 (emphasis added).

The crime of eluding includes no element of intent. 1 CP 88, inst. no. 8. Of the crimes submitted to the jury in this case, only assault required intent. 1 CP 94, inst. no. 14. Thus, this instruction did not involve intoxication as a defense to eluding – it involved intoxication as a defense to assault. Since the defendant was acquitted of assault, any error in the instructions on that crime is moot.

The record makes it clear that the defendant deliberately chose not to seek an intoxication instruction with respect to eluding. On cross-examination, he denied that his use of drugs or alcohol affected his mental state:

Q Are you telling me that would you agree with this perception, sir, that because of the use of cocaine and with – are you telling us the gin you were drinking, would this be an accurate assessment of your mood at that time, that you were moody, and that you were agitated?

A I think that I was very agitated about everything that had taken place.

5 RP 957. Thus, according to the defendant, his agitation stemmed from the alleged police harassment of him and his wife – not his use of drugs or alcohol. 5 RP 926-28.

As the defendant conceded at sentencing, his trial strategy was not to raise a defense to the eluding charge but simply to dispute its fairness. Sent. RP 1193-94. He said in closing argument, “My whole position really is that I wouldn’t have been having to run if I wasn’t being falsely accused.” 6 RP 1087. Given this strategy and his testimony, there was no reason for him to seek an intoxication instruction with regard to that crime. Since the record does not substantiate that the defendant sought such an instruction, any error in failing to give one was not truly of constitutional magnitude. Additionally, given the defendant’s arguments in regard to this crime, there is no reason to believe that such an instruction would have had any substantial effect on the verdict. The defendant has therefore not established any manifest

error affecting a constitutional right, so as to allow him to raise this issue without preserving it at the trial level.

2. If The Issue Can Be Raised, The Defendant Was Not Entitled To An Intoxication Instruction, Since There Was No Evidence Connecting His Use Of Alcohol And Drugs With Any Inability To Form A Relevant Mental State.

Even if the issue could be raised, it should be rejected.

A criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected the defendant's ability to acquire the required mental state.

State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002).

Here, the first two requirements are satisfied, but not the third. The crime of eluding requires mental states: willfully failing to bring a vehicle to a stop, and driving in a reckless manner. RCW 46.61.024; 1 CP 88, inst. no. 8. There was evidence that the defendant had consumed alcohol and drugs during the night before the eluding. 4 RP 906-07, 952. There was, however, no evidence that this consumption affected his ability to acquire any relevant mental state.

With regard to the use of cocaine, there is no evidence at all of the drug's effect. The defendant testified that he used the drug

before he visited Mr. Harris – i.e., at some unspecified time prior to midnight on the night before the crime. 4 RP 953, 905-06. There was no evidence that he was intoxicated at any time as a result of this drug use. Nor was there any evidence that it affected his mental state in any other way. Consequently, there was no basis for an intoxication instruction arising from drug use.

With regard to the use of alcohol, the defendant testified that he consumed alcohol with Mr. Harris – i.e., at some time around midnight. 4 RP 905-06. He testified that his wife considered him “a little bit too intoxicated” to drive at some time prior to her arrest – i.e., before 6:00 a.m. 5 RP 908, 866. There was no evidence that he was still intoxicated at the time of the eluding, which occurred after 9:30 a.m. 2 RP 104.

Even if there had been evidence that the defendant was intoxicated at the time of the crime, this would not be sufficient to justify an intoxication instruction. “What is relevant is the degree of intoxication and the effect it had on the defendant’s ability to formulate the requisite mental state.” State v. Priest, 100 Wn. App. 451, 997 P.2d 452 (2000). Evidence of intoxication is insufficient if it does not reach the degree that would allow a reasonable trial of fact to conclude that the state had failed to meet its burden of proof

with respect to the required mental state. State v. Kruger, 116 Wn. App. 685, 692, 67 P.3d 1147, review denied, 150 Wn.2d 1024 (2003). Here, there is no evidence of the degree of intoxication (if any) at the time of the crime.

The defendant testified that he was scared, agitated, and thought that he was being treated unfairly. 5 RP 926-28, 933, 957, 963. Nothing in that negates either of the mental states required for eluding. Nor was there any testimony tying these feelings to intoxication. Rather, the defendant claimed that they resulted from the surrounding events and his prior bad experiences with police.

The defendant cites two cases in which intoxication instructions were required: Kruger, and State v. Hackett, 64 Wn. App. 780, 827 P.2d 1013 (1992). In each of these cases, there was evidence showing the effect of the defendant's intoxication on his mental state. In Kruger, the court found "ample evidence of [the defendant's] level of intoxication on both his mind and body." 115 Wn. App. at 692. In Hackett, there was expert testimony connecting the defendant's intoxication with an inability to form the mental state required for the crime. 64 Wn. App. at 783-84. No such evidence existed in the present case. Since there was no evidence connecting the defendant's alcohol or drug use with any

inability to acquire a relevant mental state, an intoxication instruction was not appropriate.

B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THAT THE CRIMES OF ELUDING AND UNLAWFUL POSSESSION OF A WEAPON DID NOT ENCOMPASS THE SAME CRIMINAL CONDUCT, SINCE THE TWO HAD DIFFERENT VICTIMS, WERE COMMITTED AT DIFFERENT TIMES AND PLACES, AND HAD DIFFERENT OBJECTIVE INTENTS.

The defendant raises one issue relating to sentencing: he claims that the eluding and unlawful possession of a firearm should have been counted as “encompassing the same criminal conduct.” “Same criminal conduct’... means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

Determining whether two crimes encompass the same criminal conduct is a matter within the discretion of the trial court. State v. Burns, 114 Wn.2d 314, 317, 788 P.2d 531 (1990). The court’s determination will not be reversed absent a clear abuse of discretion or misapplication of the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990). The statute is construed narrowly to disallow most assertions of “same criminal conduct.” State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). In the

present case, the defendant's crimes fail all three prongs of the test.

To begin with, the two crimes did not involve the same victim. The victim of unlawful possession of a firearm is the general public. State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000). The victims of eluding are the individuals endangered by the defendant's driving. State v. Webb, 112 Wn. App. 618, 624, 50 P.3d 654 (2002). These victims are not the same.

The two crimes were also not committed at the same time and place. The defendant was in possession of the firearm when he started driving his car in Edmonds. 4 RP 720-21; 2 RP 103-05. The eluding began when police tried to stop the defendant in Shoreline, just north of the boundary with Seattle. 2 RP 258-60. When one crime occurs over a larger time and place than another, the two crimes do not encompass the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Finally, the crimes did not involve the same intent. "The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next." State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). Here, as already pointed out, the defendant took possession of the

firearm a substantial time before the eluding began. There is no evidence that he intended to elude police at the time that he took possession. Under an objective view, the defendant's intent in possessing the firearm was not the same as his intent in eluding.

The defendant points to the State's argument that the defendant committed the eluding to avoid being apprehended with the firearm. 6 RP 1025. This would not be sufficient to give the two crimes "the same intent." Two crimes do not involve the same objective intent simply because one was committed to avoid apprehension for the other. State v. Dunaway, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987).

In any event, the jury does not seem to have accepted the State's argument in this regard. The prosecutor relied on this argument with respect to the firearm allegation for the eluding. He argued that because of this motive, there was a "connection" between the firearm and the eluding, so as to render the defendant "armed" with a weapon. 6 RP 109-10. The defendant argued to the contrary, that there was no connection between the firearm and the eluding. 6 RP 1088-89. The jury found that the defendant was *not* armed with a firearm. 1 CP 72. Particularly in view of this finding, the trial court properly exercised its discretion in

determining that the two crimes did not involve the same criminal intent.

For two crimes to encompass the same criminal conduct under the statute, all three requirements must be met – same intent, same time and place, and same victim. The absence of any one of these requirements prevents a finding of “same criminal conduct.” State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Here, the trial court could properly find that none of these requirements was proved. The court did not abuse its discretion in counting the two offenses separately.

C. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING THE DEFENDANT TO PAY RESTITUTION FOR THE DAMAGE TO A POLICE CAR THAT HE CAUSED DURING THE ELUDING.

Finally, the defendant claims that the court improperly ordered restitution for the damage to the police car. Restitution is allowed for any losses that are causally connected to the crime charged. Foreseeability is not required. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). A trial court’s order of restitution will not be reversed absent abuse of discretion. Id. at 523. Here, the defendant admitted that he backed over the patrol car while attempting to avoid arrest. 5 RP 934. This testimony established a

causal connection between the eluding and the damage. Had the defendant brought his vehicle to a stop when ordered to do so, the police vehicle would not have been damaged.

The defendant points out that restitution must be related to the crime of which the defendant was convicted. State v. Eilts, 94 Wn.2d 489, 617 P.2d 993 (1980). The award of restitution was not, however, based on the unproved assault. Rather, it was based on the trial court's determination that the defendant was "still attempting to elude the pursuing police officers at the time that [he] backed up into the [police] car." Rest. RP 1262. The evidence amply supports this finding. The award of restitution was not an abuse of discretion.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on December 30, 2009.

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