

03064-4

03064-4

No. 63064-4-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TREVOR WEST,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ellen J. Fair

APPELLANT'S AMENDED OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Trevor West's Snohomish County Superior Court trial on a charge of eluding a pursuing police vehicle, the State of Washington's sole prosecution witness improperly commented on the credibility of Mr. West's defense.

2. The trial court erred in denying the defendant's motion to dismiss the charge of eluding a police vehicle based on the unconstitutionality of the statute under which the defendant was charged.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, in Trevor West's Snohomish County Superior Court trial on a charge of eluding a pursuing police vehicle, Trooper Keith Leary improperly commented on the credibility of Mr. West's defense when he called it "comical," and whether the remark constituted manifest constitutional error under RAP 2.5(a)(3), and requires reversal.

2. Whether the trial court erred in denying the defendant's motion to dismiss based on the unconstitutionality of the statute under which the defendant was charged, where RCW 46.61.024

improperly shifts the burden of proof on the issue of “knowledge” to the defendant.

C. STATEMENT OF THE CASE

The Supreme Court of the State of Washington has stated that a State’s trial witness’ blatantly prejudicial remarks, the interjection of which into a criminal trial is so improper and damaging as to be, in effect, an effort to deprive the defendant of a fair trial, may well do so. In State v. Nettleton, the Supreme Court stated:

If we are persuaded that . . . a witness for the state is deliberately trying to deprive the defendant of a fair trial, we will assume that he succeeded in his purpose and grant a new trial.

State v. Nettleton, 65 Wn.2d 878, 880 n. 4, 400 P.2d 301 (1965).

In the present case, following a 43-minute trial consisting of the testimony of a sole witness, Washington State Patrol Trooper Keith Leary, the defendant’s jury announced on the second day of deliberations that it “might be deadlocked.” 1/26/09RP at 24; 1/27/09RP at 79. The jurors were instructed to continue deliberating. 1/27/09RP at 79. Their request to view Trooper Leary’s original police report was denied. 1/27/08RP at 78.

The jury ultimately issued a guilty verdict. 1/27/09RP at 80;
CP 48.

Reversal is required, because in this close case, the jury would likely have acquitted Mr. West based on his reasonable, believable defense to the eluding charge. The defendant, who was charged with the offense for allegedly failing to stop when being followed by Trooper Keith Leary's unmarked¹ police vehicle, in fact stopped when he saw other, marked police squad cars.²
1/26/09RP at 42, 47.

¹See Laws of 2003, ch. 101 § 1 (effective July 27, 2003), amending former RCW 46.61.024 to delete requirement that the pursuing police vehicle "shall be appropriately marked showing it to be an official police vehicle." RCW 46.61.024 ("Attempting to elude police vehicle"). See also Part d.2, *infra* (statute's affirmative defense requiring defendant to prove that "[a] reasonable person would not believe that the signal to stop was given by a police officer" impermissibly shifts the burden of proof to the defendant).

²Trooper Leary admitted that the defendant stopped, pulling to the shoulder when marked police squad cars appeared on an exit ramp in front of him. 1/26/09RP at 42. The trooper claimed that the squad cars actually positioned themselves so as to block Mr. West's car – thus intimating that the defendant stopped for a reason other than the fact that he now recognized actual police vehicles – but the trooper's police report contained no mention that the squad cars were blocking Mr. West's further progress:

The [defendant's] car took the exit when I saw two patrol cars with their lights on approaching the end of the exit ramp. When the patrol cars approached the end of the ramp the Nissan pulled to the right quickly and stopped[.]

CP 98-103 (Defense Motion and Memorandum, with attached police report of Trooper K.A. Leary in Washington State Patrol case 07-010754). The jury was apprised of this significant discrepancy. 1/26/09RP at 47-49.

When Mr. West stopped his car, he explained to the arresting Trooper that he had not realized that the vehicle following him was in fact an unmarked, undercover police vehicle.

1/26/09RP at 44.

In addition, Mr. West explained that his friend Corey drove a car with lights similar to ones the vehicle behind him was displaying. 1/26/09RP at 44-45.

This defense would likely have resulted in acquittal, but for the fact that Trooper Leary, a 16-year veteran law enforcement officer who strode to the witness stand clothed in the uniform and the aura of authority of the Washington State Patrol, mocked and derided Mr. West's claims of innocence at the scene, which also constituted his defense at trial:

Q: [by prosecutor] Okay. Did he choose to talk to you?

A: I believe he did, yes.

Q: Do you remember what the extent of the conversation was?

A: There was not a whole lot of conversation. He made a reference to he thought it was a buddy of his following him, which I thought was kind of comical, myself. There's not many people that drive around –

(Emphasis added.) 1/26/09RP at 44; see 1/26/09RP at 42.

Defense counsel objected on ground of “speculation,” and the objection was sustained. 1/26/09RP at 44-45.

Following the jury's verdict, Mr. West was sentenced to a standard range term of 29 months based on an offender score of 9. 2/11/09RP at 12-13; CP 19-31. The parties agreed that the defendant had previously been sentenced on another conviction with an offender score of 7 which indicated that several of his prior convictions had been deemed to be the same criminal conduct. 2/11/09RP at 8-14; Appendix A. However, the court could not itself discern a basis for such a ruling and scored the defendant as a 9. Id.

On appeal, Mr. West argues that the Trooper's remarks were an impermissible comment on credibility, an impermissible conclusion as to guilt, invaded the province of the jury, and constituted manifest constitutional error under RAP 2.5(a)(3) and State v. Kirkman, 159 Wn.2d 918, 934-935, 155 P.3d 125 (2007). CP 5 (notice of appeal).

In addition, Mr. West argues that the eluding statute, RCW 46.61.024, is unconstitutional.

D. ARGUMENT

1. THE FLAGRANTLY IMPROPER TESTIMONY OF TROOPER LEARY CONSTITUTED MANIFEST CONSTITUTIONAL ERROR REQUIRING REVERSAL.

(a) Trooper Leary volunteered his damaging, direct personal opinions deriding the credibility of Mr. West's believable claim of lack of knowledge that he was being pursued by a police vehicle. Trooper Leary's objectionable comments were "manifest" constitutional error under RAP 2.5(a) since they involved direct statements of opinion by the trooper as to whether Mr. West was being truthful.

Importantly, the fact that the trial court sustained the defense objection does not mitigate the prejudice that resulted from the trooper's testimony. See State v. Reed, 102 Wn.2d 140, 143-47, 684 P.2d 699 (1984) (remanding for new trial because of prosecutorial misconduct in commenting on defendant's credibility, even though trial court sustained virtually every defense objection). The effect of the trooper's mocking answer deriding the credibility of Mr. West's defense was to squarely put before the jury his negative assessment of the truth of that assertion.

This violated not only ER 608 but also the defendant's constitutional right to have the jury alone pass on the believability of Mr. West's version of events. Pursuant to the protections of the Sixth Amendment and the Fourteenth Amendment's Due Process Clause, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant, because such testimony "invades the exclusive province of the [jury]." City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (citing State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) ("No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference"); State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967) (whether a defendant is guilty is a question "solely for the jury and [is] not the proper subject of either lay or expert opinion."); State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) ("Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference."); see U.S. Const., amend. 6; U.S. Const., amend. 14.

Of course, the Washington Rules of Evidence strongly disapprove of witness opinions on credibility. See ER 608 (Comment) (noting that "[t]he drafters of the Washington rule felt that impeachment by use of opinion is too prejudicial and on a practical level is not easily subject to testing by cross examination or contradiction"); Karl B. Tegland, Washington Practice: Evidence § 292, at 39 n. 4 (2d ed.1982). These constitutional, and evidentiary rules apply where a police officer offers his opinion on the credibility of a defendant's claims and defense. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

For example, in State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), a Child Protective Services worker who interviewed the child complainant stated that she believed that the child had been sexually abused. The Court found this to be an improper comment on the credibility of the complainant. State v. Jones, 71 Wn. App. at 812-13. In State v. Barr, 123 Wn. App. 373, 378, 98 P.3d 518 (2004), review denied, 154 Wn.2d 1009, 114 P.3d 1198 (2005), a police officer who interrogated the defendant testified that "it was obvious to me [the defendant] was afraid he was going to go to

prison for this." The Court deemed this improper opinion testimony on credibility and as to guilt. Barr, 123 Wn. App. at 382.

The error was "manifest." Opinion testimony that directly comments on another witness' credibility and opines about a defendant's guilt is manifest constitutional error because it violates the defendant's constitutional right to a jury trial, which includes independent determination of the credibility of the witness and of the facts by the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Generally, the appellate courts will not consider an evidentiary issue that is raised for the first time on appeal, because failure to properly object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); Kirkman, 159 Wn.2d 926. A narrow exception, however, exists for "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 936. A "manifest" error under RAP 2.5(a)(3) requires a showing of actual prejudice, which requires " 'a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.' " Kirkman, 159

Wn.2d at 935 (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

Under these circumstances, a manifest error requires “an explicit or almost explicit witness statement” that the defendant is guilty. Kirkman, 159 Wn.2d at 936; see also State v. Madison, 83 Wn. App. 754, 763, 770 P.2d 662 (1989) (an opinion on credibility that is direct, rather than implied, constitutes manifest constitutional error).

Mr. West is required to show that Trooper made an “explicit or almost explicit” comment on his guilt that resulted in actual prejudice. See Kirkman, 159 Wn.2d at 936. Each of these requirements is easily met in the present case. Trooper Leary explicitly mocked and derided the defendant's explanation of innocence. No further analysis of this aspect of the Kirkman test is necessary.

Prejudice, also, is plain. The Trooper was the trial's sole and only witness. The defendant's explanation was believable. The pursuing car was one which had been designed to trick other motorists that it was not a police vehicle. Supp. CP ____, Sub # 58 (Exhibit list, Defense exhibit 2 (photograph of unmarked vehicle)).

Yet, when the trooper strode to the stand and pronounced the defendant's defense "comical," he sealed Mr. West's fate in a close case. A police officer's opinion on the credibility of an accused has a "special aura of reliability" in the jury's eyes. Demery, 144 Wn.2d at 765; see also State v. Barr, 123 Wn. App. at 381 (opinion testimony of a law enforcement officer or other governmental official is especially likely to influence the jury); State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (same). And ultimately, the jury's documented difficulty deciding the case shows that the case was a closely decided one.

(b) Reversal is required. Admitting impermissible opinion testimony regarding the defendant's guilt or innocence is constitutional error, because it "violates [the defendant's] constitutional right to a jury trial, including the independent determination of the facts by the jury." State v. Carlin, 40 Wn. App. at 701. Constitutional error of this sort is harmless only if there is overwhelming untainted evidence that the jury would have reached the same result without the illegal evidence. State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994); State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Appellant has essentially addressed the question of reversibility in arguing that the constitutional error was “manifest,” i.e., bearing practical and identifiable consequences in the trial. See State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992); State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995) (both stating that manifest error under RAP 2.5(a)(3) is error that actually prejudices the defendant's case). In a case where the jury must decide a verdict based on two competing accounts of events, the error of allowing one witness to give his direct, negative opinion on the credibility of the defendant's version of the incident requires reversal under the constitutional error standard.

Thus in the recent case of State v. Jungers, 125 Wn. App. 895, 902-06, 106 P.3d 827 (2005), a trial court erred in denying the defense motion for mistrial where the defendant's credibility was a critical issue for jury to decide, and where the prosecutor improperly referred to previously stricken opinion testimony regarding a police officer's belief that the defendant was telling the truth when she admitted, at the time of her arrest, that certain drugs found were hers. State v. Jungers, 125 Wn. App. at 902-06.

For further example, in State v. Jones, 117 Wn. App. 89, 68 P.3d 1153 (2003), the Court of Appeals reversed on the basis of similar testimony in a case involving constructive possession of a firearm, which came down to whether Jones knew the gun in question was under his seat. Jones testified that he did not know it was there, and the officer testified that he did not believe Jones. The Court concluded that the prejudice caused by a police officer's improper testimony opining on Jones' credibility -- provided to the jury in the form of recounting the interview with the defendant -- was incurable, and required reversal of the conviction. Jones, 117 Wn. App. at 92.

This case is much like Jungers and Jones. The defendant, Mr. West, claimed that he had no knowledge he was being pursued by a law enforcement officer. The inherent prejudice that was produced in this case, by a trooper's disparagement of Mr. West's defense, was severe. A police officer's opinion on the credibility of an accused has a "special aura of reliability" in the jury's eyes. Demery, 144 Wn.2d at 765; see also State v. Barr, 123 Wn. App. at 381 (opinion testimony of a law enforcement officer or other governmental official is especially likely to influence the jury); State

v. Carlin, 40 Wn. App. at 703 (same). It cannot be concluded beyond a reasonable doubt that the flagrant, improper opinion testimony given by Trooper Leary did not affect the verdict in this case. State v. Guloy, 104 Wn.2d at 426.

**2. RCW 46.61.024 IS
UNCONSTITUTIONAL.**

(a) The due process clause requires the State to prove all essential elements of a crime beyond a reasonable doubt.

The State must prove all essential elements of a crime beyond a reasonable doubt. U.S. Const., amends. 5, 14; Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Patterson v. New York, 432 U.S. 197, 206-07, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). RCW 46.61.024 provides as follows:

RCW 46.61.024. Attempting to elude police vehicle--
Defense--License revocation.

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his 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 sirens.

(2) It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.

Mr. West was charged with eluding. Under the statute, the State was required to prove beyond a reasonable doubt that he knew the car behind him was a police vehicle.

(b) The eluding statute includes a requirement of knowledge. The Legislature amended the eluding statute in 2003, deleting as an element of the offense that the police vehicle must be marked, in response to State v Argueta, 107 Wn. App 532, 538, 27 P.3d 242 (2001), and adding the affirmative defense of subsection (2). See Laws of 2003, ch. 101 § 1 (effective July 27, 2003). Previously, the statute stated that “[t]he officer[’s] vehicle shall be appropriately marked showing it to be an official police vehicle.” Former RCW 46.61.024.

An affirmative defense shifts the burden of proof to the defendant and is subject to constitutional limitations. In short, the

Washington Courts have held that the Legislature may require defendants to prove certain statutory affirmative defenses by a preponderance of the evidence, because it is constitutionally permissible to do so, so long as the State is not relieved from proving beyond a reasonable doubt all the facts constituting the crime. State v Hundley, 72 Wn. App. 746, 866 P.2d 56 (1994).

In State v Stayton, 39 Wn. App. 46, 48-50, 691 P.2d 596 (1984), the Court of Appeals found that there can be no "attempt to elude" unless there is the prerequisite knowledge that there is "a pursuing police vehicle, and stated that there can be no willful failure to stop unless there is the prerequisite knowledge that a statutorily appropriate signal has been given by a statutorily appropriate police officer. Stayton held that knowledge that the pursuing vehicle is indeed a police officer is an element of the offense. Stayton, 39 Wn. App. at 48-50.

The affirmative defense to eluding, which was codified by the Legislature in 2003, is unconstitutional because it relieves the State of proving the actual elements of the crime, namely, knowledge that it is a police officer who is pursuing. While the Court in Stayton was dealing with the prior statute, the analysis

applies equally to the newer version of the statute. When the Legislature changed the law, it did so in two ways: First, it changed the phrase "reckless driving" to "reckless manner." RCW 46.61.024; former RCW 46.61.024. Second, it eliminated the element that required that the police vehicle be marked. RCW 46.61.024; former RCW 46.61.024.

The Legislature left in place the element that the vehicle be equipped with lights and sirens and also left intact the requirement that the police officer be in uniform. Most importantly, the Legislature left the sequence of events that constitute the crime in the same order as the prior statute analyzed by State v Stayton, supra. The notes to the new Washington Pattern Jury Instructions for this offense still reference the Stayton decision to indicate that knowledge that the pursuing vehicle is a police vehicle is in fact a prerequisite of the crime. WPIC 94.02 has the following note:

The crime of attempting to elude is best analyzed by examining its elements in the chronological order in which they must appear. State v. Tandecki, 153 Wn.2d 842, 109 P.3d 398 (2005); State v. Treat, 109 Wn. App. 419, 35 P3d 1192 (2001); State v. Stayton, 39 Wn. App. 46, 691 P.2d 596 (1984). First, a uniformed officer in a vehicle equipped with lights and sirens gives a signal to stop. Second, the driver fails to stop immediately. Third, the driver drives in a

reckless manner. All three elements must occur in sequence before the crime has been committed. See State v. Sherman, 98 Wn.2d 53, 653 P.2d 612 (1982); State v. Stayton, 39 Wn. App. at 49. 49.
* * *

An "attempt to elude" requires knowledge that there is "a pursuing police vehicle." See State v. Stayton, *supra*; State v. Mather, 28 Wn. App. 700, 626 P.2d 44 (1981). Also see State v. Trowbridge, 49 Wn. App. 360, 742 P.2d 1254 (1987) (unmarked police vehicle may be a pursuing police vehicle for purposes of RCW 46.61.024). A willful failure to stop requires that the defendant have knowledge that a statutorily appropriate signal was given by a statutorily appropriate police officer. See State v. Stayton, *supra*; State v. Mather, *supra*.

WPIC 94.02 (Comment).

(c) The new statute impermissibly shifts a burden of proof to the defendant. While the State may require the defendant to carry the burden of proving an affirmative defense which does not negate an element of the crime charged, the burden of proof on essential elements may never be shifted to the defendant. Martin v. Ohio, 480 U.S. 228, 235, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); State v. Roberts, 88 Wn.2d 337, 340, 562 P.2d 1259 (1979). As such, the State must disprove beyond a reasonable doubt a defense which negates an element of a crime.

Acosta, 101 Wn.2d at 616; State v. McCullum, 98 Wn.2d 484, 493-94, 65 P.2d 1064 (1983).

To be valid, an affirmative defense may not, in operation, negate an element of the crime which the government is required to prove; otherwise, there would be too great a risk that a jury, by placing undue emphasis on the affirmative defense, might presume that the government had already met its burden of proof. Such a presumption would, without question, violate due process. See Mullaney v. Wilbur, 421 U.S. at 700-01.

Plainly, here, the Legislature's changes to the eluding statute in 2003 result in the unconstitutional position of removing from the State's burden an essential element -- knowledge that the pursuing car is indeed a police officer -- and instead shifting that element to the defense to prove that not only did the defendant not know that it was a police officer pursuing him, but that any reasonable person would also not know this fact. One cannot attempt to elude a police vehicle unless one knows that it is indeed a police vehicle. The analysis in Stayton, that "knowledge" (that the pursuing car is a police vehicle) is an element of the offense of eluding, applies to the new statute for all the reasons laid out

herein. If the defendant is required to prove the absence of knowledge, then, a burden of proving absence of guilt is placed on the defendant.

E. CONCLUSION.

Based on the foregoing, the appellant Trevor West respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 4th day of November, 2009.


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63064-4-I
)	
TREVOR WEST,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **CORRECTED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 4TH DAY OF NOVEMBER, 2009.

X _____ *AM*