

NO. 386287-III

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA ALAN CONNELLY

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

The state failed to prove beyond a reasonable doubt the elements of *Attempting to Elude a Pursuing Police Vehicle* and *Possession of a Stolen Vehicle* where the only evidence connecting Mr. Connelly to the crimes was the fact that he resided on Ms. Ocampo's property where the Buick was kept, that he and his brother T.J. helped Ms. Ocampo repair the Buick a day earlier, and that he bared a resemblance to the perpetrator, whose image was captured by security cameras from a Conoco Gas station.

Issues Pertaining to Assignments of Error

1. Did the state fail to prove beyond a reasonable doubt the elements of *Attempting to Elude a Pursuing Police Vehicle* under RCW 9A. 46.61.024 and *Possession of a Stolen Vehicle*, pursuant to RCW 9A. 56.068 where they failed to submit sufficient evidence that the identity of the driver of the Buick was Mr. Connelly?

2. Was Defense Counsel Ineffective for failing to seek a Missing Witness Instruction when the State did not call the only witness that could identify the driver of the Buick?

B. STATEMENT OF THE CASE

Procedural Facts

On April 24, 2020 Mr. Connelly was charged by information with *Attempting to Elude a Pursuing Police Vehicle* (RCW 9A. 46.61.024), *Possession of a Stolen Vehicle* (RCW 9A. 56.068) and *Reckless Driving*. CP 1. On October 21, 2021 the State moved to amend the information by dismissing the Reckless Driving charge. CP 55. The information claimed that the crimes were committed on April 20, 2020. CP 38. After a jury trial, Mr. Connelly was convicted on both charges. CP 79, 84. This timely appeal follows. CP 83.

Substantive Facts

On April 20th, 2020 Officer Miller was on patrol in an unmarked patrol vehicle with his K-9, Rebel. *RP 138*. While on North Paye Creek Road in the city of Chewelah, Washington, Officer Miller observed a blue, 1988 Buick that was traveling at an “extremely slow rate of speed”. *RP 138*. Officer Miller observed the Buick drift into the opposite lane and then drift back into its designated lane of travel. *Id.* He ran the vehicle’s license plate and determined that that the Buick’s registration was expired. *RP 138-139*. Miller activated his vehicle’s overhead lights and attempted a traffic stop of the Buick. *RP 139*. The Buick ignored Officer Miller’s attempt and accelerated to “60 miles-per-hour” while within the city limits. *Id.*

Officer Miller advised dispatch that he was in pursuit of the Buick and activated his siren. *Id.* During the pursuit,

the Buick was traveling and a high rate of speed and swerving into the other lanes of traffic. *Id.* While giving chase, Officer Miller observed that there was also a passenger in the Buick. *RP 139-140.* The pursuit continued at a high rate of speed and Officer Miller requested back-up; shortly after, the pursuit was joined by Deputy Stearns from the Stevens County Sheriff's Department. *RP 141.*

During the chase, the driver of the Buick completed a "U-turn" in a residential driveway and drove straight at Officer Miller's vehicle. *RP 141.* As this happened, a person in the Buick was ejected out of the passenger side door, did a somersault and narrowly missed being struck by Officer Miller. *RP 141-142.*

The ejected passenger Buick was later identified as Stanley Richardson. *RP 149.* Richardson was attempting to get a ride from a Conoco Gas Station in Colville to Spokane, by hitchhiking. *Id.* Richardson was offered a ride by the driver of the Buick. *RP 150.* A second Stevens

County Deputy Patrol vehicle driven by Deputy Evans was dispatched and Officer Miller advised him to check on Stanley Richardson to ensure that he was not injured. *RP 142*. Richardson was known to both Officer Miller and Deputy Dustin Hughes.

Both Officer Miller and Deputy Stearns narrowly evaded being hit by the Buick after the “U-turn” as it was driving head-on towards their vehicles. *RP 141-143*. Officer Miller continued pursuit of the evading Buick and estimated that it was traveling 90 miles per hour. *RP 144*.

Dust from the road was being kicked up by the vehicles and obscured Officer’s Miller’s vision. For his own safety, Officer Miller decelerated and followed the Buick, still traveling at a high rate of speed, from a distance. *RP 144-146*. Deputy Stearns was in her patrol vehicle, following behind Officer Miller. *RP 144-145*.

The chase led back to Chewelah and the Buick performed another “U-turn” and drove straight at Officer

Miller's vehicle again, trapping itself in a dead-end. *RP 146*. Shortly before this, Deputy Stearns advised Officer Miller that there was no egress from where the Buick was. Knowing that the Buick would come back her way, Deputy Stearns exited her vehicle and set up "spike strips, a method used to deflate a vehicle's tires. *RP 146-147*. The Buick drove on the side of the road to avoid the spike strip. Deputy Stearns who was on foot, was nearly struck by the Buick. *Id.*

The Buick became trapped again and turned into the backyard of a residence that abutted a forested area. *RP 147-148*. Once there, the Buick became stuck in the mud. *Id.* Trapped, the driver exited the Buick and fled on foot into the wooded area. *Id.* Officer Miller and his K-9 unit pursued the driver on foot for a short distance. Officer Miller determined that due to the darkness at night, it was too dark to see in the wooded area and ended the chase. *RP 148-149*.

It was determined that the Buick was a stolen vehicle, reported missing by its owner, Ms. Ocampo. *RP 126-128*. Mr. Connelly, Ms. Ocampo's ex-boyfriend, was living on the property where she kept the Buick. *RP 122*. Mr. Connelly and his brother T.J. attempted to fix the Buick for Ms. Ocampo, a day earlier. *RP 128-129*. Mr. Connelly and T.J. resemble each other. *Id.*

Although never identified as the driver of the Buick by the law enforcement that were involved in the chase, Mr. Connelly was arrested and eventually convicted for the crimes of *Attempting to Elude a Pursuing Police Vehicle* (RCW 9A. 46.61.024) and *Possession of a Stolen Vehicle* (RCW 9A. 56.068).

At trial, stills of video footage taken by Officer Dustin Hughes of the Colville Police Department were submitted into evidence. The stills were taken from the digital security cameras at the Conoco Gas Station. At trial the stills were compared with redacted criminal booking photos of Mr.

Connelly that were also submitted into evidence, for the jury to use in identifying the driver of the Buick.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF BOTH POSSESSION OF A STOLEN VEHICLE AND ATTEMPTING TO ELUDE A POLICE VEHICLE

Someone stole the Buick owned by Marie Ocampo and led the Chewelah Police on a dangerous chase. *RP 49, 55, 161*. However, the evidence was insufficient to convict Mr. Connelly as the person that did so. As a result, both of the convictions should be reversed and the case dismissed by this Court.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). The test for determining the sufficiency of

the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial evidence is no less reliable than direct evidence and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201.

In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a “pyramiding of inferences” where the inferences and underlying evidence are not strong enough to permit a rational trier of fact to find guilt beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (citing *State v. Weaver*, 60

Wn.2d 87, 89, 371 P.2d 1006 (1962)). A mere scintilla of evidence does not rise to the level of sufficiency in order to support a conviction: instead, the State must present substantial evidence. *State v. Kirkpatrick*, 14 Wn. App. 212, 216, 540 P.2d 450 (1975); *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971).

Here, the State was required to prove beyond a reasonable doubt that Mr. Connelly was the person that both possessed a stolen motor vehicle and willfully attempted to elude a pursuing police vehicle. The State failed to meet its burden because there was reasonable doubt that Mr. Connelly was actually the person that stole the Buick and eluded law enforcement in it.

The evidence presented at trial was limited to the facts that the Buick was stolen from Ms. Ocampo's property and that the thief led law enforcement on a high-speed chase throughout the city of Chewelah while driving

it. The chase occurred at night, thus nobody involved in it could testify as to who the driver was or what the driver looked like. Despite this, the State still identified Mr. Connelly as the driver and he was arrested, tried and convicted on both charges.

The record shows that Mr. Connelly's brother T.J., and Mr. Connolley had worked together on Ms. Ocampo's Buick a day before the theft and chase. *RP 128-129*. At trial, Ms. Ocampo laughed and indicated that T.J. and Mr. Connelly resembled each other when asked what T.J. looked like. *RP 129*. T.J. did not testify at the trial.

In the Concoco still, the man's face is turned to the side, his head is down and he is wearing a baseball hat that covers the entire upper portion of his head. Further, the lighting in the comparative photos of Mr. Connelly highlight his facial features while the stills are darker and all that can be seen is facial hair and a nose. *Exhibit 5*. The

record shows that at best, there may be a slight resemblance between the photos of Mr. Connelly and the person in the Conoco still. However, a slight resemblance is not enough to overcome the State's burden of reasonable doubt. Moreover, Ms. Ocampo testified that T.J. and Mr. Connolly resembled one another. Given that T.J. did not testify, it cannot be reasonably inferred that the person in the Conoco still Mr. Connelly rather than was T.J. In any event, when Ocampo's testimony is considered together with the already thin proof of identification that was proffered, the State's case fails to meet the burden of proof beyond a reasonable doubt.

The evidence must be considered in its totality. See *State v. Fernandez*, 89 Wash. App. 292, 300, 948 P.2d 872 (1997). When doing so, the state did not meet its burden of proof. Rather, as discussed in *Bencivenga*, supra, the evidence here is scant and constitutes the impermissible "pyramiding of inferences". *Bencivenga*, 137 Wn.2d at 711.

For these reasons, this Court must reverse the conviction and remand for dismissal with prejudice.

2. MR. CONNOLLY WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO REQUEST A MISSING WITNESS INSTRUCTION.

The identity of the Buick driver was the main point of contention at trial, and Mr. Connolly's sole defense. Richardson, as a passenger in the Buick during the chase, was the only person able to identify the Buick driver. However, Richardson was not called by the State to testify during trial. Despite this glaring omission by the State, the failure to call Richardson was never addressed by Defense Counsel. Given how scant the State's proof of identification was at trial, it was error for Defense Counsel to not seek a missing witness instruction as to Richardson. Consequently, Mr. Connolly was deprived of Effective Assistance of Counsel.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) that their lawyer's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that the deficient performance prejudiced their defense at trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 743 P.2d 816, 109 Wn.2d 222, 225-26, (1987). A “reasonable probability” is defined by the Supreme Court as “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. For an ineffective assistance of counsel claim to succeed on appeal, it must establish that defense counsel’s conduct was not a legitimate trial strategy or tactic. *Slate v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

It is well-established that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and,

without satisfactory explanation, that party fails to do so, the jury may draw an inference that it would be unfavorable. *State v. Abdulle*, 174 Wn. 2d 411, 275 P.3d 1113 (2012); *State v. Davis*, 73 Wn. 2d 271, 276, 438 P.2d 185 (1968). When giving the jury this Missing Witness instruction, the trial court instructs the jury that it may draw an inference that the testimony of the missing witness would have been unfavorable to the party in the case. *Id.* The factual pre-requisite for giving the charge is that the missing witness has to be within the control of the party that should have produced them at trial. *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008).

Here, it was shown that Richardson was a passenger in the Buick and was questioned by law enforcement after the chase. In addition, both Officer Miller and Officer Hughes testified that that they were “familiar” with Richardson prior to the chase and had had “a lot” of contact him. RP 149-150, 168-169. From the testimony of both

Officers, Richardson was well known to local law enforcement, thus within their power to locate and secure his presence at trial.

Given the scarcity of identification proof adduced at trial, the testimony of Richardson was paramount to ensure that the State had arrested and charged the proper person. Richardson met the driver at the Conoco and spent some time as a passenger in the Buick, a mere foot or less away from the driver. Moreover, he was the only person involved in the incident that could actually see the driver, given the testimony by law enforcement that it was dark and dusty during the chase, making it difficult for them to see.

The record is replete of instances where Defense Counsel argued that the State did not have enough proof to identify Mr. Connolly as the driver of the Buick. *RP 233-237*. This amply demonstrates that Defense Counsel understood where the State's weakness in the case

against Mr. Connolly. As such there is no tactical reason not to request a missing witness instruction not alert the jury to this glaring weakness in the state's case.

The failure to do so and resultant damage to Mr. Connolly's case is amplified when looking at the record as a whole. The jury was hesitant in concluding that Mr. Connolly was the driver of the Buick while deliberating. This is borne out in the record when the jury sent a note to Judge Monasmith that inquired why the passenger was not a witness. *RP* 243-244. Had the jury been given the Missing Witness Instruction regarding the State's failure to call this witness, and considered the adverse inference from this failure, it is reasonably probability to that the jury would have found Mr. Connolly innocent of the charges. Defense Counsel's failure to seek a Missing Witness Instruction for Richardson was not a tactical decision; it was ineffectiveness that deprived Mr. Connolly of a fair

trial. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 1037, 145 L.Ed.2d 985 (2000).

D. CONCLUSION

Mr. Connelly respectfully requests that this Court reverse both convictions and dismiss the charges against him with prejudice.

DATED this 15th Day of April, 2022

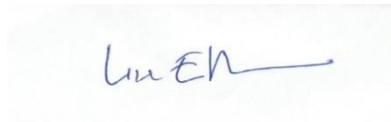
Pursuant to RAP 18.17(b), I certify that the word count in Appellant's Opening Brief is 3,093.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Stevens County Prosecutor at prosecutor.appeals@stevenscountywa.gov and Jason Connelly at Coyote Ridge Corrections Center, PO Box 769 Connell, WA 99326 a true copy of the document to which this certificate is affixed on April 15, 2022. Service was made electronically to the prosecutor and by United States mail to Joshua Connelly by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

_____Signature