IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29022-1-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
PAUL RODRIGUEZ,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Paul Rodriguez challenges a jury's determination that he attempted to elude a police officer and unlawfully possessed a firearm. While the case was clumsily tried, the evidence does support the verdicts and the challenged testimony from the officer was harmless. The convictions are affirmed.

FACTS

Mr. Rodriguez was driving in Moses Lake on February 27, 2009, when a police car pulled up alongside his Cadillac. He drove away from the officer, who followed him. The officer testified, without objection, that it appeared "that he was intending to get

away from me." Report of Proceedings (RP) at 140. Mr. Rodriguez accelerated; when he cut off some cars at an intersection, the officer activated his lights and siren.

The police car had a video system that began recording events when the lights and siren were activated. The deputy prosecutor asked the officer at what point he had turned on the video system. The officer answered:

> Yes. 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 at 169. Defense counsel immediately objected, arguing that the officer was speculating about the defendant's state of mind. RP at 169-170. The trial judge indicated he had not heard the entire answer, so he noted that witnesses were not to speculate about the state of mind of others and overruled the objection. RP at 170.

The Cadillac reached speeds of 70 mph in a 40 mph zone. When the pursuit reached a residential area, Mr. Rodriguez tossed a black bag out the driver's window of his car. The pursuing officer requested other officers to find the bag.

The pursuit was discontinued after it became too dangerous. Nonetheless, the officer subsequently saw the Cadillac pull into a trailer park. The officer eventually took Mr. Rodriguez into custody after a foot chase; the keys to the Cadillac were found in Mr. Rodriguez's pocket. Another officer retrieved the bag and discovered that it contained a

firearm and some marijuana. A ring and a bag of women's jewelry were found nearby. Additional marijuana was discovered in the car.

Five charges, including felony counts of attempting to elude and first degree unlawful possession of a firearm, were filed from the incident. The matter proceeded to jury trial. The defense stipulated to guilt on three misdemeanor counts and left the eluding and firearm possession charges for the jury's consideration. The videotape of the pursuit was played to the jury and admitted into evidence. That recording concludes with the arresting officer, in uniform, returning to his patrol car.

The jury found Mr. Rodriguez guilty on the two felony charges. He subsequently timely appealed to this court.

ANALYSIS

This appeal challenges the sufficiency of the evidence to support the jury's two verdicts and the court's ruling on the objection to the officer's statement that Mr. Rodriguez was eluding him. Each challenge will be addressed in turn.

Sufficiency of the Evidence. Challenges to the sufficiency of the evidence to support a conviction are resolved in accordance with long-settled standards. Evidence is sufficient to support a verdict if the trier-of-fact has a factual basis for finding each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S.

307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The evidence is viewed in the light most favorable to the prosecution. *Green*, 94 Wn.2d at 221.

The question, then, is whether there is evidence to support each element of the charged offense. Mr. Rodriguez contends that there was no evidence to establish the uniformed officer element of the eluding count and that it did not show that he possessed the discarded firearm. We will address each element in turn.

The charge of attempting to elude is codified at RCW 46.61.024. Broken into its constituent components, the statute provides:

> [1] Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and [2] who drives his or her vehicle in a reckless manner [3] while attempting to elude a pursuing police vehicle, [4] after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. [5] The signal given by the officer may be by hand, voice, emergency light, or siren. [6] The officer giving such a signal shall be in uniform and [7] the vehicle shall be equipped with lights and sirens.

This statute requires proof of several technical elements—how the notice to stop was provided, that the officer giving notice was in uniform, and the officer's vehicle was properly equipped. Questions to establish each of these elements should be part of the prosecutor's script for direct examination of the pursuing officer. Mr. Rodriguez

correctly points out that the officer was not asked whether he was in uniform at the time he signaled the Cadillac to stop.

Nonetheless, the State points out in response that the videotape captured the officer in uniform. Exhibit 24, just seconds before it concludes, does show the officer walking back into the camera's view. He was wearing a uniform. Thus, although the question was not asked, there was evidence from which the jury could find that the officer was in uniform at the time he gave the signal to stop. The requirements of *Green* were satisfied.

Mr. Rodriguez's challenge to the firearms charge goes to the possession element. RCW 9.41.040(1)(a) provides, in truncated form, that a person is guilty of first degree unlawful possession of a firearm (1) if the person owns, has in his or her possession, or has in his or her control any firearm (2) after having previously been convicted of a serious offense. He argues that his act of throwing the bag out the car's window did not show that he possessed or controlled the gun. We disagree.

A person possesses a firearm if it is in his or her custody or control. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Possession is either actual or constructive. *State v. Turner*, 103 Wn. App. 515, 520-521, 13 P.3d 234 (2000). Constructive possession exists when a person exercises "dominion and control over" the

firearm "or over the premises where [it] was found." *Id*. at 521. A momentary handling is insufficient to establish possession. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

The parties focus on the issue of dominion and control, debating whether Mr. Rodriguez constructively possessed the gun when he disposed of it. As the driver of the car in which the gun was located, Mr. Rodriguez exercised dominion and control over the firearm. *Turner*, 103 Wn. App. at 522-524; *State v. Reid*, 40 Wn. App. 319, 321, 326, 698 P.2d 588 (1985) (driver who moved gun from front seat to back seat of car possessed it). He further showed his dominion and control when he took the gun and tossed it out of the moving vehicle. These activities, which are similar to those in *Reid*, were sufficient to show that he constructively possessed the weapon.

They also meet the lesser standard of merely controlling the firearm, a theory that was charged in this case and on which the jury was instructed. Clerk's Papers (CP) at 1, 21 (instruction 4). There was sufficient evidence to permit the jury to conclude that Mr. Rodriguez possessed or controlled the firearm.

The evidence supports the jury's verdicts.

Officer's Testimony. The remaining challenge[1] concerns the officer's testimony

[1] Mr. Rodriguez also filed a statement of additional grounds. It is without merit and we will not further address it other than to note it also has insufficient citation to

that Mr. Rodriguez "actively was trying to elude me." While this issue is somewhat problematic, the error was harmless.

As noted previously, the deputy prosecutor asked the pursuing officer about the activation of the recording device and the officer answered that he turned it on once the defendant tried to actively elude him. RP at 169. Defense counsel objected on the basis that the officer was speculating about the defendant's state of mind. The trial court admitted that it had not heard the entire answer, so it denied the objection and directed that the witnesses not speculate about the state of mind of others. RP at 170. Mr. Rodriguez argues that it was an abuse of discretion to rule on an objection without having heard the answer. We agree that it would have been better practice to have the reporter read the answer back to the court before ruling on the objection, but whether the court erred is dependent upon the merits of the ruling, not the court's methodology.

The use of the verb "elude" is problematic in an attempting to elude prosecution because it suggests that the witness believes the defendant committed the crime that the jury is being asked to determine. In context here, it appears that the officer was attempting to distinguish the driving that led to the pursuit from that which occurred earlier. Initially, the officer noted that the defendant drove to separate himself from the

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authority for us to consider. RAP 10.10(c).

officer. RP at 140. When the officer started to follow the car, the defendant significantly increased his speed and took other actions to evade the officer. RP at 169.[2] If there was true need to distinguish these situations, beyond the description of the driving itself, it would have been preferable to use the verbs "flee" or "evade." Thus, it was error to allow use of the word "elude."

Nonetheless, the error was harmless for at least four reasons. First, the court gave a corrective instruction by telling the jury (and the witness) that witnesses are not permitted to speculate about what others are thinking. RP at 170. This directive effectively limited the verb "elude" to its synonyms of "flee" or "evade."

Second, the statement at issue here was far less egregious than the testimony in *State v. Weber*, 99 Wn.2d 158, 659 P.2d 1102 (1983). There the pursuing officer in another attempting to elude prosecution told the jury on three separate occasions (in violation of a ruling that had suppressed the evidence) that the defendant admitted he was afraid to stop for the officer. *Id*. at 160-161. The evidence was significant because it contradicted the defendant's trial testimony that he did not know the officer was behind him. *Id*. at 160. The court concluded that the testimony was harmless. *Id*. at 165-166.

[2] While there are a large number of transcript pages between the two statements, they were not far apart during the officer's testimony. The testimony was disrupted by the end of the day and the need to call another witness to testify the next morning before the officer resumed the stand.

In contrast to *Weber*, the challenged statement here was not nearly as significant as that presented there.

Third, the evidence was of little import because it was exactly what the jury would have expected. An officer who pursues a driver and arrests him for the crime of attempting to elude obviously believes that the driver committed that crime or there would have been no arrest in the first place. Providing confirmation at trial, while error, simply did not inject anything prejudicial into the proceeding.

Finally, the error was harmless in light of the videotape of the pursuit. The jury was able to see everything that the officer saw during the chase. The conclusory statement that the defendant attempted to "elude" him did not amount to significant evidence in light of the video recording of the event. The jury was able to assess for itself whether the crime occurred.

Evidentiary error can be harmless if, within reasonable probability, it did not materially affect the verdict. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986). The error had no impact on the outcome of the case. It was harmless.

For all of these reasons, we conclude that the officer's statement did not deprive Mr. Rodriguez of a fair trial on the eluding charge.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, A.C.J.

WE CONCUR:

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Sweeney, J.

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Siddoway, J.