IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,	)	NO. 62726-1-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ROBERT L. CASTLE	)	
	)	
Appellant.	)	FILED: NOVEMBER 16, 2009

BECKER, J. — Robert Castle was convicted of driving under the influence of alcohol and eluding a police vehicle. He appeals, arguing that the trial court erred by not suppressing his refusal to take a blood alcohol test and by not instructing the jury that failure to obey an officer is a lesser offense of eluding. We affirm. Castle was not denied his right to contact an attorney before refusing his blood test. And the evidence at trial allowed for no other conclusion than that he drove with willful and wanton disregard for others.

On February 16, 2007, Snohomish County sheriff's deputy Dean

Peckham arrested Robert Castle for driving under the influence of alcohol. The arrest occurred after Castle, who tried to speed away from the pursuing police car, found himself in a dead end. He got out of his car and approached the officer, refusing commands to stop. Officer Peckham fired a taser at Castle, causing him to fall down and cut his chin on the pavement.

Castle refused to take a blood test to determine his alcohol level. He moved pretrial to suppress his refusal. He argued that police did not adequately provide him with access to an attorney, as required by court rule.

The only witness at the suppression hearing was Officer Peckham. He testified that when he took Castle into custody, he advised Castle of his Miranda rights, including the right to counsel. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 695 (1966). Castle "said he wanted counsel there at the scene . . . . to see his injuries. Talked about suing us and stuff." Officer Peckham had with him a cell phone and a card with the 24-hour number of the public defender. He offered to call a public defender or another attorney if Castle had one in mind. But Castle "didn't want to talk to anybody on the phone."

Officer Peckham took Castle to a hospital to treat the injury to his chin. At the hospital, he again advised Castle of his Miranda rights and the implied consent rights and warnings regarding the blood test. Castle "said he wanted an attorney there in the hospital."

Officer Peckham again offered to call a public defender or any attorney Castle had in mind. Castle refused the offer, repeating his request to have an attorney "there in the room." Officer Peckham did not provide Castle with a telephone book or actually hand him a telephone or the public defender's number.

The trial court found that Castle refused to submit to the blood test. The court denied Castle's motion to suppress the refusal:

> The court finds that the officer did not limit the Defendant's right to have advice of counsel prior to making the critical decision whether to submit to a blood alcohol test. The officer tried to provide the Defendant with access to an attorney which the Defendant refused and that was all the officer was required to do.

Castle assigns error to the order denying his motion to suppress. He does not challenge the trial court's findings of fact. Accordingly, our review is de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

A court rule requires that a person in custody who desires a lawyer shall be provided access as necessary to place him or her in communication with a lawyer:

> (1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.
> (2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

CrR 3.1(c).

Castle argues that Officer Peckham did not take all reasonable steps necessary to place him in contact with an attorney. Castle contends that in his circumstances, the phrase "any other means necessary" means that Officer Peckham should have presented him with a telephone book, a telephone, and the public defender's number. We disagree. The rule requires that a defendant be given an opportunity to speak with a lawyer, including by telephone. Airway Heights v. Dilley, 45 Wn. App. 87, 93, 724 P.2d 407 (1986); Leininger v. Department of Licensing, 120 Wn. App. 68, 73, 83 P.3d 1049 (2004). While the State must offer access to counsel, "it is not required to force the defendant to accept." State v. Kronich, 131 Wn. App. 537, 544, 128 P.3d 119 (2006).

Castle relies on City of Spokane v. Kruger, 116 Wn.2d 135, 803 P.2d 305 (1991). In that case, the DUI defendant refused to get out of his chair at the police station and demanded that an attorney be brought to him. The police offered him the use of a telephone, but he refused. He was convicted in district court. The superior court granted relief on the basis that the only telephone number offered to the defendant was the daytime number of the public defender's office, and the office was closed at the time. The case went up to the Supreme Court solely on the issue whether the appropriate remedy was dismissal or suppression. To the extent Kruger offers guidance in the present case, it does not indicate

that Castle is entitled to relief. Officer Peckham had a 24-hour hotline number for the public defender. The court noted that if a public defender was contacted by telephone late at night, "they probably would be willing to provide advice to the Defendant by telephone," even though it was unlikely a public defender on duty would be willing to come to the hospital.

We conclude Officer Peckham complied with the rule when he offered to call any attorney of Castle's choosing or the on-call public defender. The trial court did not err in denying the motion to suppress.

Castle also argues that the trial court erred by refusing to instruct the jury that failure to obey an officer, a misdemeanor, was a lesser included offense of the felony charge of eluding a police vehicle. We review for abuse of discretion. State v. Bosio, 107 Wn. App. 462, 464-65, 27 P.3d 636 (2001).

There are two prongs to the test for determining whether it is appropriate to instruct the jury on a lesser included offense. To satisfy the legal prong, the elements of the lesser included offense must be necessary elements of the offense charged. To satisfy the factual prong, "the evidence in the case must support an inference that the lesser crime was committed." State v. Workman, 90 Wn.2d 443, 448, 584 P.2d 382 (1978). Here, only the factual prong is at issue.

The offense of eluding requires that the defendant must drive the vehicle "in a reckless manner…after being

given a visual or audible signal to bring the vehicle to a stop." RCW 46.61.024. A defendant charged with attempting to elude a pursuing police vehicle is entitled to an instruction on failure to obey a police officer only if there is affirmative evidence to rebut the inference that the defendant drove recklessly. The chance that the jury might simply disbelieve the State's evidence will not suffice. State v. Gallegos, 73 Wn. App. 644, 652, 871 P.2d 621 (1994).

Like in Gallegos, the evidence in this case does not support a conclusion that Castle's driving was less than reckless. Officer Peckham, the sole witness at trial, testified that after he activated his lights and siren, Castle continued to speed and drive erratically, weaving over the fog line and into the opposite lane of travel. Castle's vehicle nearly hit the wall of a bridge, and he reached speeds of 70-80 miles per hour on a 35 mile per hour residential street before being forced to stop.

Castle asserts that an inference that he was not driving recklessly could arise from Officer Peckham's testimony that conditions were dark and from the "tentative" nature of his testimony that Castle was speeding away from him. This is not affirmative evidence of non-reckless driving. The officer's concrete description of Castle's conduct after the pursuit began leaves no doubt about the recklessness of Castle's driving.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, A.C.J. Appelwick, J.