69131-7

69131-7

NO. 69131-7-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

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STATE OF WASHINGTON

Respondent

v.

ANTHONY L. WILLIAMS,

Appellant

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# BRIEF OF RESPONDENT

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MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent



Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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## I. ISSUES

1. Were the elements of the aggravating factor in the Information charging the defendant with attempting to elude a pursuing police vehicle present or did they appear by fair construction of the charging document?

2. Has the defendant shown he was prejudiced so that he was denied notice of the charge by the language employed in the Information adding the aggravating factor?

3. The defendant did not challenge the wording of the special verdict form related to the enhancement on the attempting to elude a police vehicle charge at trial. Is the claimed error in that special verdict form a manifest constitutional error justifying review?

4. Did the special verdict form relieve the State of its burden to prove the aggravating factor in an attempting to elude a pursuing police vehicle prosecution?

5. If the special verdict form erroneously omitted an element of the aggravating factor was it harmless?

## II. STATEMENT OF THE CASE

On October 23, 2011 approximately 2:00 a.m. Officer Dickenson of the Lynnwood Police Department was on duty. He was in uniform in his fully marked patrol car that was equipped with

lights. Officer Dickenson was running random license plates when he encountered a car driven by the defendant, Anthony Williams. The officer ran the license plate through three databases. He learned that the car was registered to a female, the defendant has been arrested out of that car previously for driving on a suspended license, and that the defendant's license was currently suspended in the first degree. 1 RP 28-32.

After Officer Dickenson received this information he again saw the defendant driving the car past his location. Officer Dickenson got out of his car. As the defendant drove past Officer Dickenson held his hand out in a stop motion. The defendant first responded by approaching slowly. He came within six feet of the officer, and then accelerated quickly southbound on 44th Avenue. 1 RP 34-35.

Officer Dickenson got back in his patrol car and pursued the defendant. He had to accelerate to 80 m.p.h. in order to catch up to the defendant. The speed limit in the area is 30 m.p.h. Officer Dickenson notified dispatch that he was in pursuit of the defendant. As they passed by the Lynnwood Police Department Officer Malloy got in his patrol car and joined the pursuit. 1 RP 36, 64-65.

Officers Dickenson and Malloy pursued the defendant on 44th Avenue West to 204th Street. The defendant drove approximately 60 m.p.h., making quick movements to the right and then left. At about 196th Street the defendant "brake checked" Officer Dickenson, nearly coming to a complete stop before speeding off. They sped by a group of people standing on the corner in the curb lane at 200th Street. At 204th Street the defendant ran though a red light. Two other vehicles were legally crossing though the intersection at the time. Although the first vehicle was able to pass through the intersection without colliding with the defendant, the second vehicle was forced to brake hard to avoid a collision with the defendant. The defendant raced on, running a second red light at 212th Street. There were other cars travelling on 44th Ave West that had to take evasive action to avoid the defendant and the officers as the defendant ran from the officers. 1 RP 37-39, 66.

The defendant and the officers eventually crossed into Mountlake Terrace and then into Brier and Kenmore. Those areas were residential neighborhoods. The streets narrowed to two lane roads, and there were cars parked on the sides of the roads. At points the roads were very hilly. The neighborhoods had dead

ends and blind turns. Some of the areas the defendant drove through were difficult to maneuver in. The maximum speed was 25 m.ph., but the defendant drove at 40 m.p.h. The defendant drove through approximately 12 stop signs without stopping while driving in the residential neighborhood. There were other persons driving on those roads at the time that were forced to pull over also. Although there were many areas the defendant could have safely pulled over, he did not. 1 RP 40-42, 67-69.

At 228th street the defendant was travelling eastbound. Officer Dickenson attempted a PIT maneuver which is designed to force a vehicle to stop. The defendant made a counter maneuver which caused the PIT maneuver to fail. 1 RP 41, 68-69.

The pursuit ended when the defendant tried to make a right hand turn. The roads were slick, and the defendant's brakes locked up. The defendant hit a curb, disabling the front of his car. The entire pursuit lasted approximately 9 minutes, and covered 8-1/2 miles. 1 RP 42-43, 69-70.

After the defendant was taken into custody the officers read him his constitutional rights. The defendant said the reason he ran was because his license was suspended. The defendant admitted that during the pursuit he called his girlfriend to tell her that he was

going to jail. The defendant license had been revoked in the first degree at the time of the pursuit. 1 RP 44-45.

Officer Malloy noticed the defendant had bloodshot, watery eyes. He detected an odor of intoxicants on the defendant's breath. The defendant stated he only had "a sip" of alcohol. Officer Malloy processed the defendant for DUI. The defendant refused to do the breath test. 1 RP 71-76.

The defendant was charged by amended Information with Attempting to Elude a Pursuing Police Vehicle (count I), Driving While License Revoked in the First Degree (count II), and Driving While Under the Influence of Intoxicants (count III). Count I alleged the aggravating factor that "one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the defendant's actions while committing the crime of attempting to elude a police vehicle; as provided by RCW 9.94A.834." 1 CP 65-67.

At trial the court instructed the jury that it would be given a special verdict form for the attempting to elude a police vehicle charge which it should address only if it found the defendant guilty of the charge. 1 CP 64. The special verdict form asked the jury to answer the question "was any person, other than Anthony L.

Williams or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Anthony L. Williams during his commission of the crime of attempting to elude a police vehicle." 1 CP 43. The defense did not raise an objection to the wording of this verdict form. 1 RP 124-25.

The jury found the defendant guilty of attempting to elude a pursuing police vehicle and DWLS 1, and not guilty of DUI. The jury answered "yes" on the special verdict form. 1 CP 41-44.

## III. ARGUMENT

### A. THE INFORMATION SATISFIED THE DEFENDANT'S DUE PROCESS RIGHT TO BE INFORMED OF THE CHARGE.

Each of the defendant's arguments relates to the aggravating circumstance alleged in count I charging attempting to elude a police vehicle. RCW 9.94A.834 states:

> (1) The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.
>
> (2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other

> than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.

The defendant alleges that an essential element of the aggravating circumstance was that someone other than the defendant or the pursuing law enforcement officer was "endangered." He argues the allegation that someone other than those involved in the pursuit was "threatened with physical injury or harm." was insufficient. BOA at 17.

The defendant challenges the Information for the first time on appeal. Under that circumstance the Court will liberally construe the charging document in favor of validity. State v Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). A challenge to the an Information will be upheld (1) if the necessary facts appear in any form, or by fair construction can be found in the charging document and (2) the defendant does not show that he was actually prejudiced by the inartful language which caused a lack of notice. Id. at 105-106. The court reads the Information as a whole, in a

commonsense manner. State v. Nonog, 169 Wn.2d 220, 227, 237 P.3d 250 (2010).

An Information does not omit an element of the offense simply because it is not written in the exact language of the statute. Kjorsvick, 17 Wn.2d at 108. An Information is sufficient if it conveys the same meaning and import. Id. In Kjorsvick the defendant was charged with Robbery. The Information did not specifically allege the non-statutory element of "intent to steal". However the Information was held to be sufficient because it alleged the defendant "unlawfully, with force, and against [the victim's] will, took the money while armed with a deadly weapon." Considering this language as a whole the Court commented that it was hard to imagine the defendant could have done what was alleged without the intent to steal the money. Id.

The statute uses both the phrase "threaten with physical injury or harm" and "endangered" to describe the circumstance that aggravates an attempting to elude a police vehicle charge. The former relate to the evidentiary sufficiency to charge while the latter is used in connection with the evidentiary sufficiency to convict. Underlying the defendant's arguments is the unstated assertion that these two descriptions mean different things. In order to determine

whether that premise is true the Court must analyze the statute. A fair construction of the statute does not support the defendant position.

The objective of statutory interpretation is to give effect to the Legislature's intent. State v. Tracy, 128 Wn. App. 388, 395, 115 P.3d 831 (2005), affirmed, 158 Wn.2d 683, 147 P.3d 559 (2006). The Court will give effect to the statute's plain meaning if that plain meaning is apparent on its face. Id. The plain meaning of the statute is derived from the wording of the statute itself, as well as from related statutes disclosing legislative intent about the particular statute in question. State Department of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). Terms which are not defined by statute are given their plain and ordinary meaning unless a contrary legislative intent is indicated. State v. Jones, 172 Wn.2d 236, 242, 257 P.3d 616 (2011).

If after reviewing the statute under these principles it may be susceptible to more than one reasonable interpretation then it is ambiguous. Id. Under those circumstances the court may resort to "statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." Id. quoting Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

Here, the defendant does not explain how "threatened with physical injury or harm" differs in any meaningful way from acting in a manner which "endangered" others. The terms are not specifically defined by the statute. To discern the common and ordinary meaning of those terms the Court may look to dictionaries. State v. Johnson, 159 Wn. App. 766, 770, 247 P.3d 11 (2011). Various dictionaries have used each term to define the other. One definition of endanger is "to bring into danger or peril of probable harm or loss: imperil or threaten danger to." Webster's Third New International Dictionary, unabridged, 748 (2002). It has also been defined as "to expose to danger or harm; imperil." The American Heritage Dictionary of the English Language, 431 (1978). Threat is defined as "an indication of something impending and usually undesirable or unpleasant." Webster's Third New International Dictionary, unabridged 2382 (2002). "Threaten" has also been defined as "to serve as a threat to; endanger; menace" and "to indicate danger or other harm." The American Heritage Dictionary of the English Language 1340 (1978). These various definitions show that "to endanger" another is essentially the same as "to threaten danger or harm" to another.

The act adopting the enhancement was known as the Guillarmo "Bobby" Aguilar and Edgar Trevino-Mendoza public safety act of 2008. Laws of Washington 2008 Ch. 219, §1. Bobby Agular and Edgar Trevino-Mendoza were killed in a collision with a car driven by Blake Young after he attempted to elude a pursuing police officer. State v. Young, 158 Wn App. 707, 243 P.3d 172 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011). This history shows the legislative intent was to enhance the penalty for eluding a pursuing police officer when the offender's conduct threatened or endangered the safety or lives of others who were truly innocent bystanders. The use of the terminology "threaten with physical harm or injury" and "endanger" are meant to convey the same concept: an offender who puts innocent bystanders at risk of being hurt are going to face stiffer penalties when the offender has committed the crime of eluding a pursuing police vehicle than when no innocent bystanders are at risk.

Analyzing the statute in the context of related provisions also supports the conclusion that the terms are meant to convey the same thing. The enhancement is specific to attempting to elude charges. Under that statute the State must prove the defendant was driving "in a reckless manner." RCW 46.61.024. Reckless

manner in the context of the eluding statute means "a rash or heedless manner, with indifference to the consequences." State v. Naillieux, 158 Wn. App. 630, 644, 241 P.3d 1280 (2010). In the context of the eluding statute to "endanger" others is to present a "threat of physical injury or harm" because either term reflects a risk of damage to third persons or property as a result of the defendant's indifference to the consequences of his acts.

The plain meaning of the statute indicates the terms are interchangeable. Thus, the Information did not leave out an essential element of the enhancement by describing the aggravating conduct in terms of "threaten with physical injury or harm" instead of "endangered."

Although it is difficult to conceive how these terms may be susceptible to more than one reasonable interpretation in the context of the statute in which they are used, if the Court finds the statute ambiguous then rules of statutory construction support the conclusion that the two terms are meant to convey the same concept. When construing a statute the court will read the statute so as to avoid an absurd result "because it will not be presumed that the legislature intended absurd results." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

As noted the terms at issue are used to describe both the evidentiary sufficiency to support charging the enhancement and the evidentiary sufficiency to prove the enhancement. The Legislative guidelines for charging sufficiency state that the prosecutor should charge if the admissible evidence is of such convincing force to make it probable that a reasonable and objective fact finder would convict after hearing all the evidence and the most plausible defense raised. RCW 9.94A.411(2)(a). If the terms meant different things then the charging standards would be meaningless. If there was sufficient evidence to prove the "threat", but not sufficient evidence to prove "endangerment," the charge may be filed despite the statutory requirements. Alternatively, a charge may not be filed because there was not enough evidence to believe the driving constituted a "threat of physical harm or injury" even though there was sufficient evidence to believe the driving "endangered" others. The only way to reconcile this conflict is to construe the terms as meaning the same thing.

Because the Information was charged in the language of the statute defining the enhancement the court need not conduct an inquiry into whether the elements of the enhancement may be discerned from the language of the Information by fair construction.

However, should the court conclude the terms mean different things, and the aggravating circumstance was whether someone was "endangered" that can be discerned from the Information by fair construction of that document. A threat of physical injury or harm of another and endangering others both convey a risk of harm. Thus, the Information was sufficient to inform the defendant of the aggravating circumstance charged.

Finally, the defendant argues that he need not show prejudice because the element of the aggravating circumstance is not in the Information in any form, relying on State v. Zillyette, 173 Wn.2d 784, 786, 270 P.3d 589 (2012) and State v. Marcum, 116 Wn. App. 526, 536, 66 P.3d 690 (2003). Since the element of the aggravating circumstance is in the Information he must show prejudice. Kjorsvick, 117 Wn.2d at 106.

In Kjorsvick the Court concluded the defendant had not shown prejudice as a result of the charging language because it did not impact the chosen defense. Id. at 111. Here the defendant asserted the affirmative defense that at first he did not know it was an officer that was directing him to pull over. When he realized it was a police officer behind him he claimed that he was unfamiliar with the area and could find no reasonable place to pull over until

he crashed his car. 1 RP 108-110, 145-148. The defense never addressed the sufficiency of the evidence on the aggravating circumstance until sentencing when defense counsel urged the court not to impose the enhancement because the evidence did not warrant it. The basis for the argument did not rest on any distinction between a threat and endangerment, but rather that no one was present to be threatened or endangered. To the extent counsel argued the term "threat of harm" it was in regard to the defendant's mental state, not the result of his conduct to others. 1 RP 183-84, 191-95.

In no way did the wording of the Information alter the defense. The defendant fails to show he was prejudiced. The defendant nonetheless argues that it prejudiced him because he did not defend himself in accordance with whether he "endangered" anyone. That makes no difference in a case such as this where the defense presented had nothing to do with the aggravating factor except insofar as it would result in the jury not reaching the question had the jury accepted the affirmative defense.

**B. THE DEFENDANT FAILED TO PRESERVE ALLEGED ERROR IN JURY INSTRUCTIONS FOR REVIEW. THE JURY INSTRUCTIONS DID NOT LEAVE OUT AN ESSENTIAL ELEMENT OF THE AGGRAVATING CIRCUMSTANCE. IF ERROR DID OCCUR IT WAS HARMLESS.**

The defendant also argues the special verdict form failed to include the essential element that his conduct "endangered" someone other than himself or the pursing police officer. He did not challenge the special verdict form at trial. He argues that it constitutes a manifest constitutional error under RAP 2.5(a) which entitles him to raise the issue for the first time on appeal.

Whether the Court will review a claim of error in jury instructions that had not been raised in the trial court is depends on whether the error is manifest constitutional error. State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). "Manifest" requires the defendant to show actual prejudice. Id. Actual prejudice is established when the defendant makes a plausible showing that the asserted error has a practical and identifiable consequence in the trial of the case. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). "The focus of actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." O'Hara, 167 Wn.2d at 99-100.

Where the instruction allows the jury to convict the defendant without finding an essential element of the crime charged the State has been relieved of its burden of proof. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). Due Process requires the State to prove every element of the charge beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Other than the fact of prior conviction, those considerations applies to sentencing enhancements as well. Apprendi v. New Jersey, 530 U.S. 466, 488, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Because the defendant claims the special verdict form relieved the State of the burden to prove the special circumstances, he has identified an issue of constitutional magnitude.

However the defendant fails to make any showing that the error was "manifest." Other than pointing out the differences in the language used in the statute, he completely ignores his duty to make a plausible showing that the claimed error had any identifiable consequence at trial. Key to this is the defendant's failure to discuss how in the context of the statute "threaten physical injury or harm" differs in any meaningful way from "endangered."

If the Court does review this assignment of error then it should conclude that the jury instructions were correct. As argued in section I.A. above the phrase and the word are two terms used to mean the same thing. The special verdict form was the standard instruction approved by the WPIC committee. See WPIC 190.12. Although pattern instructions are not immune from attack, the Court has some confidence that they usually are a correct statement of the law. "[P]attern instructions generally have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state." State v. Bennett, 161 Wn.2d 303, 308, 165 P.3d 1249 (2007).

The court does have discretion in how jury instructions are worded. State v. Dana, 73 Wn.2d 533, 536, 439 P.2d 403 (1968). The language adopted by the court and the WPIC committee reflects the theory that jury instructions should be written in language that is most familiar to lay people serving as jurors. See Tiersma, Communicating with Juries: How to Draft More Understandable Jury Instructions (2009).[1] The phrase "threatened physical injury or harm" is more descriptive, and likely more commonly understood than "endangered". Because they meant

the same thing in the context of this particular aggravating circumstance, the court did not abuse its discretion by adopting the language used in the pattern instruction for the special verdict form.

However, if the Court concludes it was error to use the pattern verdict form, then any error was harmless. "Not every omission or misstatement in a jury instruction relieves the State of its burden." State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Where an element has been omitted or misstated in a jury instruction the Supreme Court has adopted the rule for harmless error set out in Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Error in jury instructions that omit or misstate an element of the offense is harmless if that element is supported by uncontroverted evidence Brown, 147 Wn.2d at 341, citing Neder, 527 U.S. at 18.

The defendant argues that the error is not harmless because whether he endangered anyone was "highly controverted." BOA at 13. The record does not support this statement. The defendant points to Officer Dickenson's testimony describing the defendant crashing and bailing out of his car. 1 RP 51. He also points to his own testimony. However the defendant's testimony focused on the

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[1] available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507298

affirmative defense that he at first did not realize he was being ordered to stop by a police officer, and once he realized that fact he could find no safe place to pull over. 1 RP 109-116. None of that evidence addressed the existence of third persons in the area and whether the defendant's driving either threatened or endangered them.

The defendant also points to his argument that the evidence was not sufficient to support the aggravating factor raised at sentencing. The jury instructions had nothing to do with that argument. In addition, at trial and at sentencing the evidence on the issue of the aggravating factor was uncontroverted. On both occasions the State relied on the events that had been captured on video recording equipment in the officers' patrol cars. 1 RP 45-51, 76-82, 190-192. The defense did not present any evidence that events recorded on those cameras were inaccurate. When the trial court ruled on the sufficiency of the evidence motion it relied on the portion of the video showing a lawfully operated car nearly being hit by the defendant as he ran through a red light. 1 RP 200-201. The video showed the other car was equally endangered as he was threatened with physical injury by the defendant's driving. If it was

error to instruct the jury in the manner the court did, the error was harmless.

## IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction for the attempting to elude a pursuing police vehicle and the special finding that enhanced the defendant's sentence.

Respectfully submitted on April 10, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: Kathleen Webber
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

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

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| THE STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ANTHONY L. WILLIAMS,<br><br>Appellant. | No. 69131-7-I<br><br>AFFIDAVIT OF MAILING |



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The undersigned certifies that on the 11th day of April, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

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SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 11th day of April, 2013.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit