

NO. 71938-6-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**ANDREW FORD SMITH,**  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge

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**RESPONDENT’S BRIEF**

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## TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT .....	1
II. ISSUES .....	1
III. STATEMENT OF THE CASE.....	2
1. STATEMENT OF PROCEDURAL HISTORY .....	2
2. SUMMARY OF TRIAL TESTIMONY.....	4
IV. ARGUMENT .....	13
1. STOPPING INTO A HIGHWAY AND REPEATED U-TURNS INCLUDING ONE MADE INTO A HIGHWAY AT NIGHT WAS SUFFICIENT TO ESTABLISH DRIVING IN A RECKLESS MANNER.....	13
i. Standards Pertaining to Sufficiency of Evidence.....	14
ii. Elements of Attempt to Elude.....	15
iii. Sufficient Evidence Supported the Reckless Manner Provision of Attempting to Elude.....	17
2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF INTOXICATION. ....	19
3. ANY ERROR IN ADMISSION OF EVIDENCE REGARDING INTOXICATION WAS HARMLESS BEYOND A REASONABLE DOUBT. ....	22
V. CONCLUSION.....	23

## TABLE OF AUTHORITIES

	Page
<b><u>WASHINGTON SUPREME COURT</u></b>	
<i>State v. Baity</i> , 140 Wn.2d 1, 991 P.2d 1151 (2000).....	21
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	14, 15
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980) .....	14
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	20
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.2d 495 (1996) .....	20
<i>State v. Quaale</i> , ___ Wn.2d, ___, 340 P.3d 213 (2014) .....	20, 21
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	14
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997) .....	20
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004) .....	22
<b><u>WASHINGTON COURT OF APPEALS</u></b>	
<i>Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993), <i>rev. denied</i> , 123 Wn.2d 1011, 869 P.2d 1085 (1994).....	21
<i>State v. Fiser</i> , 99 Wn. App. 714, 995 P.2d 107 (2000), <i>rev. denied</i> , 141 Wn.2d 1023, 10 P.3d 1074 (2000).....	14
<i>State v. Hutton</i> , 7 Wn. App. 726, 502 P.2d 1037 (1972).....	14
<i>State v. Lewellyn</i> , 78 Wn. App. 788, 895 P.2d 418 (1995).....	20
<i>State v. McNeal</i> , 98 Wn. App. 585, 991 P.2d 649 (1999).....	14
<i>State v. Perez</i> , 166 Wn. App. 55, 269 P.3d 372 (2012).....	15
<i>State v. Prestegard</i> , 108 Wn. App. 14, 28 P.2d 817 (2001) .....	15

<i>State v. Price</i> , 126 Wn. App. 617, 109 P.3d 27 (2005).....	22
<i>State v. Ridgley</i> , 141 Wn. App. 771, 174 P.3d 105 (2007) .....	17
<i>State v. Tocki</i> , 32 Wn. App. 457, 648 P.2d 99, <i>rev. denied</i> , 98 Wn.2d 1004 (1982).....	14
<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533, <i>rev. denied</i> , 119 Wn.2d 1011, 833 P.2d 386 (1992).....	14
<i>State v. Whitcomb</i> , 51 Wn. App. 322, 753 P.2d 565 (1988).....	18

**WASHINGTON STATUTES**

Laws of Washington, 1983, ch. 80, § 1 .....	16
Laws of Washington, 2003, ch. 101, § 1 .....	16
RCW 46.61.024 .....	15

**WASHINGTON PATTERN INSTRUCTIONS**

11A Washington Practice: Washington Pattern Jury Instructions: Criminal 90.05 (3d ed. 2008).....	16
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## **I. SUMMARY OF ARGUMENT**

Andrew Smith appeals from the jury verdict finding him guilty of Attempting to Elude a Pursuing Police Vehicle. Contrary to Smith's contention, sufficient evidence at trial supported the reckless element of the charge where Smith made U-turns to avoid officers, pulled past the vehicle stop line into a highway, drove away from officers after the initial stop, made a U-turn in the highway causing other vehicles to slow and stop, and did not stop until boxed in by officers.

Smith's other contention that the trial court improperly admitted evidence of him being under the influence fails because admission of evidence was within the discretion of the trial court and it did not affect the eluding conviction since Smith was acquitted of Driving While under the Influence.

## **II. ISSUES**

1. Drawing all rational inferences in favor of the State, was there sufficient evidence to support the conviction for attempting to elude a pursuing police vehicle where the defendant drove past the vehicle stop line into the highway, drove away from the initial

stop, made a U-turn into highway traffic, causing traffic to stop and did not stop until boxed in by officers?

2. In the Appellant's Opening Brief, the appellant draws inferences in favor of the defendant. Does doing so violate the provision of the sufficiency of the evidence test that all rational inferences be drawn in favor of the State?
3. Did the trial court err in admitting evidence of the defendant's intoxication?
4. If admission of evidence of intoxication was error, did it contribute to the conviction for Attempting to Elude a Pursuing Police Vehicle where the defendant was acquitted of Driving While Under the Influence?
5. If admission of evidence of intoxication was error, was the error harmless?

### **III. STATEMENT OF THE CASE**

#### **1. Statement of Procedural History**

On March 20, 2012, Andrew Smith was charged with Attempt to Elude a Pursuing Police Vehicle and Driving While under the Influence for an incident occurring March 18, 2012. CP 1-2. The allegation was

that Smith fled a traffic stop, making a U-turn across highway traffic. CP 3-5.

On May 12, 2014, the case proceeded to trial. CP 66-7, 5/12/14 RP 10.<sup>1</sup>

On May 13, 2014, the jury returned verdicts finding Smith guilty of Attempt to Elude a Pursuing Police Vehicle, and not guilty of Driving While under the Influence. CP 49, 48, respectively, 5/13/14 RP 154

On May 15, 2014, the trial court sentenced Smith to the low-end of the standard range of two months of jail time. CP 53.

On May 16, 2014, Smith timely filed a Notice of Appeal. CP 62.

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by “RP” and- the page number. The report of proceedings in this case are as follows:

2/1/13 RP	Motion for Competency Evaluation (in volume with 10/3/13)
10/3/13 RP	Review of Pending Evaluation (in volume with 2/1/13)
10/24/13 RP	Continuance Hearing (in volume with 11/14/13 & 5/12/14)
11/14/13 RP	Hearing Regarding Restoration and Entry of Order (in volume with 10/24/13 & 5/12/14)
3/20/14 RP	Order Finding Competent
5/12/14 RP	Trial Day 1 (in volume with 10/24/13 & 11/14/13)
5/13/14 RP	Trial Day 2 (in volume with 5/15/14)
5/15/14 RP	Trial – Verdicts (in volume with 5/13/15).

## **2. Summary of Trial Testimony**

Brian Gaylord was acquainted with the defendant, Andrew Smith because Smith had been the boyfriend to Gaylord's ex-wife. 5/12/14 RP 52-3. Gaylord had known Smith for about three years to three and a half years. 5/12/14 RP 53. Gaylord lived at 28330 Ranae Lane in Sedro Woolley. 5/12/14 RP 54

On March 18, 2012, Smith showed up at Gaylord's house at about 5:00 p.m. 5/12/14 RP 54. Smith had never been to the house before. 5/12/14 RP 69. Smith had driven up Gaylord's quarter mile driveway in his Ford Explorer. 5/12/14 RP 55. When Gaylord asked what he was doing there, Smith said he had to relieve himself and walked around the side of the shop, where he did. 5/12/14 RP 56. Gaylord went tell his daughter to go back inside. 5/12/14 RP 57. About four or five minutes later, Gaylord figured out where Smith was. 5/12/14 RP 57. He found Smith standing in the middle of Gaylord's goat pen staring off into space. 5/12/14 RP 57.

Gaylord again asked Smith what he was doing there and Smith would not acknowledge Gaylord. 5/12/14 RP 57-8. Gaylord got upset and told Smith he was going call law enforcement. 5/12/14 RP 58. Smith began talking and was pretty much incoherent and followed Gaylord back



to Smith's vehicle. 5/12/14 RP 58. Gaylord told Smith he needed to get in his vehicle and leave. 5/12/14 RP 58.

Gaylord saw Smith walking and noticed he "was not walking real straight." 5/12/14 RP 59. He was also walking slower and more erratic. 5/12/14 RP 60.

It took quite some time, but Smith eventually started to leave. 5/12/14 RP 60. When he did, Smith pulled forward instead of backing up, causing him to almost drive through Gaylord's shop door. 5/12/14 RP 60. Smith repeatedly pulled forward and backed up in order to turn around. 5/12/14 RP 60. It would have been simple for Smith just to back up once and drive through the circular driveway. 5/12/14 RP 60. Instead, Smith backed all the way out. 5/12/14 RP 60-1.

Gaylord had encountered people who he thought were affected by alcohol or drugs. 5/12/14 RP 61. Based upon his observations Gaylord believed Smith was under the influence. 5/12/14 RP 62. Gaylord had observed Smith acting strangely on other days, but not as strange as that day. 5/12/14 RP 65.

Bree Gaylord is Brian Gaylord's daughter. 5/12/14 RP 71-2. She was at the house, when Smith arrived. 5/12/14 RP 72. Bree saw Smith's vehicle arrive. 5/12/14 RP 73. Bree saw Smith get out of the vehicle after

a few minutes and walk behind the shop. 5/12/14 RP 73-4. After a couple minutes, Smith and her father walked out from behind the shop and Bree called 911. 5/12/14 RP 74.

Bree saw Smith walking, and noticed that his limp was more prominent than usual. 5/12/14 RP 75. Smith stood by the vehicle trying to talk to Bree's father. 5/12/14 RP 75. Bree heard her father yell at Smith to leave. 5/12/14 RP 75. Smith got in the vehicle and sat there for a while before starting to leave. 5/12/14 RP 75. Smith proceeded to back up and pull forward almost hitting the shop door. 5/12/14 RP 76. Smith then pulled forward and backed up repeatedly in order to back down the driveway. 5/12/14 RP 76. He did so despite there being a circular driveway. 5/12/14 RP 76, 79.

Officer Christopher Dodds was working for the Skagit County Sheriff's Office on March 18, 2012. 5/12/14 RP 80-1. Dodds was working as a patrol officer and was dressed in a full uniform with patches identifying him as a Skagit County Deputy. 5/12/14 RP 82. Dodds was driving a fully marked patrol vehicle equipped with a light bar. 5/12/14 RP 83.

Dodds responded to the 911 call at about 7:45 p.m. of a complaint regarding a green SUV. 5/12/14 RP 84. When Dodds saw the vehicle

driving the opposite direction on Highway 20, he turned around to follow the vehicle. 5/12/14 RP 85. Dodds followed the vehicle for two to four miles on Highway 20. 5/12/14 RP 115. On two occasions, Dodds saw the vehicle cross over the double yellow center line while traveling westbound on Highway 20. 5/12/14 RP 86. Approaching Metcalf Street in Sedro Woolley, Dodds saw the vehicle make an abrupt move into the center lane and make a left turn southbound onto Metcalf Street without signaling. 5/12/14 RP 86. Dodds saw that the eastbound traffic on Highway 20 had to come to a stop as the vehicle crossed over in front of them. 5/12/14 RP 87.

At that point, Dodds activated his emergency lights and siren. 5/12/14 RP 87. The vehicle continued on Metcalf Street while Officer Dodds followed with lights and siren activated. 5/12/14 RP 87. The vehicle then made a U-turn on Metcalf Street and passed Dodds' vehicle and headed north. 5/12/14 RP 87.

Dodds made a U-turn himself to get behind the vehicle. 5/12/14 RP 87. At the intersection with Highway 20, the vehicle went past the stop line and came to a stop partially in the eastbound lane of Highway 20, obstructing traffic. 5/12/14 RP 88, 111, 117. Dodds then exited his patrol vehicle and made contact with the vehicle at the driver's side. 5/12/14 RP

88. Dodds recalled it was somewhat dark out. 5/12/14 RP 88. The defendant, Andrew Smith, was the driver and sole occupant. 5/12/14 RP 88, 105. There was very loud music inside the vehicle and a dog barking loudly. 5/12/14 RP 88. Smith did not make eye contact with Dodds and instead kept looking forward. 5/12/14 RP 89. Smith looked at Dodds a couple times but appeared to be looking through Dodds. 5/12/14 RP 119. Dodds several times asked Smith to shut the vehicle off using a loud voice to be heard over the dog and music. 5/12/14 RP 89-90.

Instead of complying with Dodds, Smith did a second U-turn from his stopped location into the eastbound lane of Highway 20 crossing out into the highway and heading south on Metcalf Street. 5/12/14 RP 90, 121. Dodds was right at the window when Smith did the maneuver and continued to yell at Smith through the open window. 5/12/14 RP 90. Smiths' maneuver onto Highway 20 into the eastbound lanes caused vehicles to stop or slow down. 5/12/14 RP 112.

Another officer, Sergeant Adams had been nearby and turned behind Smith's vehicle and it headed back southbound on Metcalf Street. 5/12/14 RP 91. Adams was also in a marked patrol vehicle with a sheriff's logo and equipped with lights, which were on. 5/12/14 RP 91.

Dodds saw Smith travel down Metcalf Street at a slow rate of speed toward the police department. 5/12/14 RP 91. Adams then passed Smith's vehicle, and pulled in front of Smith causing Smith to slow down. 5/12/14 RP 92, 5/13/14 RP 5. Dodds had returned to his vehicle and followed after, pulling behind Smith's vehicle. 5/12/14 RP 92. Smith then began to turn left and Dodds was able to move his vehicle to the left to prevent Smith from making another turn back northbound on Metcalf Street. 5/12/14 RP 92. Adams' vehicle was on the passenger side of Smith's vehicle to prevent Smith from leaving. 5/12/14 RP 91. Dodds and Adams then were able to force Smith's vehicle into a parking spot in front of the Sedro Woolley Police Department. 5/12/14 RP 92.

Dodds contacted Smith at the driver's door and asked Smith to show his hands and advised he was under arrest. 5/12/14 RP 97. Dodds opened the driver's door and reached in to remove Smith's seat belt. 5/12/14 RP 97. Dodds asked Smith to step from the vehicle putting his hand on Smith's shoulder. 5/12/14 RP 98. Smith became enraged, balled up his fists and began to yell and scream. 5/12/14 RP 98. Smith lifted a cane from between his legs, pointed it at Dodds and loudly said "bang, bang, bang." 5/12/14 RP 98.

Dodds backed up and continued to order Smith to exit the vehicle. 5/12/14 RP 99. Dodds deployed his Taser to gain control of Smith to remove him from the vehicle. 5/12/14 RP 99. After Smith was removed from the vehicle and placed on the ground, Dodds continued to have problems gaining control of Smith because Smith refused to move his hands from underneath his stomach. 5/12/14 RP 100.

Dodds searched Smith incident to arrest and found a pipe in Smiths' pants pocket. 5/12/14 RP 100. Dodds recognized the pipe as one commonly used to ingest controlled substances. 5/12/14 RP 102. Dodds noted a fresh burnt smell from the pipe, as if recently used. 5/12/14 RP 102.

While Smith was in the presence of Dodds, Dodds was unable to smell any odor of intoxicants from Smith. 5/12/14 RP 104. As a law enforcement officer, Dodds had training and experience in recognizing whether individuals were under the influence of intoxicants. 5/12/14 RP 104. Based upon Dodds' training and experience, he was under the opinion that Smith was under the influence of something on March 18, 2012. 5/12/14 RP 103-4.

Dodds described his actions in following Smiths' vehicle on a aerial photograph that had been admitted. 5/12/14 RP 109-12.

On cross-examination, defense elicited Officer Dodds' opinion that he believed Smith was under the influence of drugs. 5/12/14 RP 140.

Sergeant Greg Adams was working for the Skagit County Sheriff's Office on March 18, 2012. 5/13/14 RP 6-7. Adams encountered Deputy Dodds near Smith's vehicle on Metcalf Street off of Highway 20. 5/13/14 RP 8. Smith's vehicle was pulled beyond the stop line actually partially in the lane of travel on Highway 20. 5/13/14 RP 8, 15, 16. Sergeant Adams was in full uniform and also in a marked police vehicle with the lights activated as he sat across the street from Dodds and Smith. 5/13/14 RP 9. Adams heard Dodds telling Smith to shut off the car and get out. 5/13/14 RP 9. Adams described Smith making a slow U-turn and heading south on Metcalf Street. 5/13/14 RP 10. As Smith turned, he looked at Adams and waved. 5/13/14 RP 10, 20. Adams was following with lights and siren activated, but Smith would not stop. 5/13/14 RP 10. Adams pulled around in front of Smith and started slowing down to force Smith to stop. 5/13/14 RP 10. Adams saw Smith begin to turn to the left to turn back around and instead the vehicle turned and hit the curb where it stopped. 5/13/14 RP 10-1. Adams moved his push bars against the back of the vehicle so it could not back out. 5/13/14 RP 11.

Adams went around to the driver's side of the vehicle to help remove Smith. 5/13/14 RP 12. Adams saw Smith with a cane that Adams initially thought was a rifle. 5/13/14 RP 13. Smith would not comply with Dodds' directions and Adams saw Smith hold the cane up and state "bang, bang" as if shooting Dodds. 5/13/14 RP 13. Smith moved as if to rush at Dodds, and Dodds put his hands on Smith. 5/13/14 RP 13. Adams saw Dodds use a Taser to gain control of Smith. 5/13/14 RP 13. After Smith refused to stand up, he was picked up and placed at the back of Dodds' patrol vehicle. 5/13/14 RP 14.

Deputy John Hendrickson was called in to assist in the incident and investigate Smith for a suspected DUI. 5/13/14 RP 27-8, 55. Hendrickson spoke with Smith for about ten minutes at the back of Deputy Dodds' vehicle just about using his cane and being assisted into the policed department breath alcohol testing room. 5/13/14 RP 29-31. Hendrickson was certified to conduct breath tests for alcohol content by the State Patrol. 5/13/14 RP 33. Smith was offered to take a breath test, but refused. 5/13/14 RP 37. Hendrickson asked Smith questions off the DUI evaluation forms. 5/13/14 RP 37-8. Smith denied using any drugs. 5/13/14 RP 39. Smith provided unusual responses to other questions on the form. 5/13/14 RP 38-44, 61-2. When asked if he had anything to drink



since being stopped, he said yes. 5/13/14 RP 41. When asked what it was he drank, he said an apple. 5/13/14 RP 41.

Hendrickson described that Smith's demeanor was erratic, switching from aggressive to passive. 5/13/14 RP 44. Smith's pupils were constricted to the point of being pinpointed. 5/13/14 RP 46, 64. Smith's pupil stayed small regardless of application of light. 5/13/14 RP 64. Hendrickson did not notice any odor of intoxicants on Smith's breath. 5/13/14 RP 46. Smith spoke very fast and was repetitive. 5/13/14 RP 47.

Smith was asked to give a blood test and refused. 5/13/14 RP 49. Hendrickson attempted to have Smith perform field sobriety tests, but Smith refused. 5/13/14 RP 51.

Based upon Hendrickson's training and experience, and time spent with Smith for more than an hour, he was able to form the opinion that Smith was obviously intoxicated. 5/13/14 RP 52. Hendrickson could not determine the source of the intoxication. 5/13/14 RP 52.

The defense did not call any witnesses. 5/13/14 RP 85.

#### **IV. ARGUMENT**

- 1. Stopping into a highway and repeated U-turns including one made into a highway at night was sufficient to establish driving in a reckless manner.**

**i. Standards Pertaining to Sufficiency of Evidence**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "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 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

*State v. McNeal*, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), *rev. denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. *Hutton*, 7 Wn. App. at 728, 502 P.2d 1037.

**Credibility determinations are for the trier of fact and are not subject to review.** *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). **We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.** *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *rev. denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). **The trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily.** *State v. Tocki*, 32 Wn. App. 457, 462, 648 P.2d 99, *rev. denied*, 98 Wn.2d 1004 (1982).

*State v. Prestegard*, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001)

And “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* The credibility of the witnesses is for the jury. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .

*State v. Perez*, 166 Wn. App. 55, 60, 269 P.3d 372 (2012).

**ii. Elements of Attempt to Elude**

RCW 46.61.024(1) defines attempting to elude a pursuing police vehicle, and provides:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her 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 only element as to which Smith contests the sufficiency of the evidence is driving in a reckless manner. Appellant’s Opening Brief at pages 5-10.

The jury was instructed of the elements of the Attempting to Elude as follows:

To convict the defendant of the crime of attempting to elude a police vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 18, 2012, the defendant drove a motor vehicle;

- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
- (3) That the signaling police officer's vehicle was equipped with lights and siren;
- (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and
- (6) That the acts occurred in the State of Washington.

CP 44. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 94.02 (3d ed. 2008). The jury was also given the appropriate instruction as to “reckless manner.”

To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.

CP 45. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 90.05 (3d ed. 2008).

The present “reckless manner” standard applicable to the crime of attempting to elude reflects a change enacted by Laws of Washington, 2003, ch. 101, § 1; prior to that, the statute provided that the driver drive his or her vehicle “in a manner indicating a wanton or wilful disregard for the lives or property of others” in order to be guilty of the offense. Laws of Washington, 1983, ch. 80, § 1. “Wanton” as used in the former version

of the statute is defined to mean “acting intentionally in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, harm a person or property.” 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 94.02 (3d ed. 2008).

The 2003 amendment provided a lesser mental state than the previous “wanton or willful disregard” standard. See *State v. Ridgley*, 141 Wn. App. 771, 781-2, 174 P.3d 105 (2007) (noting lesser mental state).

**iii. Sufficient Evidence Supported the Reckless Manner Provision of Attempting to Elude.**

The evidence support that the defendant’s mental state was one of rash or heedless manner and indifferent to the consequences.

Deputy Dodds activate his lights after Smith made an abrupt move off of Highway 20 without signaling onto Metcalf Street. 5/12/14 RP 86. At that point Dodds activated his lights and siren. 5/12/14 RP 87. Dodds followed after and the vehicle made a first U-turn passing Deputy Dodds. 5/12/14 RP 87. The vehicle went back to Highway 20 failing to stop at the stop sign instead stopping past the stop line into the eastbound lane of Highway 20. 5/12/14 RP 88, 111, 117. Then, after Dodds approached

Smith's car on foot, Smith made a second U-turn, this time into the travelled portion of the Highway. 5/12/14 RP 90, 121. The maneuver onto Highway 20 into the eastbound lane caused vehicles stop or slow down. 5/12/14 RP 112. Smith waved at Sergeant Adams while he made the turn. 5/13/14 RP 10, 20. Thereafter, Smith was followed by Sergeant Adams, albeit at a slow speed. 5/12/14 RP 92, 5/13/14 RP 6. Adams pulled ahead of Smith in order to slow Smith down to force him to stop. 5/12/14 RP 5/13/14 RP 10. When Smith went to turn again, Dodds and Adams were able to pin Smith in, forcing him to stop. 5/12/14 RP 91-2, 5/13/14 RP 10-1.

The jury could draw the rational inference from this evidence that Smith's multiple U-turns, pulling out into the traffic on Highway 20 causing vehicles to stop and failing to stop for the officers until they had Smith boxed showed that Smith was driving in either a rash manner, or a heedless manner and was indifferent to the consequences.<sup>2</sup>

Such indifference was supported by his failing to acknowledge Deputy Dodds at the window and further, by his waiving to Sergeant

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<sup>2</sup> Under the prior version of the statute, it was held that the State need not prove that anyone was endangered by the conduct only that the conduct showed the mental state of "wanton or willful disregard for the lives or property of others." *State v. Whitcomb*, 51 Wn. App. 322, 327, 753 P.2d 565 (1988) (noting the defendant's mental state may be inferred from conduct).

Adams. 5/12/14 RP 89-90, 119, 5/13/14 RP 10, 20. Smith did not care what officers had to do to cause him to stop. His demeanor was significant evidence of indifference to the consequences.

Smith contends that the driving occurring after Deputy Dodds activated his lights did not rise to the level of driving in a reckless manner. Appellant's Opening Brief at page 8. The State is not relying on the fact of the initial abrupt turn, but as described above, relies upon Smith's actions immediately after the turn to establish the driving was in a reckless manner.

Smith also argues lack of reckless manner based upon the speed with which he was driving after the point that he came to a stop past the stop line into the highway. Appellant's Opening Brief at page 9. The jury is free to evaluate the evidence and determine whether the defendant's other actions were sufficient to establish the driving was in a reckless manner. Smith's argument drawing inferences in his favor is contrary to the test which requires that all inferences that reasonably can be drawn are drawn in favor of the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

**2. The trial court did not abuse its discretion in admitting evidence of intoxication.**

We review decisions to admit evidence using an abuse of discretion standard. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). The trial court is given considerable discretion to determine if evidence is admissible. *Id.* “Where reasonable persons could take differing views regarding the propriety of the trial court’s actions, the trial court has not abused its discretion.” *Id.* However, the trial court has abused its discretion on an evidentiary ruling if it is contrary to law. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.2d 495 (1996). “An abuse of discretion exists ‘[w]hen a trial court’s exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons.’” *Id.* (alteration in original) (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

*State v. Quaale*, \_\_\_ Wn.2d, \_\_\_, 340 P.3d 213, 216 (2014).

The trial involved both the Attempting to Elude as well as the charge of Driving While under the Influence. Therefore, evidence that related to intoxication was relevant to the charge of Driving While under the Influence charge.

The trial court permitted officers and one lay witness to testify about their opinions about whether the defendant appeared intoxicated. CP 24, 5/12/14 RP 37, 5/12/14 RP 51-2. The lay witness had known Smith for years and the two officers had training and experience to observe signs of intoxication.

Lay witnesses may express an opinion regarding the degree of sobriety. *State v. Lewellyn*, 78 Wn. App. 788, 795, 895 P.2d 418 (1995),



*citing Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993), *rev. denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994).

Officers having sufficient training and experience may express opinions regarding intoxication.

We hold that, where the testimony is supported by proper foundation, the trial court has discretion to admit opinion testimony on the degree of intoxication in a prosecution for driving while under the influence.

*Seattle v. Heatley*, 70 Wn. App. 573, 582, 854 P.2d 658 (1993).

Officers who have adequate training as a drug recognition expert may relate an opinion about the presence or absence of certain categories of drugs in a suspect's system. *State v. Baity*, 140 Wn.2d 1, 18, 991 P.2d 1151 (2000) (holding DRE protocol and classification is generally accepted in the scientific communities). However, in *State v. Quaale*, \_\_\_ Wn.2d, \_\_\_, 340 P.3d 213, 216 (2014), the Court held that a trooper's opinion that he had "no doubt" about intoxication based solely upon an HGN test was an improper opinion on the defendant's guilt.

In contrast here, the officers were presenting their opinions about intoxication based upon the full context of their contact with Smith and did not characterize their opinion in terms of the level of doubt. Thus, the testimony here did not rise to that found improper under *Quaale*.

Additionally, Smith complains of the single reference to alcoholics anonymous by the lay witness. The reference to AA was for Smith helping another individual in AA rather than being in AA himself. 5/12/14 RP 53. Smith objected and the trial court struck the answer. 5/12/14 RP 54. Smith did not seek a curative instruction for the jury to disregard the comment and did not seek mistrial based upon the violation. This reference likewise did not improperly impact the conviction for Attempting to Elude.

**3. Any error in admission of evidence regarding intoxication was harmless beyond a reasonable doubt.**

Where an error violates an evidentiary rule rather than a constitutional mandate, the error is not prejudicial unless it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Thomas*, 150 Wn.2d at 871, 83 P.3d 970.

*State v. Price*, 126 Wn. App. 617, 638, 109 P.3d 27 (2005).


Here, this Court can be certain that the evidence of intoxication had a minor significance to the charge of Attempting to Elude given that the jury acquitted Smith of Driving While under the Influence of Intoxicants. Error, if any, was harmless beyond a reasonable doubt.

**V. CONCLUSION**

For the foregoing reasons Andrew Smith's conviction for Attempting to Elude a Pursuing Police Vehicle must be affirmed.

DATED this 13<sup>th</sup> day of February, 2015.

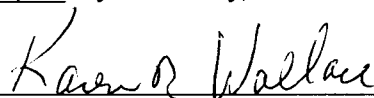
SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

**DECLARATION OF DELIVERY**

I, Karen R. Wallace, declare as follows:

I sent for delivery by:  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Oliver R. Davis, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 13<sup>th</sup> day of February, 2015.

  
KAREN R. WALLACE, DECLARANT