SUPREME COURT NO. 92986-6
COURT OF APPEALS NO. 72450-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

V.

THOMAS FEELY, JR.,

Petitioner.

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

The Honorable Charles Snyder, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 3

1. Trial Testimony 3

2. Closing Argument 6

3. Court of Appeals Decision 8

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT 10

1. WHAT THE LEGISLATURE INTENDED BY A "PURSUING LAW ENFORCEMENT OFFICER" IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE RESOLVED BY THIS COURT. 10

2. WHETHER FEELY WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT AND DEFENSE COUNSEL'S INEFFECTIVENESS IN FAILING TO OBJECT INVOLVES SIGNIFICANT QUESTIONS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS. 14

(i) The Prosecutor Misstated the Law Regarding the Enhancement 15

(ii) Prosecutor's Lessening of State's Burden 17

(iii) Prosecutor's Violation of Court's Limiting Instruction 19

F. CONCLUSION 20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Belgarde,
110 Wn.2d 504, 755 P.2d 174 (1988) 15

State v. C.G.,
150 Wn.2d 604, 80 P.3d 594 (2003) 11

State v. Emery,
174 Wn.2d 741, 278 P.3d 653 (2012) 17

State v. Evans,
177 Wn.2d 186, 298 P.3d 724 (2013) 14

State v. Kintz,
169 Wn.2d 537, 238 P.3d 470 (2010) 11

State v. Fisher,
165 Wn.2d 727, 202 P.3d 937 (2008) 19

State v. Johnson,
158 Wn. App. 677, 243 P.3d 936 (2010) 18

State v. Kintz,
169 Wn.2d 537, 238 P.3d 470 (2010) 11

State v. McHenry,
88 Wn.2d 211, 558 P.2d 188 (1977) 18

State v. Monday,
171 Wn.2d 667, 257 P.3d 551 (2011) 14-15

State v. Neidigh,
78 Wn. App. 71, 895 P.2d 423 (1995) 17

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Walker,
164 Wn. App. 724, 265 P.3d 191 (2011) 16

State v. Warren,
165 Wn.2d 17, 195 P.3d 940 (2008) 15

FEDERAL CASES

Estelle v. Williams,
425 U.S. 501, 96 S. Ct. 1691,
48 L. Ed. 2d 126 (1976) 15

In re Winship,
397 U.S. 358, 90 S. Ct. 1068,
25 L. Ed. 2d 368 (1970) 18

Miller v. Pate,
386 U.S. 1, 87 S. Ct. 785,
17 L. Ed. 2d 690 (1967) 14

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984) 17

Sullivan v. Louisiana,
508 U.S. 275, 113 S. Ct. 2078,
124 L. Ed. 2d 192 (1993) 18

United States v. Yarbrough,
852 F.2d 1522 (9th Cir. 1988) 15

TABLE OF AUTHORITIES

Page

RULES, STATUTES AND OTHERS

Const. art. 1, § 22 ..... 15, 17

Final B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008) 13

House B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008) 13

RAP 13.4(b)(3) 3, 20

RAP 13.4(b)(4) 2, 20

RCW 9.94A.533(11) 1

RCW 9.94A.834 ..... 1, 11

Senate B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008) 14

U.S. Const. Amend. VI 15, 17

U.S. Const. Amend. XIV 15

A. IDENTITY OF PETITIONER

Petitioner Thomas Feely asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the published court of appeals decision in State v. Feely, __ Wn. App. __, __ P.3d __ (2016), No. 72450-9-I, filed February 22, 2016, attached as Appendix E to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Under RCW 9.94A.533(11), the court shall add a 12-months-plus-one-day enhancement to a base sentence for attempting to elude a pursuing police vehicle if the state proves the accused endangered one or more persons while committing the crime, as provided for under RCW 9.94A.834. Under the latter statute, the state must prove the accused endangered one or more persons "*other than the defendant or the pursuing law enforcement officer.*" RCW 9.94A.834 (emphasis added). The term "pursuing law enforcement officer" is undefined.

As a matter of first impression, Division One held that officers who put out "spike strips" or "stop sticks" in an effort to capture the eluding individual are not included in the definition of a "pursuing law enforcement officer." The court therefore held Feely's sentence could be enhanced based on his alleged endangerment of these officers.

a. Where the legislature failed to define "pursuing law enforcement officer" and Division One decided its meaning as a matter of first impression, does this case involve an issue of substantial public interest that should be resolved by this Court? RAP 13.4(b)(4).

b. Assuming arguendo the appellate court misinterpreted legislative intent by putting spike stick officers in a category separate and apart from officers in direct pursuit, did the prosecutor commit prejudicial misconduct in closing when he argued the jury could convict Feely of endangering others based on his alleged endangerment of officers setting up the spike strips?

2. Did prosecutorial misconduct deprive Feely of his right to a fair trial where the state argued in closing that it would be inconsistent and not in keeping with the reasonable doubt instruction for jurors to believe Feely was guilty but also believe the state did not prove it beyond a reasonable doubt?

3. Did prosecutorial misconduct deprive Feely of his right to a fair trial where the court instructed the jury it could consider his prior driving under the influence (DUI) convictions solely to determine whether the charged DUI was a felony, but the state argued in closing the jury could consider the convictions as consciousness of guilt and as Feely's motive for reportedly eluding?

4. Did Feely receive ineffective assistance of counsel when his attorney failed to object to the prosecutor's misstatement of law regarding the enhancement, the prosecutor's lessening of the state's burden with respect to proof beyond a reasonable doubt and the prosecutor's violation of the court's limiting instruction regarding Feely's priors?

5. Where this case involves significant questions of law under the state and federal constitution regarding prosecutorial misconduct and ineffective assistance of counsel, should this Court accept review? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Feely was convicted of felony DUI[1] and attempting to elude a pursuing police vehicle. CP 15-17. The jury also found that a person other than Feely or a pursuing law enforcement officer was endangered by Feely while he was allegedly attempting to elude. CP 53.

1. Trial Testimony

Around 1:00 a.m. on April 9, 2014, Trooper Travis Lipton attempted to pull over a 2001 Dodge truck going northbound on I-5 near the overpass to Portal Way, after the trooper reportedly saw the truck drift and cross the center line. RP 60-64. The truck did not stop but exited at

Grandview Road and gave chase as Lipton pursued in his patrol car with his camera activated. RP 59-68; Ex 11.

Lipton testified that when the truck turned on Kickerville Road, it bypassed two cars that were either approaching or travelling in the same direction. RP 69. Lipton testified the two cars either slowed or stopped as a result. RP 69. Lipton requested dispatch contact other troopers or police agencies to deploy spike strips. RP 71.

At this point, the truck was heading south on North Star Road. RP 74. A spike strip was set up at the intersection of North Star and Hidden Pond Drive, but the truck went around it. RP 74.

Sergeant Larry Flynn set up another spike or "stop strip" at the intersection of North Star and Mountain View Road. RP 180-81. Flynn testified that as he deployed the strip, he could see the truck's headlights coming over the crest of the hill. RP 184. According to Flynn, the driver must have seen him, since he locked up the brakes and started sliding towards Flynn. RP 184, 197-98. Although the truck tried to maneuver around the strip, Flynn testified it hit the spikes before gunning it onto Mountain View Road. RP 185, 188. Flynn testified several officers have been killed trying to deploy spike strips. RP 187.

---

[1] At trial, Feely stipulated he had four prior qualifying convictions that elevated the DUI to a felony. CP 13-14.

Flynn never saw the driver. RP 186. Flynn did not see a passenger either, but could not guarantee there wasn't one. RP 197.

The truck turned down a gravel road and went up over a berm out of Lipton's sight and that of officer Justin Pike, who had since caught up. RP 75-80. When Lipton and Pike reached the berm, they saw the truck high centered on a log in a swampy area. RP 80, 152, 209. The truck was empty, but Lipton found a Washington State identification card for Thomas Feely inside. RP 87. The truck was registered to Feely's stepfather. RP 37, 103, 256.

Lipton estimated the entire pursuit lasted about 15 minutes. RP 98. Reportedly, the only person Lipton saw during the pursuit was the back of the driver's head. RP 62, 84. But it was dark and difficult to see into the truck. RP 129. There were also two "for sale" signs in the back windows of the truck where the driver and a passenger would be sitting. RP 130-31.

Another deputy arrived with his dog Elliott and initiated a track starting from the truck. RP 216, 243, 301. Elliott led them through the swamp, over a barbed wire fence and into a hay field. RP 243. From the hay field, Elliott continued north into the woods. RP 244. After a short time in that section of woods, Elliott came back out in the field and started backtracking to the south. RP 244, 275.

When Elliott failed to locate anyone, another officer initiated a second track with his more experienced dog, Justice. RP 217, 261, 277. Justice located Feely in a tree in the same wooded area where Elliott initially stopped. RP 218, 246-47. Pike, who recognized Feely from 4-H, testified Feely had alcohol on his breath and that his responses were delayed. RP 222. A blood draw at the hospital showed Feely's blood alcohol level was over the legal limit. RP 124.

2. Closing Argument

The prosecutor argued the jury could find Feely endangered someone other than himself or a pursuing law enforcement officer based on the other cars on Kickerville Road, as well as the officers who put out the spike strips:

> Other possibilities, you know, I don't know how many different vehicles are out there, the officers that are not pursuing, but did apply the stop sticks. They can be endangered by his driving, and I think at one point in the video, you can see the first officer, I think it's on North Star Road coming down North Star Road. You can see him coming out and try to deploy the sticks and run back, and you can find that he's endangered by the Defendant driving as he is, and then finally, of course, agent, Sergeant Flynn, he testified about how he deploys those sticks, how they work, and the danger which they are trained on, because several law enforcement officers have lost their lives in deploying those very – I was going to say those stop sticks, but such devices. So it's serious stuff.

RP 455.

In rebuttal closing, the prosecutor addressed the concept of reasonable doubt:

> It can be very frustrating to have a jury come back and say we all knew he was guilty, but you didn't prove it beyond a reasonable doubt. Those are inconsistent.

RP 481-82.

As indicated in footnote 1, Feely stipulated he had four prior qualifying convictions elevating the DUI to a felony. CP 13. Regarding the jury's consideration of these prior convictions, the defense proposed and the court gave the following instruction:

> Evidence of other crimes which occurred prior to April 9th, 2014 may be considered for the limited purpose of determining whether Mr. Feely has the requisite prior convictions to make this case a felony DUI. The evidence is not to be used or considered for the purpose of proving the character of a person in order to show that the person acted in conformity with that character.

CP 35 (emphasis added); see also CP 23; RP 426-27. The prosecutor did not object to this instruction. RP 427-28, 431-32.

Despite the court's limitation, however, the prosecutor urged the jury to consider the priors as evidence of motive:

> And then finally, it's not an element of the crime at all, but something that is brought up a lot is who has the motive to flee? Who has the motive to flee in the car while it's driving the truck? And who has a motive when it stops?
>
> Well, Mr. Feely has the four priors, we know that, four prior DUIs. You can't use that, you cannot use that to

> say that because he was convicted four times of driving under the influence, he must have been driving under the influence this time. It's not a character thing. You can't do that.
>
> But what you can do is use that for another purpose, the element of the offense, a felony DUI and motive. Would somebody who is driving under the influence want to be caught having four prior DUI convictions? Of course not. And that gives him a motive to flee police, and to do so in a very dangerous, reckless manner, and that's what you see on that video.
>
> What other motive would he have to flee the police if he was just, if he wasn't the driver? Because when you flee that truck, you sure look like you're the driver at that point, don't you?

RP 485.

3. Court of Appeals Decision

Feely argued three instances of prosecutorial misconduct in closing argument deprived him of his right to a fair trial and required reversal. First, the prosecutor misstated the law and committed misconduct when he urged jurors to convict Feely of the enhancement based on his alleged endangerment of the spike stick officers. As Feely argued, the legislature's clear intent was to enhance the penalty for individuals who endanger innocent bystanders while eluding, not the police who are involved in the individual's attempted capture. Brief of Appellant (BOA) at 13-20; Reply Brief of Appellant (RB) at 1-8.

Taking a very narrow view of what it means to "pursue" or "follow," Division One held "the plain meaning of the enhancement

extends to endangering officers who were not following the defendant." Appendix E at 1, 6-7. It therefore rejected Feely's prosecutorial misconduct claim. Id.

Second, the prosecutor trivialized the burden of proof and committed misconduct when he argued it would be inconsistent for jurors to "know" the defendant was guilty but find the state did not prove it beyond a reasonable doubt. BOA at 21-25; RB at 8-9. The appellate court agreed this was misconduct:

> It trivializes the burden of proof to suggest that jurors can ignore the reasonable doubt instruction as long as they "know" the defendant is guilty. "Knowing" a defendant is guilty is not necessarily inconsistent with having a reasonable doubt.

Appendix E at 8. Nonetheless, the court held Feely had not shown prejudice. Id.

Third, the prosecutor violated the court's ruling and committed misconduct when he urged jurors to consider Feely's prior convictions as evidence of motive. BOA at 26; RB at 8-9. While the court agreed the state violated the court's ruling, the court rejected Feely's prosecutorial misconduct claim, reasoning again that he could not show prejudice. Appendix E at 1, 13.

Finally, Feely argued that his attorney's failure to object to these instances of prosecutorial misconduct constituted ineffective assistance of

counsel. BOA at 31-36; RB at 8-9. Because the court did not find the prosecutor misstated the law, and because the court concluded Feely could not establish prejudice for the latter claims of misconduct, the court concluded he did not receive ineffective assistance of counsel. Appendix E at 1, 14.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. WHAT THE LEGISLATURE INTENDED BY A "PURSUING LAW ENFORCEMENT OFFICER" IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE RESOLVED BY THIS COURT.

Contrary to the court of appeals decision, the plain language of the endangerment statute excludes spike strip officers from its reach. They are pursuing the eluder just as much as an officer following in a police car. Moreover, interpreting the statute to include spike strip officers but not officers in direct pursuit would lead to a strained and absurd result. There is no logical reason the legislature would want to protect spike strip officers over those in direct pursuit. Both jobs are equally dangerous. But it does make sense the legislature would want to differentiate between ordinary citizens and police involved in a car chase. The officers chose a profession that can be dangerous at times. Plus, the officers can decide to stop the pursuit at any time.

This Court should not allow the appellate court to have the final say on the intended scope of the statute. This is a matter of substantial public interest that should be resolved by this Court. RAP 13.4(b)(4).

The meaning of a statute is a question of law the court reviews de novo. State v. C.G., 150 Wn.2d 604, 608, 80 P.3d 594 (2003). The court's goal is to determine the legislature's intent and carry it out. Id. If a statute's meaning is plain, then the court must give effect to the plain meaning as expressing what the legislature intended. Id. If a word is not specifically defined by statute, the court derives the plain meaning of non-technical words using dictionary definitions. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010).

RCW 9.94A.834 provides for an enhancement 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] "Pursuing law enforcement

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[2] Under RCW 9.94A.834:

> (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.

officer" is undefined. To pursue means to "follow in order to overtake, capture, kill, or defeat" or to "chase." See http://www.merriam-webster.com/dictionary/pursue. "To follow" means to "come after" and "to watch steadily" and "to attend closely to." http://www.merriam-webster.com/dictionary/follow.

Contrary to the court of appeals decision, the plain language of the statute supports exclusion of the spike strip officers from the ambit of the statute. The spike strip officers were pursuing Feely as much as trooper Lipton. They were trying to overtake him; they were "watching steadily" and "attending closely to" to his movement so they would know where to set up the spike strips. Thus, the plain language of the statute supports Feely's interpretation that officers involved in the chase of a fleeing individual – whether they are in direct pursuit or attempting to overtake him with spike strips – are not included in the endangerment statute.

This is also evident by the legislative history, which indicates the legislature was concerned with innocent bystanders. First, the legislation

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> (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

itself was in response to the killing of two civilians who were broadsided by a car thief attempting to flee from police. See http://www.seattletimes.com/seattle-news/man-convicted-in-fatal-car-crash/, attached as Appendix A; see also Final B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008), attached as Appendix B. The house bill discusses concern for children on their way to school, people out shopping and pedestrians. House B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008), attached as Appendix C. These statements indicate the legislature was concerned with civilians who happen to be in the wrong place at the wrong time. Not officers who have agreed to work in a profession that can sometimes be dangerous.

According to Division One, however, its construction makes sense because:

> The crime necessarily requires an officer in a police vehicle pursuing a defendant trying to elude that officer. The enhancement logically imposes a greater punishment if there is danger to others than the defendant and the pursuing officer. If officers who are not following are endangered, then the statute increases punishment based upon that risk that is not inherent in the mandatory elements of the crime.

Appendix E at 7.

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pursuing law enforcement officer were endangered during the commission of the crime.

But a spike strip officer has the same option to disengage as an officer directly pursuing in a police car. Accordingly, it makes no sense the legislature would want to treat them differently. And it runs contrary to the senate bill report, which states: "Our community has made it clear that it would rather have the officer stop than endanger people." Senate B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008), attached as Appendix D.

But to the extent Division One's interpretation can be considered reasonable, it is not the only reasonable interpretation. It is equally reasonable to conclude the legislature was concerned about the fleeing individual's endangerment of innocent bystanders, not police. Under the rule of lenity, the statute must be construed in Feely's favor. State v. Evans, 177 Wn.2d 186, 192-93, 298 P.3d 724 (2013).

2. WHETHER FEELY WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT AND DEFENSE COUNSEL'S INEFFECTIVENESS IN FAILING TO OBJECT INVOLVES SIGNFICANT QUESTIONS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTION THAT SHOULD BE REVIEWED BY THIS COURT.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). The right to a fair trial is a

fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976).

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted); see also United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir.1988) (analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect). Even if a defendant does not object, he does not waive his right to review of flagrant misconduct by a prosecutor. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

(i) The Prosecutor Misstated the Law Regarding the Enhancement

The prosecutor may not misstate the law to the jury. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Here, the prosecutor told the jury that it could find Feely endangered someone other than himself or a pursuing police officer if it found he endangered the officers who deployed the spike strips. For the reasons stated above, this was a gross misstatement of the law.

Feely was prejudiced because it is likely the jury found the enhancement proven based on either Sergeant Flynn or the first spike strip officer. This likelihood is evident from the video, which appears to show the truck and Lipton encounter what appear to be three other cars during the chase. On the first occasions, there is a car coming the other way, the car, truck and Lipton are each in their own lane and the car merely slows down and pulls to the side. Ex 11. The only other two cars appear when the truck passes a car on the right and another car is heading its way in the oncoming lane. But the truck's driver and Lipton, who is following right behind the truck, pass the car on the right before the other car gets there. Presumably, Lipton would not have followed right behind the truck if he thought it was dangerous. It is unlikely the jury relied on this weak evidence to find the enhancement.

In contrast, Sergeant Flynn testified the truck locked up its breaks and slid toward him and that officers have died setting up these spike strips. Therefore, is substantially likely the jury relied on Flynn as the endangered person not the civilians on Kickerville Road.

Although there was no objection, a prosecutor's misstatement of the law has such a grave potential to mislead the jury that is satisfies the more exacting standard of prosecutorial misconduct. State v. Walker, 164 Wn. App. 724, 736 n.7, 265 P.3d 191 (2011).

Alternatively, defense counsel's failure to object constituted ineffective assistance of counsel. Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687.

Defense counsel must be aware of the law and should make timely objections when the prosecutor crosses the line and jeopardizes the defendant's right to a fair trial. State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012); State v. Neidigh, 78 Wn. App. 71, 79-80, 895 P.2d 423 (1995). Counsel's failure to object to the prosecutor's misstatement of the law constituted deficient performance. It prejudiced Feely because it allowed the state to rely on more convincing evidence to support the enhancement than the law allowed. There is a substantial probability the jury relied on the spike strip officers as a basis for the enhancement, contrary to the legislature's intent.

(ii) Prosecutor's Lessening of State's Burden of Proof

The presumption of innocence and requirement that the state prove every defendant's guilt beyond a reasonable doubt are bedrock principles

of due process and fundamental to a fair trial. State v. McHenry, 88 Wn. 2d 211, 214, 558 P.2d 188 (1977) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). "The two principles are intimately related, as the proof beyond a reasonable doubt standard provides concrete substance for the presumption of innocence . . . ." McHenry, 88 Wn.2d at 214 (quoting Winship, 387 U.S. at 363). Indeed, the failure to properly instruct jurors on these principles is structural error and requires reversal. Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 192 (1993); McHenry, 88 Wn.2d at 212-215.

Division One agreed the prosecutor committed misconduct in trivializing the burden of proof in closing argument when he argued:

> It can be very frustrating to have a jury come back and say we all knew he was guilty, but you didn't prove it beyond a reasonable doubt. Those are inconsistent.

Appendix E at 8; RP 481-82.

But contrary to the appellate court's decision, a curative instruction could not have cured the resulting prejudice. BOA at 24 (citing State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010)); BOA at 25 (noting circumstantial nature of state's case including fact no one testified to seeing Feely driving).

In the event the resulting prejudice could have been cured by an instruction, counsel's failure to request one constituted ineffective assistance of counsel. BOA at 34-35.

(iii) Prosecutor's Violation of Court's Limiting Instruction

The appellate court likewise agreed the prosecutor committed misconduct when he argued the jury could consider Feely's stipulated prior DUIs not only as evidence of prior qualifying convictions elevating the DUI to a felony, but as evidence Feely had a motive to flee. Appendix E at 12-13; State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2008). But contrary to the appellate court's decision, Feely has shown the prejudice required for both his prosecutorial misconduct and ineffective assistance claims.[3] Not one of the officers who testified directly observed Feely driving. Moreover, the first dog started tracking to the south suggesting there could have been another suspect. Considering the scant evidence, it cannot be said the prosecutor's improper use of the evidence did not affect the jury's verdict.

[3] Feely argues the misconduct issue is preserved because defense counsel requested and received a limiting instruction. BOA at 30 (citing Fisher, 165 Wn.2d 727, 748 n.4). Alternatively, Feely received ineffective assistance of counsel when his attorney failed to enforce the court's limitation on the evidence. BOA at 35-36.

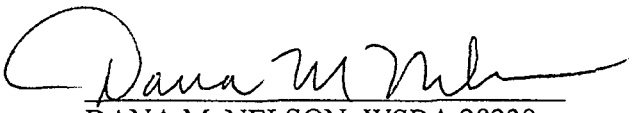
F. CONCLUSION

The scope of the endangerment statute is an issue of substantial public interest that should be decided by this Court. RAP 13.4(b)(4). Rules of statutory construction favor Feely's interpretation. The prosecutor misstated the law and committed prejudicial misconduct in closing argument when he urged jurors to convict Feely of the enhancement based on his alleged endangerment of the spike strip officers. This Court should accept review of this significant question of law under the state and federal constitution, as well as the other constitutional issues raised in this petition. RAP 13.4(b)(3).

Dated this 22nd day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX A

State v. Thomas Feely, COA No. 72450-9-I

Local News

Man convicted in fatal car crash

Originally published February 4, 2009 at 12:00 am
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A man has been convicted of second-degree murder for a crash that led to a change in Washington state law on eluding police.

By news wires
Seattle Times Staff

Yakima

A man has been convicted of second-degree murder for a crash that led to a change in Washington state law on eluding police.

A jury in Yakima convicted 22-year-old Blake Edward Young on Monday. He faces 32 to 49 years in prison when he is sentenced.

Testimony showed Young was fleeing from police in a stolen car and was high on methamphetamine when he ran a red light on Oct. 22, 2006. He broadsided another car, killing Edgar F. Trevino-Mendoza, 19, and Guillermo "Bobby" Aguilar, 19.

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Last year, the Legislature approved the Guillermo "Bobby" Aguilar and Edgar F. Trevino-Mendoza Public Safety Act.

It requires that a driver convicted of endangering others while fleeing from authorities be sentenced to an extra year and a day behind bars.

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Jon Talton
As USS Ranger departs Puget Sound, Navy's cost dilemma takes off

Sounders FC
For Sounders and other MLS teams, building global scouting network is vital

Contact

APPENDIX B

FINAL BILL REPORT
ESHB 1030

C 219 L 08
Synopsis as Enacted

Brief Description: Enhancing the penalty for eluding a police vehicle.

Sponsors: By House Committee on Public Safety & Emergency Preparedness (originally sponsored by Representatives Takko, Lovick, Simpson, Haler, Blake, Campbell, Ross, Skinner, Newhouse, Conway, Morrell, Chandler, McDonald, Rodne, Kristiansen, Wallace, Moeller, VanDeWege, McCune, Williams, Bailey, Warnick, Upthegrove, Alexander and Pearson).

House Committee on Public Safety & Emergency Preparedness
House Committee on Appropriations
Senate Committee on Judiciary

Background:

Crime of Attempting to Elude a Police Vehicle.
A driver commits the crime of attempting to elude a police vehicle by willfully failing or refusing, on a public highway, to immediately stop his or her vehicle after receiving a visual or audible signal to stop, and by driving recklessly while attempting to elude the pursuing vehicle. The signal may be given by hand, voice, emergency light, or siren, but the officer must be in uniform and the vehicle must have lights and sirens.

Even if the prosecution shows that the defendant failed to stop after being given a signal to do so, the defendant may avoid conviction if he or she establishes, by a preponderance of the evidence, that either: (1) a reasonable person would not have believed that a police officer gave the signal; or (2) driving after receiving the signal was reasonable under the circumstances.

Under the Sentencing Reform Act (SRA), attempting to elude a police vehicle is ranked as a seriousness level of I, class C felony offense. A first-time offender would receive a presumptive sentence of zero to 60 days in jail. The statutory maximum sentence is five years in prison and a $10,000 fine. Additionally, the Department of Licensing must revoke the defendant's license for one year upon conviction.

Sentencing Enhancements.
Under the SRA, the court must impose imprisonment in addition to the standard sentencing range if specific conditions for sentencing enhancements are met. Sentencing enhancements may apply if any of the following apply: (1) the offender was armed with a firearm while committing certain felonies; (2) the offender was armed with a deadly weapon while committing certain felonies; (3) the offender committed certain felonies while incarcerated; (4) the offender committed certain drug offenses; (5) the offender committed vehicular

homicide while under the influence of alcohol or drugs; or (6) the offender committed a felony crime that was committed with sexual motivation.

The U.S. Supreme Court, in *Blakely v. Washington*, ruled that any factor that increases a defendant's sentence above the standard range, other than the fact of a prior conviction, must be proven to a jury beyond a reasonable doubt. To do otherwise would violate the defendant's right to a jury trial under the Sixth Amendment.

Summary:

A procedure is established for determining whether an eluding offense involved the endangerment of other persons, and a new sentencing enhancement penalty is created for the conviction of such eluding offenses.

In a prosecution for an eluding offense, if sufficient evidence exists to support the allegation that the eluding offense involved one or more persons (other than the defendant or pursuing law enforcement officer) who were threatened with physical injury or harm, then the prosecuting attorney may file a special allegation. In a case where a special allegation has been made, if a court makes a finding of fact, or in a jury trial if the jury finds a special verdict, that: (1) an offender committed the crime of attempting to elude a pursuing police vehicle, and (2) the underlying offense involved the endangerment of one or more persons (other than the defendant or pursuing law enforcement officer), then the court must impose a sentence enhancement. The sentence enhancement must include a sentence of 12 months and one day of imprisonment that is added to the offender's presumptive sentence.

This act is known as the Guillermo "Bobby" Aguilar and Edgar F. Trevino-Mendoza Public Safety Act of 2008.

Votes on Final Passage:

House	98	0	
House	97	0	
Senate	48	1	(Senate amended)
House	93	0	(House concurred)

Effective: June 12, 2008

APPENDIX C

State v. Thomas Feely, COA No. 72450-9-I

HOUSE BILL REPORT
ESHB 1030

As Passed Legislature

Title: An act relating to the penalty for attempting to elude a police vehicle.

Brief Description: Enhancing the penalty for eluding a police vehicle.

Sponsors: By House Committee on Public Safety & Emergency Preparedness (originally sponsored by Representatives Takko, Lovick, Simpson, Haler, Blake, Campbell, Ross, Skinner, Newhouse, Conway, Morrell, Chandler, McDonald, Rodne, Kristiansen, Wallace, Moeller, VanDeWege, McCune, Williams, Bailey, Warnick, Upthegrove, Alexander and Pearson).

Brief History:
Committee Activity:
Public Safety & Emergency Preparedness: 1/10/07, 2/1/07 [DPS];
Appropriations: 3/3/07 [DPS(PSEP)].
Floor Activity:
Passed House: 3/8/07, 98-0.
Floor Activity:
Passed House: 1/23/08, 97-0.
Senate Amended.
Passed Senate: 3/6/08, 48-1.
House Concurred.
Passed House: 3/8/08, 93-0.
Passed Legislature.

Brief Summary of Engrossed Substitute Bill

- Creates a one year sentencing enhancement if a person convicted of attempting to elude a police vehicle endangers other persons while committing that crime.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives O'Brien, Chair; Hurst, Vice Chair; Pearson, Ranking Minority Member; Ross, Assistant Ranking Minority Member; Ahern, Goodman and Lovick.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Yvonne Walker (786-7841).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Public Safety & Emergency Preparedness be substituted therefor and the substitute bill do pass. Signed by 34 members: Representatives Sommers, Chair; Dunshee, Vice Chair; Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Haler, Assistant Ranking Minority Member; Anderson, Buri, Chandler, Cody, Conway, Darneille, Dunn, Ericks, Fromhold, Grant, Haigh, Hinkle, Hunt, Hunter, Kagi, Kenney, Kessler, Kretz, Linville, McDermott, McDonald, McIntire, Morrell, Pettigrew, Priest, Schual-Berke, Seaquist, P. Sullivan and Walsh.

Staff: Elisabeth Donner (786-7137).

Background:

Crime of Attempting to Elude a Police Vehicle.
A driver commits the crime of attempting to elude a police vehicle by willfully failing or refusing, on a public highway, to immediately stop his or her vehicle after receiving a visual or audible signal to stop, and by driving recklessly while attempting to elude the pursuing vehicle. The signal may be given by hand, voice, emergency light, or siren, but the officer must be in uniform and the vehicle must have lights and sirens.

Even if the prosecution shows the defendant failed to stop after being given a signal to do so, the defendant may avoid conviction if he or she establishes, by a preponderance of the evidence, that either: (1) a reasonable person would not have believed that a police officer gave the signal; or (2) driving after receiving the signal was reasonable under the circumstances.

Under the Sentencing Reform Act (SRA), attempting to elude a police vehicle is ranked as a seriousness level of I, class C felony offense. A first-time offender would receive a sentence of zero to 60 days in jail. The statutory maximum sentence is five years in prison and a $10,000 fine. Additionally, the Department of Licensing must revoke the defendant's license for one year upon conviction.

Sentencing Enhancements.
Under the SRA, the court must impose imprisonment in addition to the standard sentencing range if specific conditions for sentencing enhancements are met. Sentencing enhancements may apply if any of the following apply: (1) the offender was armed with a firearm while committing certain felonies; (2) the offender was armed with a deadly weapon while committing certain felonies; (3) the offender committed certain felonies while incarcerated; (4) the offender committed certain drug offenses; (5) the offender committed vehicular homicide while under the influence of alcohol or drugs; or (6) the offender committed a felony crime that was committed with sexual motivation.

The U.S. Supreme Court, in *Blakely v. Washington*, ruled that any factor that increases a defendant's sentence above the standard range, other than the fact of a prior conviction, must be proven to a jury beyond a reasonable doubt. To do otherwise would violate the defendant's right to a jury trial under the Sixth Amendment.

Summary of Engrossed Substitute Bill:

A procedure is established for determining whether an eluding offense involved the endangerment of other persons and a new sentencing enhancement is created for such eluding offenses.

In a prosecution for an eluding offense, if the prosecutor feels sufficient evidence exists to support the allegation that the eluding offense involved one or more persons (other than the defendant or pursuing law enforcement officer) who were threatened with physical injury or harm, then the prosecuting attorney may file a special allegation. In cases where a special allegation has been made, if a court makes a finding of fact or in a jury trial if the jury finds a special verdict that: (1) an offender committed the crime of attempting to elude a pursuing police vehicle, and (2) the underlying offense involved the endangerment of one or more persons (other than the defendant or pursuing law enforcement officer), then the court must impose a sentence enhancement. The sentence enhancement must include a sentence of 12 months and one day of imprisonment that is added to the offender's presumptive sentence.

This act is known as the Guillermo "Bobby" Aguilar and Edgar F. Trevino-Mendoza Public Safety Act of 2008.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 2, 2007.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: (Public Safety & Emergency Preparedness)

(In support) This bill is essentially redrafted from last year and is a priority item for the Washington Association of Sheriffs and Police Chiefs (WASPC) this year. This bill is an attempt to address an ongoing issue of offenders attempting to elude the police. However, some law enforcement officers do not believe that the penalties in the bill are harsh enough.

When these offenders decide to run away from police they are endangering society as a whole. This includes children on their way to school, people out shopping, pedestrians, etc. Currently the penalty for a first time offender is 30 days in jail. This bill is not about money. Offenders need to know that there is going to be consequences for their actions of endangering others.

Law enforcement around the state has done its part in regulating and following the model policy through the WASPC in regards to the types of pursuits that they allow officers to engage in. Now it is time for these offenders to go to prison.

(Opposed) None.

Staff Summary of Public Testimony: (Appropriations)

(In support) This is priority legislation for the Washington Association of County Officials and the County Sheriffs Association. Currently, first time offenders only spend 30 days in jail. It needs to be clear that the consequences will be serious. In Washington, we have a lot of traffic and pedestrians. Recent deaths have been attributed to this very behavior, which warrants actions by citizens and policy officers.

(Opposed) None.

Persons Testifying: (Public Safety & Emergency Preparedness) Mayor Dave Elder, City of Yakima; Ana Lucas Garcia; Ruby Aguilar; Maria Barajas; Juan Mendoza; Juan Hernandez; Sheriff Mike Whelan, Grays Harbor County; Sheriff John Didion, Pacific County; Chief Scott Smith, Mount Lake Terrace Police Department; and John H. Tierney, Tierney & Associates.

Persons Testifying: (Appropriations) Christina Bridston, Washington Association of County Officials and Washington Association of County Sheriffs.

Persons Signed In To Testify But Not Testifying: (Public Safety & Emergency Preparedness) None.

Persons Signed In To Testify But Not Testifying: (Appropriations) None.

APPENDIX D

State v. Thomas Feely, COA No. 72450-9-I

SENATE BILL REPORT
ESHB 1030

As Reported By Senate Committee On:
Judiciary, February 27, 2008

Title: An act relating to the penalty for attempting to elude a police vehicle.

Brief Description: Enhancing the penalty for eluding a police vehicle.

Sponsors: House Committee on Public Safety & Emergency Preparedness (originally sponsored by Representatives Takko, Lovick, Simpson, Haler, Blake, Campbell, Ross, Skinner, Newhouse, Conway, Morrell, Chandler, McDonald, Rodne, Kristiansen, Wallace, Moeller, VanDeWege, McCune, Williams, Bailey, Warnick, Upthegrove, Alexander and Pearson).

Brief History: Passed House: 1/23/08, 97-0.
Committee Activity: Judiciary: 2/22/08, 2/27/08 [DPA, DNP].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended.
Signed by Senators Kline, Chair; Tom, Vice Chair; McCaslin, Ranking Minority Member; Carrell, Hargrove, Roach and Weinstein.

Minority Report: Do not pass.
Signed by Senator McDermott.

Staff: Lidia Mori (786-7755)

Background: A driver commits the crime of attempting to elude a police vehicle by willfully failing or refusing, on a public highway, to immediately stop his or her vehicle after receiving a visual or audible signal to stop, and by driving recklessly while attempting to elude the pursuing
vehicle. The signal may be given by hand, voice, emergency light, or siren, but the officer must be in uniform and the vehicle must have lights and sirens. A defendant may avoid conviction of the crime of attempting to elude a police vehicle if the defendant establishes, by a preponderance of the evidence, that a reasonable person would not have believed that a police officer gave the signal or driving after receiving the signal was reasonable under the circumstances.

Under the Sentencing Reform Act (SRA), attempting to elude a police vehicle is ranked as a seriousness level of I, class C felony offense. A first-time offender would receive a sentence of zero to 60 days in jail. The statutory maximum sentence is five years in prison and a

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

$10,000 fine. Additionally, the Department of Licensing must revoke the defendant's license for one year upon conviction.

Under the SRA, the court must impose imprisonment in addition to the standard sentencing range if specific conditions for sentencing enhancements are met. Sentencing enhancements may apply if any of the following apply: (1) the offender was armed with a firearm while committing certain felonies; (2) the offender was armed with a deadly weapon while committing certain felonies; (3) the offender committed certain felonies while incarcerated; (4) the offender committed certain drug offenses; (5) the offender committed vehicular homicide while under the influence of alcohol or drugs; or (6) the offender committed a felony crime that was committed with sexual motivation.

Summary of Bill (Recommended Amendments): A new sentencing enhancement is created. The court must impose a sentence of 12 months and one day of imprisonment, in addition to the standard sentencing range, for any offender convicted of attempting to elude a police vehicle if it enters a finding that one or more persons, other than the defendant or pursuing law enforcement officer, were threatened with physical injury or harm by the fleeing defendant.

A procedure for entering the endangerment finding is established. In criminal cases involving a charge of eluding a police vehicle, the prosecutor must file a special allegation against the defendant and there must be sufficient admissible evidence that one or more persons, other than the defendant or pursuing law enforcement officer, were endangered by the pursuit. The state must prove endangerment beyond a reasonable doubt and the jury (or judge in a bench trial) must reach a special verdict on endangerment.

This act is known as the Guillermo "Bobby" Aguilar and Edgar F. Trevino-Mendoza Public Safety Act of 2007.

EFFECT OF CHANGES MADE BY JUDICIARY COMMITTEE (Recommended Amendments): The court must impose a sentence of 12 months and one day of imprisonment, in addition to the standard sentencing range, for any offender convicted of attempting to elude a police vehicle if the conviction included a finding by special allegation of endangering one or more persons, other than the defendant or the pursuing law enforcement officer. The original bill required a finding of endangering a person other than the defendant.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Substitute Bill: PRO: A person can elude ten times before serious time is imposed in jail. Our community has made it clear that it would rather have the officer stop than endanger people. This isn't something that happens every day but when it does, it's bad enough that it should be treated with special consideration.

CON: Prosecutors already have the tools to address this. This bill runs counter to the Sentencing Reform Act. Other charges are available to address this behavior.

Persons Testifying: PRO: Representative Takko, prime sponsor; Representative Ross; James McMahan, WA Assn. of Sheriffs and Police Chiefs.

CON: Bob Cooper, WA Assn. of Criminal Defense Lawyers, WA Defender Assn.

APPENDIX E

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

STATE OF WASHINGTON, Respondent, v. THOMAS JOSEPH FEELY, Appellant.	)	No. 72450-9-I PUBLISHED OPINION FILED: February 22, 2016

VERELLEN, J. — Under RCW 9.94A.834, a trial court may impose an endangerment enhancement for the crime of attempting to elude a pursuing police vehicle when "one or more persons other than the defendant or the pursuing law enforcement officer" were endangered by the actions of the defendant during the commission of the crime. We conclude the plain meaning of the enhancement extends to endangering officers who were not following the defendant. Therefore, we reject Feely's claim of prosecutorial misconduct for arguing to the jury that officers who deployed spike strips were endangered by his driving.

Feely's other claims of prosecutorial misconduct also fail because he does not show the challenged statements, when viewed in context, resulted in prejudice. And because he does not show prejudice from these statements, his attorney's failure to object does not support a claim for ineffective assistance of counsel. We affirm.

FACTS

Shortly after midnight, Trooper Travis Lipton was parked in an unmarked vehicle on the shoulder of the northbound onramp to Interstate 5. A pickup truck driven by Thomas Feely passed very close to Trooper Lipton's car while merging onto the freeway. Trooper Lipton observed the truck drift into the left lane before returning to the right lane. He followed Feely.

Once Trooper Lipton caught up to Feely, he started his car's audio and video recording system. He observed Feely drift "back and forth within the right lane continuously," and cross the fog line and the "center skip line" dividing the two lanes.[1] After Feely failed to signal a lane change, Trooper Lipton activated his siren and emergency lights.

Feely continued northbound. Trooper Lipton advised dispatch of Feely's failure to stop. Feely took the next exit and ran the stop sign at the top of the exit ramp. Feely continued on the two-lane road, greatly exceeding the speed limit and drifting "over onto the oncoming lane frequently."[2] He bypassed two cars that slowed or stopped as a result. Trooper Lipton requested dispatch contact other troopers to deploy spike strips.

Police set up a spike strip, but Feely went around it. Sergeant Larry Flynn set up another spike strip. Feely attempted to drive around it but "immediately locked up" his brakes.[3] He "slid almost the whole way" towards Sergeant Flynn and stopped just short of where Sergeant Flynn was standing.[4] Feely then "started to jerk forward" towards

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[1] Report of Proceedings (RP) (July 28, 2014) at 59, 62.

[2] Id. at 68.

[3] RP (July 29, 2014) at 184.

[4] Id.

Sergeant Flynn by the side of the road.[5] Sergeant Flynn released some slack on the spike strips so he could get farther off the road. Feely ran over one of the spike strips with his front left tire and sped away. Trooper Lipton maintained his pursuit.

After turning down a private driveway, Feely drove his truck into a swamp. He ran into the woods, leaving one shoe behind in the mud. More police officers shortly arrived, and after searching with two police dogs, they found Feely hiding in a tree. He had no shoes on and his clothes were wet. The officers took Feely into custody and smelled alcohol on his breath.

Trooper Lipton took Feely to a hospital. About an hour later, Trooper Lipton collected Feely's blood, which registered a blood alcohol level of 0.13.

The State initially charged Feely with one count of felony driving under the influence (DUI) and one count of attempting to elude a pursuing police vehicle with an endangerment sentencing enhancement. The State later amended the information to allege an aggravating circumstance under RCW 9.94A.535(2)(c): "[Feely] has committed multiple current offenses and [his] high offender score results in some of the current offenses going unpunished."[6]

At trial, Feely stipulated that he had four prior qualifying convictions, elevating the DUI to a felony. The jury found Feely guilty as charged. In a special verdict, the jury also found that a "person, other than [Feely] or a pursuing law enforcement officer, [was] endangered . . . by the actions of [Feely] during his commission of the crime of Attempting to Elude a Police Vehicle."[7]

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[5] Id.

[6] Clerk's Papers (CP) at 15-16.

[7] Id. at 53-54.

The trial court sentenced Feely to 60 months for the felony DUI. The court sentenced him to 29 months for attempting to elude, plus 12 months and one day for the endangerment enhancement. The court ordered "[a]ll counts shall be served consecutively, including the portion of those counts for which there is an enhancement."[8] The court imposed this exceptional sentence after expressly finding that "the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."[9]

Feely appeals.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

Feely asserts three instances of prosecutorial misconduct violated his due process right to a fair trial. To prevail on a claim of prosecutorial misconduct, he "bears the burden of proving, first, that the prosecutor's comments were improper and, second, that the comments were prejudicial."[10]

a. Argument about Endangerment of Spike Strip Officers

Feely claims the prosecutor misstated the law when he argued the jury "could find Feely endangered someone other than himself or a pursuing police officer if it found he endangered the officers who deployed the spike strips."[11] We disagree.

During closing, the prosecutor argued:

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[8] Id. at 70.

[9] Id. at 76.

[10] State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

[11] Appellant's Br. at 16.

So the question becomes who is endangered? Well, certainly [Feely] was endangering himself. Certainly he was endangering Trooper Lipton, and perhaps during a part of that, he was endangering Officer Pike, because Officer Pike was behind Lipton and suddenly found a tire coming his way, *but those would not qualify for you to answer yes, because it's a pursuing officer or a defendant. It has to be someone else that's in danger.*

Of course, there were other people out on the road. You can count them. There's I think three or four vehicles. Some that pulled over. Some were driving by at various points, but certainly on Kickerville, . . . he comes to a place where, unfortunately, two vehicles driving in opposite directions are in the same place. . . . Mr. Feely has to dart through, between the two of them. So those, those individuals are, certainly could, you could find that they're endangered by the driving of Mr. Feely on that night.

Other possibilities, you know, I don't know how many different vehicles are out there, *the officers that are not pursuing*, [who] did apply the stop sticks. They can be endangered by his driving, and I think at one point in the video, you can see the first officer . . . . *[y]ou can see him com[e] out and try to deploy the sticks and run back, and you can find that he's endangered by the Defendant driving as he is.*[12]

Under RCW 9.94A.834,

(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*

[12] RP (July 30, 2014) at 453-54 (emphasis added).

> *pursuing law enforcement officer* were endangered during the commission of the crime.[13]

We review questions of statutory interpretation de novo.[14] "The purpose of statutory interpretation is 'to determine and give effect to the intent of the legislature.'"[15] "To determine legislative intent, we first look to the plain language of the statute considering the text of the provision in question, the context of the statute, and the statutory scheme as a whole."[16] We give "undefined terms their plain and ordinary meaning unless a contrary legislative intent is indicated."[17] "If the statute is unambiguous after a review of the plain meaning," our inquiry ends.[18]

The statute does not define "pursuing law enforcement officer." The dictionary defines "pursue" as "to follow [ ] determinedly in order to overtake, capture, kill, or defeat."[19]

We conclude the plain meaning of the exclusion of any endangerment to "the pursuing law enforcement officer" relates to the risk of harm to the "following" police officer. Under this plain meaning, the spike strip officers were not "pursuing police officers" because they were not following Feely. The legislature could have also excluded "apprehending officers" from the enhancement, but it did not. Applying the plain meaning, we conclude the statute is unambiguous.

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[13] RCW 9.94A.834 (emphasis added).

[14] State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013).

[15] Id. (quoting State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012)).

[16] State v. Reeves, 184 Wn. App. 154, 158, 336 P.3d 105 (2014) (citing Evans, 177 Wn.2d at 192).

[17] Id.

[18] State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010) .

[19] WEBSTER'S THIRD NEW INT'L DICTIONARY 1848 (2002).

Contrary to Feely's arguments, this construction of the statute is logical. The crime necessarily requires an officer in a police vehicle pursuing a defendant trying to elude that officer. The enhancement logically imposes a greater punishment if there is danger to others than the defendant and the pursuing officer. If officers who are not following are endangered, then the statute increases punishment based upon that risk that is not inherent in the mandatory elements of the crime.[20]

Therefore, we conclude the prosecutor did not misstate the law in arguing that the jury could consider Feely's endangerment of the spike strip officers for the sentencing enhancement.

b. Misstating the Burden of Proof

Feely argues that the prosecutor committed prejudicial misconduct by misstating the reasonable doubt standard in closing rebuttal argument.

A prosecutor who addresses the reasonable doubt standard in closing argument acts improperly by "'trivializ[ing] and ultimately fail[ing] to convey the gravity of the State's burden and the jury's role in assessing' the State's case against the defendant."[21] In essence, the State acts improperly when it mischaracterizes the standard as requiring anything less than an abiding belief that the evidence presented establishes the defendant's guilt beyond a reasonable doubt.[22]

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[20] Even if we considered the enhancement ambiguous, the legislative history relied upon by Feely does not compel a different result. The bill report gives examples of the risk to children and bystanders created by eluding defenders, but still returns to the general risk to "society as a whole." H.B. REP. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008).

[21] State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936 (2010) (quoting State v. Anderson 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)).

[22] See State v. Pirtle, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995); see also State v. Osman, No. 71844-4-I, 2016 WL 298802, at *7 (Wash. Ct. App. Jan. 25, 2016).

Feely contends the prosecutor "trivialized and ultimately failed to convey the gravity" of the State's burden of proof "in arguing the jury had to convict if it 'knew'" he was guilty.[23] The prosecutor told the jury that "[i]t can be very frustrating to have a jury come back and say we all knew he was guilty, but you didn't prove it beyond a reasonable doubt. Those are inconsistent."[24]

It trivializes the burden of proof to suggest that jurors can ignore the reasonable doubt instruction as long as they "know" the defendant is guilty. "Knowing" a defendant is guilty is not necessarily inconsistent with having a reasonable doubt. But Feely does not establish he is entitled to relief on appeal. First, Feely did not object at trial and therefore, he is deemed to have waived the error "unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice."[25] Under this heightened standard, Feely must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury's verdict.'"[26] "[R]emarks are not per se incurable simply because they touch upon a defendant's constitutional rights."[27] Feely does not establish that any prejudice could not have been cured by a curative instruction.

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[23] Appellant's Br. at 24.

[24] RP (July 30, 2014) at 482.

[25] State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citing State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)).

[26] Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

[27] Id. at 763; accord State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001) ("Some improper prosecutorial remarks can touch on a constitutional right but still be curable."); see also State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (prosecutor's flagrantly improper comments in closing argument undermining the

Second, Feely cannot show a substantial likelihood that the statements affected the jury's verdict. In analyzing the prejudicial effect of a prosecutor's improper comments, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.[28]

Immediately following the statements, the prosecutor accurately restated the reasonable doubt standard:

> If you all know the Defendant committed a crime, and committed all of the, or all of the elements are proven, then you are convinced beyond a reasonable doubt. It's not just that I knew that it happened, or I knew that he was guilty. So think about [it] in those terms.[29]

Taken in context of the prosecutor's total rebuttal closing argument, the prosecutor clearly reiterated and emphasized the State's burden of proof:

> I have to prove to 12 of you beyond a reasonable doubt that I have met all of the elements of each of those crimes in order for you to return a guilty verdict.[30]
>
> . . . .
>
> There's a presumption of innocence, and the Defendant doesn't have to prove anything to you. It's my burden. The State[,] as a representative of the people of this State, it's my burden to prove those elements beyond a reasonable doubt, and I'm arguing to you that I have proven those elements.[31]
>
> . . . .
>
> The burden is what do you know? What do you believe, have an abiding belief in were the facts?[32]

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presumption of innocence were cured by trial court giving a correct and thorough curative instruction on the reasonable doubt standard).

[28] Yates, 161 Wn.2d at 774.

[29] RP (July 30, 2014) at 482.

[30] Id. at 476.

[31] Id. at 476-77.

[32] Id. at 477.

. . . .

> There is an instruction on beyond a reasonable doubt . . . . It's one for which a reason exists. It may arise from evidence or the lack of evidence. It is such a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or the lack of evidence, and when you look at all of the pieces of evidence here, the reasonable conclusion is that Mr. Feely was driving that vehicle.[33]

. . . .

> So I think I was on the reasonable doubt instruction and what it means, and it's a personal thing to each of you. . . . It's how you evaluate the evidence and how you match it up to, to the law as given to you by the Court. It's when you're convinced. It's not when you just think it might have happened, but when you're convinced it happened. You know it because you believe it happened, and you're going to believe it today. You're going to believe it tomorrow. You're going to believe it two months from now when you're telling your cousin about it. If you have reached that point, then you're convinced beyond a reasonable doubt. That's, that's the way to look at this.[34]

These statements corresponded with the trial court's reasonable doubt instruction. Juries are presumed to follow the court's instructions.[35]

Moreover, Feely's crime was captured on Trooper Lipton's vehicle's video recording system and admitted at trial. This video showed one driver driving a truck registered to Feely's parents. The officers testified that they followed Feely down the private driveway, where they found his truck stuck in a swamp with the driver side window partially rolled down and the driver side door ajar. The passenger side door was closed and an expired Washington State identification card belonging to Feely was in the center console. The officers also testified that they heard what "sounded like one person" "making his way through the brush and the sticks," and that they did not hear

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[33] Id. at 479.

[34] Id. at 481-82.

[35] Warren, 165 Wn.2d at 28.

any sounds coming from any other direction.[36] Moreover, police dogs, who arrived within five minutes of finding Feely's truck, were able to locate him hiding nearby in a tree. These dogs led the officers to the same tree. Feely smelled of alcohol, and several hours after the incident, had a blood alcohol level of 0.13. The only element at issue at trial was identity. Given the multiple, corroborating facts identifying Feely as the driver of the truck, compelling evidence supports his convictions.

Feely relies on State v. Johnson, where, even absent an objection, the court concluded the prosecutor's misstatements were flagrant and ill intentioned and required reversal.[37] But in Johnson, the prosecutor used a puzzle analogy to explain the "abiding belief" requirement of the reasonable doubt standard.[38] The prosecutor further stated that to "be able to find reason to doubt, *you have to fill in the blank*, that's your job."[39] The Johnson court held the prosecutor's statements improperly "trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so."[40]

Feely argues the prosecutor's minimization of the State's burden of proof here is analogous to the prosecutor's improper statements in Johnson. But the prosecutor here never implied the jury had a duty to convict without a reason to do so or ever suggested that the burden of proof shifted to Feely. In context of the total closing argument, we conclude the prosecutor did not trivialize the State's burden.

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[36] RP (July 28, 2014) at 83.

[37] 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010).

[38] Id. at 682.

[39] Id. (emphasis added).

[40] Id. at 685.

Because Feely did not object at trial and fails to establish any resulting prejudice, his claim fails.

c. Argument about Prior Offenses as Motive to Flee

Feely contends the prosecutor violated the trial court's limiting instruction when he argued the jury could consider Feely's stipulated prior DUIs not only to prove he had prior qualifying convictions elevating the DUI to a felony, but also to prove he had a "motive to flee."[41]

Here, Feely requested and received a limiting instruction under ER 404(b):

> Evidence of other crimes which occurred prior to April 9th, 2014 may *only* be considered for the limited purpose of determining whether Mr. Feely has the requisite prior convictions to make this case a felony DUI. The evidence is not to be used or considered for the purpose of proving the character of a person in order to show that the person acted in conformity with that character.[42]

During the prosecutor's rebuttal closing argument, he argued:

> Well, Mr. Feely has the four priors, we know that, four prior DUIs. You can't use that, you cannot use that to say that because he was convicted four times of driving under the influence, he must have been driving under the influence this time. It's not a character thing. You can't do that.
>
> But what you can do is use that for another purpose, the element of the offense, a felony DUI[,] and motive. Would somebody who is driving under the influence want to be caught having four prior DUI convictions? Of course not. And that gives him a motive to flee police, and to do so in a very dangerous, reckless manner, and that's what you see on that video.
>
> What other motive would he have to flee the police if he was just, if he wasn't the driver? Because when you flee [in] that truck, you sure look like you're the driver at that point, don't you?[43]

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[41] Appellant's Br. at 26.

[42] CP at 35 (emphasis added).

[43] RP (July 30, 2014) at 484-85.

Defense counsel did not object during argument.

When a trial court has ruled in a motion in limine that evidence of prior convictions are limited to proving only the fact of prior convictions and when the express limiting instruction given by the court allows that evidence "only" as proof of prior convictions, if the State wants to use the evidence for another ER 404(b) purpose, then it must ask the trial court for such a ruling.[44] Here, the prosecutor's argument is inconsistent with the court's instruction that the evidence could "*only* be considered *for the limited purpose*" of determining whether Feely had the requisite prior convictions to make the case a felony DUI, and therefore is improper.

But because Feely fails to show resulting prejudice in view of the compelling evidence of his guilt noted above, his claim fails.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In the alternative, Feely argues he was denied effective assistance because defense counsel failed to object to the prosecutor's closing arguments. We disagree. We review ineffective assistance claims de novo.[45] To establish an ineffective assistance claim, a defendant must show deficient performance and resulting prejudice.[46]

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[44] See State v. Fisher, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009) (holding where a trial court expressly conditions the admission of evidence of physical abuse on defense counsel's making an issue of molestation victim's delay in reporting, the prosecutor's preemptive introduction of that evidence contravened the court's pretrial ruling and the requirements of ER 404(b)).

[45] State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

[46] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

Counsel's performance is deficient if it falls "below an objective standard of reasonableness."[47] To establish deficient performance, the defendant must show the absence of any "conceivable legitimate tactic" supporting counsel's action.[48] We strongly presume counsel's performance was reasonable.[49]

To establish prejudice, the defendant must show there is a reasonable probability that, but for the deficient performance, the outcome would have been different.[50] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[51] Failure to establish either prong of the test is fatal to an ineffective assistance of counsel claim.[52]

Because the prosecutor's argument about the endangerment enhancement was not improper, defense counsel's performance was not deficient. Even assuming deficient performance as to the prosecutor's two other arguments, Feely fails to show that the arguments themselves prejudiced him, and therefore, he does not show prejudice from defense counsel's failure to object.

III. EXCEPTIONAL SENTENCE

At sentencing, Feely had an offender score of 14 for each count. The trial court imposed the 12 month and one day endangerment enhancement to increase the base sentence for the attempting to elude conviction. It also imposed consecutive sentences

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[47] State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001).

[48] State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

[49] Strickland, 466 U.S. at 690; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

[50] Nichols, 161 Wn.2d at 8.

[51] Strickland, 466 U.S. at 694.

[52] Id. at 700.

for the attempting to elude and felony DUI convictions. Feely contends the court exceeded its authority in imposing the exceptional sentence. He focuses upon the trial court's oral comments that it was concerned that the endangerment enhancement would not have any impact on his punishment.

> To reverse an exceptional sentence, we must determine whether
>
> (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient.[53]

We review Feely's challenge to the trial court's reasons for imposing an exceptional sentence de novo.[54]

We conclude the trial court properly imposed an exceptional sentence based on Feely's high offender score. A trial court may impose a consecutive sentence when it finds that the "defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."[55] These are referred to as "free crimes."[56] Here, the court imposed consecutive sentences based on the free-crimes principle.[57] The trial court's written findings of fact expressly

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[53] State v. France, 176 Wn. App. 463, 469, 308 P.3d 812 (2013); RCW 9.94A.585(4); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

[54] France, 176 Wn. App. at 469.

[55] RCW 9.94A.535(2)(c).

[56] France, 176 Wn. App. at 468.

[57] "Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a).

state that "the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."[58]

Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the sentencing range increases based on the defendant's offender score, up to a score of 9.[59] Based on Feely's offender score of 14 for each count, he faced a 60-month sentence for the felony DUI conviction alone. Therefore, *any* sentence for eluding, with or without the endangerment enhancement, would have been subsumed.

Accordingly, we conclude the trial court did not exceed its authority in sentencing Feely to consecutive terms. Even though the court referred to the endangerment enhancement, it is clear the court considered that "there's no benefit to the community" by a concurrent sentence.[60] And Feely cites no authority to support his assertion that a court may not take a sentencing enhancement into account when imposing consecutive sentences.

IV. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In his statement of additional grounds, Feely argues his counsel was ineffective when she failed to interview the State's expert on dog tracking. Failure to investigate or interview witnesses may support an ineffective assistance claim.[61] But Feely's counsel thoroughly cross-examined and recross-examined the State's expert. Even assuming deficient performance, Feely fails to establish prejudice in view of the compelling evidence of his guilt.

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[58] CP at 76.

[59] RCW 9.94A.510.

[60] RP (Aug. 18, 2014) at 25.

[61] State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

Feely also argues the prosecutor committed misconduct during closing argument by playing the State's video evidence and improperly commenting on the evidence. For example, the prosecutor made a comment that something had been thrown out of Feely's truck during the pursuit. The prosecutor continued, "It takes a little while to see it, but when you're looking at it, you can see it going out the driver's side window and go over to the right, indicating that there's nobody in that right passenger seat."[62] Defense counsel objected, arguing the prosecutor's comment was "a misstatement of what the facts show."[63] The trial court instructed the jury that the prosecutor could not ask them "to speculate about what they might have seen here" but that they could "see the video" and "make their own decisions."[64] Even assuming improper conduct, Feely fails to establish prejudice.

We affirm.

WE CONCUR:

[62] RP (July 30, 2014) at 457-58.

[63] Id. at 458.

[64] Id. at 457-58.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. THOMAS FEELY, JR. Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 72450-9-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF MARHC 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS FEELY, JR
DOC NO. 788137
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF MARHC 2016.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 22, 2016 - 4:43 PM

Transmittal Letter

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