Supreme Court No. 89760-3
No. 69131-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY LEWIS WILLIAMS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Anthony Williams was the appellant in COA No. 69131-7.

B. COURT OF APPEALS DECISION

Mr. Williams seeks review of the decision issued November 25, 2013, in COA No. 69131-7 (Division One). Appendix A.

C. ISSUES PRESENTED ON REVIEW

1. In Anthony Williams' jury trial on charges of Eluding and the special allegation of RCW 9.94A.834, a special finding authorizes a 12+ month sentence enhancement, and may be filed as a charge whenever there is evidence that the defendant's actions in Eluding "threatened" any person with injury or harm. However, the statutes provide that, in order for the sentencing court to *impose* the 12+ month enhancement, the jury must have found, beyond a reasonable doubt, that other person(s) were "endangered" by the defendant's driving actions during the offense.

In this case, the language of the special verdict only asked the jury if the defendant caused others to be "threatened with physical injury or harm." The instructions were missing the essential element of endangerment. The evidence as to the missing element was highly controverted. Did the language of the special verdict relieve the State of its Fourteenth Amendment and

Washington Constitution Due Process burden to prove the "endangerment" element to the jury, requiring reversal?

2. Did the trial court err in entering judgment on the 12+ month enhancement of RCW 9.94A.533(11) as required to be authorized under RCW 9.94A.834, where sentencing authority is solely statutory?

3. The charging information entirely omitted the essential element of "endangerment" of RCW 9.94A.834(2), instead merely alleging that the defendant's actions "threatened" others. The defendant had no notice of the endangerment element. Prejudice need not be shown in such instance, but prejudice nonetheless appears in the record where the defense did not defend the case at trial accordant with the "endangerment" standard, and litigated its directed verdict motion on the element under the erroneous "threatened" standard. Did the information fail to charge an essential element, requiring reversal for failure of Notice?

D. STATEMENT OF THE CASE

Anthony Williams was charged with Attempting to Elude a Police Vehicle, Driving While License Suspended, and Driving Under the Influence. CP 65, 78. The Eluding charge was accompanied in an amended information by a special allegation of

threatening harm. CP 65-67. According to the affidavit of probable cause, police officer Dickinson exited his patrol car and approached Mr. Williams' vehicle on foot, and verbally asked him to stop. A high-speed chase ensued, resulting in Mr. Williams crashing. CP 100-01. Mr. Williams testified at trial that he drove off because it was late at night and he did not realize the person walking toward his car was a police officer. In addition, he took care to avoid other vehicles as he drove. 6/19/12RP at 111-12, 114-15.

Counsel argued in closing that Mr. Williams drove reasonably and not recklessly after mistakenly fearing the officer as someone else. 6/19/12 at 146-48, 154. He was acquitted of DUI. CP 41. The jury found Mr. Williams guilty of DWLS, and Eluding, and answered "yes" to the special verdict language, which asked:

> Was any person, other than Anthony L. Williams or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Anthony L. Williams during his commission of the crime of attempting to elude a police vehicle?

CP 43; compare RCW 9.94A.834 (requiring jury finding that persons "were endangered during the commission of the crime.").

The court also addressed the defense motion for a directed verdict on the special allegation. After again viewing the police car

camera video footage the jury was shown at trial, and after hearing extensive argument of counsel, the court acknowledged that there were no passengers, and no persons could be seen to be in proximity to the ongoing incident. Nevertheless, the court denied the motion because of the appearance of other vehicles in the video of the chase. 7/10/12RP at 182-201; Exhibit list, Exhibits 3-A and 3-B (dash cam video DVD's). The court therefore imposed the consecutive 12+ month sentence enhancement. 7/10/12RP at 204-06; CP 23-33.

Mr. Williams appealed. CP 13-17. The Court of Appeals affirmed, concluding that there was no failure of notice because the language "threatened with physical injury or harm" in the charging standards portion (subsection 1) of RCW 9.94A.834 is simply the definition of the "endangerment" element required to be found by the jury, as specified in subsection 2. Appendix A (Decision, at pp. 3-4). On the issue of whether the special verdict's instruction to the jury relieved the State of its burden of proof, the Court of Appeals similarly reasoned that the phrases are interchangeable. Decision, at pp. 4-5. The Court ignored the *plain language* of the statutes at issue, which expressly require that the jury finding must be "endangerment," RCW 9.94A.834(2), and which expressly require

that the enhancement can only be imposed if the trial court has that particular specified jury finding in hand. RCW 9.94A.533(11).

E. ARGUMENT

1. THE SPECIAL VERDICT LANGUAGE RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT OTHER PERSONS "WERE ENDANGERED" DURING MR. WILLIAMS' COMMISSION OF THE CRIME OF ELUDING A POLICE VEHICLE.

a. Review is warranted. Review of this issue is warranted under RAP 13.4(b)(3), because the issue whether Due Process violated when the jury instructions relieved the State's burden is a significant constitutional question, and under RAP 13.4(b)(1) and (3), the Court of Appeals decision is in conflict with decisions of this Court, including State v. Bennett, 161 Wn.2d 303 (2007), infra, and contravenes the United States Supreme Court's Fourteenth Amendment Due Process decisions, including County Court of Ulster County v. Allen, 442 U.S. 140 (1979), infra.

b. Manifest constitutional error. The State must prove a special allegation beyond a reasonable doubt. State v. Tongate, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). Mr. Williams argues herein that the State was relieved of its burden to prove the "endangerment" special allegation beyond a reasonable doubt because the language of the special verdict form did not require

proof of endangerment, as required by RCW 9.94A.834. The alleged error is constitutional. See State v. Harris, 164 Wn. App. 377, 383, 385, 263 P.3d 1276 (2011) (erroneous definition of recklessness element relieved State of burden of proving every element and was constitutional error); State v. Stein, 144 Wn.2d 236, 240-1, 27 P.3d 184 (2001) (Where trial court's instructions to jury could be construed as omitting element of charged offense, defendant could challenge error as constitutional).

The error is also manifest, having "practical and identifiable consequences in the trial of the case." State v. Stein, 144 Wn.2d at 240; see State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) (constitutional error of failure to properly require proof of an element was "manifest" because jury employs instructional language to measure guilt or innocence on the included elements, and review was therefore proper despite absence of objection below); State v. Roggenkamp, 153 Wn.2d 614, 620, 106 P.3d 196 (2005) (failure to properly instruct on an element of a charged crime is manifest constitutional error which may be raised for the first time on appeal under RAP 2.5(a)). In addition, reversal is the presumed outcome. State v. Stephens, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980).

Review may be taken by this Court. RAP 2.5(a)(3).

c. The special verdict language relieved the State of its burden to prove every fact necessary to imposition of the sentence enhancement authorized by RCW 9.94A.834, which requires proof that persons were "endangered" during the crime. When the term "sentence enhancement" describes an increase beyond the authorized sentence for the offense, the special allegation becomes the equivalent of an element of a greater offense, which must be proved beyond a reasonable doubt. U.S. Const. amend. 14; State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). See also State v. Williams–Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010) ("under both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict.").

Due Process is the source of the requirement the State of Washington must prove all elements of the crime charged beyond a reasonable doubt. State v. Aver, 109 Wn.2d 303, 310, 745 P.2d 479 (1987); U.S. Const. amend. 14. The same standard applies to prove a sentencing enhancement. State v. Tongate, supra, at 754 ("Our cases involving other enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the

facts which, if proved, will increase a defendant's penalty"); see also State v. Recuenco, supra; State v. Lua, 62 Wn. App. 34, 42, 813 P.2d 588 (1991); see, .e.g., State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995) (school zone enhancement); State v. Simms, 171 Wn.2d 244, 250, 250 P.3d 107 (2011) (any fact that increases the penalty beyond that prescribed for the criminal offense must be properly proved to jury before imposition of punishment).

Accordingly, Due Process, under both the United States and Washington Constitutions, requires that the jury be instructed on every essential element. U.S. Const. amend. 14; Wash. Const. art 1, § 22; Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.ed.2d 560 (1979); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (a conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden). A defendant cannot be said to have had a constitutionally fair trial if the jury might assume that an essential element need not be proved. State v. Stein, 144 Wn.2d at 241.

In the present case, the trial court imposed a sentence enhancement of 12+ months incarceration, at sentencing following the jury's verdicts. CP 23, 7/10/12RP at 205-06. The court cited

the special allegation of RCW 9.94A.834 and the jury's special verdict as authority for the enhancement. 7/10/12RP at 185-86, 204-06.

The special allegation of RCW 9.94A.834 may be filed as a charge by the prosecutor whenever there is evidence that the defendant's actions in committing a crime of Eluding "threatened" any person (except for the defendant or officer) with physical injury or harm.

> **RCW 9.94A.834 Special allegation-- Endangerment by eluding a police vehicle— Procedures**
>
> (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.

(Emphasis added.) RCW 9.94A.834, subsection (1).[1] However, the statute explicitly provides that, in order for the sentencing court to

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[1] RCW 9.94A.533(11) authorizes the 12+ month enhancement where the jury has found the endangerment allegation:

> (11) An additional twelve months and one day shall be added to the standard sentence range for a

impose the 12+ months enhancement, the jury must find, beyond a reasonable doubt, that other person(s) actually were "endangered" by the defendant's driving actions during the crime.

> (2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.

(Emphasis added.) RCW 9.94A.834, subsection (2).

In this case, the trial court did not have authority to impose the sentence enhancement of 12+ months incarceration. CP 7/10/12RP at 205-06. RCW 9.94A.533(11). The jury in Mr. Williams' trial had been asked,

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> conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

(Emphasis added.) RCW 9.94A.533(11).

> Was any person, other than Anthony L. Williams or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Anthony L. Williams during his commission of the crime of attempting to elude a police vehicle?

CP 43 (Special Verdict Form 1). However, the plain language of the applicable statutes requires proof of "endangerment" of others beyond a reasonable doubt before the prescribed sentence enhancement may be imposed. RCW 9.94A.834; RCW 9.94A.533(11).

The jury instructions therefore relieved the State of its burden of proof in this case. Jackson v. Virginia, supra, 443 U.S. at 316; State v. Brown, supra, 147 Wn.2d at 339; see also State v. Randhawa, 133 Wn.2d 67, 76, 941 P.2d 661 (1997) (instructions that relieve the State's burden of proof violate due process); State v. Bennett, 161 Wn.2d 303, 306–07, 165 P.3d 1241 (2007) (instructions that diminish State's burden of proof violate due process); County Court of Ulster County v. Allen, 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

The State was entirely relieved of its burden of proving beyond a reasonable doubt that other persons were "endangered."

RCW 9.94A.834(2). Neither the special verdict form, or any other instruction, informed the jury that it must find endangerment. Cf. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (failure of to-convict instruction to specify the degree of rape attempted was harmless because another instruction did so; therefore, the State was not relieved of its burden of proof). Constitutional error occurred.

c. Constitutional error in omitting an element is not harmless if any trial evidence on the missing element was "controverted." Constitutional error is presumed to be prejudicial, requiring reversal. State v. Stephens, supra, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980) (violation of a defendant's constitutional rights is presumed to be prejudicial."); cf. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997) ("[F]ailure to instruct on an element of an offense is automatic reversible error.").

Under Neder and Brown, constitutional instructional error as to essential elements requires reversal unless it affirmatively appears that the error was harmless, beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). In the context of a jury instruction that is

missing or has misstated an essential element, the error is harmless only where the element is supported by uncontroverted evidence at trial below. Brown, 147 Wn.2d at 341, citing Neder, 527 U.S. at 18.

The record overwhelmingly establishes that any evidence pertinent to the missing element was highly controverted below. Mr. Williams' counsel cross-examined the police witnesses regarding questions of dangerousness of the incident, Mr. Williams' testified in his defense, and the parties litigated an extensive post-trial motion to dismiss the special allegation, including with the court re-viewing the dash-cam videos and hearing argument as to whether physical harm was risked to persons. 6/18/12RP at 51, 6/19/12RP at 109-16, 7/10/12RP at 182-206.

Dash-cam video footage from Officer Dickinson's patrol car and that of an officer following behind him was admitted. 6/18/12RP at 46-47; Exhibits 3-A, 3-B. Officer Dickinson believed there was danger to vehicles and noted the defendant was driving at a "[h]igh rate of speed" with "quick vehicle movements." 6/18/12RP at 27, 37. Other cars on the road pulled over when they saw the patrol car's flashing lights, or saw the two cars coming.

6/18/12RP at 39, 42. Another vehicle on the road had to "slow down significantly to avoid a collision." 6/18/12RP at 38.

However, Officer Dickinson's only reference to pedestrians during the incident was his remark that he and the defendant "passed a group of people at about 200th standing on the corner in the curb lane[.]" 6/18/12RP at 37.

Similarly, Officer Molloy, who responded to Officer Dickinson's pursuit call and followed his patrol car, could merely note that the pursuit went "past stores, restaurants, shopping centers." 6/18/12RP at 68. Molloy also noted that Mr. Williams slowed down at at least one intersection "to avoid the vehicles that were coming through the green light." 6/18/12RP at 66.

It was also pointed out in the viewing of the video during the defense motion that Mr. Williams could be seen slowing and using his brakes at intersections. 7/10/12RP at 181-82, 190-92.

The evidence below was highly "controverted," further and specifically by the defendant himself. In his testimony, Mr. Williams admitted that he "took off" when Officer Dickinson first approached his vehicle, stating that he did not realize at first that he was a police officer. 6/19/12RP at 109-10. He had just dropped a friend off to whom he had given a ride when the officer appeared, and Mr.

Williams was scared of him. 6/19/12RP at 110-13. Mr. Williams merely "proceeded" to drive off, and then did not pull over because there was no safe place to do so. 6/19/12RP at 111-12, 114. He admitted that cars pulled away during the incident, but specifically testified that he "kept going straight" as he drove, and he avoided other cars that were driving in the area. 6/19/12RP at 110-11, 115. Since it was nighttime, Mr. Williams properly had his headlights on. 6/19/12RP at 116.[2]

Accordingly, in closing argument, defense counsel contended that there was inadequate proof that Mr. Williams drove in a reckless manner or caused risk. 6/19/12RP at 146-47. Arguing that Mr. Williams had "taken off" because it was nighttime and he did not realize that it was a police officer approaching him on foot, counsel specifically noted how the officer and the video established that Mr. Williams used his brakes and slowed down to allow vehicles in intersections to pass. 6/19/12RP at 147-48. As counsel argued,

> To me, ladies and gentlemen, that doesn't come up to the level of someone who has disregard for the safety of others or the consequences.

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[2] Mr. Williams also stated that his driving was not impaired by alcohol. 6/19/12RP at 118. The jury acquitted him on the Driving Under the Influence charge. CP 41 (Verdict Form C – Not Guilty).

6/19/12RP at 148. Counsel continued to controvert the State's charges through the remainder of closing argument, arguing that Mr. Williams drove in a reasonable manner, avoiding harm, and asking the jury to find the defendant guilty of driving with a suspended license, but not guilty on all the other State's accusations. 6/19/12RP at 148-49, 155.

The error was not harmless where the missing element was not supported by uncontroverted evidence. Brown, 147 Wn.2d at 341) (reversal required unless uncontroverted evidence supported missing element and error was shown to be harmless beyond a reasonable doubt) (citing Neder, 527 U.S. at 18). The dictated remedy is reversal, and additionally Mr. Williams contends that the sentencing enhancement must be vacated and dismissed. State v. Pierce, 155 Wn. App. 701, 714-15, 230 P.3d 237 (2010) (reversing and dismissing firearm enhancement where, *inter alia*, jury was relieved of its burden to prove an operable firearm) (citing Williams–Walker, supra) (court violates right to jury trial if it imposes a firearm enhancement without a jury authorizing same by explicitly finding that defendant committed the offense while so armed).

2. REVERSAL IS REQUIRED WHERE THE CHARGING DOCUMENT OMITTED THE ESSENTIAL "ENDANGERED" ELEMENT.

a. Review is warranted. Review is warranted under RAP 13.4(b)(3) because this issue presents a significant question of whether all the essential elements of a crime, including sentencing enhancements, must indeed be alleged in the information. State v. Recuenco, supra, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); CrR 2.1(a)(1); U.S. Const. amend. 6; Wash. Const. art. I, § 22. The Court of Appeals decision conflicts with decisions of this Court, as argued herein. RAP 13.4(b)(1).

b. Failure of Notice. Here, because Mr. Williams is challenging the sufficiency of the information for the first time on appeal, this Court construes the document liberally in favor of validity. Kjorsvik, 117 Wn.2d at 102. Even under this standard, the endangerment element was not charged by the information. The information in this case completely omitted the essential element that persons other than the defendant or the pursuing officer were "endangered," instead alleging that others were threatened with harm CP 65-67 (amended information); RCW 9.94A.834, subsection (2) ("the jury shall [find whether] persons other than the

defendant or the pursuing law enforcement officer were endangered") (Emphasis added.).

b. No prejudice showing required. Where even a liberal reading of the information indicates that an essential element is wholly missing, reversal of the conviction is required, without any requirement that the defendant must show he was prejudiced in his defense by the absence of the element in the charging document. State v. Marcum, 116 Wn. App. 526, 536, 66 P.3d 690 (2003) (prejudice need not be shown if charge cannot be saved by liberal construction). As the Supreme Court recently said:

> While the second Kjorsvik prong requires the defendant to show actual prejudice as a result of vague charging language, courts do not reach that part of the analysis unless the necessary elements can be fairly found on the face of the information. As we reiterated in State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010), if the necessary elements are not found explicitly or by fair construction in the charging document, prejudice is presumed and reversal is required[.]

State v. Zillyette, 173 Wn.2d 784, 786, 270 P.3d 589 (2012) (citing Brown, at 198 (Omission of term "knowledge" necessitated reversal without prejudice showing, and reference to the statute did not sufficiently allege the essential elements)).

Using correct language and simple rules of grammar, the information must be written in such a manner as to enable persons of common understanding to know what elements are charged. State v. Simon, 120 Wn.2d 196, 198-99, 840 P.2d 172 (1992) (citing Kjorsvik, 117 Wn.2d at 110; and RCW 10.37.050(6)) (to be sufficient, information must clearly and distinctly set forth the acts charged as the crime "in such a manner as to enable a person of common understanding to know what is intended").

Here, the information entirely failed to apprise Mr. Williams of the essential element of endangerment of RCW 9.94A.834(2). When an information fails to charge an essential element, the remedy is to reverse the conviction and without prejudice to the State refiling the charge. State v. Marcum, 116 Wn. App. 526, 536, State v. Guzman, 119 Wn. App. 176, 186, 79 P.3d 990 (2003).

c. Prejudice shown. In any event, Mr. Williams was plainly prejudiced. The defense did not defend the case at trial by cross-examination of witnesses or presentation of a defense accordant with the statutory "endangered" language. Verbatim Report of Proceedings (Jury Trial & Sentencing Hearing volume), at pp. 27-61, 62-104, 104, 108-121, 143-55. Mr. Williams' counsel also litigated the motion for a directed verdict on the special allegation,

by arguing under the "threat" standard that had erroneously been charged in the information and asserted by the prosecutor in the State's trial pleadings and post-trial argument. 7/10/12RP at 182-206. Counsel necessarily questioned witnesses, presented evidence, and argued the case in closing premised on the State's "threatened" allegation. See supra.

The essential "endangered" element enacted by the Legislature does not, at all, appear in the charging document, and reversal is thus required without showing prejudice. However, Mr. Williams was indeed prejudiced in his defense. State v. Marcum, 116 Wn. App. at 536

F. CONCLUSION.

Mr. Williams respectfully asks this Court to reverse the judgment and sentence of the Superior Court.

Dated this 19 day of December, 2013.

Respectfully submitted,

Oliver R. Davis – WSBA 24560
Washington Appellate Project
Attorney for Appellant

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY LEWIS WILLIAMS, Appellant.	)	No. 69131-7-I DIVISION ONE PUBLISHED OPINION FILED: November 25, 2013

APPELWICK, J. — Williams appeals the judgment and sentence imposed following his convictions for attempting to elude a pursuing police vehicle and first degree driving with a suspended license. Williams argues that defects in the information and special verdict instructions regarding the sentencing enhancement of endangering the public pursuant to RCW 9.94A.834 mandate reversal. We affirm.

FACTS

The State charged Anthony Williams with attempting to elude a pursuing police vehicle, driving under the influence (DUI) and first degree driving with a suspended license. The State also filed a special allegation that Williams' actions endangered the public pursuant to RCW 9.94A.834. The charging language for the enhancement read as follows:

> COUNT I: ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE, committed as follows: That the defendant, on or about the 23rd day of October, 2011, as a driver of a motor vehicle, did willfully fail or refuse to immediately bring his or her vehicle to a stop and did drive his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after having been given a visual or audible signal to bring the vehicle to a stop, said signal having been given by hand, voice,

> emergency light, or siren by a uniformed police officer whose vehicle was equipped with lights and siren; proscribed by RCW 46.61.024, a felony, and the crime was aggravated by the following circumstance: one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the defendant's actions while committing the crime of attempting to elude a police vehicle; as provided by RCW 9.94A.834.

At the conclusion of the evidence, the trial court instructed the jury regarding the sentencing enhancement as follows:

> This special verdict is to be answered only if the jury finds the defendant guilty of ATTEMPTING TO ELUDE A POLICE VEHICLE as charged in Count I.
>
> We, the jury, return a special verdict by answering as follows:
>
> Was any person, other than Anthony L. Williams or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Anthony L. Williams during his commission of the crime of attempting to elude a police vehicle?[1]

The jury acquitted Williams of the DUI charge but convicted him of attempting to elude a pursuing police vehicle and driving with a suspended license. In addition, the jury answered "yes" on the special verdict form for the sentencing enhancement. Williams appeals.

DISCUSSION

RCW 9.94A.834 provides:

> (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

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[1] We note that the instruction used by the State is the pattern instruction. See 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL § 190.12, at 664 (3d ed. 2008).

> sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.
>
> (2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.

(Emphasis added.)

A charging document must include all essential elements of a crime, statutory or otherwise, in order to provide a defendant with sufficient notice of the nature and cause of the accusation. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Where, as here, a defendant challenges the sufficiency of the information for the first time on appeal, this court construes the document liberally in favor of validity. Kjorsvik, 117 Wn.2d at 102. In making that determination, we engage in a two-part inquiry: (1) whether the essential elements appear in any form, or can be found by any fair construction, in the information; and (2) if the language is vague or inartful, whether the defendant was thereby prejudiced. State v. Brown, 169 Wn.2d 195, 197-98, 234 P.3d 212 (2010).

Williams argues that the information was constitutionally deficient, because it did not allege as an essential element that someone other than Williams and the

pursuing law enforcement officers were "endangered," as required by RCW 9.94A.834(2), instead alleging that they were "threatened with physical injury or harm." But, it is clear from the context of RCW 9.94A.834(1) that "threatened with physical injury or harm" provides the definition of "endangerment." When the plain meaning of a term is clear from both the language and context of the statute, a separately labeled definition is unnecessary. Am. Cont'l Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). Williams argues that "endangered" cannot be the same as "threatened with physical injury or harm" because when the legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent must be presumed. See, e.g., State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). But, this court engages in questions of statutory interpretation only when a statutory provision is ambiguous. State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). A statute is ambiguous when it is susceptible to two or more reasonable interpretations, but is not ambiguous merely because different interpretations are conceivable. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). Here there is no ambiguity. It is not vague or inartful when the information utilizes the definition of a term instead of the term defined. Consequently, there is no need to analyze whether Williams was prejudiced.

Williams also argues that the language of the special verdict instruction relieved the State of its burden to prove the sentencing enhancement beyond a reasonable doubt because the language of the special verdict form required proof

that the public was "threatened with physical injury or harm" rather than "endangered." But instructions are sufficient when they are readily understood, not misleading, and allow a defendant to satisfactorily argue his theory to the jury. State v. Alexander, 7 Wn. App. 329, 336, 499 P.2d 263 (1972). Because "threatened with physical injury or harm" provides the definition of "endangerment," the instruction properly informed the jury of the law.

Affirmed.

Cuppelwick, J

WE CONCUR:

Verellen, J

Becker, J

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69131-7--I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Mary Webber, DPA
Snohomish County Prosecutor's Office

☐ petitioner

☐ Attorney for other party

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