SUPREME COURT NO. 91355-2

NO. 44652-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LELDON PITTMAN,

Petitioner.

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

The Honorable Jerry T. Costello, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Leldon Pittman asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' part-published opinion in State v. Leldon Pittman, case no. 44652-9-II,[1] filed January 27, 2014. The opinion is attached as an Appendix.

C. ISSUE PRESENTED FOR REVIEW

Did the trial court violate the petitioner's right to a public trial, and the public's right to open court proceedings, by taking peremptory challenges by having the parties quietly pass a sheet of paper back and forth?

D. STATEMENT OF THE CASE[2]

The State charged Pittman with attempting to elude a pursuing police vehicle, driving under the influence (DUI), failure to remain at an injury accident, and obstructing a law enforcement officer. CP 12-13. The State also made a special allegation as to the attempt to elude that

[1] State v. Pittman, ___ Wn. App. ___, 341 P.3d 1024 (2015).

[2] This petition refers to the verbatim reports as follows: 1RP – 6/11/12; 2RP – 7/26/12; 3RP – 2/5 and 2/6/13; 4RP – 2/7/13; 5RP – 2/11/13; 6RP – 2/12/13; 7RP – 2/13, 2/14, 3/1, 3/18/13; and Supp. RP – 2/6/13 (jury selection).

"one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm." CP 12; RCW 9.94A.834.

Jury selection occurred on February 6, 2013. Supp. RP. After the parties finished asking potential jurors questions, the court announced the attorneys would "pass a sheet back and forth . . . quietly between themselves" to exercise peremptory challenges.[3] Supp. RP 78. Afterward, the court called the names of the remaining jurors and their seat assignments. Supp. RP 78-79. A sheet listing each side's peremptory challenges was filed in the court file at some point that day. CP 120, 124.

The jury found Pittman guilty of attempt to elude and DUI. CP 54, 56. The jury found the special allegation applied to the attempt to elude but acquitted Pittman of the remaining counts. CP 55, 57-58.

The court denied Pittman's request for an exceptional sentence downward and sentenced him within the standard range on attempt to elude. CP 65-91, 99; 7RP 509. The court also sentenced Pittman to a concurrent sentence of 364 days on the DUI, a gross misdemeanor. CP 106-07.

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[3] In contrast, the court directed that any challenges for cause be made in front of the jury panel. 3RP 16; Supp. RP 41, 44.

Pittman appealed, arguing the public trial issue identified above. He also argued the State failed to allege all the essential elements of the crime of attempting to elude. Pittman raised several additional arguments in a Statement of Additional Grounds for Review.

In the unpublished portion of its opinion, Division Two of the Court of Appeals rejected the public trial argument, stating:

> In State v. Marks, ___ Wn. App. ___, 339 P.3d 196 (2014), we rejected a nearly identical challenge to the use of written peremptory challenges, relying on our decisions in State v. Wilson, 174 Wn. App. 328, 338-40, 298 P.3d 148 (2013), State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), and State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014), as well as the Supreme Court's decision in State v. Slert, 181 Wn.2d 598, 334 P.3d 1088, 1092 (2014). *We follow Marks and reject Pittman's challenge here for the same reasons.*

Opinion at 9 (emphasis added).

The Court also rejected the argument related the charging document, Opinion at 3-8, as well as Pittman's pro se arguments, Opinion at 3-13. See also Opinion at 14-15 (Johanson, J., concurring as to sufficiency of charging document).

E. REASONS REVIEW SHOULD BE ACCEPTED

BECAUSE THE EXERCISE OF PEREMPTORY CHALLENGES IN THIS CASE VIOLATED PITTMAN'S RIGHT TO PUBLIC JURY SELECTION, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1), (2), (3), AND (4).

1. The trial court's procedure violated Pittman's right to public jury selection and the public's right to open court proceedings because peremptory challenges are part of the voir dire process.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." The latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, therefore, he or she must first apply on the record the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). A violation of the right to a public trial is presumed prejudicial on a direct appeal and is not subject to harmless error

analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006).

Jury selection in a criminal case is subject to the public trial right and is typically open to the public. Strode, 167 Wn.2d at 227 (lead opinion); Strode, 167 Wn.2d at 236 (concurrence). Strode supports the conclusion that the public trial right attaches to parties' challenges of jurors. In Strode, jurors were questioned, and "for-cause" challenges conducted, in chambers. This Court treated the "for-cause" challenges in the same manner as individual questioning and held exercise in chambers violated the right to a public trial. Strode, 167 Wn.2d at 224, 227, 231 (lead opinion); Strode, 167 Wn.2d at 236 (concurrence).

Although relied on by the Court to reject Pittman's claim, Division Two's earlier opinion in State v. Wilson actually supports a conclusion that the public trial right attaches not only to "for-cause," but also to peremptory challenges. 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013). There, the Court applied the "experience and logic" test adopted in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. The Court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in

doing so, the Court expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Thus, in Wilson, Division Two appeared to recognize, correctly, that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly, to be distinguished from the broader concept of "jury selection," which may encompass proceedings that need not. Wilson, 139 Wn. App. at 339-40. Because preemptory challenges were not conducted openly, and because the court here failed to consider the necessary factors before employing its procedure, the trial court violated Pittman's public trial rights.

In State v. Marks, ___ Wn. App. ___, 339 P.3d 196, 199 (2014),[4] however, the same Court appeared to reverse course and hold that peremptory challenges are not part of voir dire. But the Court's attempt in Marks to reframe its prior consideration of the matter makes little sense. There, the Court observes that CrR 6.4(b) refers to "voir dire examination," apparently excluding of the exercise of challenges from "voir dire." Marks, 339 P.3d at 199. But, contrary to that reasoning, the

[4] A petition for review is pending in that case under case no. 91148-7.

court rule's inclusion of the term "examination" instead indicates that the "examination" portion should be differentiated from voir dire as a whole. Court rules are interpreted in the same manner as statutes, Jafar v. Webb, 177 Wn. 2d 520, 526, 303 P.3d 1042 (2013), and courts presume statutes do not include superfluous language. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P. 106 P.3d 196 (2005). Division Two's reframing of its discussion of the matter in Wilson violates this principle.

Moreover, if "voir dire examination" enables the intelligent exercise of peremptory challenges, then it follows that peremptory challenges themselves are an integral part of voir dire. Contrary to Marks, and consistent with Wilson, such challenges are part of that portion of jury selection that must be conducted openly, and are subject to existing law clearly establishing that the public trial right applies.

2. The "experience and logic" test also supports the need for open exercise of peremptory challenges.

Assuming for the sake of argument that the exercise of preemptory challenges is not an integral part of voir dire, it would be necessary to apply the "experience and logic" test to determine whether the public trial right applies to a portion of the trial process. Courts examine (1) whether the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process.

Sublett, 176 Wn.2d at 73 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

The result of analysis under the experience and logic test is no different than the result dictated by Strode and Wilson. First, Pittman can satisfy the "logic" prong because meaningful public scrutiny plays a significant positive role in the exercise of peremptory challenges. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right, "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that

there is no inappropriate discrimination. This protection can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether a party is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[5] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions highlighting difficulty of obtaining appellate relief for discriminatory acts even where discriminatory exercise of peremptory challenges may have occurred). Also of note, there was no valid competing consideration, given that the court took "for-cause" challenges openly.

Regarding the historic practice, State v. Love,[6] a Division Three case relied on by Division Two in the current and previous cases,[7] appears

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[5] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[6] State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), review granted, ___ Wn. 2d ___ (Jan. 07, 2015).

to have reached an incorrect conclusion based on the available evidence. Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret—written—peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. But most significantly, the fact that the Thomas appellant challenged the practice suggests it was atypical even at the time.

In summary, both prongs of the experience and logic test support that the public trial right was implicated in this case.

3. The filing of a written record after the fact does not cure the error.

In response, the State may argue the opportunity to find out, sometime after the process, which side eliminated which jurors satisfies the pubic trial right. In other words, the State may argue that the filing of a sheet listing each side's peremptory challenges renders the proceedings open.

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[7] E.g. State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014), review denied, ___ Wn. 2d ___ (Jan. 07, 2015). Mr. Dunn passed away while the petition for review was pending. See Supreme Court case no. 90238-1.

Any such argument should be rejected. Even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. In Pittman's case, this would have required members of the public to recall the characteristics of 10 individuals, as the parties exercised 10 total peremptory challenges. CP 120, 169-71. This is not realistic. But see State v. Filitaula, ___ Wn. App. ___, 339 P.3d 221, 223 (2014) (Division One opinion holding it is sufficient to file written form containing names and numbers of the prospective jurors who were removed by peremptory challenge, listing the order in which the challenges were made, and identifying the party who made them).

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. By analogy, filing a record of which party exercised which challenge after-the-fact is inadequate as well.

In summary, Pittman's right to a public trial and the public's right to open proceedings were violated by the manner in which the court took peremptory challenges.

Because the Court of Appeals' opinion conflicts with this Court's decisions and the Court's own previous decision, involves a significant

question of constitutional law, and is a matter of substantial public interest, this Court should accept review. RAP 13.4(b)(1), (2), (3), and (4).

F. CONCLUSION

For the foregoing reasons, this Court should accept review.

DATED this 26TH day of February, 2015.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant. v. LELDON R. PITTMAN, Respondent.	No. 44652-9-II PART PUBLISHED OPINION

BJORGEN, A.C.J. — Leldon R. Pittman appeals his convictions for attempting to elude a police vehicle and for driving under the influence of intoxicants. Pittman claims that the charging information omitted essential elements from the charge of attempting to elude a police vehicle and that the parties' exercise of their peremptory challenges on paper violated his right to a public trial. In a pro se statement of additional grounds, Pittman claims that his trial was untimely, requiring dismissal under CrR 3.3, and that he received ineffective assistance of counsel. We conclude in the published portion of this opinion that the charging information was adequate, and we address and reject Pittman's additional arguments in the unpublished portion. We affirm.

FACTS

In January 2012, Pittman returned home after a night out and fought with his mother and stepfather. After Pittman and his girl friend drove off, his mother called 911 to report the altercation and gave a description of Pittman's car.

Police dispatch reported the incident as a vehicular assault involving a dark colored vehicle with a broken front windshield, and units from the Fife and Milton police departments responded. One of these units saw a car matching that description driving erratically away from the scene of the altercation. As the uniformed officer pulled behind the car to initiate a traffic stop, the car sped away. The car, later determined to be the one driven by Pittman, led officers on a chase at speeds between 30 and 80 m.p.h. During this chase, the sirens and emergency lights of the police vehicles were in use.

The chase ended when Pittman's car crashed. As police officers approached the crashed vehicle, Pittman got out of it, saw the officers and, despite verbal commands that he stop, attempted to flee. Officers ultimately had to taser Pittman to subdue him.

The State charged Pittman with, among other offenses, driving under the influence of alcohol in violation of RCW 46.61.502(1)(c) and attempting to elude a police vehicle in violation of RCW 46.61.024(1).[1] On the eluding charge, the information stated that

> Leldon Roy Pittman . . . did unlawfully, feloniously, and wil[l]fully fail or refuse to immediately bring his vehicle to a stop and drive his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring his vehicle to a stop by a uniformed officer in a vehicle equipped with lights and sirens, contrary to RCW 46.61.024(1).

[1] RCW 46.61.024(1) provides that

> [a]ny driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren.

Clerk's Papers (CP) at 12. The State alleged that while attempting to elude the police, Pittman endangered one or more persons other than himself or the pursuing officers, an aggravating circumstance for sentencing under RCW 9.94A.533(11).

After trial, the jury convicted Pittman of the driving under the influence and attempting to elude offenses. The jury also found that Pittman had endangered persons other than himself or the pursuing police when he attempted to elude a police vehicle, constituting the aggravating circumstance for sentencing.

Pittman timely appeals.

ANALYSIS

I. SUFFICIENCY OF THE CHARGING DOCUMENT

Pittman argues that the information omitted an essential element of the crime of attempting to elude a police officer. Specifically, he contends that the charging document omitted any mention that police signaled by hand, voice, emergency light, or siren that he should stop. We hold that the method by which police officers signal to stop is not an essential element of the crime of attempting to elude a police vehicle and that the information did not need to include this language.

An information is constitutionally defective if it fails to list the essential elements of a crime. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). The essential elements of a crime are those "'whose specification is necessary to establish the very illegality of the behavior' charged."[2] *Zillyette*, 178 Wn.2d at 158 (quoting *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640

[2] Essential elements required in an information may be imposed by statute or common law. *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). Pittman's challenge here concerns statutory elements, since he claims that language found in RCW 46.61.024(1) creates an essential element.

(2003)). Requiring the State to list the essential elements in the information protects the defendant's right to notice of the nature of the criminal accusation guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. *Zillyette*, 178 Wn.2d at 158. Due to the constitutional nature of the challenge to the sufficiency of an information, we review de novo claims that it omitted essential elements of a charged crime. *State v. Williams*, 133 Wn. App. 714, 717, 136 P.3d 792 (2006).

In a challenge to the sufficiency of an information, we must first decide whether the allegedly missing element is, in fact, an essential element. *See State v. Tinker*, 155 Wn.2d 219, 220, 118 P.3d 885 (2005). If so, and where the defendant challenges, as here, the sufficiency of the information for the first time on appeal, we must then "liberally construe the language of the charging document in favor of validity." *Zillyette*, 178 Wn.2d at 161. Liberal construction requires that we determine whether "the necessary elements appear in any form, or by fair construction, on the face of the document and, if so," whether "the defendant [can] show he or she was actually prejudiced by the unartful language." *Zillyette*, 178 Wn.2d at 162 (citing *Kjorsvik*, 117 Wn.2d at 105-06).

The elements of the crime of attempting to elude a police vehicle are fixed in RCW 46.61.024(1), which states:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

The information, set out above, omits any mention of making the signal by hand, voice, emergency light, or siren. The issue, then, is whether making the signal by one of those four means is an essential element of the crime.

To make such a determination, we must engage in statutory interpretation. *Tinker*, 155 Wn.2d at 221; *State v. Caton*, 163 Wn. App. 659, 668, 260 P.3d 946 (2011), *reversed on other grounds by* 174 Wn.2d 239, 273 P.3d 980 (2012). When interpreting a statute, we attempt to ascertain and give effect to the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). We ascertain the legislature's intent using the plain meaning imparted by the text of the provision and that of any related provisions. *Campbell & Gwinn*, 146 Wn.2d at 11-12. Where a statute is susceptible of multiple reasonable interpretations after the plain meaning analysis, it is ambiguous, and we must turn to extrinsic evidence such as legislative history, common law precedent, or canons of construction to determine the legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 12.

The first sentence of RCW 46.61.024(1), quoted above, plainly sets out essential elements of the crime: those elements which are necessary to establish illegality. *Zillyette*, 178 Wn.2d at 158. One of those elements is that the defendant must have been given a visual or audible signal to bring the vehicle to a stop. The second sentence then specifies further that the signal must have been given by "the police officer" and that it "may be by hand, voice, emergency light, or siren." RCW 46.61.024(1). The third sentence of RCW 46.61.024(1) adds to this by requiring that the officer giving the signal be in uniform.

The requirements in the second and third sentences that the signal be given by a police officer in uniform are also necessary to establish illegality and are thus essential elements under *Zillyette*. 178 Wn.2d at 158. The statement in the second sentence, though, that the police

"may" signal "by hand, voice, emergency light, or siren," is not so easily characterized. RCW 46.61.024(1). "May" in this context could reasonably be read as requiring the police to use any one of the four enumerated means of signaling to a defendant. RCW 46.61.024(1). The defendant would not act criminally unless he or she disregarded one of the specified signal types. However, as the State notes, the legislature's use of "may" in RCW 46.61.024(1) could also reasonably be read to permit, but not require, one of the enumerated types of signals. Under this reading of the statute, the manner in which police give the signal does not establish the criminality of the defendant's actions. Instead the State would only need to prove that the defendant disregarded some type of police signal to stop to show criminal behavior.[3] Under the former reading, the manner in which police signal would be an essential element of the crime. *Cf. Zillyette*, 178 Wn.2d at 160 (type of controlled substance is a necessary element where the delivery of only certain types of controlled substances can give rise to homicide by delivery charges). Under the latter reading, it would not be an essential element.

Under its plain meaning, then, RCW 46.61.024(1) is susceptible of multiple reasonable interpretations and is therefore ambiguous. *Campbell & Gwinn*, 146 Wn.2d at 12. With that ambiguity, we must turn to legislative history, common law precedent, or canons of construction to determine the legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 12. One of those canons states that we construe statutes in a manner avoiding absurd interpretations. *State v. Ortega*, 177 Wn.2d 116, 130, 297 P.3d 57 (2013). Closely related to this canon is the fundamental rule that we construe statutes to give effect to the legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 9-10.

[3] The use of "may" in the second sentence and "shall" in the third does not resolve this dichotomy, since "may" logically could mean that the signal must be given by any one of the four listed means. RCW 46.61.024(1).

The gravamen of the attempting to elude offense is that the defendant failed to stop when signaled to do so by police. Courts have recognized that this serves the legislature's goal of "prevent[ing] 'unreasonable conduct in resisting law enforcement activities.'" *State v. Treat*, 109 Wn. App. 419, 426, 35 P.3d 1192 (2001) (quoting *State v. Hudson*, 85 Wn. App. 401, 403, 932 P.2d 714 (1997)). As the State points out, under Pittman's interpretation, defendants could freely ignore certain types of law enforcement signals such as whistles, flares, or written signs, thereby defeating the legislature's intent in enacting RCW 46.61.024(1).

Resolving an ambiguity by following an interpretation that so erodes transparent legislative intent creates a basic and unnecessary contradiction in the law. This dissonance both creates an absurdity under *Ortega*, 177 Wn.2d at 130, and ignores the basic injunction of statutory construction to give effect to legislative intent. *Campbell & Gwinn*, 146 Wn.2d at 9-10. To avoid that absurdity and to honor that intent, RCW 46.61.024 (1) must be interpreted to require that the police have reasonably signaled the defendant to stop, but not that they must have made that signal exclusively by hand, voice, emergency light, or siren. Therefore, the specific method by which the police made this signal is not an essential element of the crime of attempting to elude a police vehicle.

Pittman attempts to analogize the information in his case to the one found defective in *State v. Naillieux*, 158 Wn. App. 630, 241 P.3d 1280 (2010). In *Naillieux* the State alleged in the information that the defendant had driven

> "his . . . vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle appropriately marked after being given visual or audible signal by a uniformed police officer to bring his . . . vehicle to a stop."

158 Wn. App. at 644 (quoting Clerk's Papers at 3-4). The language in the information in *Naillieux* tracked the language found in an older version of the attempting to elude statute. 158

Wn. App. at 644 (citing former RCW 41.61.024 (1983)). Legislative amendments had modified two elements found in the former statute before Naillieux's alleged criminal act.[4] Division Three of our court found that the use of the former statutory language in the information failed to provide notice of the essential elements of the crime of attempting to elude a police vehicle as it existed when Naillieux allegedly refused to stop. *Naillieux*, 158 Wn. App. at 644-45. *Naillieux*, therefore, simply stands for the rule that use of obsolete statutory language in an information may well miss current essential elements of an offense. It does not suggest that use of the phrase "visual or audible signal" overlooks an essential element of the offense.

The specific manner by which police signal someone to stop is not an essential element of the crime of attempting to elude a police vehicle. The information therefore did not omit an essential element of that crime.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

II. PUBLIC TRIAL

After conducting voir dire, the parties exercised their peremptory challenges to potential jurors by listing the jurors that they wished to strike on a piece of paper. There is no evidence that the trial court considered the factors prescribed in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), before allowing the parties to exercise their peremptory challenges in this

[4] First, the legislature had replaced the phrase "'manner indicating a wanton or willful disregard for the lives or property of others'" with the phrase "'reckless manner.'" *Naillieux*, 158 Wn. App. at 644 (citing LAWS OF 2003, ch. 101, § 1). Second, the legislature had replaced the phrase "'appropriately marked showing it to be an official police vehicle'" with the phrase "'equipped with lights and sirens.'" *Naillieux*, 158 Wn. App. at 645 (citing LAWS OF 2003, ch. 101, § 1).

manner. Pittman contends that following this process without first conducting on the record the inquiry required by *Bone-Club*, 128 Wn.2d 258-59, violated his right to a public trial. His challenge, however, fails under recent precedent.

In *State v. Marks*, ___ Wn. App. ___, 339 P.3d 196 (2014), we rejected a nearly identical challenge to the use of written peremptory challenges, relying on our decisions in *State v. Wilson*, 174 Wn. App. 328, 338-40, 298 P.3d 148 (2013), *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013), and *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (2014), as well as the Supreme Court's decision in *State v. Slert*, ___ Wn.2d ___, 334 P.3d 1088, 1092 (2014). We follow *Marks* and reject Pittman's challenge here for the same reasons.

III. TIME FOR TRIAL RULE

In his statement of additional grounds, Pittman contends that his trial did not occur within the time specified by CrR 3.3, requiring dismissal of all the charges against him. Specifically, Pittman contends that the State improperly delayed arraigning him and that multiple continuances to which he objected delayed his trial.[5] Pittman, however, waived any claim of a time for trial rule violation, and we decline to address his claims.

CrR 3.3 requires that a criminal defendant receive a trial within 60 or 90 days of his first appearance unless the defendant waives that time for trial, the trial court otherwise resets the time for trial, or the trial court excludes a period of time from the time for trial calculation. CrR

[5] None of the orders granting continuances are in the record designated for appeal, nor are many of the transcripts of proceedings where the trial court granted the continuances. The proceedings that we do have confirm that Pittman signed a time for trial waiver so that he could exercise his right to represent himself and have time to prepare for trial.

3.3(b), (c), (e), (f).[6, 7] If the State fails to try the defendant within the time period required by CrR 3.3, it must dismiss the charges with prejudice. CrR 3.3(h). We review claims that a defendant's trial occurred outside the time allowed by this rule de novo. *State v. Chavez-Romero*, 170 Wn. App. 568, 577, 285 P.3d 195 (2012), *review denied*, 176 Wn.2d 1023 (2013).

CrR 3.3(d)(3) requires the defendant to take specific steps to preserve a claim that his or her trial occurred in an untimely manner. Specifically,

> [a] party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

CrR 3.3(d)(3). The motion for a trial within the period set by CrR 3.3 must be made in writing. *Chavez-Romero*, 170 Wn. App. at 581.

The record shows no written motion from Pittman requesting a trial in accordance with CrR 3.3. The record also shows no hearing noted for any such motion. Pittman failed to preserve his time for trial challenge, and CrR 3.3(d)(3) requires that we refrain from addressing the merits of his claim.[8]

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[6] Whether trial is required within 60 or 90 days depends on whether the defendant spends the pretrial period in custody. CrR 3.3(b)(1)-(4).

[7] The trial court may exclude a period of time from the time for trial calculation for competency proceedings, proceedings on unrelated charges, continuances, the dismissal of charges without prejudice, the disposition of a related charge, the defendant's detention in a foreign or federal jail or prison, juvenile proceedings, certain unavoidable or unforeseen circumstances, or the recusal of the assigned judge. CrR 3.3(e).

[8] Pittman's time for trial claim also makes allegations of prosecutorial vindictiveness. No evidence in the record supports Pittman's allegations that the prosecutor threatened to punish him with additional charges unless he pleaded guilty or that the prosecutor actually did add

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Pittman contends that his attorney rendered ineffective assistance by failing to call an expert to support a diminished capacity defense.[9] We disagree.

Both the state and federal constitutions guarantee criminal defendants the right to effective representation by their counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014).[10, 11] We review the constitutional sufficiency of a defendant's representation using the federal test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Grier*, 171 Wn.2d at 32. To obtain relief under *Strickland*, the defendant must show both that counsel performed deficiently and that this deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. We review de novo claims of ineffective assistance of counsel as these claims present mixed questions of law and fact. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

The deficient performance prong turns on the legitimacy of defense counsel's tactical choices. Where the defendant complains about choices that "'can be characterized as legitimate trial strategy,'" we may not find deficient performance. *Grier*, 171 Wn.2d 33-34 (quoting *State*

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offenses to punish him for his refusal to plead guilty. His claim therefore fails. *State v. Lee*, 69 Wn. App. 31, 35-38, 847 P.2d 25 (1993).

[9] Pittman's diminished capacity claim asserts that his stepfather abused him when he was a child and that the fight with his parents the night of his arrest triggered some manner of impaired volitional control related to memories of that abuse

[10] The relevant portion of the Sixth Amendment of the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

[11] The relevant portion of article I, section 22 of the Washington Constitution provides that "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). However, where "a criminal defendant can . . . demonstrat[e] that 'there is no conceivable legitimate tactic explaining counsel's performance,'" he or she shows deficient performance. *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Diminished capacity is a "mental disorder" that "impair[s] the defendant's ability to form the culpable mental state to commit the crime charged." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). In the context of RCW 46.61.024(1), the required mental state, "willfulness," simply means "knowledge" that the police have ordered the defendant to stop. *State v. Mather*, 28 Wn. App. 700, 702, 626 P.2d 44 (1981).

Pittman rests his ineffective assistance of counsel claim on the psychological evaluation attached to the defense's sentencing memorandum. The psychologist opined that Pittman had "great difficulty conforming his conduct to the requirements of the law" and that this justified a lenient sentence. CP at 91. The psychologist's testimony does not, in any way, suggest that Pittman could not understand that he was being told to stop, only that he had difficulty in making himself do so. Given the failure of the evaluation to show an inability to form the necessary mental state, case law would have required the trial court to exclude the psychologist's testimony. *Atsbeha*, 142 Wn.2d at 920-21; *cf. State v. Gough*, 53 Wn. App. 619, 622-23, 768 P.2d 1028 (1989). Pittman's counsel did not render deficient performance by declining to call a psychologist to testify about a diminished capacity defense, which the trial court would have excluded. Pittman's ineffective assistance of counsel claim, therefore, must fail. *Kyllo*, 166 Wn.2d at 862 (we may resolve an ineffective assistance counsel claim on either prong of the *Strickland* test).

CONCLUSION

We affirm Pittman's convictions.

Bjorgen, J.
BJORGEN, C.J.

I concur:

Melnick, J.
MELNICK, J.

JOHANSON, C.J. (concurring) — I concur with the majority opinion in almost all aspects. My disagreement starts with the majority opinion where it declares RCW 46.61.024(1) ambiguous. Majority at 7. In my view, a plain reading of the statute is all that is necessary in order to determine that the charging document adequately informed Leldon R. Pittman of all essential elements of the felony eluding charge.

Where the defendant challenges the sufficiency of the charging document for the first time on appeal, we must then "liberally construe the language of the charging document in favor of validity." *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). Liberal construction requires that we determine whether "the necessary elements appear in any form, or by fair construction, on the face of the document and, if so," whether "the defendant can show he or she was actually prejudiced by the unartful language." *Zillyette*, 178 Wn.2d at 162 (citing *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991)). A charging document must allege all essential elements. *Zillyette*, 178 Wn.2d at 158. An element qualifies as essential if it is required to establish the very illegality of the behavior. *Zillyette*, 178 Wn.2d at 158.

In my view, applying the required liberal construction in favor of validity, the "very illegality" of the felony elude behavior is established by the statutory language "fails or refuses to stop after being given a visual or audible signal to . . . stop." RCW 46.61.024(1). The next sentence that the majority deems ambiguous contains a permissive "may" and a nonexclusive list of the manner of giving the audible or visual signal to stop. The manner of giving the "stop" signal is plainly unnecessary to define the criminality of the offense. This language simply defines various ways an officer is permitted to give the audible or visual signal to stop. Liberal construction requires that we determine whether the necessary elements appear in any form or by fair construction. A plain reading of the statute allows us to simply answer "yes"; Pittman was

informed of all essential elements of felony eluding when he was charged with "fails or refuses to . . . stop after being given a visual or audible signal to . . . stop." Clerk's Papers at 12. I would hold that RCW 46.61.024(1) is unambiguous and that the charging document was sufficient.

Johanson, C.J.
JOHANSON, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
vs.	)	COA NO. 44652-9-II
	)	
LELDON PITTMAN,	)	
	)	
Petitioner.	)	

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 26TH DAY OF FEBRUARY 2015, 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] LELDON PITTMAN
68949 EAST GRANDVIEW
TACOMA, WA 98404

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF FEBRUARY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 26, 2015 - 2:10 PM

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