No. 46632-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**AnthonyTolman,**

Appellant.

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Pierce County Superior Court Cause No. 14-1-02363-6

The Honorable Judge K.A. van Doorninck

# Appellant's Opening Brief

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## ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Tolman's eluding conviction and the associated sentence enhancement violated his Fourteenth Amendment right to due process.
2. The state introduced insufficient evidence to prove beyond a reasonable doubt that Mr. Tolman drove in a reckless manner.
3. The state introduced insufficient evidence to prove that any bystander was threatened with physical injury or harm.

> **ISSUE 1:** A conviction for attempting to elude requires proof that the accused person drove in a reckless manner. Here, the evidence showed only that Mr. Tolman sought to elude pursuit, not that he drove in a rash or heedless manner, indifferent to the consequences. Did the conviction for attempting to elude violate Mr. Tolman's Fourteenth Amendment right to due process because the evidence failed to establish an essential element of the offense?
>
> **ISSUE 2:** For purposes of a sentencing enhancement, the state was required to prove that Mr. Tolman's conduct threatened a bystander with physical injury or harm. The state did not prove that any bystander was placed in harm's way. Was the evidence insufficient to prove the sentencing enhancement beyond a reasonable doubt?

4. Mr. Tolman's conviction for attempting to elude violated his Sixth and Fourteenth Amendment right to notice of the charges against him.
5. Mr. Tolman's conviction for attempting to elude violated his state constitutional right to notice of the charges against him under Wash. Const. art. I, §§ 3and22.
6. The Information was legally deficient because it failed to allege the essential elements of attempting to elude.
7. The Information was legally deficient because it failed to allege that an officer signaled Mr. Tolman by hand, voice, emergency light, or siren.

> **ISSUE 3:** A criminal Information must set forth all of the essential elements of an offense. The Information did not allege that an officer signaled Mr. Tolman by hand, voice, emergency light, or siren. Did the Information omit an essential legal element of attempting to elude in violation of

Mr. Tolman's right to adequate notice under the Sixth and Fourteenth Amendments and art. I, § 22?

8. Mr. Tolman's convictions in counts one and two and the sentencing enhancement in count one violated Mr. Tolman's right to notice under the Fifth, Sixth, and Fourteenth Amendments.

9. Mr. Tolman's convictions in counts one and two and the sentencing enhancement in count one violated his state constitutional right to notice under Wash. Const. art. I, §§ 3, 9,and 22.

10. The Information was factually deficient because it failed to allege critical facts identifying the attempting to elude charge and allowing Mr. Tolman to plead a former acquittal or conviction in any subsequent prosecution for a similar offense.

11. The Information was factually deficient because it failed to allege critical facts identifying the sentencing enhancement and allowing Mr. Tolman to plead a former acquittal or conviction in any subsequent prosecution for a similar offense.

12. The Information was factually deficient because it failed to allege critical facts identifying the possession of a stolen vehicle charge charge and allowing Mr. Tolman to plead a former acquittal or conviction in any subsequent prosecution for a similar offense.

**ISSUE 4:** A charging document must set forth any critical facts necessary to identify the particular crime charged. Here, the Information did not provide any details describing the attempting to elude charge, the associated sentence enhancement, or the possession of a stolen vehicle charge. Did the omission of critical facts infringe Mr. Tolman's right to an adequate charging document under the Fifth, Sixth, and Fourteenth Amendments and art. I, §§ 3, 9, and 22?

13. The trial court's reasonable doubt instruction violated Mr. Tolman's Fourteenth Amendment right to due process.

14. The trial court's reasonable doubt instruction violated Mr. Tolman's Sixth and Fourteenth Amendment right to a jury trial.

15. The trial court's reasonable doubt instruction violated Mr. Tolman's right to a jury trial under Wash. Const. art. I, §§ 21 and 22.

16. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.

**ISSUE 5**: In a criminal case, jurors must be instructed to acquit if they have a doubt that is reasonable. Here, the trial court instructed jurors that a reasonable doubt is one for which a reason exists. Did the court's instruction undermine the presumption of innocence, impermissibly shift the burden of proof, and vitiate the jury's verdicts?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Someone stole Juan Blanco's car in Snohomish County on June 16, 2014. RP 256-257. The next day, Deputy Wheeler saw the same car in Pierce County and followed it. RP 47-53. He turned on his lights and chased the car for a time. RP 57-62.

There was only one point during the chase in which there was another vehicle in the road. A car was standing in the turn lane, and both the stolen and police vehicles went around it. RP 69-71, 95-96, 102.

At some point, the driver stopped the car and ran into some brush. RP 76-82. The driver was not apprehended, even after a tracking dog searched the area. RP 105-125.

Police arrested Anthony Tolman for driving the car that night. He was charged with attempting to elude a pursuing police vehicle, unlawful possession of a stolen vehicle, possession of stolen property, and driving while license suspended in the first degree. .[1] CP 8-10. The eluding count also contained an aggravator that alleged that Mr. Tolman endangered a person other than himself and the pursuing police officer. CP 8-10. The eluding count alleged that Mr. Tolman

> …did unlawfully, feloniously, and willfully fail or refuse to immediately bring his vehicle to a stop and drive his vehicle in a

[1] A charge of possessing motor vehicle theft tools was dismissed. CP 9;

> 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…
> CP 8.

The aggravating factor was that "during the commission thereof, the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer, contrary to 9.94a.834…" CP 8.

The possession of a stolen vehicle count averred that Mr. Tolman "did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.0668 and 9A.56.140…." CP 8-9.

At trial, Deputy Wheeler confirmed that he noted no traffic or pedestrians except for the one car in the turn lane. RP 70-71, 96, 102. He testified that the car was in the left turn lane. He said the car he was chasing started to go around it to the left, but that it then went back into its own lane of travel and continued around the left turning vehicle. RP 69-71. Wheeler said the car was not moving. RP 96.

Wheeler described the driving of the car he was pursuing in several ways. He said that they both went over the speed limit, that they went through a stop sign, that they drove through a parking lot and the driver of the vehicle hit a shopping cart and popped his tire, and that they did not stay in their lanes. RP 57-104.

The court told the jury that a "reasonable doubt is one for which a reason exists". CP 16.

The jury convicted Mr. Tolman on all charges and answered yes to the aggravating factor. After he was sentenced, Mr. Tolman timely appealed. CP 49, 65.

## ARGUMENT

### I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. TOLMAN OF ATTEMPTING TO ELUDE.

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

B. No rational trier of fact could have found Mr. Tolman guilty of attempting to elude a pursuing police vehicle.

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with

prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

To be sufficient, evidence must be more than substantial. *Vasquez,* 178 Wn.2d at 6. On review, inferences drawn in favor of the prosecution may not rest on evidence that is "patently equivocal." *Id.,* at 8. To establish even a *prima facie* case, the prosecution must present evidence that is consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 328-29, 150 P.3d 59 (2006) (addressing the *corpus delicti* rule).

To prove eluding, the state is required to establish that the accused person drove in a "reckless manner," defined as a "rash or headless manner, with indifference to the consequences." RCW 46.61.024; *State v. Naillieux*, 158 Wn. App. 630, 644, 241 P.3d 1280 (2010) (internal quotation marks omitted); *State v. Roggenkamp,* 153 Wn.2d 614, 622, 106 P.3d 196 (2005). In this case, the prosecution did not prove that Mr. Tolman drove in a reckless manner.

The evidence tending to show imperfect driving consisted of evidence that Mr. Tolman:

- Drove his vehicle above the speed limit.
- Went through a stop sign
- Drove fast through a parking lot, where he hit a shopping cart rack, popped one tire, and continued driving.
- Drove through a bank's drive-through lane

- Almost drove around a car that was stationary in the roadway
- Didn't stay in his lane while driving

RP 57-98.

This all took place at around 2:00 a.m. RP 47-49. The two vehicles encountered only one other vehicle—the one that was stationary in the roadway. There is no indication that the stationary car was occupied, or that any other people were in the vicinity during the vehicle's attempt to get away. RP 69-71, 96-98, 102.

This evidence does not prove reckless driving. Although the driving was less than perfect, it did not rise to the level of rash or heedless driving. *Naillieux*, 158 Wn. App. at 644. Nor did it show indifference to consequences. *Id.*

Because the evidence was insufficient to prove that Mr. Tolman drove in a reckless manner, his conviction must be reversed. *Vasquez*, 178 Wn.2d at 6. The charge must be dismissed with prejudice. *Id.*

C. No rational trier of fact could have found that any bystander was threatened with physical injury or harm.

The state did not prove that anyone other than the police was present when the pursued vehicle tried to get away. RP 102. The two cars encountered only one other car, which was stationary in the roadway. RP 69-72, 102. Even if the state had presented evidence that this car had

an occupant, the driver's conduct did not threaten that occupant with physical injury or harm.

Because of this, the special verdict was not supported by the evidence. The enhancement must be vacated and dismissed, and the case remanded for correction of Mr. Tolman's sentence. *Smalis,* 476 U.S. at 144.

## II. THE AMENDED INFORMATION WAS LEGALLY AND FACTUALLY INSUFFICIENT.

### A. Standard of Review.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *Zillyette*, 178 Wn.2d at 158. Such challenges may be raised for the first time on appeal. *Id.*, at161. Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.* A fair construction of the Information must set forth the essential elements and necessary facts. *Id.*, at 162. If the Information is deficient, prejudice is presumed. *Id.*. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.,* at 164.

### B. The Amended Information did not to properly charge attempting to elude because it omitted an essential legal element.

A criminal defendant has a constitutional right to be fully informed of the charge s/he faces. This right stems from the Sixth and Fourteenth

Amendments to the federal constitution, as well as art. I, §§ 3 and 22 of the Washington State Constitution. The right to constitutionally-sufficient Information is one that must be "zealously guarded." *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

All of the essential elements of a crime must be alleged in the charging document. *Zillyette*, 178 Wn.2d at 158. Failure to include an essential element requires dismissal without prejudice. *State v. Johnson*, 180 Wn.2d 295, 301, 325 P.3d 135 (2014) (Johnson I).

1. The state failed to allege that Mr. Tolman was given a signal by hand, voice, emergency light, or siren.

To convict a person of attempting to elude, the prosecution must show that a uniformed officer gave the accused person a visual or audible signal to stop. The signal "may be by hand, voice, emergency light, or siren." RCW 46.61.024.

The state alleged in the Information that an officer gave Mr. Tolman a visual or audible signal to stop, but did not specify that it was given by hand, voice, emergency light, or siren. CP 8. Because the charging document omitted this essential element, it is constitutionally insufficient. *Zillyette*, 178 Wn.2d at 158. Mr. Tolman's eluding conviction must be reversed. *Id.*

2. The *Pittman* court misinterpreted RCW 46.61.024 and rendered a portion of the statute superfluous.

In interpreting any statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen,* 153 Wn.2d186, 194, 102 P.3d 789 (2004).

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *Jametsky v. Rodney A.*, -- Wn.2d --, 317 P.3d 1003, 1006 (Wash. 2014). The court may not add language to a clearly worded statute, even if it believes the legislature intended more.[2] *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008). A statute should not be interpreted in a way that renders some language superfluous. *State v. Johnson*, 179 Wn.2d 534, 546-47, 315 P.3d 1090 (2014) (Johnson II).

RCW 46.61.024 provides a uniformed officer with choices as to how to signal a motorist to stop: the visual or audible signal "may be by hand, voice, emergency light, or siren." RCW 46.61.024(1). While giving the officer options, this language makes clear that not every signal would

[2] A court may not rewrite a statute even if the legislature intended something else but failed to express it adequately. *Martin*, 163 Wn.2d at 509. The judiciary may only correct inconsistencies that render a statute meaningless. *Martin,* 163 Wn.2d at 512-513.

"count" as a predicate for an eluding charge. For example, an officer who beeps her horn could not arrest a motorist for eluding without also giving a visual or audible signal made by hand, voice, emergency light, or siren. The officer may choose any of the listed means, but may not resort to other means.

This language regarding the means of signaling must be given effect; otherwise, it is entirely superfluous. *Johnson* II, 179 Wn.2d at 546-547. Each of the listed means qualify as either visual or audible; had the legislature meant *any* visual or audible signal to suffice, it would have omitted the entire sentence.

The statute's use of the word "may" does not change this. There is no ambiguity in the statute: the word "may" provides the officer with a choice as to the mode of signaling. The *Pittman* court's contrary ruling is a distortion of the statutory language. *State v. Pittman*, ---Wn. App. ---, ___, 341 P.3d 1024, 1027 (Wash. Ct. App. 2015).

By interpreting the mode of signal as purely optional, the *Pittman* court rendered the language entirely superfluous. *Id.* Under the *Pittman* court's reading of the statute, any visual or audible signal qualifies as a predicate to the offense. *Id.* The legislature could have omitted the sentence outlining the method by which the signal may be given and achieved the same result. The fact that the legislature included the

language shows that the legislature's intent was to limit the kinds of visual or audible signals essential to the offense, while still giving officers some degree of flexibility.[3]

Because the statutory language is unambiguous, the *Pittman* court erred by ignoring its plain meaning. *Pittman* was incorrectly decided. It is also harmful, and thus should be overruled. *State v. W.R., Jr.*, 181 Wn.2d 757, 768, 336 P.3d 1134 (2014) (explaining the standard for overruling precedent).

The *Pittman* decision is harmful because it can result in prosecution and conviction of persons whose conduct was not meant to qualify as eluding. For example, a person who fails to stop after an officer beeps her horn could be accused of eluding. This is not what the legislature intended, as can be seen from the statute's plain language. RCW 46.61.024.

This court should overrule *Pittman* and reverse Mr. Tolman's eluding conviction. *W.R., Jr.*, 181 Wn.2d at 768. The charge must be dismissed without prejudice. *Zillyette*, 178 Wn.2d at 158.

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[3] The *Pittman* court ignored the plain language of the statute, in part because the plain language would prohibit eluding charges based on "certain types of law enforcement signals such as whistles, flares, or written signs." *Pittman*, --- Wn. App. at ___. But the court may not expand the statute simply because it believes the legislature may have intended more. *Martin*, 163 Wn.2d at 509, 512-513. Furthermore, motorists must obey signals such as whistles, flares, and written signs, and may be charged with infractions or other offenses if they ignore them. *See* RCW 46.

C. The Amended Information failed to allege critical facts sufficient to allow Mr. Tolman to plead his convictions as a bar against a second prosecution on counts one and two.

A charging document "is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy." *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).[4] The charge must include more than "the elements of the offense intended to be charged." *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).

Any offense charged in the language of the statute "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense." *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction "in case any other proceedings are taken against him for a similar offense." *Id.*

Any "critical facts must be found within the four corners of the charging document." *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004). For example, in theft cases, the charging document must "clearly" charge the accused person with a crime relating to

[4] The Fifth Amendment, applicable through the Fourteenth, protects the accused person against double jeopardy. U.S. Const. Amend. V, XIV. Art. I, § 9 embodies a similar right.

"specifically described property." *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002).[5]

In this case, the Information fails to include sufficient facts to protect against double jeopardy as to counts one and two.[6] CP 8-10; *Russell,* 369 U.S. at 763-64. Because of this, Mr. Tolman's convictions and the associated sentencing enhancement must be vacated and the charge dismissed without prejudice. *Id.*

In count one, the Information does not name the officer Mr. Tolman allegedly eluded. It does not specify the signal he allegedly ignored. It does not describe the location of the crime, or the specific conduct constituting the offense.[7] CP 8. Because it alleges the crime only in the bare language of the statute, it cannot provide the double jeopardy protection required by the state and federal constitutions. *Russell,* 369 U.S. at 763-64.

Similarly, the Information accuses Mr. Tolman using only the bare language of the sentencing enhancement. It does not identify the

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[5]When the charging document includes "not a single word to indicate the nature, character, or value of the property," the charge is "too vague and indefinite upon which to deprive one of his [or her] liberty." *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

[6] And the sentencing enhancement associated with count one.

[7] The Information need not have alleged every single fact; however, the right to notice and to be free from double jeopardy requires sufficient detail to allow Mr. Tolman to plead the charging document should the state attempt a second prosecution for the same offense.

bystander he allegedly endangered, either by name or by general description. It is constitutionally deficient. *Russell,* 369 U.S. at 763-64.

Count two also lacks the specificity required to protect against double jeopardy. It does not name the owner of the stolen vehicle, or identify the car in any way. CP 8-9. As with count one and the sentencing enhancement, the language charging possession of a stolen vehicle does not satisfy the requirements of the state and federal constitutions. *Russell,* 369 U.S. at 763-64.

The Amended Information's allegations are "too vague and indefinite upon which to deprive [Mr. Tolman] of his liberty." *Edwards*, 266 F. at 851.The charging language provides no protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine,* 395 F.3d at 631. The critical facts cannot be found by any fair construction of the Amended Information. *Zillyette*, 178 Wn.2d at 158.

The Amended Information is factually deficient. Mr. Tolman's convictions in counts one and two must be reversed and the charges dismissed without prejudice. *Zillyette*, 178 Wn.2d at 158.

## III. THE TRIAL COURT'S INSTRUCTIONS IMPROPERLY DIVERTED THE JURY'S ATTENTION AWAY FROM THE REASONABLENESS OF ANY DOUBT, AND ERRONEOUSLY FOCUSED IT ON WHETHER JURORS COULD PROVIDE A REASON FOR ANY DOUBTS.

### A. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 3; *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993); *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. Amends.VI; XIV; *Sullivan*, 508 U.S.at 278-81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty "vitiates *all* the jury's findings." *Sullivan,* 508 U.S. at 279-281.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012) (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a reason for their doubt is "inappropriate"

because it "subtly shifts the burden to the defense." *Emery*, 174 Wn.2d at 759-60.[8]

Requiring articulation "skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit…" *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997) *on reh'g en banc,* 138 F.3d 552 (5th Cir. 1998).[9] An instruction imposing an articulation requirement "creates a lower standard of proof than due process requires." *Id.*, at 534.[10]

B. The trial court erroneously told jurors to convict unless they had a doubt "for which a reason exists."

The trial court instructed jurors that "A reasonable doubt is one for which a reason exists." CP 16. This suggested to the jury that it could not acquit unless it could find a doubt "for which a reason exists." CP 16. This instruction – based on WPIC 4.01 – imposes an articulation requirement that violates the constitution.

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[8] *See also State v. Walker*, 164 Wn. App. 724, 731-32, 265 P.3d 191 (2011); *State v. Johnson*, 158 Wn. App. 677, 684-86, 243 P.3d 936 (2010) *review denied,* 171 Wn.2d 1013, 249 P.3d 1029 (2011) (Johnson III).

[9] The Fifth Circuit decided *Humphrey* before enactment of the AEDPA. Subsequent cases applied the AEDPA's strict procedural limitations to avoid the issue. *See, e.g., Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000).

[10] In *Humphrey,* the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as "a serious doubt, for which you can give a good reason." *Humphrey,* 120 F.3d at 530.

A "reasonable doubt" is not the same as a reason to doubt. "Reasonable" means "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason… Rational." *Webster's Third New Int'l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. *Accord Jackson v. Virginia,* 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); *Johnson v. Louisiana,* 406 U.S. 356, 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

The "a" before "reason" in Instruction No. 2inappropriately alters and augments the definition of reasonable doubt. CP 16. "[A] reason" is "an expression or statement offered as an explanation of a belief or assertion or as a justification." *Webster's Third New Int'l Dictionary.* The phrase "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable

doubt—one for which a reason exists, rather than one that is merely reasonable.

This language requires more than just a reasonable doubt to acquit. *Cf. Winship*, 397 U.S. at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.") Jurors applying Instruction No. 2could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable.[11]For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 2. CP 16.

As a matter of law, the jury is "firmly presumed" to have followed the court's reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474-475, 285 P.3d 873 (2012). Jurors had no choice but to deliberate with the understanding that acquittal required a reason for any doubt.

The instruction "subtly shift[ed] the burden to the defense." *Emery*, 174 Wn.2d at 759-60. It also "create[d] a lower standard of proof than due process requires…" *Humphrey,*120 F.3d at 534. By relieving

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[11]*See* Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003).

the state of its constitutional burden of proof, the court's instruction violated Mr. Tolman's right to due process and his right to a jury trial. *Id.; Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. Accordingly, his convictions must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

## CONCLUSION

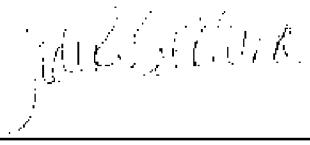
Mr. Tolman's attempted eluding charge and the associated enhancement must be dismissed with prejudice. The evidence was insufficient to prove the offense and the enhancement.

If the charge and enhancement are not dismissed with prejudice, they must be dismissed without prejudice because of deficiencies in the Amended Information. The same is true for count two, the count charging possession of a stolen vehicle.

All of Mr. Tolman's convictions must be reversed because the court's reasonable doubt instruction shifted the burden of proof, undermined the presumption of innocence, and violated Mr. Tolman's jury trial right. The case must be remanded for a new trial with proper instructions.

Respectfully submitted on February 25, 2015,

**BACKLUND AND MISTRY**



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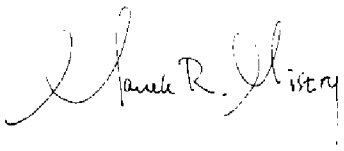

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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Anthony Tolman, DOC #845341
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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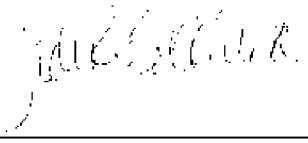
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 25, 2015.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

# BACKLUND & MISTRY

## February 25, 2015 - 10:50 AM

**Transmittal Letter**

Document Uploaded: 5-466325-Appellant's Brief.pdf

Case Name: State v. Anthony Tolman

Court of Appeals Case Number: 46632-5

**Is this a Personal Restraint Petition?** Yes ■ No

## The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

**Comments:**

No Comments were entered.

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