72450-9

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April 7, 2015
Court of Appeals
Division I
State of Washington

NO. 72450-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS FEELY, JR.,

Appellant.

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

The Honorable Charles Snyder, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct in closing argument by misstating the law regarding the endangering others enhancement.

2. The prosecutor committed misconduct in closing argument by lessening the state's burden of proof as to proof beyond a reasonable doubt.

3. The prosecutor committed misconduct in closing by violating the court's limiting instruction with respect to appellant's prior offenses.

4. Appellant received ineffective assistance of counsel when his attorney failed to object to the prosecutor's misstatement of the law, lessening of the state's burden and violation of the court's limiting instruction.

5. The court acted outside its authority in imposing an exceptional sentence based on the jury's verdict on the endangerment enhancement.

Issues Pertaining to Assignments of Error

1. Did prosecutorial misconduct deprive appellant of his right to a fair trial where the prosecutor argued in closing the jury could convict appellant of endangering others, an enhancement for

attempting to elude, based on appellant's endangerment of officers setting up spike or "stop" strips, where the legislature's intent was to enhance the penalty for endangering pedestrians and innocent bystanders, not police officers, when attempting to elude?

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

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

4. Did appellant receive ineffective assistance of counsel when his attorney failed to object to the prosecutor's misstatement of law regarding the enhancement, the prosecutor's lessening of the state's burden with respect to proof beyond a reasonable doubt

and the prosecutor's violation of the court's limiting instruction regarding appellant's priors?

5. Where the legislature has provided that endangering others shall be punished by imposition of a 12-month plus one day enhancement to the underlying sentence for attempting to elude, did the court act outside its authority in imposing consecutive sentences for felony driving under the influence and attempting to elude, based on the jury's finding of endangering others?

B. STATEMENT OF THE CASE[1]

1. Testimony

Following a jury trial in Whatcom County, appellant Thomas Feely was convicted of felony driving under the influence (DUI)[2] and attempting to elude a pursuing police vehicle, allegedly committed on April 9, 2014. CP 15-17, 51-54. The jury also found that a person other than Feely or a pursuing law enforcement officer was endangered by Feely while he was allegedly attempting to elude. CP 53.

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[1] The verbatim report of proceedings for trial on July 28-31, 2014 is contained in three bound volumes and referred to as "RP." Pretrial proceedings on July 23, 2014 is referred to as "1RP," and sentencing on August 18, 2014, is referred to as "2RP."

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

Around 1:00 a.m. on April 9, 2014, Trooper Travis Lipton was parked on the shoulder of the northbound onramp to I-5 at Guide Meridian monitoring traffic speeds. RP 56-57. Lipton testified a 2001 Dodge truck came surprisingly close to his door as it merged onto the freeway. RP 58, 98. Lipton decided to follow after reportedly seeing the truck drift into the left lane before returning to the right. RP 58.

Lipton caught up and activated his camera. RP 59. According to Lipton, the truck was drifting continuously back and forth within the right lane. RP 60. Lipton claimed the truck also crossed the fog line on one occasion and crossed the "center skip line" near Slater Road. RP 60-62.

Lipton decided to initiate a traffic stop by the overpass to Portal Way. RP 64. Lipton activated his lights and siren but the truck continued north and exited at Grandview Road. RP 66. Lipton testified the truck slowed but did not stop at the stop sign and began accelerating as it turned west over the freeway. RP 67.

Lipton testified the truck reached speeds upwards of 80 miles an hour and failed to stop at the next stop sign. RP 68. According to Lipton, when the truck turned south on Kickerville Road, the truck bypassed two cars that were either approaching

them or travelling in the same direction. RP 69. Lipton testified the two cars either slowed or stopped as a result. RP 69.

Lipton testified he continued following as the truck drove at speeds of 75-90 miles an hour along various country roads. RP 70. Lipton requested dispatch contact other troopers or police agencies to deploy spike strips. RP 71.

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

Sergeant Larry Flynn set up another spike or "stop strip" at the intersection of North Star and Mountain View Road. RP 180-181. Flynn testified that as he deployed the strip, he could see the truck's headlights coming over the crest of the hill. RP 184. According to Flynn, the driver must have seen him, since he locked up the brakes and started sliding towards Flynn. RP 184, 197-98. Although the truck tried to maneuver around the strip, Flynn testified it hit the spikes before gunning it eastbound onto Mountain View Road. RP 185, 188.

Due to the glare of headlights and Flynn's focus on the truck's tires, he never saw the driver. RP 186. Flynn testified several officers have been killed trying to deploy spike strips. RP

187. Flynn did not see a passenger, but could not guarantee one was not there. RP 197.

Lipton testified that when the truck turned onto Elder Road, he noticed the left front tire was going flat. RP 75. The truck started slowing down. RP 77.

The truck turned down a driveway on Olson Road. RP 77. Officer Justin Pike had caught up to Lipton as they followed the truck down the driveway. RP 77. The gravel road turned into a muddy trail. RP 79. Up ahead, Lipton saw a berm where the trail ended. RP 80. The truck went up and over it, but Lipton and Pike stopped and parked. RP 80.

When Lipton and Pike reached the berm, they saw the truck high centered on a log in a swampy area. RP 80, 152, 209. The truck was empty, however, and the driver's door was ajar. RP 80, 104. The passenger door was closed, but there was room to open it, according to Lipton. RP 105.

Lipton checked the car and found a Washington State identification card for Thomas Feely. RP 87. The truck was registered to Feely's stepfather. RP 37, 103, 256; Ex 11. Lipton also noticed a shoe at the left front tire that appeared to have gotten stuck in the brush and popped off. RP 86. Lipton and Pike

decided to wait for a police dog to initiate a track, rather than search the woods on their own. RP 82.

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

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

When the first track proved unsuccessful, officer Jeremy Woodward initiated a second track with his more experienced dog, Justice. RP 217, 261, 277. Justice located Feely in a tree in the same wooded area Elliott had initially stopped at. RP 218, 246-47, 278-82. Pike, who provided cover on the track, recognized Feely from 4-H. RP 220. Feely had no shoes and was wet, cold and

shivering. RP 222, 248. Pike testified he had alcohol on his breath and his responses were slow and delayed. RP 222.

Lipton took Feely to the hospital. RP 114-17, 120. They arrived at 3:15 a.m. and a blood draw was taken at about 5:00 a.m. RP 123. According to the toxicology report, Feely's blood alcohol level was .13 percent.[3] RP 124.

2. Closing

In closing argument, the prosecutor argued the jury could find Feely endangered someone other than himself or a pursuing police officer based on other cars on the road, as well as the officers who put out the spike strips:

> Of course, there were other people out on the road. You can count them. There's I think three or four vehicles. Some that pulled over. Some were driving by at various points, but certainly on Kickerville after he turns left on Kickerville, and he's going down Kickerville, he comes to a place where, unfortunately, two vehicles driving in opposite directions are in the same place. They obviously can hear the lights, hear the siren and see the lights. They know something is going on, and they do what many people do is kind of freeze it appears, and that creates a kind of a road jam, a logjam, and Mr. Feely has to dart through, between the two of them. So those, those individuals are, certainly could, you could find that they're endangered by the driving of Mr. Feely on that night.
>
> Other possibilities, you know, I don't know how many different vehicles are out there, the officers that are not pursuing, but did apply the stop sticks. They

[3] Feely stipulated to the admissibility of the toxicology report. CP 13-14.

> can be endangered by his driving, and I think at one point in the video, you can see the first officer, I think it's on North Star Road coming down North Star Road. You can see him coming out and try to deploy the sticks and run back, and you can find that he's endangered by the Defendant driving as he is, and then finally, of course, agent, Sergeant Flynn, he testified about how he deploys those sticks, how they work, and the danger which they are trained on, because several law enforcement officers have lost their lives in deploying those very – I was going to say those stop sticks, but such devices. So it's serious stuff.

RP 455.

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

> So I think I was on the reasonable doubt instruction and what it means, and it's a personal thing to each of you. That's why they can't tell you, you know, it's 73 percent or whatever. It's not five witnesses to, you know, whatever number of witnesses. It's how you evaluate the evidence and how you match it up to, to the law as given to you by the Court. It's when you're convinced. It's not when you just think it might have happened, but when you're convinced it happened. You know it because you believe it happened, and you're going to believe it today. You're going to believe it tomorrow. You're going to believe it two months from now when you're telling your cousin about it. If you have reached that point, then you're convinced beyond a reasonable doubt. That's, that's the way to look at this.
>
> It can be very frustrating to have a jury come back and say we all knew he was guilty, but you didn't prove it beyond a reasonable doubt. Those are inconsistent. If you all know the Defendant committed a crime, and committed all of the, or all of the

> elements are proven, then you are convinced beyond a reasonable doubt. It's not just that I knew it happened, or I knew that he was guilty. So think about in those terms.

RP 481-82.

As indicated in footnote 2, Feely stipulated he had four prior qualifying convictions elevating the DUI to a felony. CP 13. Regarding the jury's consideration of these prior convictions, the defense proposed and the court gave the following instruction:

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

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

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

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

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

RP 485.

3. Sentencing

The state asked the court to impose an exceptional sentence based on the "free crimes" aggravator.[4] 2RP 8-9. Because of Feely's offender score of 14 points,[5] his standard range for felony driving under the influence maxed out at 60 months, and the standard range for eluding – including the 12-month enhancement for endangering someone other than himself and a pursuing police officer – was 34-41 months. CP 55-57. The state argued Feely therefore received no additional punishment for eluding. Supp. CP __ (sub. no. 48, Sentencing Memorandum, 8/14/14).

[4] The aggravator was charged in the Information. CP 8-10.

The court determined an exceptional sentence was appropriate because, otherwise, Feely would receive no punishment for endangering others, which the court stated was important to the jury:

> I believe in looking at this case if there is a basis for an exceptional sentence it has to be on the basis that the jury made a specific finding that you endangered people and that video clearly showed that. In fact, that was why they wanted to see the video the last time during deliberations was to help verify that and they made that finding,[6] and for a jury to make a finding like that is the only way we can get to the point where the Court can consider the additional enhancement of a sentence such as yours in this case on the alluding [sic], the year and a day additional enhancement.
>
> If I do not impose a consecutive sentence, if these run concurrently, that enhancement will not count, will not do anything. It will not do anything. It will not affect the amount of time you spend in custody because for somebody with the number of points you have which is well over the maximum, they don't add up anymore after 9, you got the same sentence standard range whether you've got 9 or 19 points, so there's no benefit to the community by a sentence, because it's above the standard range but it is within the standard range because it's the same standard range no matter what.
>
> . . . so it seems to me that this Court could and should based upon the jury's findings impose consecutive sentences simply because the

[5] A majority of Feely's points are attributable to driving offenses, not felonies. Supp. CP __ (sub. no. 48, State's Sentencing Memorandum, 8/14/14); see also CP 55-57; RCW 9.94A.525(11).

[6] During deliberations, the jury requested and was allowed to watch the video once again. CP 50. The record does not reveal the jurors' thought processes, however. RP 492-93.

> enhancement that the jury found and which was to them significant and which is to me significant today would not in any way impact your sentence if these 2 cases – these 2 counts did not run consecutive, and for that reason because that enhancement could not be imposed and it is a significant portion of the sentence and if is a specific jury finding based upon the particular behavior of this case, and that behavior being so similar to that of other matters with you that the Court finds a grounds for imposing an exceptional sentence by running the 2 sentences for these 2 counts consecutively.

2RP 24-26.

The court therefore imposed 60 months for the felony DUI to run consecutively to the 29 months plus the 12-month enhancement for the eluding, for a total for a total of 101 months. 2RP 26. This appeal follows. CP 79-90.

C. ARGUMENT

1. FEELY WAS DENIED A FAIR TRIAL DUE TO THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). The right to a fair trial is a fundamental liberty secured by the Sixth and

Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wash.2d 792, 843, 975 P.2d 967 (1999).

Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics.

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Monday, 171 Wn.2d at 676. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted); see also United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir.1988) (analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect).

Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578. Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct is both improper and prejudicial. Monday, 171 Wn.2d at 675, (citations omitted). Even if a defendant does not object, he does not waive his right to review of flagrant misconduct by a prosecutor. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

(i) The Prosecutor's Misstatement of Law Regarding the Enhancement

Contrary to the prosecutor's argument, the jury was not authorized to find Feely guilty of endangering someone other than himself or pursuing police officers based on his alleged endangerment of the spike or "stop strip" officers. The legislature's clear intent was to enhance the penalty for individuals who endanger innocent bystanders while eluding, not the police who are involved in the individual's attempted capture. The prosecutor's misstatement of the law constituted flagrant misconduct denying Feely of his right to a fair trial.

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

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 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.

"Pursuing law enforcement officer" is undefined. An undefined term is "given its plain and ordinary meaning unless a contrary legislative intent is indicated." Ravenscroft v. Wash. Water Power Co., 136 Wash.2d 911, 920–21, 969 P.2d 75 (1998). To pursue means to "follow in order to overtake, capture, kill, or defeat" or to "chase." See http://www.merriam-webster.com/dictionary/pursue. The ordinary dictionary definition arguably supports the state's argument that the spike strip officers were not pursuing police officers because they weren't following or chasing Feely, although they were trying to capture or defeat him.

Nonetheless, a contrary legislative intent is indicated. This Court reviews questions of statutory interpretation de novo. In re Det. of Williams, 147 Wash.2d 476, 486, 55 P.3d 597 (2002). When interpreting a statute, "the court's objective is to determine the legislature's intent." State v. Jacobs, 154 Wash.2d 596, 600, 115 P.3d 281 (2005).

The enacting legislation – also known as the Guillermo "Bobby" Aguilar and Edgar F. Trevino-Mendoza Public Safety Act of 2008 – was passed in response to a fatal car crash in which a man fleeing from police in a stolen car ran a red light and broadsided another car, killing Aguilar and Trevino-Mendoza. See

http://www.seattletimes.com/seattle-news/man-convicted-in-fatal-car-crash/, attached as Appendix A; see also Final B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008), attached as Appendix B.

The house bill report indicates the legislature was concerned about protecting traffic and pedestrians, not police officers attempting to capture an individual who is attempting to elude:

> This bill is essentially redrafted from last year and is a priority item for the Washington Association of Sheriffs and Police Chiefs (WASPC) this year. This bill is an attempt to address an ongoing issue of offenders attempting to elude the police. However, some law enforcement officers do not believe that the penalties in the bill are harsh enough.
>
> When these offenders decide to run away from police they are endangering society as a whole. This includes children on their way to school, people out shopping, pedestrians, etc. Currently the penalty for a first time offender is 30 days in jail. This bill is not about money. Offenders need to know that there is going to be consequences for their actions of endangering others.
>
> Law enforcement around the state has done its part in regulating and following the model policy through the WASPC in regards to the types of pursuits that they allow officers to engage in. Now it is time for these offenders to go to prison.
>
> . . . This is priority legislation for the Washington Association of County Officials and the County Sheriffs Association. Currently, first time offenders only spend 30 days in jail. It needs to be clear that the consequences will be serious. In Washington, we have a lot of traffic and pedestrians. Recent deaths have been attributed to this very

> behavior, which warrants actions by citizens and policy officers.

House B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008) (emphasis added), attached as Appendix C.

That the legislation is aimed at enhancing the penalty for endangering innocent bystanders is further evidenced by the Senate Bill Report:

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

Final B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008) (emphasis added), attached as Appendix D.

These authorities clearly indicate the legislature's intent to target the defendant's endangerment of ordinary citizens or innocent bystanders, not the police officers who are involved in the defendant's attempted capture.

The prosecutor's misstatement went to a core element in dispute – whether Feely's actions endangered someone other than himself or the officers involved in his capture. It invited jurors to base its finding on something the legislature clearly did not intend. Moreover, it had the effect of lightening the State's burden by

broadening the evidence it could rely upon and, thus, constituted flagrant misconduct.

The prosecutor's misconduct was prejudicial. Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Monday, 171 Wn.2d at 578. As stated above, when the prosecutor misstates the law it is "particularly grievous" because "[t]he jury knows that the prosecutor is an officer of the State." Warren, 165 Wn.2d at 27.

Based on the prosecutor's argument, it is likely the jury relied on Feely's endangerment of Flynn in finding Feely endangered someone other than himself or a pursuing police officer. Flynn testified the truck started sliding towards him when the driver saw him and locked up the brakes. Flynn further testified that officers have died deploying spike strips. In light of this testimony and the prosecutor's argument, it is likely the jury did not even consider whether Feely's driving endangered the innocent bystanders who encountered him on Kickerville Road. There is likewise a possibility the jury may not have found Feely's actions endangered the other two drivers on Kickerville. Because there is a substantial likelihood the prosecutor's misconduct affected the verdict, this Court should reverse the enhancement.

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

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

During closing argument, the prosecutor violated Feely's right to due process by misstating the reasonable doubt standard. Specifically, the prosecutor stated:

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

RP 481-82. Contrary to the prosecutor's characterization, there is nothing inconsistent about knowing a defendant is guilty but finding

the state failed to prove it beyond a reasonable doubt. To "know" means to:

> 1 a (1): to perceive directly : have direct cognition of (2): to have understanding of <importance of knowing oneself> (3): to recognize the nature of : discern
> b (1): to recognize as being the same as something previously known (2): to be acquainted or familiar with (3): to have experience of

http://www.merriam-webster.com/dictionary/know.

To "discern" means to:

> 1 a: to detect with the eyes <discerned a figure approaching through the fog>
> b: to detect with senses other than vision <discerned a strange odor>

http://www.merriam-webster.com/dictionary/discern.

But the prosecutor's characterization essentially read the reasonable doubt requirement out of it, asserting it was enough that jurors discern or recognize the defendant's guilt, not necessarily that they believe it beyond a reasonable doubt. Thus, the prosecutor's argument minimized the state's standard of proof.

The prosecutor's minimization is analogous to the prosecutor's misstatement in State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010). There, in addressing the "abiding belief"

requirement of the reasonable doubt standard, the prosecutor argued:

> I like to look at abiding belief and use a puzzle to analogize that. You start putting together a puzzle and putting together a few pieces, and you get one part solved. So with this one piece, you probably recognize there's a freeway sign. You can see I-5. You can see the word "Portland" from looking in the background. You may or may not be able to see which city that is, but it is probably near one that is on the I-5 corridor.
>
> You add another piece of the puzzle, and suddenly you have a narrower view. It has to be a city that has Mount Rainier in the background. You can see it. It can still be Seattle or Tacoma, or if you weren't familiar, you might think that mountain might be Mt. Hood, and it could be Portland.
>
> You add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.

Johnson, 158 Wn. App. at 682. Defense counsel did not object. Id.

On appeal, Johnson argued the prosecutor misstated the law by arguing that arriving at an abiding belief to satisfy the reasonable doubt standard was the same as intuiting the subject of a partially completed puzzle. Id. Division Two of this Court agreed the prosecutor's argument trivialized and ultimately failed to convey the gravity of the state's burden and the jury's role in assessing the state's case against the defendant. Johnson, 158 Wn. App. at 684-85 (citing State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273

(2009) (discussing reasonable doubt standard in the context of everyday decision making was improper); see also State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009) (prosecutor's argument defendant not entitled to the benefit of the doubt was flagrant misconduct but cured by the court's thorough curative instruction).

As in Johnson, the prosecutor trivialized and ultimately failed to convey the gravity of the state's burden here in arguing the jury had to convict if it "knew" Feely was guilty.

And significantly, even though there was no objection in Johnson, the court found the prosecutor's misstatement was flagrant and ill-intentioned and required reversal:

> [W]e follow our holding in Venegas[7] that such arguments are flagrant and ill-intentioned and incurable by a trial court's instruction in response to a defense objection. Although the trial court's instructions regarding the presumption of innocence may have minimized the negative impact on the jury, and we assume the juror followed these instructions, a misstatement about the law and the presumption of innocence due a defendant, the "bedrock upon which [our] criminal justice system stands," constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights. State

[7] State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010) (prosecutor's "fill-in-the-blank" reasonable doubt argument was improper because it subverts the presumption of innocence).

> v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); Anderson, 153 Wn. App. at 432, 220 P.3d 1273.
>
> In State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008), cert. denied, __ U.S. __, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009), our Supreme Court declined to apply constitutional harmless error analysis to improper prosecutorial arguments involving the application and undermining of the presumption of innocence. Furthermore, even were we to do so, with conflicting evidence and a misstatement of the reasonable doubt standard and the presumption of innocence due Johnson, we cannot conclude that such misstatements did not affect the jury's verdict. Thus, we reverse Johnson's conviction and remand to the trial court for further proceedings.

Johnson, at 685.

Feely is entitled to the same result. The state's evidence as to whether Feely was driving was entirely circumstantial. Not one of the officers who testified directly observed him driving. Moreover, the first dog started tracking to the south suggesting there could have been another suspect. In light of the scant evidence and the presumption of innocence due Feely, it cannot be said the prosecutor's misstatement did not affect the jury's verdict. This Court should therefore reverse his convictions and sentencing enhancement.

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

The court expressly limited the jury's consideration of Feely's four prior DUI convictions to "the limited purpose of determining whether Mr. Feely has the requisite prior convictions to make this case a felony DUI." CP 35. In the same instruction, the court also directed, "the evidence is not to be considered for the purpose of proving the character of a person in order to show that the person acted in conformity with that character." CP 35.

Despite this limitation, the prosecutor violated the first part of the court's ruling when he argued the jury could consider the priors as "motive to flee" and evidence Feely must be the driver:

> And then finally, it's not an element of the crime at all, but something that is brought up a lot is who has the motive to flee? Who has the motive to flee in the car while it's driving the truck? And who has a motive when it stops?
>
> Well, Mr. Feely has the four priors, we know that, four prior DUIs. You can't use that, you cannot use that to say that because he was convicted four times of driving under the influence, he must have been driving under the influence this time. It's not a character thing. You can't do that.
>
> But what you can do is use that for another purpose, the element of the offense, a felony DUI and motive. Would somebody who is driving under the influence want to be caught having four prior DUI convictions? Of course not. And that gives him a motive to flee police, and to do so in a very

> dangerous, reckless manner, and that's what you see on that video.
>
> What other motive would he have to flee the police if he was just, if he wasn't the driver? Because when you flee that truck, you sure look like you're the driver at that point, don't you?

RP 485.

Because the state never asked the court to admit the priors for this purpose, however, and because the court in fact ruled they were admissible only to determine whether the charged DUI was a felony, the prosecutor's argument constituted flagrant misconduct.

Washington courts have found prejudicial misconduct where a prosecutor's actions violate an in limine ruling. State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993) (prosecutor's violation of motion in limine excluding evidence of defendant's prior drug-related offense in closing argument was "flagrantly improper").

The circumstances here are analogous to those in State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2008), where the prosecutor violated the court's ER 404(b) ruling. Fisher was charged with molesting his stepdaughter Melanie approximately six years earlier, when she was twelve. Melanie attributed her delay in reporting to embarrassment and a desire to remain with her younger brother

and sister, Brett and Brittany, both of whom she claimed Fisher also physically abused. Fisher, 165 Wn.2d at 733.

At a pretrial hearing to determine the admissibility of evidence Fisher physically abused Brett and Brittany, the court ruled it would be admissible if Fisher made an issue of Melanie's delay in reporting. Fisher, 165 Wn.2d at 734.

Defense counsel made no mention of Melanie's delay in reporting in opening statement or otherwise. Fisher, 165 Wn.2d at 735. Despite the court's ruling, the prosecutor made statements and elicited testimony concerning Fisher's alleged abuse of Brett and Brittany throughout the proceedings. Fisher, 165 Wn.2d at 735, 738. In closing, the prosecutor argued the evidence of abuse established a pattern. Fisher, at 738.

On review, the Supreme Court held the trial court identified a proper purpose for admitting the evidence of physical abuse – to explain why Melanie did not disclose the abuse. Fisher, at 746. However, the prosecutor's use of the evidence for a different purpose constituted misconduct:

> Here, the trial court expressly conditioned the admission of evidence of physical abuse on defense counsel's making an issue of Melanie's delayed reporting. The prosecuting attorney, however, first mentioned the physical abuse in his opening

> statement and introduced the evidence of physical abuse during the direct examination of Melanie, the State's first witness. Defense counsel was not provided the opportunity to decide whether to raise the issue of Melanie's delayed reporting, and defense counsel ultimately never raised Melanie's delay in reporting.
>
> By preemptively introducing the evidence, the prosecuting attorney did not use the evidence for its purported purpose. Instead of using the evidence to rebut a defense argument that Melanie's delay in reporting the sexual abuse means that she is not credible, the prosecuting attorney used the evidence to generate a theme throughout the trial that Fisher's sexual abuse of Melanie was consistent with his physical abuse of all his stepchildren and biological children, an impermissible use of the evidence. In violation of the court's pretrial ruling and in spite of defense counsel's standing objection, the prosecuting attorney directed the jury to consider the evidence of physical abuse to prove Fisher's alleged propensity to commit sexual abuse when he discussed the system failing Tyler, Melanie, Brett, Brittany, Ashland, and Shelby.
>
> The prosecuting attorney further stated Fisher "engaged in a repeated pattern of abuse that didn't stop with physical abuse. It spilled right over into sexual abuse." The prosecuting attorney thus contravened the trial court's pretrial ruling by impermissibly using the physical abuse evidence to demonstrate Fisher's propensity to commit the crimes. Using the evidence in such a manner after receiving a specific pretrial ruling regarding the evidence clearly goes against the requirements of ER 404(b) and constitutes misconduct.

Fisher, at 747-49 (footnote and citation to the record omitted, emphasis added). The court further held the misconduct likely

affected the jury's verdict and required a new trial. Fisher, at 747-49.

The prosecutor engaged in the same type of misconduct here. The court expressly limited the admissibility of Feely's priors to determining whether the charged DUI constituted a felony. By using the priors instead as evidence of motive in closing argument, the prosecutor contravened the court's ruling and the requirements of ER 404(b).

This Court should find the error is preserved as defense counsel requested and received a limiting instruction under ER 404(b). See Fisher, 165 Wn.2d 727, 748 n.4 (no objection required because defense had standing objection).

Alternately, this Court should find the prosecutor's misconduct was flagrant and ill-intentioned as he was aware of the court's ruling, failed to object or seek to broaden it and chose instead to ignore it.

The bell once rung could not be unrung. See e.g. State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (where misconduct strikes at the heart of the defense case, a curative instruction is ineffective to "unring the bell"). In light of the circumstantial nature of the state's evidence, there is a substantial

likelihood the prosecutor's misconduct affected the jury's verdict. This Court should therefore reverse the convictions.

2. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MULTIPLE INSTANCES OF MISCONDUCT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Assuming arguendo this Court decides the prosecutor's multiple instances of misconduct were not flagrant, this Court should still reverse the convictions and enhancement based on ineffective assistance of counsel.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

"This right exists, and is needed, in order to protect the fundamental right to a fair trial." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Ineffective assistance of counsel is established if: (1) counsel's performance

was deficient, and (2) the deficient performance prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting two-prong test from Strickland, 466 U.S. at 687). As shown below, both prongs are satisfied here.

(i) Counsel's Failure to Object to Prosecutor's Misstatement of Law Regarding the Enhancement.

"Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Counsel fails to render constitutionally required effective assistance when she does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. Hawkman v. Parratt, 661 F.2d 1161 (8th Cir.1981). Thus, deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

Counsel's performance was objectively unreasonable. Competent defense counsel must be aware of the law and should make timely objections when the prosecutor crosses the line during closing argument and jeopardizes the defendant's right to a fair trial. State v. Neidigh, 78 Wn. App. 71, 79-80, 895 P.2d 423

(1995). Here, counsel's performance was deficient because she failed to object to the prosecutor's obvious misstatement of the law regarding the endangerment enhancement.

Without objection, no potentially clarifying instruction was given and the jury was left to believe it could rely on Feely's endangerment of the spike strip officers to find him guilty of the enhancement. Competent counsel would have objected.

Counsel's deficient performance prejudiced the outcome of the case. Prejudice occurs if there is a reasonable probability that the result of the proceeding would have been different, had the deficient performance not occurred. Thomas, 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. That is the case here.

As the Washington Supreme Court has recognized, "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). As explained above, the prosecutor's misstatement of the law encouraged jurors to find Feely guilty of the enhancement based on his alleged endangerment of an officer involved in his attempted

capture, which clearly was not authorized by the legislature. Without counsel's objection, the jury was left with the incorrect notion that the law allowed it to do so. The jury may not have believed Feely actually endangered innocent bystanders, such as the drivers of the two cars on Kickerville.

Given this, there is a reasonable probability that the outcome would have been different had counsel objected and asked for the Court to clarify the law. Hence, Feely was denied effective assistance of counsel and the enhancement should be reversed.

(ii) Counsel's Failure to Object to the Prosecutor's Lessening of the State's Burden of Proof

The prosecutor misstated and trivialized its burden of proof when he stated it was inconsistent for jurors to know a defendant is guilty but find the state didn't prove it beyond a reasonable doubt. Defense counsel's failure to object was patently unreasonable. It is black letter law the state may not minimize or trivialize the reasonable doubt standard. There was no tactical reason not to object as the prejudicial impact of a prosecutor's misstatement of law as to the burden of proof is well recognized. See e.g. State v. Bennett, 161 Wn.2d 303. Reasonably competent counsel therefore

would have objected and sought a clarifying instruction from the court.

There is a reasonable probability the outcome would have been different had counsel objected and sought a curative instruction. In light of the authorities cited above, such as Johnson and Venegas, it is likely the court would have sustained the objection and clarified the state's burden to prove not only the elements of the offense but to prove them by proof beyond a reasonable doubt.

The state's case was far from overwhelming. No one directly observed Feely driving. Therefore, some jurors may have believed he was driving but that the state did not prove it beyond a reasonable doubt. The prosecutor's argument removed the beyond-a-reasonable-doubt requirement from the jury's consideration. Counsel's failure to object therefore undermines confidence in the outcome of the proceeding.

(iii) Counsel's Failure to Object to Prosecutor's Violation of the Court's Limiting Instruction

The court ruled Feely's priors were admissible solely for determining whether the current DUI constituted a felony. Despite the court's express limitation, the prosecutor argued Feely's priors

could be considered as evidence of motive. Having obtained a favorable ruling, there was no tactical reason for counsel not to object to the prosecutor's violation of the court's ruling. Considering the circumstantial nature of the case, reasonably competent counsel would have sought to enforce the court's limitation.

Considering the court's limiting instruction, the court would have sustained a timely objection. Counsel's failure to object allowed the state to unfairly bolster its circumstantial case. Because no on saw Feely driving, and because the first dog's track suggested another suspect, jurors may have had a reasonable doubt Feely was the driver in the absence of the state's improper use of Feely's prior convictions. Due to counsel's failure to object, confidence in the outcome of the proceedings is undermined. This Court should reverse the convictions and enhancement.

3. THE COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING AN EXCEPTIONAL SENTENCE BASED ON THE ENHANCEMENT.

The state asked the court to impose an exceptional sentence based on the "free crimes" aggravator resulting from Feely's high offender score. 2RP 8-9. Instead, the court imposed an exceptional sentence based on the jury's finding Feely endangered

someone and the fact that *finding* would go unpunished if the sentences were run concurrently. 2RP 24-26. However, the court misapprehended the law in interpreting the "free crimes" aggravator as providing a basis for an exceptional sentence in this circumstance. Moreover, there is no statutory authority for the court to impose an exceptional sentence based on the jury's finding of endangerment. Rather, the legislature has decided for a 12-month-plus-one-day enhancement to the base sentence as punishment for such conduct. Because the court's sentence was unauthorized, reversal is required.

This Court should reverse an exceptional sentence when: (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. State v. France, 176 Wn. App. 463, 308 P.3d 812 (2013); RCW 9.94A.585(4).

This Court should reverse the exceptional sentence because the reasons supplied by the sentencing court do not justify a

departure from the standard range. In its written findings, the court found:

> [T]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

CP 76. This is known colloquially as the "free crimes" aggravator.

The free crimes aggravator is triggered when the defendant's high offender score combines with multiple current offenses to leave "some of the current offenses going unpunished." RCW 9.94A.535(2)(c). Thus, once the defendant has some current offenses going unpunished, the trial court's discretion to impose an exceptional sentence on all current offenses is triggered. France, 176 Wn. App. at 470.

Here, however, the court was not concerned with a current *offense* going unpunished. Rather, as its oral ruling indicates, the court was concerned with the jury's special finding of endangerment going unpunished. This court may consider the trial court's oral findings and conclusions in order to interpret and clarify its written findings and conclusions. Sweeten v. Kauzlarich, 38 Wash.App. 163, 169, 684 P.2d 789 (1984) (cited in State v.

Martinez, 76 Wash.App. 1, 3–4 n. 3, 884 P.2d 3 (1994), review denied, 126 Wash.2d 1011, 892 P.2d 1089 (1995)).

The statute is unambiguous, however, and allows the court to depart from the standard range when the result is a "current offense" going unpunished. RCW 9.94A.535(2)(c). The free crimes aggravator therefore did not justify the sentence imposed by the court under these particular circumstances.

The legislature has provided the jury's special finding of endangerment is to be honored by imposing a 12-month-plus-one-day enhancement to the base sentence for eluding. RCW 9.94A.533(11). There was therefore no authority for the court to use the finding as a basis to impose consecutive sentences. This Court should reverse the exceptional sentence.

D. CONCLUSION

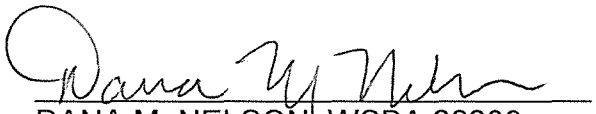
Prosecutorial misconduct and ineffective assistance of counsel deprived Feely of his right to due process and a fair trial. This Court should reverse his convictions and enhancement.

Alternatively, this Court should remand for resentencing because the court was not authorized to impose consecutive sentences based on the jury's enhancement finding.

Dated this 6th day of April, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

Local News

Man convicted in fatal car crash

Originally published February 4, 2009 at 12:00 am
Updated February 3, 2009 at 10:08 pm

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

By news wires
Seattle Times Staff

Yakima

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

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

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

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

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

Seattle Times Staff

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APPENDIX B

FINAL BILL REPORT
ESHB 1030

C 219 L 08
Synopsis as Enacted

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

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

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

Background:

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

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

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

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

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

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

Summary:

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

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

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

Votes on Final Passage:

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

Laws of 2008, c 219, § 2

Effective: June 12, 2008

60th

APPENDIX C

HOUSE BILL REPORT
ESHB 1030

As Passed Legislature

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

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

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

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 1/10/07, 2/1/07 [DPS];
Appropriations: 3/3/07 [DPS(PSEP)].

Floor Activity:

Passed House: 3/8/07, 98-0.

Floor Activity:

Passed House: 1/23/08, 97-0.
Senate Amended.
Passed Senate: 3/6/08, 48-1.
House Concurred.
Passed House: 3/8/08, 93-0.
Passed Legislature.

Brief Summary of Engrossed Substitute Bill

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

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

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

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

Staff: Yvonne Walker (786-7841).

HOUSE COMMITTEE ON APPROPRIATIONS

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

Staff: Elisabeth Donner (786-7137).

Background:

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

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

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

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

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

Summary of Engrossed Substitute Bill:

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

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

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

Appropriation: None.

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

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

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

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

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

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

(Opposed) None.

Staff Summary of Public Testimony: (Appropriations)

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

(Opposed) None.

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

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

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

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

APPENDIX D

SENATE BILL REPORT
ESHB 1030

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

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

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

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

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

SENATE COMMITTEE ON JUDICIARY

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

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

Staff: Lidia Mori (786-7755)

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

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

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

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

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

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

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

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

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

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

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

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

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

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

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

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72450-9-I
	)	
THOMAS FEELY, JR.	)	
	)	
Appellant.	)	

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 6TH DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS FEELY, JR
DOC NO. 788137
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF APRIL 2015.

X Patrick Mayovsky