SC#93071-6

NO. 33098-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ANDREW JACKSON GILBERT, JR.,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

ANDREW JACKSON GILBERT, JR. requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Gilbert seeks review of an unpublished decision of Division III of the Court of Appeals dated April 7, 2016. (Appendix "A" 1-5)

3. ISSUE PRESENTED FOR REVIEW

Has the Court of Appeals correctly interpreted the applicability of *State v. Rooth,* 129 Wn. App. 761, 121 P.3d 755 (2005) to the facts and circumstances of Mr. Gilbert's case?

4. STATEMENT OF THE CASE

Sergeant Sursely of the Moses Lake Police Department was on duty on the evening of August 26, 2014. There had been a report of a loud motorcycle with two (2) riders. One of the riders was wearing a backpack. (RP 104, ll. 9-10; RP 105, ll. 2-3; ll. 16-25)

The sergeant observed the motorcycle and began to follow it. As the motorcycle increased its speed he activated his lights and siren. (RP 107, ll. 16-23)

A pursuit ensued for two (2) minutes forty-nine (49) seconds. The motorcycle and patrol car were traveling at excessive speeds in residential

areas. The motorcycle also failed to stop at an intersection. (RP 108, ll. 17-21; RP 109, ll. 6-13; RP 110, ll. 2-8; RP 112, ll. 20-21)

Sergeant Sursely ceased pursuit due to the excessive speeds. (RP 109, ll. 15-21)

After midnight, Officer McCain of the Moses Lake Police Department saw a motorcycle with two (2) people near a pickup. As he approached it it took off at a high rate of speed. It did not stop for his lights or siren. (RP 197, ll. 1-2; RP 205, ll. 6-11; RP 208, ll. 1-7; ll. 13-17)

Officer McCain did not know if this was the same motorcycle that Sergeant Sursely had heard. He had been hearing a motorcycle throughout the evening. (RP 199, ll. 14-15; RP 240, ll. 19-22)

As the pursuit continued the motorcycle failed to stop at an intersection. It later went up on a canal bank and became stuck in a ditch. When it emerged from the ditch it slid and slightly impacted his patrol car. (RP 199, ll. 14-15; RP 215, ll. 20-23; RP 219, ll. 8-11; RP 219, l. 20 to RP 220, l. 13)

Officer McCain recognized the driver of the motorcycle as Mr. Gilbert. He was not wearing a helmet. (RP 221, ll. 5-20)

An Information was filed on August 27, 2014 charging Mr. Gilbert with one (1) count of attempting to elude a pursing police vehicle and one (1) count of second degree vehicle prowling. (CP 1)

An Amended Information was filed on October 6, 2014 adding a second count of attempting to elude a pursuing police vehicle. It (Count I)

referred to the events of August 26 involving Sergeant Sursely. Count II involved Officer McCain. It included an enhancement. (CP 27)

A Second Amended Information was filed on October 22, 2014 adding accomplice liability to the second degree vehicle prowling count. (CP 35)

Defense counsel moved for a dismissal of Count I after the State rested. The trial court granted the motion. (RP 282, l. 10; RP 302, ll. 9-14)

Prior to closing argument the trial court advised the jury that one (1) count had been dismissed. The Court stated: "**You'll see that reflected in the jury instructions**." (RP 309, ll. 19-23) (Emphasis supplied.)

The prosecuting attorney, during his closing argument, referenced **Count I** as to both the verdict form and special verdict form. (RP 325, l. 4 to RP 339, l. 25) (Emphasis supplied.)

Defense counsel conceded that Mr. Gilbert was guilty of attempting to elude a pursuing police vehicle on August 27, 2014. He only challenged the enhancement on Count II. (RP 340, ll. 10-21; CP 144)

The to-convict instruction on attempting to elude a pursuing police vehicle (Instruction 12) referred to **Count I.** Both the verdict form and special verdict form also referred to **Count I.** (RP 317, l. 21 to RP 318, 22; RP 323, ll. 17-20; CP 112; CP 122; CP 124; Appendix "B"; Appendix "C"; Appendix "D") (Emphasis supplied.)

The jury found Mr. Gilbert guilty of Counts **I** and III. (CP 122; CP 123) (Emphasis supplied.)

The jury was polled on both convictions as well as the special verdict form. The jury was unanimous in its decision. (RP 368, l. 16 to RP 370, 20; RP 372, l. 24 to RP 375, l. 9) (Emphasis supplied.)

Judgment and Sentence was entered on January 20, 2015. It refers to the **Count I** conviction. Paragraph 2.3 deals with the enhancement. Mr. Gilbert was sentenced to a term of forty-one (41) months in prison. During the sentencing hearing the trial court referred to **Count I** on two (2) occasions. (RP 380, ll. 17-19; RP 385, ll. 11-12) (Emphasis supplied.)

Mr. Gilbert filed his Notice of Appeal on January 20, 2015. (CP 163)

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals decision runs contrary to the decision in *State v. Rooth, supra.* It contravenes RAP 13.4(b)(2).

The Court of Appeals attempts to distinguish the *Rooth* case from the facts and circumstances in Mr. Gilbert's case. It concludes that because Count I was dismissed and not submitted to the jury that this constitutes a sufficient distinguishing factor and precludes application of the *Rooth* analysis.

The Court of Appeals states at p. 4: "First, there's no indication in our record that the jury here was ever notified about the charging document, let alone the numbering of counts in that document."

As the courts are well aware a charging document does not constitute evidence. It merely informs a defendant of the charge(s) against him/her. The numbering of the counts has significance because that helps to distinguish when multiple counts of the same offense are included in a charging document.

The trial court, the prosecuting attorney, and the jury instructions all informed the jury that they were considering **Count I** which had already been dismissed. They found Mr. Gilbert guilty of **Count I**. A defendant cannot be guilty of an offense that has been dismissed. (Emphasis supplied.)

The Court of Appeals recognized that the elements instruction and the verdict form were internally consistent. (Decision at p. 5.)

The Court of Appeals also ruled that the issue is one of clerical error only. (Decision at p. 5) The Court is in error.

The State, in the *Rooth* case, argued that the error was clerical in nature and that the judgment and sentence could be corrected pursuant to CrR 7.8. The Court ruled at 770-71:

> In *Presidential Estates Apartment Associates v. Barrett,* 129 Wn.2d 320, 326, 917 P.2d 100 (1996), the court set forth the review necessary to determine whether an error is clerical or judicial. The court looks at "whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial" to determine if the error is clerical. *Presidential,* 129 Wn.2d at 326. If it does, then the amended judgment merely corrects the language to reflect the court's

> intention or adds the language the court inadvertently omitted. *Presidential,* 129 Wn.2d at 326. If it does not, then the error is judicial and the court cannot amend the judgment and sentence. *Presidential,* 129 Wn.2d at 326.
>
> Here, the trial court's judgment followed a jury trial, not a bench trial. The trial court sentenced according to the jury's verdicts, which the State alleges were incorrect because of clerical error. Nothing in the record indicates that the trial court intended to sentence in accord with the information but, through some clerical error, it wrongfully sentenced Rooth. Perhaps if the verdict forms had identified the firearm, *i.e.,* the .22 caliber handgun or the 9mm handgun, there would be a basis to address clerical error. But that is not evident from the record. And "an intentional act of the court, even if in error, cannot be corrected under [CrR 7.8]." *Wilson v. Henkle,* 45 Wn. App. 162, 167, 724 P.2d 1069 (1986). The error in the instructions and the judgment and sentence were judicial errors, not clerical errors.

Mr. Rooth's convictions were reversed and the case dismissed.

Moreover, in *State v. Pharr,* 131 Wn. App. 119, 124, 126 P.3d 66 (2006), the Court ruled that a

> ... judge's sentencing authority is limited to "the facts reflected in the jury verdict." The jury is presumed to follow the instructions given. Thus, verdicts incorporate the instructions on which they are grounded and reflect the facts required to be found as a basis for decision.

The exact same remedy should be applied in Mr. Gilbert's case.

6. CONCLUSION

The Court of Appeals decision is in conflict with *State v. Rooth, supra.* RAP 13.4(b)(2) is applicable.

Mr. Gilbert has been convicted of an offense that was dismissed at trial. He is entitled to relief.

DATED this 25th day of April, 2016.

Respectfully submitted,

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APPENDIX "A"

FILED
April 7, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 33098-2-III
Respondent,	)	
	)	
v.	)	
	)	
ANDREW JACKSON GILBERT, JR,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Andrew Gilbert appeals his conviction for attempting to elude and second degree vehicle prowling, arguing that the eluding charge should be dismissed. Distinguishing the case he relies upon, we affirm.

FACTS

In the late evening of August 26, 2014, a Moses Lake police sergeant chased, but was unable to apprehend, a motorcycle containing two people. The sergeant broke off pursuit when the motorcycle drove at high speed through a residential area. About two hours later, a man call 911 to report that someone was in his pickup truck while another person waited nearby on a motorcycle. An officer responded to the location and saw the two men. They got on the motorcycle and fled with the officer giving chase.

The motorcycle eventually crashed and the occupants were arrested after fleeing on foot. Mr. Gilbert was identified as the motorcycle driver during the second pursuit. The prosecutor ultimately charged Gilbert in count 1 with attempting to elude for the successful evasion of the sergeant on August 26; count 2 was identified as attempting to elude on August 27; count 3 alleged second degree vehicle prowling on August 27. The matter proceeded to jury trial.

There was no identification of Mr. Gilbert as the driver on the August 26 eluding count and that charge was dismissed at the conclusion of the State's case. The remaining charges, identified in the charging documents as counts 2 and 3, were submitted to the jury. The jury was instructed on the elements of the charge of eluding "as charged in count one" and the verdict form for that count identified the attempting to elude "as charged in count one." Clerk's Papers (CP) at 112, 122. In contrast, the elements and verdict form for the vehicle prowling did not make any reference to a "count." CP at 117, 123.

The jury convicted Mr. Gilbert on both charges submitted to it. He then timely appealed to this court.

ANALYSIS

The sole challenge raised in this appeal concerns the attempting to elude count. Mr. Gilbert argues that because the jury instructions and verdict referred to the eluding

"as charged in count one" when in fact, count one had already been dismissed, there is no valid verdict on the eluding charge. However, there was no error.

Mr. Gilbert contends this case is controlled by *State v. Rooth*, 129 Wn. App. 761, 121 P.3d 755 (2005).[1] Although there are some superficial similarities between this case and that one, the error identified in *Rooth* did not occur in this case.

As relevant here, *Rooth* involved a prosecution for two counts of unlawful possession of a firearm; one of the weapons was a .22 caliber handgun and the other a 9 mm handgun.[2] The 9 mm gun was identified in the charging document as the basis for count I, while the .22 caliber was the basis for count II. *Id.* at 769. However, the court's instructions and accompanying verdict forms reversed the count number for each weapon from the count number used in the charging document. *Id.* During closing argument, the prosecutor conceded that the evidence was insufficient to support the charge involving the .22 caliber handgun. The jury acquitted the defendant on count one and convicted on count two. *Id.* at 769-770.

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[1] Mr. Gilbert also contends his counsel was ineffective for failing to identify and challenge the verdict form. Since we address the merits of his instructional challenges and conclude that there was no prejudicial error, we decline to further address the ineffective assistance contention.

[2] Three additional charges were submitted to the jury but are not relevant to the issue presented here. 129 Wn. App. at 766.

Division Two concluded that the "as charged in count" language of the verdict forms referenced the charging documents.[3] *Id.* at 772. The appellate court then interpreted the jury's acquittal on "count I" as involving the 9 mm handgun. *Id.* Because the evidence concerning the .22 caliber handgun was insufficient, the jury's verdict on "count II" was reversed. *Id.*

Similarly here, Mr. Gilbert argues that the "as charged in count one" language used in the eluding count instructions should be read to refer to the dismissed August 26 eluding instead of the August 27 eluding presented to the jury. For a couple of reasons, there was no risk here of any similar confusion to that which occurred in *Rooth*.

First, there is no indication in our record that the jury here was ever notified about the charging document, let alone the numbering of counts in that document. While any initial instructions to the venire were not transcribed for appeal, the court's preliminary instructions do not at all refer to the charges before the jury and the court's written instructions likewise only reference a single eluding charge rather than the two similar counts described in the charging document.

More critically, unlike the jury in *Rooth* that rendered verdicts on two similar weapons charges, the jury here decided only a single eluding charge. There was no

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[3] The court's opinion does not indicate whether the charging document was read to the jury or whether the contents of the charging document were otherwise identified to the jury.

possibility of confusion between multiple similar charges as might have occurred in *Rooth*. Here the jury was told that it was to consider whether the prosecution had proved the elements of an attempting to elude count committed on August 27 "as charged in count one." The verdict form similarly referred to the eluding "as charged in count one." The elements instruction and the verdict form were internally consistent, even if denominating the "count one" eluding charge differently than it had been alleged in the charging document.

We see no risk of jury confusion here. The panel was properly instructed solely on one count of attempting to elude and returned a single verdict on a single eluding charge. If there were any error here at all, it was a mere clerical error. Mr. Gilbert's right to a jury determination of the charge against him was not impinged in the slightest.

The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Price, J.P.T.

APPENDIX "B"

Instruction No. 12

To convict the defendant of attempting to elude a pursuing police vehicle as charged in count one, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 27, 2014, the defendant drove a motor vehicle;

(2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;

(3) That the signaling police officer's vehicle was equipped with lights and siren;

(4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;

(5) That while attempting to elude a pursuing police vehicle, the defendant drove his or her vehicle in a reckless manner; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "C"

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 14-1-00579-5
v.	)	VERDICT FORM A
ANDREW JACKSON GILBERT, JR., Defendant.	)	ORIGINAL

We, the jury, find the defendant, Andrew Jackson Gilbert, Jr.,

GUILTY of the crime of attempting to elude as charged in
(write in not guilty or guilty)

count one.

DATED: 10-24-14

James H. Meier
Presiding Juror

APPENDIX "D"

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON, Plaintiff, v. ANDREW JACKSON GILBERT, JR., Defendant.	)	No. 14-1-00579-5 SPECIAL VERDICT FORM ORIGINAL

We, the jury, answer the question submitted by the court as follows:

QUESTION: Was any person, other than Andrew Jackson Gilbert, Jr. or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Andrew Jackson Gilbert, Jr. during his commission of the crime of attempting to elude a police vehicle as charged in count one?

ANSWER: YES (Write "yes" or "no")

DATE: 10-24-14

James H. Mees
Presiding Juror

NO. 33098-2-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. ANDREW JACKSON GILBERT, JR., Defendant, Appellant.	)	GRANT COUNTY NO. 14 1 00579 5 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 25th day of April, 2016, I caused a true and correct copy of the *RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW* to be served on:

RENEE S. TOWNSLEY, CLERK
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