NO. 47136-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DALE HARVEY OYA, III, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 14-1-00528-0

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRENT J. HYER
Deputy Prosecuting Attorney
WSB # 33338

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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5. Is there sufficient evidence from which a rational trier of fact could have found the essential elements for defendant's convictions when the evidence is taken in the light most favorable to the State?

B. STATEMENT OF THE CASE.

1. Procedure

On February 10, 2014, Dale Harvey Oya, III ("Defendant") was charged with assault in the second degree (Count I), failure to remain at injury accident (Count II), and attempting to elude a pursuing police vehicle (Count III). CP 1-2. Counts I and II were alleged to be acts of domestic violence as defined by RCW 10.99.020. CP 1-2. Count III alleged that during the eluding, defendant endangered one or more persons, an enhancement to that crime. CP 1-2.

Prior to trial, defendant filed a motion to sever the eluding charge from the other two counts. CP 9-15. The trial court denied this motion. 2 RP 58.

The jury found defendant guilty of Counts II and III with the enhancements on each count. CP 74-80. Defendant was sentenced to 60 months. CP 83-95.

Defendant filed a timely notice of appeal. CP 96-109.

2. Facts

Lacee Sharp and her mother Connie Sharp were returning from the movies when they saw a van strike Angel Boyd. 4 RP 348. They pulled over and Lacee called 911. 4 RP 349. Lacee could not see who was driving the van, but after the van hit Boyd, it drove back around and there were "words exchanged" before the van drove off as fast as it could. 4 RP 350. Boyd stayed on the ground and cried. 4 RP 352. Boyd told Lacee that her knee hurt, but that she was all right. 4 RP 352. Lacee stayed until police arrived. 4 RP 352.

Connie Sharp did not see the van hit Boyd, but she saw the van circle around the lot and pull upside Boyd. 4 RP 370. The driver of the van and Boyd were having some type of altercation. 4 RP 372. Connie Sharp saw that a man with dark hair was driving the van. 4 RP 372. She was able to give the van's license plate, at least a partial plate, to 911. 4 RP 372.

Gabriealla Lopez also observed the incident. 3 RP 286. Lopez saw a man in a van arguing with Boyd. 3 RP 288. Boyd reached into the car and the man starting driving away. 3 RP 289. The van partially ran over her, then reversed, then ran over her again. 3 RP 289. The van then drove off. 3 RP 290. Lopez contacted Boyd, who was on the floor sobbing. 3 RP 292. Lopez then called the police. 3 RP 293.

Tacoma Police Officers Bortle and Welsh were dispatched to the gas station regarding a hit and run involving a pedestrian. 4 RP 383-384. When they arrived, Officer Bortle observed Boyd in obvious pain, grabbing at her leg. 4 RP 384. Boyd was yelling and screaming that her leg hurt. 4 RP 384. Officer Bortle noted that Boyd's left ankle was swollen. 4 RP 385.

Officer Welsh noted that Boyd was crying and holding her leg. 3 RP 246. Medical aid arrived and assessed Boyd's injuries. 3 RP 252. Boyd declined to go to the hospital for her injuries. 3 RP 253. There was swelling on her knee and ankle. 3 RP 254. Boyd was limping and had a hard time walking. 3 RP 253.

Officer Welsh interviewed Boyd. 3 RP 254. The interview was difficult and Boyd was holding back. 3 RP 258. Boyd refused to write out a statement. 3 RP 256. Boyd also refused to let officers photograph her injuries. 3 RP 253.

Officer Welsh noted that Boyd was hysterical and crying. 3 RP 258. Boyd said that defendant, who is her boyfriend, she and Arlene Winrow were out celebrating defendant's birthday. 3 RP 254. They were on the way to the casino and stopped to get gas. 3 RP 254. She and defendant got into an argument about infidelity, cheating, and jealously issues. 3 RP 254. Winrow left the van and Boyd got out shortly afterwards. 3 RP 255.

As Boyd was walking towards the gas station, she heard the van rev up. 3 RP 255. She turned around and saw the van was coming directly at her at a fast pace. 3 RP 255. She attempted to get out of the way, but the van still her hit. 3 RP 255. Defendant put the van in reverse and started coming at her again. 3 RP 255. She had to roll out of the way. 3 RP 255. Defendant then stopped the van and told her to get in the vehicle. 3 RP 256. She refused and he sped away. 3 RP 256. Officers searched for the van that night but did not locate it. 3 RP 257.

Three days later, Officer Walsh saw the van while on patrol. 3 RP 304. By the time he turned around and caught up to the van, it was parked and unoccupied. 3 RP 306. Officer Walsh set up surveillance on the van along with other police officers, including Officer Waddell. 3 RP 307.

About 40 minutes later, defendant left in the van. 3 RP 311. As defendant turned eastbound, the officers turned on their emergency lights

to initiate a traffic stop. 3 RP 312. Defendant stopped in the middle of the road. 4 RP 407. Officer Waddell exited his car and was yelling commands, but defendant took off driving. 4 RP 408.

Officers pursued defendant with their lights and sirens on. 3 RP 315. Officer Waddell was now the lead vehicle. 4 RP 408. Defendant was travelling approximately 40 to 50 miles an hour. 4 RP 409. Defendant slowed to about 15 to 20 miles an hour and a passenger jumped out of the van. 4 RR 409[1]. Officer Waddell stopped his pursuit of the van to contact this person, later identified as Jordan George. 4 RP 409.

Defendant then turned south and accelerated up to 70-75 miles per hours. 3 RP 316. The speed limit on the road was 35 miles per hour. 3 RP 318. Defendant eventually stopped. 3 RP 317. The pursuit lasted about three-quarters of a mile. 3 RP 321. Defendant was arrested without incident. 3 RP 320.

C. ARGUMENT.

1. THE COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S SEVERANCE MOTION.

Washington law disfavors separate trials. ***State v. Grisby***, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). CrR 4.3(a) allows the State to join offenses in one charging document if the offenses: "(1) Are of the same or

[1] Officer Walsh's testimony was different as he believed that the van stopped abruptly and a passenger in the front seat jumped out. 3 RP 316.

similar character, even if not part of a single scheme or plan; or (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.4(b) allows the trial court to sever joined offenses if doing so "will promote a fair determination of the defendant's guilt or innocence of each offense." A defendant seeking severance has the burden to show that joinder is so manifestly prejudicial that it outweighs the interest in judicial economy. ***State v. Bythrow***, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

Considerations in whether to grant or deny a severance motion are "the jury's ability to compartmentalize the evidence, the strength of the State's evidence on each count, the issue of cross admissibility of the various counts, [and] whether the judge instructed the jury to decide each count separately." ***State v. Kalakosky***, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). A court presumes jurors follow the court's limiting instructions. ***State v. Johnson***, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

A trial court deciding a motion to sever offenses should consider four factors, the presence of which tends to neutralize any prejudice that may result from the joinder of offenses. Those factors are: (1) the strength of the State's evidence on each count; (2) the clarity of defenses to each count; (3) whether the trial court properly instructed the jury to consider the evidence of each crime, (4) the admissibility of the evidence

of the other crimes even if they had been tried separately or never charged or joined. ***State v. Hernandez***, 58 Wn. App. 793, 798, 794 P.2d 1327 (1990), *disapproved on other grounds by*, ***State v. Kjorsvik***, 117 Wn.2d 93, 812 P.2d 86 (1991), *citing* ***State v. Watkins***, 53 Wn. App. 264, 766 P.2d 484 (1989).

However, even if evidence is not cross-admissible, severance is not mandated. ***Bythrow***, 114 Wn.2d at 720. The defendant must be able to point to "specific prejudice" resulting from the joint trial. *Id.* Given the jury's ability to compartmentalize the evidence of the separate counts, the strength of the State's evidence, and the strong public policy of judicial economy, a trial court can deny a motion for severance even if the evidence of the individual counts is not cross-admissible.

Courts have held that when evidence of one crime is admissible to prove an element of a second, then joinder or consolidation of the two crimes for trial cannot be said to be unlawfully prejudicial. ***State v. Kinsey***, 7 Wn. App. 773, 502 P.2d 470 (1972). The use of the word "may" indicates that the legislature gave the trial court considerable discretion in its determination whether two informations should be consolidated for trial. ***State v. McDonald***, 74 Wn.2d 563, 445 P.2d 635 (1968)(consolidating grand larceny and assault informations for trial). The trial court's power to consolidate cases for trial will not be disturbed

unless a manifest abuse of discretion has been demonstrated. ***State v. Norby***, 122 Wn.2d 258, 264-265, 858 P.2d 210 (1993); ***State v. Orange***, 78 Wn.2d 571, 573, 478 P.2d 220 (1970); ***State v. Mason***, 41 Wn.2d 746, 752, 252 P.2d 298 (1953). The defendant bears the burden of demonstrating such abuse. ***State v. Russell***, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

Defendant argues that the court erred because consolidation is inherently prejudicial citing ***State v. Ramirez***, 46 Wn. App. 223, 226, 730 P.2d 98 (1986)(discussing joinder and severance under CrR 4.3). Brief of Appellant ("BOA"), p. 14. ***Ramirez*** stands for the proposition that when the prosecution files a multiple count information pertaining to more than one alleged victim and evidence of one count would not be admissible in a separate trial for the other, the trial court abuses its discretion if it denies a motion to sever. Although never expressly overruled, this case can no longer be deemed to be controlling since the Supreme Court issued the decisions in ***State v. Markle***, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992) and ***State v. Kalakosky***, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993). In both these cases, the court held that the fact that separate counts would not be cross-admissible in severed proceedings does not constitute a sufficient ground to sever as a matter of law. Thus, in Washington, a defendant

cannot show a court abused its discretion in consolidating trials merely by arguing that consolidation is "inherently prejudicial."

In the instant case, the State had strong evidence for each count. The victim and independent witnesses testified about defendant's driving the van, hitting the victim and then fleeing the scene leaving the injured victim behind, even if it was at her urging. 4 RP 348; 3 RP 289. Police searched for defendant that night, but he could not be located. 3 RP 257. Three days later, defendant is spotted in the same van. 3 RP 304. Police attempt to pull him over. Defendant stops, but then takes off again when police exit their vehicles. 4 RP 408.

There was a distinct difference in each offense and substantial evidence to support each count. There was no danger of the jury not being able to compartmentalize the evidence for each count.

The jury was also instructed to decide each count separately. CP 50. A jury is presumed to follow a court's instructions. ***State v. Lough***, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). The jury was able to follow these instructions as they found defendant not guilty of Count I.

Further, there is no indication that there were any problems in terms of the clarity of defenses. Defendant argues that he wanted to present evidence on his own behalf regarding Count III, but that he did not want to give up his right to remain silent regarding Counts I and II. BOA, page 17. Defendant indicates that he was prepared to explain why he

failed to stop and how he had not been reckless in his driving. BOA, page 17. As the trial court instructed the jury on the lesser included charge of failure to obey, defendant was able to make these arguments to the jury. CP 66-68. Defendant was able to argue that his driving was not reckless and that the passenger was not endangered. 5 RP 504-512. The jury, after hearing the evidence, disagreed with defendant's arguments.

Additionally, a defendant's desire to testify only as to some, but not all, of the counts is an insufficient reason to require severance. ***State v. Weddel***, 29 Wn. App. 461, 467-468, 629 P.2d 912 (1981). Severance is required only if the defendant makes a convincing showing to the trial court that he has both important testimony to give concerning one count and a strong need to refrain from testifying about the other. *Id.* at 469. When defendant renewed his motion to sever count III at the close of the State's case, the trial court noted that this really wasn't a Hobson's choice about testifying on one count and not another because defendant's testimony would really also go to an aspect of Count I, as well as what he wanted to argue about Count III. 4 RP 449.

Finally, the evidence for all of the charges would likely be cross-admissible. First, defendant being found in the van during the elude three days later helps establish his identity that he was the driver of the van during the assault and hit and run. 2 RP 52-53.

Second, the incidents are related. Assuming arguendo that the trial court had severed the elude, the elude jury would still need to hear why

three days later, police are searching for a van and setting up surveillance on the van in order to find the driver. The reason for this police activity is because the van was involved in the initial assault and hit and run.

Third, the charge of attempted elude is consistent with evidence of flight. Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. "Evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence." ***State v. Bruton***, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). "Flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution." *Id.* The law does not define what circumstances constitute flight and as such, what may be shown as evidence of flight is broad. ***State v. Jefferson***, 11 Wn. App. 566, 571, 524 P.2d 248 (1974). If the evidence is relevant, then it is admissible unless it is so prejudicial that it outweighs its probative value under ER 403. In this case, the trial court evaluated this evidence under 403 and did not believe that it would be more prejudicial than probative in considering the severance. 2 RP 57. The trial court astutely determined that there are two alternative explanations for defendant's flight and that it is up to the jury to decide which explanation is more credible. 2 RP 57-58.

These two acts by the defendant were a "series of acts connected together" and properly joined for trial. Defendant has not shown that the joinder of them for trial was so manifestly prejudicial as to outweigh the judicial economy of one trial. The trial court did not abuse its discretion in denying defendant's motion to sever. The Court should affirm the jury's verdicts.

2. DEFENDANT WAIVED THE CONFRONTATION CLAUSE ARGUMENT WHERE HE FAILED TO OBJECT AT TRIAL.

"A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182, 1189 (1985). If the specific objection made at trial is not the basis the defendants are arguing on appeal, "they have lost their opportunity for review." *Id.* To preserve an issue for review, an objection must be timely and specific. ***State v. Gray***, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006).

In addition, the appellate court will not entertain a claim of error not raised before the trial court. RAP 2.5(a). An exception to that general rule is RAP 2.5(a)(3), which requires an appellant to demonstrate a manifest error affecting a constitutional right. ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). "Stated another way, the appellant 'must identify a constitutional error and show how the alleged error

actually affected the appellant's rights at trial.' " ***State v. O'Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (*quoting* ***State v. Kirkman***, 159 Wn.2d 918, 926–927, 155 P.3d 125 (2007)).

To determine if an error is of constitutional magnitude, the appellate looks to whether the defendant's alleged error is actually true, and whether the error actually violated the defendant's constitutional rights. ***O'Hara***, 167 Wn.2d at 98. An error is manifest if it is so obvious on the record that the error warrants appellate review. *Id.*, at 99–100. The defendant must also demonstrate "actual prejudice," meaning the defendant must plausibly show the asserted error had practical and identifiable consequences at trial. ***Gordon***, 172 Wn.2d at 676,

Failure to raise confrontation issues at or before trial bars any consideration on appeal. "A clear line of decisions—***Melendez-Diaz***, ***Bullcoming***, ***Jasper***, and ***Hayes***—requires that a defendant raise a Sixth Amendment confrontation clause claim at or before trial or lose the benefit of the right." ***State v. O'Cain***, 169 Wn. App. 228, 248, 279 P.3d 926 (2012) (*citing* ***Melendez–Diaz v. Massachusetts***, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009); ***Bullcoming v. New Mexico***, ——U.S. ——, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011); ***State v. Jasper***, 174 Wn.2d 96, 271 P.3d 876 (2012); ***State v. Hayes***, 165 Wn. App. 507, 265 P.3d 982 (2011), *review denied*, 176 Wn.2d 1020 (2013)). The same rule applies to

the article I, section 22 confrontation clause right of the Washington Constitution. ***State v. Fraser***, 170 Wn. App. 13, 25, 282 P. 3d 152 (2012); ***O'Cain***, 169 Wn. App. at 252.

In ***Fraser***, the defendant was charged with murdering his ex-girlfriend's new boyfriend. The State introduced evidence documenting Fraser's cell phone communications with his ex-girlfriend to prove motive; that Fraser was obsessed with her and jealous of the victim. *Id.*, at 25. At trial, Fraser objected unsuccessfully on the basis that the records were more prejudicial than probative. *Id.* On appeal, he argued he had a right to confront the person who created the reports. *Id.*, at 26.

Since ***Crawford v. Washington***, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Court of Appeals has held in several cases that the defendant has waived, or failed to preserve, the Confrontation Clause issue where he failed to raise it in the trial court. *See*, ***Fraser*** (Div. I), *supra*. In ***O'Cain***, 169 Wn. App. 228 (Div. I), the defendant waived his Confrontation Clause issue where he failed to raise it at trial. The court admitted admission of victim's out-of court statements to various medical personnel who treated her for her injuries. *Id.*, at 232. In ***State v. Schroeder***, 164 Wn. App. 164, 262 P. 3d 1237 (2011), Division III of the Court of Appeals held that the defendant waived his Confrontation Clause objection to hearsay: admission of laboratory test results in a drug case

without testimony from the analyst who performed the testing. *Cf.* ***Melendez-Diaz***.

In this case, defendant's objection at trial was that this testimony was hearsay. 4 RP 412. The State responded that the witness in question was excited when the statements were made and the trial court overruled the objection. 4 RP 412. Defendant did not object to this testimony under the Confrontation Clause. The Court should decline to hear this issue as this was not the objection below and no record was made regarding the Confrontation Clause.

3. EVEN IF THE COURT ERRED BY ADMITTING HEARSAY EVIDENCE TESTIMONY, IT WAS HARMLESS.

Confrontation clause errors are subject to harmless error analysis. ***Jasper***, 174 Wn.2d at 117. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." ***State v. Guloy***, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. *Id.* The appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.*, at

426. The State must show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. ***Jasper***, 174 Wn.2d at 117.

In this case, the evidence of the elude was overwhelming even if the trial court had excluded Mr. George's statement. The evidence at trial was that defendant initially stopped in the middle of the road after officers turned on their lights and sirens. 4 RP 407. Defendant then looked back at the officers. 4 RP 408. While Officer Waddell was yelling commands at defendant, he took off driving again. 4 RP 408. Even without Mr. George's statement, the evidence showed that defendant willfully attempted to elude police.

Additionally, defendant's offer of proof as discussed above was that he did not stop because he did not have a license and insurance; it was not that he did not know the police were behind him. Similarly, his other argument regarding the elude is that his driving was not reckless (BOA, 39-41). George's testimony has nothing to do with either of defendant's arguments regarding the elude charge at trial or now on appeal. Admission of George's statement was harmless beyond a reasonable doubt.

4. DEFENDANT FAILS TO DEMONSTRATE DEFICIENCY OF COUNSEL OR PREJUDICE THEREBY.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). "Surmounting ***Strickland's*** high bar is never an easy task." ***Padilla v. Kentucky***, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126

Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for ineffective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). In fact:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable error – the kind of testing environed by the Sixth Amendment has occurred.

State v. Webbe, 122 Wn. App. 683, 694, 94 P.3d 994 (2004), *quoting* ***U.S. v. Cronic***, 466 U.S. 648, 656-57, 104 S. Ct. 2039, 80 L. Ed 657 (1984).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge

the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489.

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

a. Defense counsel's performance was not deficient.

Defendant's only argument regarding defense counsel's alleged deficient performance stems from his objecting to George's statement on the basis of hearsay rather than under the Confrontation Clause. BOA, page 33.

The decision of when or whether to object is a classic example of trial tactics. ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.* Even then, the defendant would have to show that the objection would have been sustained. ***State v. Johnston***, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007).

In this case, defense counsel actually did object, just not on the basis that appellate counsel would have used. This does not constitute ineffective assistance of counsel, but a difference in trial tactics and strategy. Additionally, the few statements George made to police about why he jumped out of defendant's moving van were not central to the State's case. The statement, as relayed by Officer Waddell, was relatively minor in this trial and used to show that defendant knew police were after

him during the course of the elude, which is a point that defendant did not challenge at trial and does not challenge on appeal.

b. No prejudice can be presumed to result from the decision not to call the alleged alibi witness.

For a finding of ineffective assistance of counsel, the defendant must demonstrate prejudice. An error is prejudicial if, within reasonable probabilities, it materially affected the outcome of the trial. ***State v. Neal***, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

5. THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS FOR DEFENDANT'S CONVICTIONS.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. ***State v. Lopez***, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" ***State v. Brockob***, 159 Wn.2d 311, 336, P.3d 59 (2006) (*quoting* ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, sufficient evidence supports a conviction when, viewing it in the light most

favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt. ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id. (quoting* ***State v. Myers***, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, determinations of credibility are for the fact finder and are not reviewable on appeal. ***Brockob***, 159 Wn.2d at 336; ***State v. Locke***, 175 Wn. App. 779, 788-89, 307 P.3d 771, 776 (2013). In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99, 101 (1980).

a. Failure to Remain at the Scene of an Injury Accident

To convict defendant of failure to remain at the scene of an injury accident, the State proved that defendant knowingly became involved in an accident that resulted in injury to any person while driving a vehicle and did fail to immediately stop and or remain at the scene of the accident until all of the following statutory requirements were fulfilled: give his name, address, insurance company, insurance policy number, and vehicle

license and exhibit his driver's license to any person struck or injured and render to any person injured in such accident reasonable assistance, including the carrying or making of arrangement for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary, or if such carrying is requested by the injury person or on his/her behalf. RCW 46.52.020(1).

Defendant does not contest that he was the driver of the van that night nor that Boyd was injured in the accident when he struck her and instead focuses both sufficiency arguments on the statutory requirements of a driver when there is an accident.

Defendant's first argument regarding sufficiency is that the State did not prove all of the elements because the defendant actually stopped, which means the State only proved three of the four statutory requirements, not all four of them. BOA, pages 36-37. Defendant's reading of the statute fails to apprehend that these are not elements of the crime. The State does not need to prove all four of these statutory requirements. The law explicitly sets forth that it is the **driver's** responsibility to complete each of them in order to satisfy the driver's obligations under the law. RCW 46.52.020(1), (3). A driver who gets into an accident and provides aid to an injured person, but never gives them their name or insurance has committed the crime the same as if the person provides their name, but fails to stop or render aid and instead drives away. To meet the driver's statutory requirements, the driver must

complete all of the requirements. RCW 46.52.020(4)(a). In this case, the evidence was that defendant fled the scene of the accident and did not stop to render aid to Boyd. 3 RP 256; 3 RP 290; 4 RP 350. Because defendant did not stop and render aid to a person injured in the crash, he failed to satisfy all of his statutory duties as a driver in an accident. The State proved beyond a reasonable doubt that he is guilty of this crime.

Defendant's second argument is that this case is similar to ***State v. Teuber***, 19 Wn. App. 651, 577 P.23 147, *review denied*, 91 Wn.2d 1006 (1978) and that the statutory requirements are satisfied or obviated when they are already known to the other party such as next door neighbors. BOA, pages 37-38. While ***Teuber's*** reasoning may be applicable to this case in terms of the name, license, and insurance requirements, defendant still runs afoul of RCW 46.52.020 because he did not stop and render any assistance to Boyd, who was on the ground crying in pain. Again, defendant failed to satisfy all of his statutory duties as a driver in an accident because of his actions.

Taken in the light most favorable to the State, there was proof beyond a reasonable doubt that defendant committed the crime of failure to remain at the scene of an injury accident. The Court should uphold this conviction.

b. Attempting to Elude

To convict defendant of attempting to elude a pursuing police vehicle, the State proved that defendant willfully failed or refused to

immediately bring his vehicle to a stop and drove his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring his vehicle to a stop by a uniformed officer in a vehicle equipped with lights and sirens. RCW 46.61.024(1).

Defendant does not contest that he willfully failed or refused to stop his vehicle after being signaled to stop by a uniformed officer in a vehicle equipped with lights and sirens. His only argument is that the State failed to prove that he drove in a reckless manner. BOA, page 39. A person operates a motor vehicle in a reckless manner means to drive in a rash or heedless, manner, indifferent to the consequences. CP 64; RCW 46.61.500(1).

In ***State v. Perez***, 166 Wn. App. 55, 61, 269 P.3d 372 (2012), the Court found sufficient evidence for attempting to elude when the defendant "immediately accelerated to over 50 miles per hour in a 25 mile-per-hour zone, freighted a pedestrian, scared a dog, and then ran a stop sign." The ***Perez*** chase lasted 40 seconds. *Id.*

Here the facts are arguably more egregious, or are at least similar to those in ***Perez***. In this case, police attempted to stop defendant by turning on their lights and sirens. 4 RP 406. Defendant stopped directly in the middle of the road. 4 RP 407. As police exit their cars, with their guns drawn, defendant sped away. 4 RP 408. Defendant then slowed his car to 15 to 20 miles an hour and his passenger jumped out of the moving

vehicle. 4 RP 409. After the passenger leapt from the moving van, defendant made a left turn going 30 to 40 MPH. 3 RP 316. Defendant then accelerated up to 75 miles per hour in a 35 mile per hour zone. 3 RP 316. This was on a street with a lot of traffic. 3 RP 316-317. It was a cold night and the roadway was dry, but there were spots of ice. 3 RP 318. Defendant's was reckless and showed that defendant was indifferent to the consequences.

Taken in the light most favorable to the State, there was proof beyond a reasonable doubt that defendant committed the crime of failure to remain at the scene of an injury accident. The Court should uphold this conviction.

c. Attempting to Elude Enhancement

If, during the commission of an attempt to elude a pursuing police vehicle, the defendant endangers one or more persons other than the defendant or the pursuing law enforcement officer, it adds additional time to the presumptive sentence. RCW 9.94A.834.

Defendant argues that the passenger in defendant's van was never endangered during the elude. BOA, page. 43.

The Court has previously noted that the attempt to elude law was passed because of the dangers of high-speed chases such as this one. ***State v. Malone***, 106 Wn.2d 607, 611, 724 P.2d 364 (1986). While defendant dismisses the dangers that police may have shot the passenger or crashed into the van during the chase (BOA, pg. 43), these are real dangers caused

because defendant's failure to stop. Defendant could have also crashed into another driver as he was driving on a street with a lot of traffic. 3 RP 316-317. Even setting aside these theoretical arguments, the evidence was that defendant's passenger flung himself from the van while it was traveling 15-20 miles per hour during the course of the elude. 4 RP 409. This is sufficient evidence that the defendant endangered another person during his commission of this crime.

Taken in the light most favorable to the State, there was proof beyond a reasonable doubt that defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. The Court should uphold this aggravating circumstance.

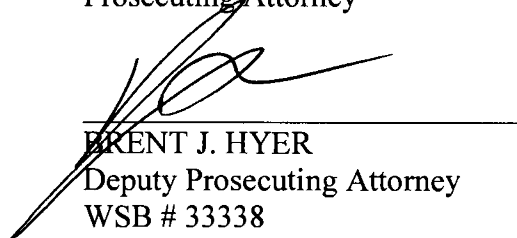
D. CONCLUSION.

The trial court did not abuse its discretion by denying defendant's motion for severance of count III. With respect to Mr. George's statement to police, defendant did not object to this testimony based on his rights under the confrontation clause and the Court should not hear this challenge. Even if the Court does consider this, the error is harmless. Defense counsel was not ineffective for objecting to this evidence as hearsay rather than under the confrontation clause. Finally, sufficient

evidence supports defendant's convictions and the aggravating circumstances. The Court should uphold the jury verdicts in this case and dismiss defendant's appeal.

DATED: January 21, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



BRENT J. HYER
Deputy Prosecuting Attorney
WSB # 33338

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-21-16 Theron Kar
Date Signature

PIERCE COUNTY PROSECUTOR

January 21, 2016 - 10:43 AM

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