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NO. 99040-9

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOHN BRADLEY RAYMOND,
Appellant/Petitioner.

ANSWER TO PETITION FOR REVIEW BY YAKIMA COUNTY

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TABLE OF CONTENTS PAGE

TABLE OF AUTHORITIES .... ii-iii

A. INTRODUCTION 1

ISSUES PRESENTED BY PETITION 1

1. This Court should grant review because the Court of Appeals opinion erred when it determined the State had presented sufficient evidence to support this conviction.
2. This Court should grant review because the Court of Appeals incorrectly determined the trial court did not commit error when it refused Raymond's proposed jury instruction for the word "immediately."

ANSWER TO ISSUES PRESENTED BY PETITION....................... 1

1. The Court of Appeals opinion does not merit review. The Court of Appeals correctly determined that there was sufficient evidence presented.
2. The Court of Appeals correctly determined there was no error on the part of the trial court when it refused to give the proposed instruction

B. STATEMENT OF THE CASE... 2

C. ARGUMENT 11

D. CONCLUSION 19

TABLE OF AUTHORITIES PAGE

Cases

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).......... 18

State v. Benn, 120 Wn.2d 631, 845 P.2d 289 cert. denied, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993).. 16

State v. Brown, 132 Wn.2d 529, 611-612, 940 P.2d 546 (1997) ……….18

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)............. 14, 15

State v. Pacheco, 125 Wn.2d 150, 154, 882 P.2d 183 (1994). 18

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 11

State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999)………………..17

Douglas v. Freeman, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991)……..18

Petersen v. State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983) 17

Schwendeman v. Wallenstein, 971 F.2d 313 (9th Cir. 1992).................. 13

Rules

RAP 13.4(b) .... passim

Statutes

A. **INTRODUCTION.**

Raymond raised two issues on appeal; the State had failed to present sufficient evidence to prove the one court of attempting to elude a pursing police officer and, the court had committed error when it refused to give Raymond's proposed jury instruction defining "immediately." He specifically challenged whether the State had proven "that he drove in a reckless manner or that he failed to immediately stop the vehicle." (Slip at 3)

This case was affirmed by the Court of Appeals, Division III on August 18, 2020 in an unpublished opinion. The court opined "[p]roperly viewed, the evidence permitted the jury to find those elements… [e]mphasizing that speed alone cannot constitute reckless driving and that the incident was over so rapidly, Mr. Raymond contends that the State did not prove its case. He overly simplifies the facts." (Slip at 2-3)

The Court of Appeals ruled there was no basis to reverse the underlying conviction.

ISSUES PRESENTED BY PETITION

1. The State presented insufficient evidence of attempting to elude a police vehicle.
   a. The court denied Appellant's right to a fair trial and the right to present a defense when it refused to instruct the jury as the meaning of "immediately" as it pertains to felony elude.

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals opinion does not merit review. Raymond does not even mention the rule applicable for review to be accepted until his concluding paragraph. He therefore has not met the standards set forth in the Rules of Appellate Procedure, 13.4, which determine whether a matter is should be reviewed.
   a. The Court of Appeals correctly determined that there was sufficient evidence presented.
   b. The opinion in this case does not conflict with other opinion of this court or any division of the Court of Appeals.
   c. The opinion of the Court of Appeals does not address a significant question of law under either the State or Federal Constitutions.
   The Court of Appeals opinion does not merit review under any circumstance and specifically not under RAP 13.4
   d. Neither sufficiency of the evidence nor the denial of the giving of a jury instruction for "immediately" are errors necessitating review by this court.

B. **STATEMENT OF THE CASE**

Mr. Michael Martin the manager of the Yakima County GIS Department testified regarding the information that was sent from Deputy Paganelli's patrol vehicle during this pursuit. RP 131-32. His testimony covered a map which was admitted that showed the route of the pursuit and a portion of that map set out the time and the speed of the deputy's vehicle at each time. RP 133-7. His testimony was that Dep. Paganelli was initially travelling north on North Wenas Road, it began to slow and then slowed rapidly, turned around and then headed south on North Wenas Road. RP 133-34. The deputy's vehicle went from 39 mph to a stop, the lowest actual speed recorded was 7 mph. RP 137-8. The highest record speed for Dep. Paganelli's patrol vehicle was 80 mph. RP 137.

He also testified that the road was not straight and that there was vegetation on the side of North Wenas Road where this elude occurred. RP 142-3.

Deputy Justin Paganelli was working patrol around midnight on April 21, 2017. He was driving a fully marked police car, a Ford Interceptor SUV. In the car with the deputy was his K9 partner. The SUV had overhead lights, lights on the front grill and lights on the back window. Deputy Paganelli testified that he had been involved in approximately 30-35 "self-initiated" pursuits, been a participant in between 45 and 50 pursuits in total. He was wearing his standard issue police uniform. RP 146-7. 148

His vehicle was equipped with both a multidirectional radar for the front and the back and also a hand-held LIDAR unit. The Deputy is certified to operate both of these radars. RP 147-8.

The deputy was patrolling on North Wenas between Brathovde Road and Ames Road. The deputy was familiar with this area because he patrolled it nearly every day. The posted speed limit on this road is 40 MPH. RP 149-50. His testimony what that he did not remember any inclement weather and that the area is "pretty much pitch black…[t]here's no streetlights out there." RP 150, 176. As previously testified to, the SUV being operated by Deputy Paganelli has a GPS unit that tracks its

movement and sends out a signal every ten seconds recording speed, location and general direction of travel. RP 150.

The deputy testified as to the travel of his vehicle from 11:50 p.m. on April 20 (the VRP indicates "a.m.") until 12:04 a.m. on April 21, 2017. At 12:03 a.m. the deputy was on North Wenas headed towards the town of Selah. At that time, he observed a vehicle he testified "…appeared to be going at a high rate of speed. I looked at my radar display. It displayed 78 miles per hour in a 40 zone." The defendant was far enough away that the deputy "…had enough time to stop (his) vehicle, wait(ing) for him to pass and then turn around and perform a traffic stop." RP 151, 172-3. He testified that this section of the road has two corners and in between kind of straightens out. The Deputy was at the southern end and could see the defendant "just prior to the corner." PR 151-2. The deputy kept his radar on during while he was driving, and the unit has both forward and rear facing capability and it displays the speed as the deputy is driving. Once again, the defendant's speed was 78 mph. RP 152, 175. The deputy agreed with Raymond's counsel when counsel stated that Raymond was "…flying by you." RP 174. The speed is posted in the section of road traveled by the defendant. RP 153. Deputy Paganelli confirmed that the section of the road the defendant was traveling had corners and it curved. He testified that common practice would be to slow in this section to avoid

sliding off the roadway and causing an accident. RP 155-6.

The deputy testified that he had pull his patrol vehicle over and was stopped before the defendant passed his location. The deputy had already determined that he was going to stop the speeding vehicle and had activated his emergency lights and siren before the defendant passed the location were the deputy was pulled over and stopped. He further testified that as the defendant passed his location, he did not see any brake lights activate on the defendant's car. RP 156. The deputy testified that the defendant showed no signs of slowing down and in fact appeared to be speeding up. The deputy lost sight of the defendant through a section of the road that was a corner and that he was able to again see the defendant's car after coming out of that second corner, at which time the officer was traveling at 57 miles per hour. RP 158

Soon after this section of the road the deputy's speed was down to 31 miles per hour. He testified that at that time he was observing Raymond quickly slow down at what later turned out to be Raymond's home address. The decrease in speed was so severe that the deputy observed that the defendant's car slid from the pavement onto the gravel driveway, sliding sideways, and almost hitting a fence. RP 159-60

The deputy was still a distance behind Raymond's vehicle as that car entered the drive-way. The deputy testified that he finally caught up

with Raymond's vehicle after it had entered the driveway to his residence and had come to a stop in front of that home. RP 159. By the time the deputy came up behind Raymond's vehicle Raymond had turned off the headlights.

The deputy further testified "I could see his brake lights. He was still a little ways ahead of me. I was trying to catch up. I could see the brake lights activated and the vehicle slid sideways. It was a gravel driveway. He was going too fast to enter that driveway at those speeds… Once he was in the driveway, it appeared that he had turned off the headlights. The car was blacked out." The vehicle continued to move down the long driveway with the lights blacked out driving towards the house. RP 159-60. Deputy Paganelli testified that he estimated the pursuit covered approximately one mile and that during the pursuit Raymond never attempted to slow down or stop until he was at his own driveway. RP 165. 100

The car came to a halt in front of the residence and the door flew open. The deputy did not know whose residence they were at. He drew his pistol because he did not know what Raymond was doing or why Raymond was trying to hide from the deputy. He ordered Raymond to place his hands on top of the vehicle which he complied with initially, however Raymond continued to place his hands back inside the car. RP

161, 182. This continued and finally the deputy made it up to the car door and grabbed Raymond's hand, took him out of the vehicle, put him on the ground and placed him under arrest. The deputy testified the reason he drew his weapon was "[d]ue to the circumstances and the time of day. It was a completely dark driveway. I was by myself. Due to the fact what he had just done, that he failed to stop for emergency vehicle, lights and siren activated, the fact that he blacked out heading down the driveway. I had no idea what he was doing. He was not complying with my commands." RP 161-62. Deputy Paganelli testified that the driveway was completely dark and there may have been a porch light on at the residence. That even after he had parked his patrol vehicle, he had left the emergency lights on. RP 162, 181. Raymond kept stating to the deputy that it was his property and that he was not going to jail. RP 164.

Deputy Paganelli identified numerous photograph exhibits of the area of the pursuit. Some of these pictures identified other roads which entered in to North Wenas road and identified at least one location on the shoulder of that road where Raymond could have safely pulled over. When asked if Raymond could have safely pulled over at that location the deputy testified "[t]here was (sic) plenty of places." RP 166. There were other places along the route of the pursuit, Ranchette Lane, Oakwood Lane and initially right near where the deputy had pulled over, turned his

lights and siren on and waiting for the defendant's car to pass him. RP 166-67.

On cross examination Deputy Paganelli was asked about the response by Raymond to the question the deputy asked when Raymond was finally stopped. The deputy asked why Raymond was going so fast and why he was running from the deputy. The deputy agreed that Raymond denied running from the deputy and state he was in his driveway and he was just going home. RP 169. A later exchange between defense counsel and Dep. Paganelli resulted in the following:

> A. Like I said, I lost sight of him between the first corner and the second corner due to how fast he was going. He had rounded the first or the second corner prior to me being able to turn around and catch up with him.
> Q. You're saying his speed increased from 78 miles per hour?
> A. Yes. My lights were on. It was clear that he had observed me, and he had sped up instead of slowing down.
> Q. When he passes you, you clock him at 78. How fast did he go from that point?
> A. I estimated his speed near 100 miles per hour by the time he rounded that second corner and got on the straightaway.
> Q. You testified that he nearly wrecked when he turned into his driveway.
> A. Yes.
> Q. And he slid sideways into his driveway?
> A. Yes.
> Q. His driveway is gravel, right?
> A. Yes.
> Q. Were there slide marks in the driveway?
> A. I believe there were at the very beginning of the driveway.
> RP 184-5

Raymond's son testified. He stated that he was at home on the night of this incident. That the lighting in the front of the house was just a porch light which was not very bright. RP 198. He testified that he was playing video games with his gaming headset on but one ear was not completely covered. He stated he heard his father come down the driveway the normal 5 miles per hour. He stated that the first thing that drew his attention was "the siren lights" he then states "I did not hear any siren" he almost immediately states again "I started seeing the siren lights coming down the driveway…I kind of glanced over and I didn't go outside, just hearing to see (sic) what was going on." RP 200, 214-5 On redirect Raymond's son testified there was a gap between the time his father came down the driveway and when the police car came down that same driveway. "I can't describe how many minutes, probably like two to five give or take…there was a good gap of time." RP 223.

Raymond took that stand and testified. He stated that he drove home from gambling and that he was "…going a pretty good speed…" He saw a car parked on the side of the road passed it and went down the road turning into his driveway. RP 227 Raymond admitted that he was driving up to 130 miles per hour on the way home. RP 228. He testified that he continued that this speed was through the area just before where the

officer testified, he had been pursuing Raymond. RP 228-9 Raymond admitted that when he passed this car parked on the side of the road he noticed there was a light bar on top. He stated that no lights came on after he drove past this parked police car. RP 229. He stated that he never saw emergency lights as he drove home. He did see those lights after he was parked in front of his house for maybe a minute or two. He stated that he never heard any siren. RP 229-30. He stated that he slowed to about 5 or maybe 10 or 15 miles per hour to get into his narrow driveway. RP 231. He next thing he knew was the deputy was yelling at him to put his hands up and then he was pulled from the car. RP 231.

On cross examination he stated he say headlights first coming into his driveway then when the vehicle was half way down the driveway, he saw its emergency lights. RP 233-34. He confirmed that while driving home on North Wenas he was traveling at 130 miles per hour. He stated that by the time he saw Dep. Paganelli he had already slowed down. RP 237-38. He admitted that he had seen the deputy on the side of the road and saw the light bar on the top of the police car. RP 238. He stated that he slowed down in this area and agreed that he was going 78 miles per hour as he went through the area where he had seen the deputy even though he knew the posted speed limit was 40 miles per hour. He went on to testify "The vehicle was parked on the left-hand side of the road below

Oakwood Road. I went around him. His lights did not come on, no headlights on, no sirens, no lights at all." RP 240. He then went on to state that after he had gone by the office it appeared to him that the police vehicle never moved from its location. RP 240-41.

Raymond's trial counsel stated the following in his opening "John did not notice the emergency lights until they were coming down the driveway, never heard a siren. John was not trying to elude. He was just going home. Thank you. RP 128 He closed this case stating "Where was John Raymond when the officer got there? He's in his car. He's there. He's parked. He's home. If you think about it, 13 seconds, it's such a short period of time. I mean, count 0 to 13. Think about how fast that is. It's a very short gap of time. It is reasonable that he wouldn't see the lights. They have to prove beyond a reasonable doubt that he had knowledge that those lights were activated. RP 268

ARGUMENT

This petition is governed by RAP 13.4(b), which sets forth the standard an appellant must meet before this court will accept review. Raymond does not even try to indicate what part of the original opinion meets the criterion of RAP 13.4(b) there is no basis for review.

These two allegations are controlled by clearly settled case law and the actions of the court did not implicate any of Raymond's rights under

either Constitution. No portion of the court's ruling conflicts with any cases cited by Raymond or any other case.

Issue 1 - Insufficiency of the evidence.

Raymond alleges the Court of Appeals erred when it determined the State presented sufficient evidence to support the jury's verdict. Raymond's allegation is that because all he did was speed for a brief period of time there could be no finding of guilt, claiming that speed alone was not sufficient to support the conviction.

Quoting Judge Korsmo; "Emphasizing that speed alone cannot constitute reckless driving and that the incident was over so rapidly, Mr. Raymond contends that the State did not prove its case. He overly simplifies the facts." (Slip at 4)

As this court can see from the facts set forth above this was not some car speeding down the freeway in the middle of the day.

Raymond testified under oath that prior to the officer seeing him he was at times going 130 mph. There is no dispute that this occurred at night, on a winding road in rural section of the county. Testimony showed there were other roads that led into this road. Or that Raymod's speeds were in excess of twice the legal posted speed. The officer testified that he observed Raymond had to brake hard and he skidded into his own driveway.

Raymond averred throughout the trial, as did his son, that they were unaware that the officer was giving chase. This testimony on its own refutes the second allegation raised herein. Raymond did not raise two conflicting defenses, which can be done. Throughout his trial his claim and testimony was he had no idea that the officer was behind him or the was a need to immediately pull over. Therefore, he did not know he had to comply with the law and "immediately" pull over. There was no need for this proposed instruction because "immediately" is not a legal term that must be defined for the jury to properly apply the law and there was no need for this instruction for him to present a full defense because his defense was simply, I had no idea I needed to do anything until the officer raced up my driveway and arrested me. By his theory Raymond did comply with the law when he parked his vehicle when he arrived home.

Raymond cites Schwendeman v. Wallenstein, 971 F.2d 313 (9th Cir. 1992) as applicable to his petition. Schwendeman is legally and factually distinguishable. Schwendeman addressed a jury instruction which allowed the jury to infer that driving above the lawful speed was driving in a reckless manner. The court stated

> …the jury was not given a simple set of instructions which would have permitted them to consider all of the evidence and arrive at a verdict. Instead, the trial

> court gave the jury the following instruction number 7: A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given. Schwendeman, , 971 F.2d 315.

Here the jury was given a simple set of instructions. They were also not given an instruction which allowed them to infer anything or told they could look to speed and speed alone to come to a verdict. The jury was specifically instructed to consider all of the evidence presented in the second instruction given to them:

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.
>
> If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. CP 11

The arresting officer and Raymond both testified. Clearly the jury did not believe what Raymond stated. Issues of witness credibility are to be determined by the trier of fact and cannot be reconsidered by an appellate court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court will consider the evidence in a light most

favorable to the prosecution. Id. It also must defer to the finder of fact in resolving conflicting evidence and credibility determinations. Camarillo, 115 Wn.2d at 71. A challenge to the sufficiency of the evidence requires that the defendant address the evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Judge Korsmo:

> The incident took place in the middle of a dark night on a winding, rural road with a 40 m.p.h. speed limit. There were various curves that required vehicles to slow, as well as other roads connecting to North Wenas Road
>
> …
>
> A jury could conclude that traveling at nearly double the speed limit under those conditions constituted driving in a reckless manner…there were places that Mr. Raymond safely could have pulled over and stopped in response to the deputy's signal to do so…there were locations where a driver could have pulled off the road prior to where Mr. Raymond did so. The State's obligation in this regard is not governed by how out of control the driver was.
>
> The evidence permitted the jury to conclude that the mad midnight dash constituted an effort to evade the officer." Slip at 4

Simply put this was a factual question which was correctly decided by the jury and that verdict was properly upheld by the Court of Appeals. Nothing in this sufficiency of the evidence allegation conflicts with any of the law, infringed on Raymond's rights or any of the other factors set out

in RAP 13.4. There is no reason to accept review of this case.

Issue two – Jury instruction.

This court will review claimed instructional errors de novo, evaluating the instruction "in the context of the instructions as a whole." State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993). The instructions as a whole must provide an accurate statement of the law and allow each party to argue its theory of the case to the extent that it is supported by the evidence. Benn, 120 Wn.2d at 654, 845 P.2d 289.

Raymond presented the trial court with his proposed instruction regarding the term "immediately" and took exception to the court's refusal to instruct the jury. The following is the court's statement regarding that proposal and the court's refusal to give the instruction:

> THE COURT: Mr. Webster, any exceptions to instructions given or not given?
> MR. WEBSTER: Your Honor, the only exception is I had proposed to define immediately.
> THE COURT: Yeah.
> MR. WEBSTER: I cited case law.
> THE COURT: State vs. Sherman.
> **MR. WEBSTER**: Your Honor, my concern with that language, I don't think it's clear from the WPIC. I think a definition of immediately explains that it doesn't mean instantaneous. There's a little more grace there. I don't think that's clear from the jury instructions. That's why I proposed it. I think it defines it, I guess, better for the jury.
> **THE COURT**: I read the Sherman case. Sherman did deal with the issue of whether immediately was vague, void

> of vagueness. The court ultimately decided that it was not. The circumstances there, what kind of drove that, the circumstances of the case are what drove that particular conclusion.
>
> In this case, we have two versions of the events, the one with Deputy Paganelli and another one with Mr. Raymond. Under Deputy Paganelli's version, I mean, the issue whether the pulling over was immediately or not is really irrelevant.
>
> Under Mr. Raymond's version of the events, he maintains that he didn't know he was being pursued. He didn't see any lights and hear a siren. So, you know, he simply went home and pulled into his driveway.
>
> I don't think either scenario implicates this issue of whether the vehicle was pulled over immediately. It's not a situation where somebody is actually looking for a good place to pull over out of traffic or something like that.
>
> That would implicate the Sherman case and the clarification of the term immediately. That isn't this case.
>
> Under the circumstances, I think giving the proposed instruction would be unnecessary and would simply serve to confuse the jury about the applicable law. That's why I didn't give it. RP 245-7

Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. State v. Dana, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court is granted broad discretion in determining the wording and number of jury instructions. Petersen v. State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). "Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case." State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Discretion is

abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A jury instruction is sufficient if it properly informs the jury of the applicable law without misleading the jury and permits each party to argue its theory of the case. Id See Douglas v. Freeman, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991).

When a statute does not define a nontechnical word, the court may look to the dictionary for guidance. State v. Pacheco, 125 Wn.2d 150, 154, 882 P.2d 183 (1994). State v. Brown, 132 Wn.2d 529, 611-612, 940 P.2d 546 (1997)

> A term is "technical" when it has a meaning that differs from common usage. The phrases here are not defined by statute. No appellate court has defined them and no pattern jury instructions address them. We conclude the phrases are expressions of common understanding to be given meaning from their common usage.
>
> Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory. (Footnote omitted)

The term in question is not a technical term. There was no need for this jury instruction. Further, as indicated in the State's opening brief and in the Court of Appeals opinion, Raymond said he heard nothing, saw nothing and was never aware of a need to pull over ever, let alone immediately. There were no other "defenses" proposed or argued. This

instruction was not needed and the court's refusal to give this instruction was not a violation of Raymond's constitutional right to a fair trial.

Merely asserting that a right has been violated does not then raise that allegation to a justiciable argument which would allow this court to accept review under RAP 13.4

D. CONCLUSION

The Court of Appeals cited well settled case law in its opinion. The State presented evidence which was more than sufficient to support the charge. The proposed instruction was not unnecessary for two reasons; one, Raymond's defense negated that need for him to argue the State did not prove he failed to stop immediately and, two the word "immediate" is a common word in the English language and did not need a separated definition. Raymond has not met his burden under RAP 13.4 therefore this court should deny review.

Respectfully submitted this 21st day of October 2020,

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DECLARATION OF SERVICE

I, David B. Trefry, state that on October 21, 2020, I emailed a copy of the State's Answer to: Tiffinie Ma at wapofficemail@washapp.org

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21st day of October, 2020 at Spokane, Washington.

__s/_David B. Trefry________________

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YAKIMA COUNTY PROSECUTORS OFFICE

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Transmittal Information

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