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NO. 35476-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN BELITZ,

Appellant.

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

The Honorable Kathryn Susan K. Serko, Judge

BRIEF OF APPELLANT

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1 Shepard's citation notes that this case was modified by 737 P.2d 670,
however, this case does not exist.

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A. ASSIGNMENTS OF ERROR

1. The trial judge impermissibly commented on the evidence in violation of article IV section 16 of the Washington State Constitution by telling the jurors to take notes during the state's first witness' testimony.

2. Mr. Belitz was denied effective assistance of counsel when his attorney failed to demand a definition of "driving in a reckless manner" an essential element of the crime of attempting to elude a police officer.

3. Was Mr. Belitz denied due process when the jury was not instructed on the meaning of "driving in a reckless manner" an essential element of the crime of attempting to elude.

Issues Pertaining to Assignment of Error

1. Did the trial judge impermissibly comment on the evidence thereby violating article 4 § 16 when she told the jurors to take notes during the state's first witness' testimony?

2. Was Mr. Belitz denied due process when the trial court used incorrect and insufficient instructions to define attempting to elude?

3. Was Mr. Belitz denied due process by ineffective assistance of counsel when his trial attorney agreed to incorrect jury instructions that relieved the state of its burden of proving an essential element of the crime of attempting to elude a pursuing police vehicle?

B. STATEMENT OF THE CASE

1. Procedural Facts

Mr. Steven Belitz was charged with eleven different crimes: CP 1-6. The state amended the information and charged Mr. Belitz with: Five Counts of Robbery in the first degree with a firearm, two counts of assault in the second degree, one count of possessing stolen property, one count of attempting to elude a pursuing a police vehicle, one count of obstructing justice, and one count of resisting arrest. CP 7-18. The trial court granted the state's motion to dismiss the two assault charges during trial.

Following a 3.5 hearing, Mr. Belitz's confessions were admitted in full. CP 57-59. Mr. Belitz was convicted by a jury of five counts of robbery in the first degree, each with a firearm enhancement, one count of possession of stolen property in the second degree and one count of attempting to elude a police officer, also with firearm enhancements, the Honorable Judge Susan Serko presiding. CP 25-43.

During the state's first witness' testimony, the judge interrupted as follows:

Mr. Penner [prosecutor], I'm going to stop you just for a minute. I notice that no one is taking notes. You don't have to take notes, you are not obligated to take notes, but it is at this point when evidence is presented that you are entitled to take notes if you choose. So you can pull them out, and I'll give you just a minute to do that if you like to, or not, as you see fit.

RP 97-98.

Mr. Belitz was charged as follows in Count IX:

That STEVEN R. BELITZ, in the State of Washington, on or about the 17th of May, 2005, did unlawfully, feloniously, and willfully fail or refuse to immediately bring his vehicle to a stop and **drive his vehicle in a reckless manner** while attempting to elude a pursuing police vehicle

Jury Instruction # 25 provides:

A person commits the crime of Attempting to Elude a Pursuing Police Vehicle when he or she **willfully** fails or refuses to bring his or her vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle he or she drives his or her car in a manner indicating a **wanton or willful disregard** for the lives or property of others.

(Emphasis added) Jury Instruction #26 provides:

In order to find the defendant drove in a manner indicating a wanton or willful disregard for the lives or property of others, you must find:

- (1) that the defendant had a **wanton or willful** disregard for the lives or property of others; and
- (2) that the defendant drove in a manner indicating a **wanton or willful** disregard for the lives or property of others.

(Emphasis added). Jury Instruction # 27 provides:

For the purposes of the crime Attempting to Elude a Pursuing Police Vehicle: **Willful means acting intentionally and purposely,**

and not accidentally or inadvertently. Wanton means acting in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know what such conduct would, in a high degree of probability, harm a person or property.

(Emphasis added). Jury instruction # 28 instructed:

For the purposes of the crime of Attempting to Elude a Pursuing Police Vehicle, **a person acts “willfully” when he or she acts knowingly.**

(Emphasis added). Jury Instruction #29 provides in relevant part:

To convict the defendant of Attempting to Elude a Pursuing Police Vehicle, as charged in Count IX, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 17th day of May 2005, the defendant drove a motor vehicle:

(2) That the defendant was signaled to stop.....;

(3)

(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 vehicle in a manner indicating a **wanton or willful** disregard for the lives or property of others;

(6)

(Emphasis added). Supp CP (Jury Instructions #25, 26, 27, 28; September 7, 2006). Counsel did not take exception to any of these instructions. Mr. Belitz filed this timely appeal. CP 85.

2. Substantive Facts

a. Tacoma Boys Robbery

Stephanie Hedt was working as a cashier in the Tacoma Boys on May 17, 2005 when a man came through her checkout line with a steak and demanded that she put all of the money from the till into a bag. The man showed her a gun at his waist. RP 157, 173-74. Ms. Hedt gave the man the money in a white plastic bag used by all customers and he walked out of the store just like a regular paying customer. RP 174-75, 179. Ms. Hedt could not identify Mr. Belitz as the robber and when she viewed the video surveillance camera she could not identify which of two persons observed leaving the store in the video might have been the robber. RP 158, 184. Ms. Hedt believed the man walking out of the store was Mr. Belitz, but there was a man in front of him that was fleeing the store. Ms. Hedt admitted that the man fleeing the store could have been the robber and not the man in front later identified as Mr. Belitz. RP 183 -84.

Ms. Hedt told Kris Bowers another employee that she had just been robbed. RP 181. Mr. Bowers testified that the robber had come in earlier and

asked to use the rest room. RP 122. Mr. Bowers testified that he saw a person running outside of the store. Mr. Bowers chased this man even though Ms. Hedt did not identify the man running as the robber. RP 134-35. Mr. Bowers got a good look at the man he chased and identified him as Mr. Belitz. RP 138, 144. The man pointed a shiny metal gun at him during the chase. Mr. Bowers testified that the gun presented in the state's exhibit #1 looked like the gun Mr. Belitz pointed at him. RP 139-40. The man fled and someone called the police. RP 107-08. The forensic specialist were not able to obtain any fingerprints at the robbery scene. RP 239-41.

On May 17, 2005, Chad Roy was working as the manager of the Tacoma Boys. RP 96. He first noticed something was wrong when he saw an employee Kris Bowers chasing a man outside in the parking lot. At first he thought the man was a shoplifter rather than a robber. RP 99-103. Mr. Roy ran outside to assist. Outside, Mr. Bowers told him the man had a gun. Id. The man pulled out the gun and pointed it in his and Mr. Bower's direction. Mr. Roy did not pursue the man because of the gun. RP 107-08. Mr. Roy got a better look at the gun than the man, but believed Mr. Belitz was the robber even though. Mr. Roy did not see a robbery take place in the store.

Tacoma Police Officer Zachary Small went to the Tacoma Boys after Mr. Belitz was located in the area and drove Mr. Bowers to Mr. Belitz'

location for a show-up identification. RP 235. On arrival at the scene, in full view of Mr. Bowers, the police removed Mr. Belitz from the police car in handcuffs and asked Mr. Bowers to identify him as the robber. RP 238. Mr. Bowers identified Mr. Belitz, the only suspect and the only person present in handcuffs, as the person he had chased. RP 144, 49. Mr. Bowers did not see the robbery take place and therefore could not identify Mr. Belitz as the robber. RP 145.

b. Attempting to Elude

Officer Steven Thornton was working on patrol May 17, 2005 when he heard a broadcast of an armed robber at Tacoma Boys. RP 196-97. Mr. Thornton obtained a description of the suspect vehicle and determined that the car was stolen. RP 199. Mr. Thornton saw a car matching the description of the suspect vehicle and gave chase. He turned on his overhead lights and got behind the suspect car. RP 200-201. Thornton turned on his siren after the suspect did not stop for the police and continued to drive through a red light. RP 203. Thornton was advised during the pursuit that the man was armed with a gun. RP 204. The suspect drove through stop signs and cut off a fire truck while driving at speeds between 50-60 miles per hour. The suspect nearly caused a near collision. RP 204-206.

The suspect drove into oncoming traffic and nearly struck another patrol car. RP 206. The suspect tried to turn right on "I" street and ended up crashed into the bushes on the curb. RP 207. Thornton stopped his patrol car

behind the suspect and the suspect tried to back into his patrol car. Id. Thornton arrested Mr. Belitz and placed him in his patrol car. RP 210. Thornton observed a gun and a plastic bag with currency on the front passenger seat. RP 214-15. . Tacoma Police Detective Jerry Reidburn also participated in the investigation. RP 307. He placed the gun retrieved from the Blue Honda into evidence. RP 307.

Vickie Chittick, another Tacoma Police Officer confirmed that she too observed the suspect driving in front of Thornton while Thornton had his lights and siren activated. RP 220. Chittick testified that she had to swerve out the way to avoid being struck by the suspect vehicle. RP 221.

After Mr. Belitz was arrested, he was taken the police station, patted down, given Miranda warnings and placed in a room for an interrogation. RP 269-70. Money fell down Mr. Belitz' leg during the pat down. Id. Detective Andren went to the police interrogation room where Mr. Belitz was waiting with officer Rush. RP 275. Andren advised Mr. Belitz of his Miranda rights. RP 276. Andren described Mr. Belitz as articulate and without signs of "heavy impairment". RP 279-80. Reidburn also testified that during the interview, Mr. Belitz was articulate but took a long tome to formulate his thoughts which could have been due to the effects of crack cocaine consumption before the robbery. RP 323-24.

During the interview, Mr. Belitz confessed to the Tacoma Boys Robbery and to four other robberies as well. RP 284, 289, 299. Mr. Belitz explained that he had a crack cocaine habit and that he only robbed the

stores to get money for his habit. He said that his gun was never loaded and that he was careful not to harm anyone. Mr. Belitz was very remorseful for his actions. RP 289, 292-93.

c. Safeway Robbery

Linda Randleman was working at Safeway on 38th street when a man came up to her register, showed her a gun and asked her to put all of the money from the cash register into a bag. RP 339-342. Ms. Randleman gave the man all of her one dollar bills and five dollar bills and he left. RP 343-44. Ms. Randleman identified Mr. Belitz as the robber. RP 345. Ms. Randleman told her supervisor that she was robbed and pointed to Mr. Belitz as he left the store. RP 344. Mr. Pollock, the manager watched Mr. Belitz leave but could not positively identify him as the robber and he did not see the commission of the robbery. 348.

d. Starbucks Robbery

Carrie Clapp and Carissa Thomas were working at Starbucks on Pearl Street May 14, 2005 when a man later identified as Mr. Belitz entered the store and demanded the money from the till. RP 356, 369. Mr. Belitz displayed the gun to Ms. Clapp and she asked the assistant manager Ms. Thomas to open the till. 370-71. Ms. Clapp put the money from the till in a bag and Mr. Belitz left. RP 372, 374. Ms. Thomas could not identify Mr. Belitz as the robber. RP 360. A customer observed the transaction but did not see Mr. Belitz' face and could not identify him. He also never saw a weapon and identified the car the man drove as an old green Nissan or

Toyota. RP 366-67. Ms. Clapp testified that she gave Mr. Belitz the money because she was afraid for her life. RP 372-73.

e. Quizno's Robbery

Sara Richotte, the assistant manger for Quizno's on 38th street was working May 15, 2005 when a man entered the business, ordered a sandwich and demanded money from a co-employee, Charles Babcock. 1RP 10-12. Ms. Richotte saw the man pull a gun and demand money from Mr. Babcock, who could not open the cash register, so Ms. Richotte opened the cash register and gave the man the money. 1RP 12-, 14-15. The man then left without further incident. Ms. Richotte believed that Exhibit 1 looked like the same gun used in the robbery. She could not however identify the robber. 1RP 13-14. Ms. Richotte testified that the robbery occurred between 11:00AM and 1:00PM. 1RP 12. Officer Dave Engstrom who responded to the 911 call to investigate the robbery testified that the robbery occurred in the late afternoon near 4:40PM. 1RP 21.

f. Ivar's Robbery

Laura Sinz worked at Ivar's on 19th Street in May 2005. 1RP 22-23. Ivar's was robbed in May 2005 by a man who was polite and apologetic for the whole incident. 1RP 23. Ms. Sinz was the cashier during the robbery. She testified that a man came in, went to the bathroom and came up to the register after looking at a menu, he then lifted his shirt and showed a gun while saying: "I need what's in your till". 1RP 24-25. The man pulled the gun out and pointed at her. 1RP 25. Ms. Sinz testified that Ex 1 looks like

the gun. 1RP 26. The man asked for just the paper money which Ms. Sinz gave to him. The man apologized again by saying "I'm sorry". 1RP 26. Ms. Sinz testified that she was a little scared and felt threatened by the gun. 1RP 27. Ms. Sinz believes she gave the robber approximately \$120. Ms. Sinz could not identify the robber in court. 1RP 23.

g. Possession of Stolen Property

Mr. Lawrence Frye owns a 1971 Blue Honda Civic. IT was stolen in May 2005. The car was returned to him the following day with 185\$ worth of damage. RP 184-86. Mr. Frye did not give Mr. Belitz permission to use or take his car. RP 187. After filling out a damage report, Mr. Frye looked up the Blue Book value of his car and determined that it was worth \$1400. RP 189. The police identified the car Mr. Belitz drove as Mr. Frye's. RP 186-87, 222.

C. ARGUMENTS

1. THE TRIAL JUDGE MADE AN IMPERMISSIBLE COMMENT ON THE EVIDENCE WHEN SHE INSTRUCTED THE JURY THAT IT WAS TIME TO TAKE NOTES DURING THE STATE'S FIRST WITNESS' TESTIMONY.

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law". Const. art 4, § 16, forbids a trial judge from expressing his or her personal opinion about evidence in a

case. State v. Louie, 68 Wn.2d 304, 313-14, 413 P.2d 7 (1966), 2

A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986)³. The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury. State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977).

State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Judges are prohibited from commenting on the evidence to prevent the trial judge's opinion from influencing the jury. Hansen, 46 Wn. App. at 300. The Supreme Court of Washington declared this as early as 1900:

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his

² In Louie, the Court held that there was no comment on the evidence by the judge's failure to give an instruction that passed on a peripheral and undisputed piece of evidence, that was not excepted to during trial. Louie, 68 Wn.2d at 313.

³ Shepard's citation indicates that 737 P.2d 670, modified Hansen, however, this case does not exist.

discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

Lane, 125 Wn.2d at 838, quoting, State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900).

In the instant case, the trial judge attempted to impart neutral advice to the jury. She advised the jury as follows after this testimony:

Prosecutor (“Q”). Back on May 17th 2005, were you working that day?

Chad Roy (“A”): Yeah..

Q. All right. And do you remember an incident that took place that was fairly significant?

A. Yes.

Q. All right. What was the general nature of that incident?

A. Well, starting from where I came in or what happened before?

Q. Well, generally just give me a word or two to describe what happened.

A. Well, we got robbed at gunpoint at the cash registers. Stephanie was at the cash register, got robbed at gunpoint and we ended up chasing the guy down outside and he pulled a gun on us. DO you want exact - -

Q. That’s what I was looking for.

A. I can tell you exactly what happened.

Q. We’ll go through this.

A. Okay

THE COURT:

Mr. Penner, [prosecutor] I’m going to stop you just for a minute. I notice that no one

is taking notes. You don't have to take notes, you are not obligated to take notes, but it is at this point when evidence is presented that you are entitled to take notes if you choose. So you can pull them out, and I'll give you just a minute to do that if you like to, or not, as you see fit.

RP 97-98.

The giving of advise is in an of itself an expression of opinion that ventures into impermissible territory. In the instant case the judge advised the jury to take notes in the middle of the state's first witness, whose testimony was extremely potent. In so doing she conveyed her belief in the value and importance of the testimony. This was an impermissible comment on the evidence. While the judge may have wanted to merely suggest note taking, her timing and the fact that she was not pleased with the juror's lack of note taking, coupled with the Supreme Court's historic and long standing understanding that juror's want the judges opinion, created an impermissible comment on Mr. Roy's critical testimony.

The standard when reviewing violations of Const. art. 4, § 16 requires that once the reviewing Court determines that the trial judge's remarks constitute a comment on the evidence, a presumption arises that the comments were prejudicial and thus error of constitutional magnitude. Lane, 125 Wn.2d 838-39, citing, State v. Bogner, 62 Wn.2d 247, 249, 253-

54, 382 P.2d 254 (1963); State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986).

The reviewing Court applies the "overwhelming untainted evidence" test for constitutional error to determine if reversal of the conviction is required. Lane, 125 Wn.2d at 839, citing, State v. Guloy, 104 Wn.2d at 426. In Guloy, the Supreme Court held a constitutional error is only harmless "if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt". Guloy, 104 Wn.2d at 426. This means that regardless of the strength of the state's case, the prosecution must affirmatively establish that the judge's comments could not have influenced the jury.

[E]ven if the evidence commented upon is undisputed, or "overwhelming," a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

Lane, 125 Wn.2d at 839, quoting, Bogner, 62 Wn.2d at 252. Under this test, a comment influences the jury if there is "any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict. Guloy, at 426. Thus, to find harmless error, the reviewing

court must be convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Guloy, at 425. The State bears the burden of proving beyond a reasonable doubt that the error was harmless. Guloy, at 425. A judicial comment may be properly raised for the first time on appeal if it "'invades a fundamental right of the accused'" State v. Levy, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006) (quoting, State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)) such as the right to a jury free from judicial comment on the facts. See also, State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006) (issue of judicial comment raised in context of jury instruction).

In Bogner, supra, the trial court's comments were of constitutional magnitude because they relieved the State of its burden of proof. The police arrested Bogner near a housing project shortly after an employee of the project called the police to report a robbery. During the State's examination of a police officer, Bogner objected to the officer's assertion that a robbery had occurred. Bogner, 62 Wn.2d at 248-49. The court asked defense counsel, "[d]on't you think we are getting a little ridiculous, or aren't we?" Bogner, 62 Wn.2d at 249. The Supreme Court found reversible error, holding that the court's comment allowed the jury to infer that the court believed that the corpus delicti of the crime had been established. Bogner, 62 Wn.2d at 252, 256.

In State v. James. 63 Wn.2d 71, 76, 385 P.2d 558 (1963), another case on point, when the jury was informed by the trial court that the co-defendant was being discharged in order to be a witness for the state, the Court orally stated: ". . . *providing that he testify fully as to all material matters within his [Topper's] knowledge. . .*" (emphasis in original) Id. The Supreme Court held that this language amounted to an impermissible comment on the evidence in violation of Art. 4 section 16 because, "[t]he jury could draw only one conclusion: the court was satisfied that Topper had testified *"fully as to all material matters within his knowledge."* (emphasis in original) Id. The Supreme Court reversed and remanded for a new trial.

Bogner and James are on point. In the instant case as in Bogner, and James, the judge made her attitude toward the testimony clear: she believed that if the juror's were not admonished to take notes, they would miss in her opinion Mr. Roy's critical evidence. Mr. Roy had just described in detail an armed robbery that also involved an attempt to elude. The judge's comment told the jury this information was so important that they should take notes. What the judge did not say, but certainly telegraphed to the jury was her opinion that she believed the testimony describing the robbery. This relieved the state of its burden of proving that Mr. Belitz robbed the Tacoma Boys store by infusing his

testimony with the judge's determination of Mr. Roy's credibility. This type of comment was determined to be prejudicial error in James and Bogner.

In Lane, unlike in the instant case and James and Bogner, there was overwhelming untainted evidence of guilt on all counts, thus the Court held that even though the judge's remarks were impermissible comments on the evidence they were harmless. Lane, 125 Wn.2d at 840-41.

The untainted evidence against Mr. Belitz in the Tacoma Boys robbery was not overwhelming and the comments from the judge cannot be considered harmless beyond a reasonable doubt. The testimony regarding the Tacoma Boys robbery was clear enough but none of the witnesses identified Mr. Belitz as the person who committed the robbery. Ms. Hedt, the cashier who was confronted by the robber could not identify Mr. Belitz. Mr. Roy and Mr. Bowers each of whom chased Mr. Belitz, did not see him commit the robbery and when Ms. Hedt viewed the video surveillance camera, she saw two men leave the store and admitted that the one fleeing the store, not chased by the Mr. Roy and Mr. Bowers could have been the robber. RP 172, 178, 183-84.

The jury was required to take a leap and assume that because Mr. Belitz was chased and fled from the police, he was the robber. It is conceivable that absent the judge's comments, which reinforced the

testimony of Mr. Roy describing the robbery, the jury could have determined that Mr. Belitz was not the robber. It is certain that the judge's comments could have influenced the jury and nothing appears in the record to affirmatively establish beyond a reasonable doubt that the judge's comments did not influence the verdict.

For these reasons, the judge's comments violated art. 4 section 16; the jury could have inferred from the trial judge's directive that she personally believed Mr. Roy's testimony, thus impermissibly imposing on the jury, her personal opinion as to Mr. Roy's credibility. Louie, 68 Wn.2d at 313-14; citing, State v. Browder, 61 Wn.2d 300, 378 P.2d 295 (1963). For these reasons, this Court should reverse and remand for a new trial.

2. THE TRIAL COURT DENIED MR. BELITZ HIS RIGHT TO DUE PROCESS BY GIVING AN INCORRECT DEFINITION OF ATTEMPTING TO ELUDE, SPECIFICALLY IT FAILED TO DEFINE "DRIVING IN A RECKLESS MANNER.

In a criminal case, the trial court must instruct the jury that the State has the burden to prove each essential element of the crime beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 135 L. Ed. 2d 1084 (1996). It is

reversible error if the instructions relieve the State of that burden. Pirtle, 127 Wn.2d at 656. "Jury instructions are 'sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'" State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005), quoting, Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996).

The appellate courts review challenged jury instructions de novo, examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portions in the context of all the instructions given. Pirtle, 127 Wn.2d at 656. Jury instructions 25 through 28 in the instant case referenced the attempting to elude charge. These instructions allowed the jury to convict Mr. Belitz of attempting to elude a police officer without defining the essential element of "driving in a reckless manner" and by giving two contradictory definitions of the term "willful" and using the terms "willful and wanton" in the jury instructions when the charging document did not contain these non-statutory terms. Mr. Belitz was charged as follows in Count IX:

That STEVEN R. BELITZ, in the State of Washington, on or about the 17th of May, 2005, did unlawfully, feloniously, and willfully fail or refuse to immediately bring his vehicle to a stop and **drive his vehicle in**

a **reckless manner** while attempting to elude a pursuing police vehicle

Jury Instruction # 25 provides:

A person commits the crime of Attempting to Elude a Pursuing Police Vehicle when he or she **willfully** fails or refuses to bring his or her vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle he or she drives his or her car in a manner indicating a **wanton or willful disregard** for the lives or property of others.

(Emphasis added) Jury Instruction #26 provides:

In order to find the defendant drove in a manner indicating a wanton or willful disregard for the lives or property of others, you must find:

- (3) that the defendant had a **wanton or willful** disregard for the lives or property of others; and
- (4) that the defendant drove in a manner indicating a **wanton or willful** disregard for the lives or property of others.

(Emphasis added). Jury Instruction # 27 provides in:

For the purposes of the crime Attempting to Elude a Pursuing Police Vehicle: **Willful means acting intentionally and purposely, and not accidentally or inadvertently.** Wanton means acting in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or

have reason to know what such conduct would, in a high degree of probability, harm a person or property.

(Emphasis added). Jury instruction # 28 instructed:

For the purposes of the crime of Attempting to Elude a Pursuing Police Vehicle, **a person acts “willfully” when he or she acts knowingly.**

(Emphasis added). Jury Instruction #29 provides in relevant part:

To convict the defendant of Attempting to Elude a Pursuing Police Vehicle, as charged in Count IX, each of the

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

(11) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a manner indicating a **wanton or willful** disregard for the lives or property of others;

.

(Emphasis added).

There are several problems with instructions 25 through 28. First, jury instructions #27 and #28 provide two distinct and contradictory definitions for the term “willful”. As instructed the jury could not have known or been unanimous as to whether “willful” in each of its appearances in the statute meant “intentional” or “knowingly”. Second, the term willful does not appear in the statute. RCW 46.61.024. The failure to clearly define the term “willful” effectively relieved the state of its burden

of proving beyond a reasonable doubt the crime of attempting to elude a pursuing police vehicle. Pirtle, 127 Wn.2d at 656.

Third, the state charged Mr. Belitz under the current Attempting to Elude statute using the correct statutory language; specifically with respect to the element of “driving in a reckless manner”. RCW 56.62.024. The state did not however define “driving in a reckless manner” and the to-convict instruction did not require the state to prove beyond a reasonable doubt that Mr. Belitz drove in a reckless manner. Rather jury instruction #26 defined driving in a “willful or wanton” manner and the to convict instruction #29, referenced driving in a “willful or wanton” manner rather than driving in a reckless manner. The court’s instructions completely failed to connect the definition of “willful or wanton” with the definition of “reckless manner”. The result was that the jury was not instructed that to convict Mr. Belitz of the crime of attempting to elude a pursuing police vehicle it had to believe that the state proved beyond a reasonable doubt that Mr. Belitz drove in a “reckless manner”.

This may appear to be an argument of semantics; however, recently, the Supreme Court determined that the phrase “in a reckless manner” is “well-settled”. State v. Roggenkamp, 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005). “[D]riving in a reckless manner’ means ‘driving in a rash or heedless manner, indifferent to the consequences.’”. Roggenkamp,

153 Wn.2d at 622, quoting, State v. Bowman, 57 Wn.2d 266, 270-271, 356 P.2d 999 (1960). Without arguing the correctness of the ruling in Roggenkamp, it is clear that “Driving in a reckless manner” “Rash or heedless”, “willful or wanton”, knowingly “ and intentionally” all carry separate and distinct meanings and separate and disparate levels of culpability. State v. Brown, 40 Wn. App 91, 96-97, 697 P.2d 583 (1985).

The correct definition of “Reckless manner” is:

the actor has **intentionally** done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

(Emphasis added) (Footnotes omitted.) Brown, 40 Wn. App at 96-97.

The court’s instructions to the jury relieved the state of its burden of proving beyond a reasonable doubt the element of “driving in a reckless manner” because the jury could not in reading the instructions as a whole determine its meaning.

State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005) is instructive. In State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005), the Court of Appeals addressed a knowledge instruction that stated

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Goble, 131 Wn. App. at 202 (quoting CP at 44) (emphasis added). The Court held that this instruction was confusing because it potentially allowed the jury to find the defendant guilty of third degree assault against a law enforcement officer without having to find that the defendant knew the victim was a law enforcement officer performing his official duties. Goble, 131 Wn. App. at 202-03 (quoting CP at 44)). Specifically, the Court stated:

We agree that the instruction is confusing and that the [challenged] portion of the instruction allowed the jury to presume Goble knew [the victim's] status at the time of the incident if it found Goble had intentionally assaulted [the victim]. **This conflated the intent and knowledge elements required under the to-convict**

instruction into a single element and relieved the State of its burden of proving that Goble knew [the victim's] status if it found the assault was intentional.

Goble, 131 Wn. App. at 203 (emphasis added).

The errors in the instant case are analogous to those in Goble. In the instant case, the to convict instructions did not require the jury to find that Mr. Belitz drove in a reckless manner, rather it was sufficient to find that he knowingly drove in a wanton manner. This relieved the state of the burden of proving a greater level of culpability. The dual definitions of “willful” as meaning: either “intentional” or “knowingly” permitted the jury to find Mr. Belitz guilty without knowing or understanding what the state was in fact required to prove beyond a reasonable doubt.

Even though defense counsel did not object to the instructions, because they affected an element of the offense, this issue is of constitutional magnitude which may be raised for the first time on appeal. RAP 2.5; State v. Davis, 154 Wn.2d 291, 305-06, 111 P.3d 844 (2005). A defendant does not waive his right to challenge the adequacy of jury instruction by failing to object to the instruction at trial. “Failure to properly instruct the jury on an element of a charged crime is an error of constitutional magnitude which may be raised for the first time on appeal.” State v. Roggenkamp, 153 Wn.2d 614, 620, 106 P.3d 196 (2005), citing,

State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001); Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); RAP 2.5(a). Mr. Belitz did not waive his right to object to his attorney's failure to request a definition of "driving in a reckless manner" or to his attorney's failure to object to incorrect and misleading definitions of the term "willful".

The trial court committed reversible error by giving the improper instruction. This error is subjected to a harmless error test. The test for harmless error when the instructions misstate or omit an element is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Neder v. United States, 527 U.S. at 15, quoting, Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)), quoted in State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Reading instructions 25 through 28 together, there is ambiguity, misleading statements of law and the state was relieved of its burden of proving each essential element beyond a reasonable doubt. This was reversible error. Pirtle, 127 Wn.2d at 656; Goble, 131 Wn. App. at 203.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE INSTUCTIONS DEFINING “WILLFUL AND WANTON” AND FOR FAILING TO OBJECT TO THE ABSENCE OF A DEFINITION OF AN ESSENTIAL ELEMENT: “DRVING IN A RECKLESS MANNER”.

In an abundance of caution, appellant raises an ineffective assistance of counsel argument to insure that this Court reviews the merits of Argument Number 2.

Washington applies the two-part Strickland test in determining whether a defendant had effective assistance of counsel. State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish that counsel was ineffective, the defendant must first show that counsel's performance was deficient. Appellate courts generally presume the defendant was properly represented. Cienfuegos, 144 Wn.2d at 227. Second, the defendant must show that the deficient performance prejudiced the defense. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 687; State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. The appellate court looks to the facts of the individual case to see if the Strickland test has been met. Cienfuegos, 144 Wn.2d at 228-29.

In State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987), the defendant was charged with felony flight/attempting to elude a police vehicle. Thomas, 109 Wn.2d at 226. Felony flight, currently attempting to elude requires willful behavior. Thomas, 109 Wn.2d at 227. In Thomas the defendant had a history of drinking and blackouts, and testified she was drunk and incoherent on the night of the incident, and had no memory of eluding police or even of police cars following her car. Thomas, 109 Wn.2d at 225. The defense proposed as a theory of the case that Thomas was too intoxicated to form the requisite intent; however, her attorney did not request the diminished capacity instruction and the instructions given did not make the subjectivity of the required intent clear. Thomas, 109 Wn.2d at 227-28.

The Supreme Court held that the jury instructions were defective because they allowed the jury to conclude mere intoxication satisfied the willful behavior element, without any further inquiry to the defendant's actual subjective intent to flee. Thomas, 109 Wn.2d at 229. The failure of the attorney to propose the diminished capacity instruction under the facts presented was therefore deficient and deprived Thomas of a fair trial. The conviction was reversed and the case remanded for a new trial. Thomas, 109 Wn.2d at 232.

In the instant case, as in Thomas, counsel's failure to request a definition of "driving in a reckless manner" allowed the jury to find guilt based on an unknown standard. This relieved the state of proving beyond a reasonable doubt the element of "driving in a reckless manner". As in Thomas, this is reversible error.

More recently in State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997), the Supreme Court held that, "[d]iminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged. . . . Refusal to give an instruction that prevents the defendant from presenting his theory that a killing was unintentional is reversible error." See also State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003)

(failure to present diminished capacity defense due to marijuana consumption indicated ineffective assistance of counsel).⁴

In the instant case similar to in Thomas and Warden, defense counsel failed to object to instructions that provided contradictory definitions of the term “willful” and failed to request a definition of an essential element. These failures were of constitutional magnitude because they effectively relieved the state of proving beyond a reasonable doubt the element of driving in a reckless manner. The correct definition of “Reckless manner” is:

the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

(Footnotes omitted.) Brown, 40 Wn. App at 96-97.

The trial court did not provide this definition. There is no tactical reason to fail to request a definition of an essential element of a crime. Mr. Belitz was prejudiced by his attorney’s deficient performance. Reversal is required.

⁴ The Court in Tilton, reversed on other grounds because the record was insufficient as reconstructed.

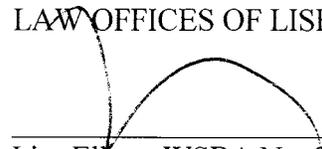
D. CONCLUSION

Mr. Belitz was denied his right to a fair trial by the combined impact of the judge making an impermissible comment on the evidence and by his attorney failing to object to an incorrect definition of an essential element of the crime of attempting to elude. The state also failed to prove beyond a reasonable doubt an essential element of the crime of attempting to elude. Due to the constitutional errors at trial, each of Mr. Belitz' convictions should be reversed.

DATED this 24th day of April, 2007.

Respectfully submitted

LAW OFFICES OF LISE ELLNER



Lise Ellner, WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Steven Belitz DOC 899224 1313 N. 13th Ave. Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed, on April 24, 2007. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature
