

NO. 35476-4-II

07 JUL 13 PM 4:16

07 JUL 13 PM 4:16

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY gn
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN BELITZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 05-1-02425-1

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
P. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

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

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Was it a comment on the evidence for the trial court to instruct the jury when they could begin note-taking, when such instruction contained no opinion about or attitude toward the testimony and the instruction made it clear note-taking was optional? (Pertaining to Appellant's Assignment of Error #1.)..... 1

2. Can this Court consider defendant's assignments of error to (a) jury instructions, or (b) ineffective assistance of counsel related to instructions, when defendant has failed to make said instructions part of the record on appeal as required by RAP 9.6(b)(1)(F)? (Pertaining to Appellant's Assignment of Error #2 and #3.)..... 1

3. Is defendant entitled to relief regarding incorrect jury instructions where the doctrine of invited error bars his claim because he proposed the instruction? (Pertaining to Appellant's Assignment of Error #3.)..... 1

4. Is defendant entitled to relief due to ineffective assistance of counsel where he is unable to meet his burden under the second prong of Strickland: actual prejudice? (Pertaining to Appellant's Assignment of Error #2.)..... 1

B. STATEMENT OF THE CASE2

1. Procedure.....2

2. Facts3

C. ARGUMENT..... 11

1. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE BY MERELY INSTRUCTING THE JURY THAT THEY COULD BEGIN NOTE-TAKING. 11

2.	THIS COURT CANNOT CONSIDER DEFENDANT’S ASSIGNMENT OF ERROR TO (a) JURY INSTRUCTIONS OR (b) TO INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENDANT FAILED TO MAKE THE INSTRUCTIONS PART OF THE RECORD ON APPEAL AS REQUIRED BY RAP 9.6(b)(1)(F).....	14
3.	ASSUMING ARGUENDO THAT THE INSTRUCTIONS IN DEFENDANT’S BRIEF ARE ACCRUATE, DEFENDANT IS NOT ENTITLED TO RELIEF BECAUSE HE IS BARRED BY THE DOCTRINE OF INVITED ERROR.	16
4.	DEFENDANT IS NOT ENTITLED TO RELIEF FOR INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE IS UNABLE TO MEET THE SECOND PRONG OF <u>STRICKLAND</u> , ACTUAL PREJUDICE.	19
D.	<u>CONCLUSION</u>	27

Table of Authorities

Federal Cases

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052,
80 L.Ed.2d 674 (1984).....19, 20, 22

State Cases

Allemeier v. UW, 42 Wn. App. 465, 472-73, 712 P.2d 306 (1985),
review denied, 105 Wn.2d 1014 (1986) 15

City of Spokane v. Neff, 152 Wn.2d 85, 93 P.3d 158 (2004)15, 16

In re Det. of Gaff, 90 Wn. App. 834, 845, 954 P.2d 943 (1998).....17

Personal Restraint Petition of Rice, 118 Wn.2d 876, 888-89,
828 P.2d 1086 (1992)20

State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)20

State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)11

State v. Bradfield, 29 Wn. App. 679, 630 P.2d 494 (1981).....15

State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000).....16, 17

State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993)19

State v. Firven, 22 Wn. App. 703, 704-05, 591 P.2d 869 (1979).....16

State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990)17

State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996)....19, 20, 22

State v. Holt, 56 Wn. App. 99, 106, 783 P.2d 87 (1989).....12

State v. Knapp, 14 Wn. App. 101, 113, 540 P.2d 898 (1975)11

State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).....11, 12

State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996)17

<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006)	12
<u>State v. Lord</u> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991).....	20
<u>State v. McFarland</u> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).....	19
<u>State v. Neher</u> , 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989)	16
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005)22, 23	
<u>State v. Stockton</u> , 97 Wn.2d 528, 530, 647 P.2d 21 (1982)	15
<u>State v. Studd</u> , 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999)....	16, 17, 18
<u>State v. Summers</u> , 107 Wn. App. 373, 381, 28 P.3d 780 (2001).....	16, 17
<u>State v. Surry</u> , 23 Wash. 655, 660, 63 P. 557 (1900)	11
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	19
<u>State v. Tracy</u> , 128 Wn. App. 388, 394-95, 115 P.3d 381 (2005).....	16
<u>State v. Vazquez</u> , 66 Wn. App. 573, 583, 832 P.2d 883 (1992).....	15
<u>State v. White</u> , 81 Wn.2d 223, 225, 500 P.2d 1242 (1972), <i>review denied</i> , 123 Wn.2d 1004, 868 P.2d 872 (1994).....	20
<u>State v. Winings</u> , 126 Wn. App. 75, 107 P.3d 141, 149 (2005)	17
<u>Story v. Shelter Bay Co.</u> , 52 Wn. App. 334, 345, 760 P.2d 368 (1988)), <i>review granted</i> , 156 Wn.2d 1030 (2006).....	16

Constitutional Provisions

Sixth Amendment.....	19
Wash. Const. art. IV, §16	11, 14
Wash. Cont., article I, section 22.....	19

Statutes

Laws of Washington 2003 c 101 § 120, 21
RCW 46.61.024(1)21

Rules and Regulations

ER 404(b) 15
RAP 9.6 16
RAP 9.6(b)(1)(F) 14, 15

Other Authorities

WPIC 16.02 17

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

1. Was it a comment on the evidence for the trial court to instruct the jury when they could begin note-taking, when such instruction contained no opinion about or attitude toward the testimony and the instruction made it clear note-taking was optional? (Pertaining to Appellant's Assignment of Error #1.)
2. Can this Court consider defendant's assignments of error to (a) jury instructions, or (b) ineffective assistance of counsel related to instructions, when defendant has failed to make said instructions part of the record on appeal as required by RAP 9.6(b)(1)(F)? (Pertaining to Appellant's Assignment of Error #2 and #3.)
3. Is defendant entitled to relief regarding incorrect jury instructions where the doctrine of invited error bars his claim because he proposed the instruction? (Pertaining to Appellant's Assignment of Error #3.)
4. Is defendant entitled to relief due to ineffective assistance of counsel where he is unable to meet his burden under the second prong of Strickland: actual prejudice? (Pertaining to Appellant's Assignment of Error #2.)

B. STATEMENT OF THE CASE.

1. Procedure

On May 18, 2005, the State charged STEVEN BELITZ, defendant, with five counts of first degree robbery (counts I through V), first degree possession of stolen property (count VI), and attempting to elude a pursuing police vehicle (count VII). CP 1-6. Each count also alleged a firearm sentencing enhancement. Id. Prior to trial, the State amended the information to add two counts of second degree assault, obstruction, and resisting arrest. CP 7-12. During trial, the State filed its second amended information reducing the charge of first degree possession of stolen property to second degree, based on the testimony. CP 13-18; 1RP 32.¹

At the close of the State's case, defendant moved for dismissal of count XI, resisting arrest. The State conceded and the court dismissed that count. 1RP 38-39.

The jury returned verdicts of guilty on all other counts, except for count X, obstruction, on which defendant was acquitted. CP 28-34; 3RP 14.

¹ The verbatim report of proceedings (VRP's) are paginated consecutively, with the exception of the VRP's for 9/5/06, 9/6/06 PM, and 9/7/06, which each begin pagination anew with page 1. On 9/6 AM, and again on 10/6, the consecutive pagination resumes where it left off. Citations to the record shall be "1RP" for 9/5, "2RP" for 9/6 PM, "3RP" for 9/7, and "RP" for all other portions of the record.

At sentencing, the State conceded that the second degree assault convictions merged with one of the robbery convictions. RP 444. The trial court sentenced defendant to the low end of the standard range, 129 months in prison. CP 68; RP 465. Defendant additionally received firearm sentencing enhancements totaling 336 months for 465 months of total confinement. CP 68.

This timely appeal follows.

2. Facts

a. Safeway store robbery.

On May 12, 2005, defendant robbed the Safeway store located at 38th and “M” Street in Tacoma. RP 339. Defendant got into a checkout line purportedly to purchase a beer. RP 341. When the cashier, Linda Randleman, rang him up, defendant told her to put all the money in a bag. Id. When Randleman repeated what he had said, defendant told her to shut-up and he pulled up his shirt to reveal the handle of a gun. RP 342. She put the money in a bag and defendant left the store. RP 343. Defendant got between \$200.00 and \$300.00 from this robbery. RP 353.

Randleman positively identified defendant in court as the man who robbed her. RP 345. The store manager, Dean Pollock, was at the check stand behind Randleman during the robbery. RP 348. He too identified defendant in court as the man he saw that day. RP 353.

Defendant admitted to police that he committed this robbery. RP 290. Defendant told detectives how he parked his car to the west of the

store and got into the check out line with an item he had picked up. RP 290. He admitted when the clerk rang up the purchase, he showed her the gun and told her he wanted all the money. RP 290. Defendant said he walked out of the store and then ran to his car. RP 290. From there he went to his drug dealer's house to score some cocaine and then rented a motel room. RP 290.

b. Starbucks robbery.

On May 14, 2005, defendant robbed the Starbucks on Pearl Street in Tacoma. RP 369. Defendant entered with a cigarette. He went outside to finish the cigarette. RP 370. When other customers left, he came back inside. Id. He told the cashier, Carrie Clap, that it was a robbery and to give him the money. RP 370. Unsure of what was happening, Clap asked him to repeat himself. Id. Defendant then pulled a gun out of his waistband and showed it to her. Id. Fearing for her life, Clap gave him the money, about \$150.00. RP 359; 372. She identified defendant in court as the man who robbed her. RP 373.

Danny Bessett, the Principal at Wilson High School, was in Starbucks at the time of the robbery. RP 362. He knew it was a robbery because of the fear he saw on the clerks' faces, he saw defendant's hand doing something by his pocket, and he saw the clerks putting money into a Starbucks bag. RP 364. Bessett casually followed defendant outside and saw him get into a car and drive away. RP 365.

Defendant confessed to this robbery as well. RP 291. He provided details of the crime, which had not been disclosed to him by detectives. Id. Defendant said that on the day he robbed Starbucks he had run out of money. He saw a car running with no one in it and he stole the car. Id. He told detectives he drove to North Pearl and hung around in the Starbucks until customers left. Id. He demanded money, using the gun that he had in his waistband. Id. The clerk bagged up the money and he left. Id. He saw a customer follow him out and he was sure the guy saw him get into the car and drive off. Id. Again, defendant went immediately to buy crack cocaine. Id. He was disappointed with the amount of money he got from Starbucks. Id.

c. Quizno's Sandwich Shop robbery.

On May 15, 2005, defendant robbed the Quizno's sandwich shop on 38th Street in Tacoma. 1RP 10. The assistant manager, Sara Richotte, took defendant's order for a sandwich. 1RP 12. When defendant moved down the line to the cashier, Richotte saw defendant pull a gun and point it at the cashier. 1RP 12. The cashier could not get the cash drawer open, so Richotte had to open it. 1RP 15. Defendant took the money and the cashier asked defendant if he wanted his sandwich with that. 1RP 15. Defendant took the sandwich and the money, around \$200.00, and walked out the front door. 1RP 15.

Defendant described to detectives how he committed this robbery. RP 292. Defendant said he walked in, ordered a sandwich, and when the

clerk rang up the sandwich, he demanded all the money from the register. RP 292. The clerk was having trouble opening the till, so he pointed his gun at him and told him to open it. RP 292. A woman came over and opened the till and defendant grabbed the money, his sandwich. He then ran to his car and drove off. RP 292. Defendant said he again went and bought drugs and a motel room. RP 292.

d. Ivar's Seafood Bar robbery.

On May 16, 2005, defendant robbed Ivar's Seafood Bar on 19th and Mildred. 1RP 22. Laura Sinz was working at Ivar's that night. 1RP 22-23. She recalled how defendant was very polite about the robbery and how he apologized for doing it, which she thought was weird. 1RP 23. Sinz saw defendant enter Ivar's and go straight into the bathroom. 1RP 24. When defendant came out of the bathroom, he studied the menu for some time. 1RP 25. Sinz noticed he looked nervous or unsure. 1RP 25. Defendant then came toward the register and lifted his shirt and pulled out a gun and said, "I need what's in your till." 1RP 25. The gun was out and pointed in Sinz' direction. 1RP 25. Defendant got away with about \$120.00 from the till. 1RP 26.

Defendant told detectives how he committed this robbery. RP 292. Defendant said he had driven around the area and noticed only one couple in the restaurant and no one at the counter. Id. Defendant explained how he went into the bathroom hoping the couple would be gone when he came out. RP 292. The couple was still there, so defendant said he

approached the counter and began reading the menu. RP 293. When the girl behind the counter asked him if she could help him, defendant said he showed her the gun in his waistband and told her to give him all the money. RP 293. Defendant said he told her he was sorry for having to do this. Id.

Defendant said that after he had the cash, he ran to his car and then drove to get some more cocaine and a motel for the night. RP 293. Defendant explained he was staying at a different location every night because he was afraid the police were coming for him. Id.

e. Tacoma Boys robbery.

On May 17, 2005, defendant robbed Tacoma Boys on 6th Avenue in Tacoma. RP 119-35. Defendant brought some meat up to the cashier, Stephanie Hedt. RP 172. As she reached for the meat to ring it up, defendant told her, "You are being robbed; give me everything you have." RP 172. Defendant pulled a gun out from under his shirt and pointed it at her stomach. RP 172-73. Hedt was concerned for her safety and that of others; there were people everywhere. RP 173-175. Hedt put all the bills into a bag, defendant took it and walked out of the store very quickly. RP 174-75.

Hedt alerted other employees who chased defendant. RP 175. Employees Bowers and Roy chased defendant through the parking lot. RP 96; 122. Defendant turned and pointed his gun at them, causing them to back off. RP 100; 136. Both Roy and Bowers identified defendant in

court as the man they chased through the parking lot. RP 104; 138.

Bowers was able to get defendant's license plate number, along with a description of the car, which he provided to police. RP 141-42.

Tacoma Police Officer Thornton was dispatched to the robbery call at Tacoma Boys. RP 192; 197. He was dressed in full uniform and was driving a fully marked police patrol vehicle. RP 197. Officer Thornton had the vehicle description and knew that that vehicle used in the robbery was stolen. RP 199. Officer Thornton spotted the vehicle nearby. RP 199-200. He turned on his emergency lights on the patrol car to stop the suspect vehicle. RP 200. Instead of stopping, defendant sped away. RP 201.

Officer Thornton chased defendant for what turned out to be a "fairly long pursuit." RP 202. Defendant ran a red light in the oncoming lane of travel. RP 200-10. He then accelerated through a stop sign and drove at speeds of 50 MPH and 60 MPH in residential and business neighborhoods around 5:00 PM on a weekday when there were many other cars on the roadway. RP 202-22. At some point during the chase, defendant sped through the very busy intersection at 12th and Sprague. RP 222. There was also pedestrian traffic in the form of adults and children on the sidewalks. Id. Defendant ran another stop sign and continued on, weaving in and out of traffic, mostly in the oncoming lane of travel. RP 205. In his effort to get away, defendant drove at 60 MPH, failing to stop at intersections. Id. Defendant then ran another stop sign and almost got

into a “T-bone” collision with another vehicle. RP 3206. Still refusing to stop, defendant got back into the oncoming lanes and nearly collided with Officer Quilio’s patrol vehicle approaching from the other direction. RP 206. At that moment, Officer Quilio was stopped in the lane of travel and defendant actually veered toward him, nearly striking his patrol car. RP 230. Defendant then ran another stop sign, swerved all over the roadway, slowed briefly, and then sped off again. RP 206. Defendant finally stopped, but only because he took a corner way too fast, lost control of the vehicle, and crashed. RP 207. He was high-centered. RP 207. Officer Thornton stopped directly behind defendant. Defendant tried to back up his vehicle to get away and crashed into Officer Thornton’s patrol car. RP 207. Officers arrested defendant, took him into custody and advised him of his rights. RP 210.

Officers found a plastic bag with a flank steak and the gun used in the robberies in the front passenger seat. RP 212-13; 274. Defendant had loose currency in his right pants pocket and in his pants. RP 214. Defendant was transported down to an interview room. RP 269. He was re-advised of his rights and he indicated he understood them and agreed to waive his rights and make a statement to detectives. RP 276-78.

Defendant was apologetic about putting others in danger. RP 283. He told detectives that he had a drug problem that drove him to rob. RP 283. He immediately admitted to the robbery at Tacoma Boys and gave detectives the details of the crime. RP 284. Defendant explained how he

thought Tacoma Boys would be easy to rob and get away from. RP 286. He said he put his weapon in his waistband, walked into the store, shopped for a short time and then selected a package of steaks to present to the cashier. RP 286. He said he put the steaks on the counter and told the cashier he wanted all the money from the till, lifting his shirt to show her the gun. RP 286. After the cashier put the money in the bag with the steak, defendant ran off towards the car, but was chased by two men. RP 286. He told detectives how he threatened them with the gun and got them to back off. RP 286. He then said he drove off through the residential area, only to be spotted by a police officer he unsuccessfully tried to outrun. RP 286. Defendant said he did not have time to throw away the gun before crashing and giving up. RP 286-87.

When detectives asked defendant if he committed other robberies, defendant initially denied it. He was confronted with the robberies detailed herein in subsections (a) through (d), along with the robberies of two gas stations. RP 287. Defendant was provided with the name and location of the businesses robbed, and was told he matched the description of the robber, but was not provided any details. RP 287-88. Defendant then hung his head and said, "I didn't do the gas stations." RP 288. He later provided the details of the businesses he robbed. RP 289-93. Defendant then agreed to make a taped statement regarding his involvement in the robberies. RP 294. The tape was played to the jury during trial. RP 319; Ex. #7.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE BY MERELY INSTRUCTING THE JURY THAT THEY COULD BEGIN NOTE-TAKING.

Trial courts are forbidden from commenting upon the evidence presented at trial. Wash. Const. art. IV, §16. A judge comments on the evidence if the comment suggests the judge's attitude toward the merits of the case or the judge's evaluation relative to the disputed issue. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). It is error for a judge to instruct the jury that “matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The purpose of prohibiting judicial comments is to prevent the judge's opinion from influencing the jury. Lane, 125 Wn.2d at 838.

In assessing whether a statement constitutes an improper comment, courts have considered whether the comment was directed at counsel, as opposed to the jury, and was said in legal terms or to explain a ruling, State v. Knapp, 14 Wn. App. 101, 113, 540 P.2d 898 (1975); State v. Surry, 23 Wash. 655, 660, 63 P. 557 (1900), and whether the court instructed the jury to disregard its comment. Surry, 23 Wash. at 661.

Once the defendant demonstrates that the trial judge made a comment on the evidence, the reviewing court will presume the comments were prejudicial; the burden is then on the State to show no prejudice

could have resulted from the comment or that no prejudice did result to the defendant. Lane, at 838-839.

Washington courts have concluded that judicial comments were harmless in at least three cases. State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006)(“to convict” instructions which stated that the State must prove the defendant had “entered or remained unlawfully in a building, to-wit: the building of [the victim]”; had taken “personal property to-wit: jewelry, from the person or in the presence of another, to-wit: [names of victims]”; and had been “armed with a deadly weapon, to-wit: a .38 revolver,” was harmless error where “[n]o one could realistically conclude that a revolver is not a deadly weapon, an apartment is not a building, a specifically named person is not someone other than the defendant, and jewelry is not personal property.”); State v. Lane, 125 Wn.2d 825, 840, 889 P.2d 929 (1995) (a judicial comment regarding the credibility of a witness did not prejudice one of the defendants because there was overwhelming untainted evidence supporting his conviction); State v. Holt, 56 Wn. App. 99, 106, 783 P.2d 87 (1989)(to convict instructions that specified the material alleged to be lewd were harmless beyond a reasonable doubt because other instructions provided a definition of “lewd”).

Here, defendant fails to demonstrate that there was a comment on the evidence. The trial court stated:

THE COURT: [Mr. Prosecutor,] I am going to stop you for just 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 so choose. So you can pull them out, and I'll give you a minute to do that if you would like to, or not, as you see fit.

RP 97-8. This statement was made at the very beginning of the State's first witness, the first witness in the trial. Id. The witness stated his name on the record on page 96, and the court interrupted the prosecutor at the bottom of page 97, a very short time later. RP 96-7.

The trial court merely instructed the jury as to the law regarding note taking and when that could take place. The jury may take notes "when the evidence is presented." RP 97. She did not express any opinion or attitude towards the merits of the case or any disputed issues. In fact, the witness had only generally stated that his place of business was robbed at gunpoint; he had not yet provided any details. RP 96-7.

The trial court did not instruct the jury "that it was time to take notes," as asserted by defendant. BOA at 11; 14. The court made it perfectly clear to the jury that it was totally up to them as to whether they wanted to take notes. She told the jury that they did not 'have to take notes,' that they were 'not obligated to take notes,' that they could take notes 'if they choose,' and that they could take out their note pads 'if [they] like to, or not, as [they] see fit.' RP 97-8. The judge made it clear she was not trying to influence them about whether they take notes. Nor

does even the most liberal interpretation suggest the judge was attempting to highlight the current witness' testimony. Rather, it appears from the record that the judge forgot to instruct the jury before the prosecutor called its first witness, but did so almost immediately thereafter.

Additionally, there was overwhelming evidence that defendant robbed Tacoma Boys. Two witnesses identified him as the man they chased in the parking lot as he fled the store. The license number of the getaway car matched the license plate of the car defendant was driving when he fled police at high speeds. When defendant was taken into custody, he had the cash on him from the robbery, he had the gun in the car with him, along with the steak he presented to the clerk in the checkout line. Finally, defendant fully confessed to this crime. Even if by some stretch of the imagination the trial court conveyed a comment on the evidence, the comment would be harmless.

The trial court's statements did not violate Wash. Const. art. IV, §16. Defendant's claim fails.

2. THIS COURT CANNOT CONSIDER DEFENDANT'S ASSIGNMENT OF ERROR TO (a) JURY INSTRUCTIONS OR (b) TO INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENDANT FAILED TO MAKE THE INSTRUCTIONS PART OF THE RECORD ON APPEAL AS REQUIRED BY RAP 9.6(b)(1)(F).

"The clerk's papers **shall** include, at a minimum ... any jury instruction given or refused that presents an issue on appeal." RAP

9.6(b)(1)(F) [emphasis added]. "Matters referred to in the brief but not included in the record cannot be considered on appeal." State v. Stockton, 97 Wn.2d 528, 530, 647 P.2d 21 (1982); State v. Bradfield, 29 Wn. App. 679, 630 P.2d 494 (1981).

Defendant makes three assignments of error, two of which are based on jury instructions. Brief of Appellant, BOA, at 1. One of defendant's claims is that he was denied due process when the trial court incorrectly instructed the jury. Id. The other claim is that he was denied effective assistance of counsel for trial counsel's failure to demand a proper instruction. Id. However, defendant did not include in the appellate record the court's instructions to the jury or defense counsel's or plaintiff's proposed instructions. The party seeking review has the burden of perfecting the record so that the reviewing court has before it all of the relevant evidence. State v. Vazquez, 66 Wn. App. 573, 583, 832 P.2d 883 (1992). An insufficient record on appeal precludes review of the alleged errors. Allemeier v. UW, 42 Wn. App. 465, 472-73, 712 P.2d 306 (1985), *review denied*, 105 Wn.2d 1014 (1986).

In City of Spokane v. Neff, 152 Wn.2d 85, 93 P.3d 158 (2004), the city sought review of the trial court's exclusion of evidence of prior prostitution related behavior under ER 404(b) as improper propensity evidence. Id. at 91. Because the Neff court found "nothing in the record to establish the basis upon which the trial court ruled," it held that the city failed to meet its burden of providing the record of the evidentiary hearing

and affirmed the evidentiary ruling. *Id.*; *see also* State v. Tracy, 128 Wn. App. 388, 394-95, 115 P.3d 381 (2005) (When an appellant fails to meet the burden of providing an adequate record, "the trial court's decision stands.") (*citing* Story v. Shelter Bay Co., 52 Wn. App. 334, 345, 760 P.2d 368 (1988)), *review granted*, 156 Wn.2d 1030 (2006); State v. Firven, 22 Wn. App. 703, 704-05, 591 P.2d 869 (1979) (RAP 9.6 requires "[t]he party seeking review of a lower court's ruling [to] designat[e] the necessary clerk's papers and exhibits.").

Because appellate courts cannot consider matters referred to in the brief but not included in the record, this Court must decline to review defendant's arguments relating to the instructions and ineffective assistance of counsel.

3. ASSUMING ARGUENDO THAT THE INSTRUCTIONS IN DEFENDANT'S BRIEF ARE ACCRUATE, DEFENDANT IS NOT ENTITLED TO RELIEF BECAUSE HE IS BARRED BY THE DOCTRINE OF INVITED ERROR.

The doctrine of invited error bars a defendant from claiming on appeal that jury instructions were deficient when the defendant proposed the instructions. State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000)(*citing* State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989); State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); State v. Summers, 107 Wn. App. 373, 381, 28 P.3d 780 (2001), modified by 43 P.2d 526 (2002). This is true even if the defendant simply proposes

standard Washington Pattern Jury Instructions (WPIC) approved by the courts. Studd, 137 Wn.2d at 548-49; Summers, 107 Wn. App. at 381. In fact, “even where constitutional rights are involved, [an appellate court is] precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording.” State v. Winings, 126 Wn. App. 75, 107 P.3d 141, 149 (2005)(citing Bradley, 141 Wn.2d at 736); In re Det. of Gaff, 90 Wn. App. 834, 845, 954 P.2d 943 (1998); *see also*, Studd, 137 Wn.2d at 547.

The invited error doctrine is strict in Washington. The doctrine has been applied to errors of constitutional magnitude, including where an offense element was omitted from the “to convict” instruction. Id. (citing State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990)(failing to specify the intended crime in a conviction for attempted burglary); Summers, 107 Wn. App. 373, 380-82, 28 P.3d 780 (2001)(omitting the knowledge element of unlawful possession of a firearm). The doctrine has been applied even in cases where the error resulted from neither negligence nor bad faith. *See e.g.*, Studd, 137 Wn.2d at 547.

In Studd, a consolidated case, the six defendants all proposed instructions that were modeled after WPIC 16.02, which was a proper statement of the law at the time the instruction was offered. After trial, the Supreme Court in State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996), ruled that a similar instruction erroneously stated the law of self-defense.

Studd, 137 Wn.2d at 545. While concluding that the error was of constitutional magnitude, and therefore presumed prejudicial, the Supreme Court held that the defendants who had proposed the instruction had invited the error and could not therefore complain on appeal. Studd, 137 Wn.2d at 546-47.

In this case, the defense proffered the instruction that he now complains about.² 1RP 51-52. After discussions regarding instructions, the parties advised the trial court:

[PROSECUTOR]: Your Honor, [defense counsel] and I took the opportunity to go through the instructions and we were actually able to agree on everything so we have taken some of his instructions and some of my instructions. . . . On the eluding charge, **the State is agreeing to the defense's proposed instruction and the proposed language** there so we pulled the definition of reckless which doesn't apply anymore. . . .

[DEFENSE]: Your Honor, we have agreed and we certainly have **no objection** to the Court's failing to give any of the instructions because everything that I wanted [the prosecutor] and I worked out and everything he wanted we worked out so this is an **agreed** packet.

1RP 51-51 [emphasis added].

Defendant, therefore, invited any error related to that instruction and is therefore barred from asserting error on appeal.

² Defendant fails to disclose in his brief that it was the defendant who proposed the instructions that he now complains about.

4. DEFENDANT IS NOT ENTITLED TO RELIEF FOR INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE IS UNABLE TO MEET THE SECOND PRONG OF STRICKLAND, ACTUAL PREJUDICE.

The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To demonstrate ineffective assistance of counsel in Washington, a defendant must satisfy the two-prong test laid out in Strickland. *See also* State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he was prejudiced by the deficient representation. *Id.* To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In determining the first prong, whether counsel's performance was deficient, there is a strong presumption of adequacy. McFarland, 127 Wn.2d at 335. Competency is not measured by the result. State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993)(citing State v. White, 81

Wn.2d 223, 225, 500 P.2d 1242 (1972), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994)). “[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.” Personal Restraint Petition of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992)(*citing Strickland*, 466 U.S. at 689)). If defense counsel’s trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) *citing State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

To satisfy the second prong, prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. “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. If either part of the test is not satisfied, the inquiry need go no further.” Hendrickson, 129 Wn.2d at 78.

- a. The State concedes that defense counsel’s representation was deficient.

In 2003, the Legislature amended the eluding statute. The new version became effective July 27, 2003. Laws of Washington 2003 c 101 § 1. The amendments:

Redesignated the first formerly undesignated paragraph as subsection (1); in present subsection (1), substituted "**reckless manner**" for "*manner indicating a wanton or willful disregard for the lives or property of others*" in the first sentence, substituted "the vehicle" for "his vehicle" and substituted "shall be equipped with lights and sirens" for "shall be appropriately marked showing it to be an official police vehicle"; added present subsection (2); and redesignated the former second paragraph as subsection (3).

Id. [Emphasis added.]

In order to convict a defendant of attempting to elude a pursuing police vehicle under the current statute, the State must prove:

(1) That on or about a particular date, the defendant drove a motor vehicle;

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

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

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

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

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

RCW 46.61.024(1) [emphasis added].

Without an adequate record, this Court must, for the sake of argument, rely on defendant's brief, rather than actual court documents,

for the facts of the case. If those facts are fully and truthfully set forth, defense counsel proposed a jury instruction that was obsolete and did not accurately reflect the current elements and definitions of the charge of attempting to elude a pursuing police vehicle. Therefore, his conduct in that regard was deficient. The State concedes that the first prong of Strickland is satisfied.

b. Defendant has not met his burden of showing actual prejudice.

The second prong, however, has not been satisfied. Defendant carries the burden of showing that there exists a reasonable probability that the result of the trial would have been different but for his counsel's error. Hendrickson, 129 Wn.2d at 78.

Counsel's error does not bring into question the reliability of the verdict. Even if properly instructed, there is no reasonable probability that the jury would have acquitted defendant on the eluding charge for three reasons. First, there is little difference between the element provided to the jury and the correct element. Second, there is overwhelming evidence of guilt on that element. Third, defendant did not dispute the nature of the driving during the attempted eluding.

The term "reckless manner" means "rash or heedless, indifferent to the consequences." State v. Roggenkamp, 153 Wn.2d 614, 621-22, 106

P.3d 196 (2005).³ According to defendant's brief, the term "reckless manner" did not appear anywhere in the court's instructions to the jury. BOA 21-22. Defendant further claims that the jury was instructed that "[w]anton means acting in heedless disregard of the consequences..." BOA at 21. Thus, the definitions are not vastly different. In his brief, defendant does not even attempt to argue how applying the evidence to the correct instructions would make a difference that would lead to an acquittal, how the correct instruction would change how the jury evaluated reasonable doubt, or any way that the correct instruction could have made a difference in the result. The definition of 'wanton' is very lengthy, as compared to the definition of reckless manner, which is brief and uses the same key words used to define wanton. A portion of the definition of wanton, according to defendant is:

Wanton: "acting in heedless disregard of the consequences" BOA at 21.

Reckless manner: "rash and heedless, indifferent to the consequences"

Roggenkamp, 153 Wn.2d at 621-22. Both definitions contain the term 'heedless'. There is no difference between 'disregard of the consequences' vs. 'indifferent to the consequences'.

³ In one portion of his brief, defendant cites Roggenkamp and also asserts that this is the meaning of "in a reckless manner." BOA at 23. However, relying on court of appeals decisions, defendant later inconsistently claims that a different definition applies. BOA at 24 and 31.

Additionally, there was overwhelming evidence that defendant drove in a reckless manner; that he was rash and heedless, indifferent to the consequences. Defendant engaged police officers in a lengthy chase at high speeds in the city of Tacoma on a weekday at rush hour. RP 195-233. The chase began near South Cedar and 12th, continued on to 14th and Cedar, 15th and Pine, 19th Street, 12th and Sprague, and ended when defendant crashed off of the roadway. Id.

Defendant ran a red light in the oncoming lane of travel. RP 200-10. He then accelerated through a stop sign and drove at speeds of 50 MPH and 60 MPH in residential and business neighborhoods around 5:00 PM on a weekday when there were many other cars on the roadway. RP 202-22. At some point during the chase, defendant sped through the very busy intersection at 12th and Sprague. RP 222. There was also pedestrian traffic in the form of adults and children on the sidewalks. Id. Defendant ran another stop sign and continued on, weaving in and out of traffic, mostly in the oncoming lane of travel, driving at least 60 MPH. RP 205. When he ran the stop sign, defendant nearly struck a firetruck. RP 205, 208. Defendant then ran another stop sign and almost got into a “T-bone” collision with another vehicle. RP 206. Still refusing to stop, defendant got back into the oncoming lanes and nearly collided with Officer Quilio’s patrol vehicle approaching from the other direction. RP 206. At that moment, Officer Quilio was stopped in the lane of travel and defendant actually veered toward him, nearly striking his patrol car. RP 230.

Defendant also nearly collided with Officer Chittick's vehicle. Had she not taken evasive action, defendant would have collided with her patrol vehicle or that of a citizen who had pulled over in response to Officer Thornton's lights and siren. RP 221. Defendant ran more stop signs, swerved all over the roadway, slowed briefly, and then sped off again. RP 206. Defendant finally stopped, but only because he took a corner way too fast, lost control of the vehicle, and crashed. RP 207. He was high-centered. RP 207. Officer Thornton stopped directly behind defendant. Defendant tried to back up his vehicle to get away and crashed into Officer Thornton's patrol car. RP 207. Officers then took defendant into custody. RP 210. This constitutes overwhelming evidence of driving in a reckless manner.

Lastly, trial counsel presented a defense of identity. In closing, defense counsel said that the issues in the case were the confession, identification, and memory. RP 415. His theory was that the State could not prove that defendant was the person who committed the robberies because (1) witnesses could not identify him; (2) witness who did identify him had memory issues and reliability issues; and (3) his confession to all crimes was unreliable because he was under the influence of crack cocaine at the time of the interview and taped statement. RP 411-424. Counsel emphasized that identity is an element of the crime. RP 421. Thus, defendant's theory of the case below was one of identity.

Of the three officers who testified to the details of the pursuit, defendant only cross-examined one and that involved firearm issues. RP 216-17; 223; 233. He did not even attempt to minimize the egregious pursuit through cross-examination. That would have been futile and could have caused him to lose credibility with the jury. Therefore, he did not challenge the nature of the driving during the pursuit. In fact, he did not even mention the facts of the pursuit or the eluding charge in closing argument. RP 411-24. Counsel did the best he could to defend against an ironclad case with a full, taped confession.

Had the jury been correctly instructed that they must find beyond a reasonable doubt that defendant drove in a reckless manner, there can be no question that they would have so found. Therefore, defendant cannot meet his burden of showing actual prejudice. The ineffective assistance of counsel claim must fail.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence.

DATED: July 13, 2007.

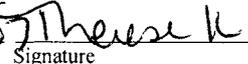
GERALD A. HORNE
Pierce County
Prosecuting Attorney



P. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

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.

7-13-07 
Date Signature

FILED
COURT OF APPEALS
DIVISION II
07 JUL 13 PM 4:46
STATE OF WASHINGTON
BY 
DEPUTY