

Original

No. 36085-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Troy McClure,**

Appellant.

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FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

Lewis County Superior Court

Cause No. 06-1-00601-6

The Honorable Judge Richard L. Brosey

**Appellant's Opening Brief**

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## ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to give the defendant's proposed missing witness instruction, which was as follows:

If a party does not produce the testimony of a witness who is [within the control of] [or] [peculiarly available to] that party, and as a matter of reasonable probability, it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

RP (3/21/07) 87.

2. Mr. McClure's conviction for Attempting to Elude violated due process because the prosecutor was not required to prove all essential elements beyond a reasonable doubt.

3. The trial court's "to convict" instruction omitted elements of Attempting to Elude.

4. The trial court's "to convict" instruction misstated elements of Attempting to Elude.

5. The trial court erred by giving Instruction No. 4, which reads as follows:

A person commits the crime of attempting to elude a pursuing police vehicle when he willfully fails or refuses to immediately bring his 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 drives his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others.

A signal to stop given by a police officer may be by hand, voice, emergency light, or siren. The police officer giving such a signal must be in uniform and the officer's vehicle must be appropriately marked showing it to be an official police vehicle.

6. The trial court erred by giving Instruction No. 5, which reads as follows:

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

- (1) That on or about the 29th day of June, 2006, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;
- (3) That the signaling police officer's vehicle was appropriately marked, showing it to be an official police vehicle;
- (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) That the acts occurred in the State of Washington.

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

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

Instruction No. 5, Supp CP.

7. The trial court's instructions as a whole allowed conviction without proof of all essential elements.

8. The trial court's instructions as a whole misstated the applicable law.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Troy McClure was charged with Attempting to Elude a Pursuing Police Vehicle. The main issue at trial was the identity of the driver. The state called the officer who pursued the eluding pickup truck, but did not call the officer who searched the truck, and did not provide any additional

evidence-- such as the driver's seat position, fingerprints on the steering wheel, or documents-- establishing Mr. McClure as the driver. Mr. McClure requested a missing witness instruction. The trial court refused to give the instruction, finding that the officer who searched the truck was not peculiarly available to the prosecution and that the missing evidence was not important to the case.

1. Did the trial judge abuse his discretion by refusing to give a missing witness instruction in light of the prosecution's failure to call Deputy Breen to testify? Assignment of Error No. 1.
  
2. Did Deputy Breen, the investigating officer who searched the truck, share a community of interest with the prosecution such that a missing witness instruction was required? Assignment of Error No. 1.
  
3. Was Deputy Breen peculiarly available to the prosecution? Assignment of Error No. 1.
  
4. Was Deputy Breen's testimony important to the main issue at trial? Assignment of Error No. 1.
  
5. Was Deputy Breen's testimony unique rather than cumulative? Assignment of Error No. 1.
  
6. Did the prosecutor fail to provide a satisfactory explanation for Deputy Breen's absence? Assignment of Error No. 1.

The court's instructions did not require proof that the pursuing officer drove a police vehicle equipped with lights and sirens; instead, the instructions allowed conviction if the car was "appropriately marked."

The instructions also did not require the jury to find that Mr. McClure drove "in a reckless manner." Instead, they allowed conviction if Mr. McClure drove "in a manner indicating a wanton or willful disregard for the lives or property of others..."

7. Did the trial court's instructions omit and misstate essential elements of Attempting to Elude a Pursuing Police Vehicle? Assignments of Error Nos. 2-8.

8. Was Mr. McClure denied his constitutional right to due process by the trial court's failure to include in the "to convict" instruction all essential elements of the charged crime? Assignments of Error Nos. 2-8.

9. Did the trial court's instructions as a whole allow conviction without proof of all essential elements of the charged crime? Assignments of Error Nos. 2-8.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

In September of 2006, Troy McClure was charged by Information with Attempting to Elude a Pursuing Police Vehicle. According to City of Toledo Officer Brockmueller, a two-tone pickup truck drove by his home on June 29, 2006, while the officer was at home (although on duty). RP (3/21/07) 75-79. Brockmueller, who had been asked to watch for the pickup, gave chase but did not catch the driver. The pickup was later discovered in a field, abandoned. RP (3/21/07) 67-73. The truck was searched by Deputy Breen of the Lewis County Sheriff's Department. RP (3/21/07) 82.

At Mr. McClure's jury trial, the main issue was Officer Brockmueller's ability to identify the driver of the pickup. RP (3/21/07) 75-85; CP 24. Brockmueller's only opportunity to identify the driver was when the pickup drove past his house, roughly 45 feet away from where he was standing. RP (3/21/07) 76. Despite this, he testified that he was "100 percent" certain that Mr. McClure was the driver. RP (3/21/07) 83.

Deputy Breen, who had searched the pickup, was not called to testify about whether or not he found anything establishing Mr. McClure as the driver. RP (3/21/07) 85-97.

Mr. McClure requested a missing witness jury instruction, arguing that the officer's testimony left a gap in the state's case and that officer was peculiarly available to the state. RP (3/21/07) 85-102. The court declined to give the requested instruction. RP (3/21/07) 96-97.

The court gave an instruction defining Attempting to Elude. Instruction No. 4, Supp. CP. The court's "to convict" instruction provided as follows:

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

- (1) That on or about the 29th day of June, 2006, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;
- (3) That the signaling police officer's vehicle was appropriately marked, showing it to be an official police vehicle;
- (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) That the acts occurred in the State of Washington.

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

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.  
Instruction No. 5, Supp CP.

None of the court's instructions required the jury to find that Mr. McClure drove "in a reckless manner;" nor did any of the instructions require proof that the pursuing officer drove a vehicle equipped with light and sirens. Supp. CP. The jury found Mr. McClure guilty, he was sentenced, and this timely appeal followed. CP 14-23, 3-13.

### ARGUMENT

#### **I. THE TRIAL COURT SHOULD HAVE GRANTED MR. MCCLURE'S REQUEST FOR A MISSING WITNESS INSTRUCTION.**

Under the missing witness doctrine, where a party fails to produce otherwise proper evidence which is within his or her control, the jury may draw an inference unfavorable to that party. *State v. Russell*, 125 Wn.2d 24 at 90, 882 P.2d 747 (1994). WPIC 5.20 sets forth the standard missing witness instruction:

If a party does not produce the testimony of a witness who is within the control of or peculiarly available to that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.  
WPIC 5.20.

The instruction must be given when requested by the defendant if warranted by the facts of the case. *State v. Davis*, 73 Wn.2d 271, 438 P.2d

185 (1968). There are three exceptions to this rule. First, the instruction should not be given if the witness possesses evidence that is unimportant or merely cumulative, depending on the facts of the case. *State v. Blair*, 117 Wn.2d 479 at 489, 816 P.2d 718 (1991); *Davis*, at 278. Second, the instruction should not be given if there is a satisfactory explanation for the witness' absence. *Blair*, at 489. Third, the instruction should not be given if the witness is incompetent or the testimony is privileged. *Blair*, at 489.

The witness must be “within the control of or peculiarly available” to the party against whom the instruction is offered. WPIC 5.20; *Blair*, *supra*. However, this question of availability does not mean that the witness is present in court or subject to the subpoena power. Instead,

[f]or a witness to be “available” to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging. *Davis*, at 277, 438 P.2d 185; *accord*, *United States v. MMR Corp. (LA)*, 907 F.2d 489 (5th Cir.1990). The rationale for this requirement is that a party will likely call as a witness one who is bound to him by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be. *Davis*, 73 Wash.2d at 277, 438 P.2d 185 (quoting 5 A.L.R.2d 895 (1949)). *State v. Blair*, at 490.

In this case, the court should have granted Mr. McClure's request for a missing witness instruction. First, there was a community of interest

between the missing witness and the prosecution. The missing witness was Deputy Breen, who searched the truck after it was discovered abandoned in a field. RP (3/21/07) 82. He was one of only two investigating officers on the case; he was an employee of the Lewis County Sheriff's Department in a case prosecuted by the Lewis County Prosecuting Attorney's Office. RP (3/21/07) 61-85, 82. Because of his relationship to the case and to the prosecuting authority, there was a community of interest between him and the prosecution.

Second, Deputy Breen's information was important to the main issue at trial: the driver's identity. Deputy Breen's search of the truck either yielded information tending to confirm that Mr. McClure was the driver, or it failed to produce such information.<sup>1</sup> It is reasonable to assume that the prosecutor would have called Deputy Breen to testify if such proof had been discovered; the prosecutor's failure to call Deputy Breen suggests that he found no such evidence.

Third, Deputy Breen's testimony would not have been cumulative. No one else testified regarding the evidence (or lack thereof) discovered in the truck. *See, e.g., Davis, supra*; RP (3/21/07) 61-84. Had Officer

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<sup>1</sup>Information obtained from the truck would have (potentially) included the driver's seat position, fingerprints on the steering wheel, loose documents showing that Mr. McClure (or another) had recently been in the truck, or even hair and fiber evidence or DNA evidence.

Brockmueller (who chased the truck) participated in the search of the truck, he could have testified to the results, and Deputy Breen's absence would have been unremarkable. But Brockmueller was not involved; the failure to call Deputy Breen suggests he was unable to find anything identifying Mr. McClure as the driver on the date in question. RP (3/21/07) 82.

Finally, the prosecutor gave no satisfactory explanation for Deputy Breen's absence. Nor was there any suggestion that he was unavailable, incompetent or that his testimony was in some way privileged. RP (3/21/07) 83-100.

The trial court mistakenly concluded that Deputy Breen was equally available to both parties, ignoring the Washington Supreme Court's interpretation of that phrase. RP (3/21/07) 96. The trial court did not analyze the issue under the "community of interest" test set forth in *Davis* and its progeny.<sup>2</sup> Under the trial court's interpretation, no missing witness would ever qualify as being "peculiarly available" to either party,

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<sup>2</sup> The facts here are similar to those set forth in *Davis*. In *Davis*, the circumstances surrounding the defendant's confession were at issue. The State failed to call an officer who was present during the alleged confession, and did not explain the officer's absence on the record. The defendant requested a missing witness instruction; the request was denied. The Supreme Court reversed the conviction, holding that the officer was peculiarly available to the State (since they shared a community of interest) and that his testimony would not have been unimportant or merely cumulative. *Davis, supra*.

since either party could always subpoena the witness and compel attendance.

Furthermore, the trial judge erroneously concluded that Deputy Breen's testimony did not relate to an issue of importance, even if he found nothing linking the truck to Mr. McClure. RP (3/21/07) 96-98. Instead, the trial court seemed to demand proof that Deputy Breen's testimony would have been damaging to the prosecution, and dismissed Mr. McClure's request for a missing witness instruction as "based on speculation and conjecture..." RP (3/21/07) 96.

The trial judge's insistence on proof overlooks the point of the missing witness instruction: where the prosecution fails to provide an adequate explanation for a witness's absence, the jury is permitted to infer-- that is, speculate and engage in conjecture-- that the testimony would have been unfavorable.

The missing witness instruction should have been given. The trial court's refusal to give the instruction was error, and the conviction must be reversed. *Davis, supra*.

**II. THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO ESTABLISH EVERY ELEMENT OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.**

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67; 941 P.2d 661 (1997).

The failure to instruct on all the elements of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415 (2005). The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn. App. 88 at 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn. App. 40 at 45, 21 P.3d 1172 (2001). See *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439, (1987).

A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22

at 31, 93 P.3d 133 (2004). The jury has the right to regard the “to convict” instruction as a complete statement of the law. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997). Any conviction based on an incomplete “to convict” instruction must be reversed. *Smith*, at 263.

The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003).

Mr. McClure was charged with Attempting to Elude a Pursuing Police Vehicle, under RCW 46.61.024(1), which provides as follows:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop *and who drives his vehicle in a reckless manner* while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform *and the vehicle shall be equipped with lights and sirens*. RCW 46.61.024(1), *emphasis added*.

The current statute is a result of amendments passed in 2003. *See* Laws of 2003 Chapter 101 Section 1.

A. The court’s instructions allowed conviction without proof that the pursuing vehicle was “equipped with lights and sirens.”

Neither the instruction defining Attempting to Elude nor the “to convict” instruction included the requirement that the jury find beyond a reasonable doubt that the pursuing police vehicle was “equipped with

lights and sirens,” as required by the current version of RCW 46.61.024.<sup>3</sup>

Supp. CP.

Because the instructions omitted this essential element, prejudice is presumed and the conviction must be reversed. *Brown, supra; Smith, supra.* The case must be remanded to the superior court for a new trial. *Brown, supra; Jones, supra.*

B. The court’s instructions allowed conviction without proof that Mr. McClure drove “in a reckless manner.”

The trial court’s instructions were erroneously based on the former statute, and diluted an essential element under the current statute. Prior to 2003, a conviction of Attempting to Elude required proof that the accused drove “in a manner *indicating* a wanton or wilful [sic] disregard for the lives or property of others...” *Former RCW 46.61.024, emphasis added.* The prior statute required the jury to infer the accused’s mental state from her or his driving (driving “in a manner indicating a wanton or wilful disregard...”); the current statute requires proof that the driving itself was reckless (driving “in a reckless manner.”) *Compare former RCW 46.61.024 with RCW 46.61.024.*

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<sup>3</sup> Instead, the court’s instructions included the requirements of *former* RCW 46.61.024. See Instructions Nos. 4 and 5: the vehicle “must be appropriately marked showing it to be an official police vehicle.” Supp. CP.

The difference between the former and current statutes is significant. Under the current statute, the focus is on the driving itself, and conviction requires proof of actual reckless driving. By contrast, under the former statute, the focus was on the driver's mental state; the driving itself need not have been reckless, so long as the jury could infer the defendant's wanton or willful disregard for persons or property.

In this case, the court's instructions lowered the prosecution's burden. The instructions should have focused the jury on the driving itself, and required proof that Mr. McClure drove "in a reckless manner." Instead, the instructions erroneously tracked the former statute, and allowed conviction upon proof that Mr. McClure "drove his vehicle in a manner *indicating* a wanton or willful disregard for the lives or property of others." Instructions Nos. 4 and 5, Supp. CP. The statute requires proof of actual reckless driving; Instructions Nos. 4 and 5, by contrast, required only proof of a culpable mental state (wanton or willful disregard) inferred from the manner of driving.

It may be tempting to compare the word "reckless" with the phrase "wanton or willful" and apply the rule that proof of a higher mental state satisfies a requirement for proof of a lower mental state. *See* RCW 9A.08.010. This analysis is inappropriate here because it takes the words out of context. As noted above, the focus in the current statute is on the

actual driving; the focus in the former statute is on the accused's mental state. For example, a person driving in a manner that is not reckless under the circumstances-- i.e. by speeding on a straight road during daylight hours-- might nonetheless have a wanton and willful disregard for the lives or property of others. Proof that the driver had a wanton and willful disregard for the lives or property of others-- even if inferred from the driving-- would not establish that she or he drove in a reckless manner.

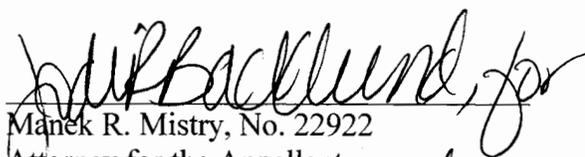
Mr. McClure's conviction for Attempting to Elude must be reversed. The court's instructions did not correctly set forth the essential elements of the crime, depriving Mr. McClure of his constitutional right to due process. Accordingly, prejudice is presumed. *Lorenz, supra; Douglas, supra; Brown, supra; Kiehl, supra.* The case must be remanded to the superior court for a new trial. *Brown, supra; Jones, supra.*

**CONCLUSION**

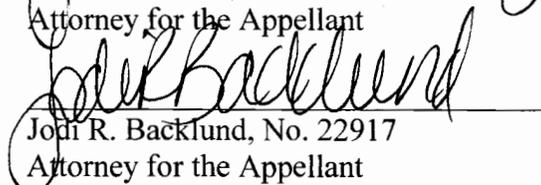
For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on September 6, 2007.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Troy McClure  
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and to:

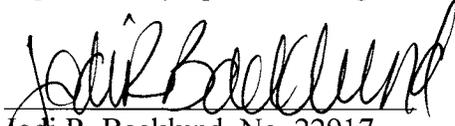
Lewis County Prosecuting Atty  
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Chehalis WA 98532-4802

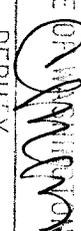
And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 6, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 6, 2007.

  
\_\_\_\_\_  
Jodi R. Backlund, No. 22917  
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