

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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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

Lewis County Superior Court

Cause No. 06-1-00601-6

The Honorable Judge Richard L. Brosey

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THE TRIAL COURT SHOULD HAVE GIVEN A MISSING WITNESS INSTRUCTION.**

At trial, the primary issue was whether or not Troy McClure was the driver of the truck pursued by the police. RP (3/21/07) 61-83. The state failed to call the one officer—Deputy Breen—who might have been able to provide physical evidence corroborating that Mr. McClure was the driver of the truck before it was abandoned. RP (3/21/07) 61-83. The state’s failure suggests that the officer would not have been able to provide that corroboration—in other words, that Deputy Breen “had [nothing] to add to the Attempting to Elude charge.” Brief of Respondent, p. 4. Deputy Breen’s absence suggests that he found nothing in the truck connecting it to Troy McClure. Under these circumstances, the trial judge should have given a missing witness instruction. *State v. Russell*, 125 Wn.2d 24 at 90, 882 P.2d 747 (1994); WPIC 5.20.

### **II. RESPONDENT’S CONCESSION REQUIRES REVERSAL.**

Respondent concedes that the jury instructions were erroneous. Brief of Respondent, pp. 5-10. Accordingly, the instructions violate due process and are presumed prejudicial. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *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).

Nothing in the record shows that the police car was equipped with “sirens” (plural); the testimony cited by Respondent only demonstrates that the car had a single siren. Brief of Respondent, p. 9. This testimony is insufficient to meet the requirements of RCW 46.61.024, which requires proof that the car was “equipped with lights and sirens.” RCW 46.61.024(1).

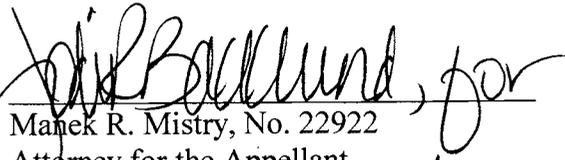
Mr. McClure’s conviction for Attempting to Elude must be reversed. The court’s instructions did not correctly set forth the essential elements of the crime, depriving Mr. McClure of his constitutional right to due process. Accordingly, prejudice is presumed; the case must be remanded to the superior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

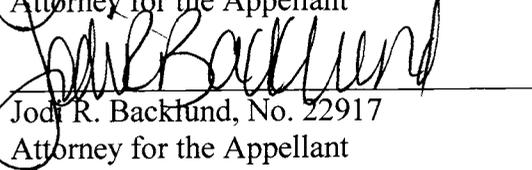
**CONCLUSION**

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

Respectfully submitted on February 29, 2008.

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CERTIFICATE OF MAILING

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

Troy McClure  
P.O. Box 520  
Winlock, WA 98596

And to the Lewis County Prosecuting Attorney at their address of record,  
and that I sent the original and one copy to the Court of Appeals, Division  
II, for filing;

All postage prepaid, on February 29, 2008.

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 February 29, 2008.

  
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