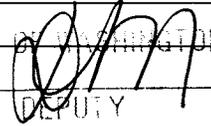


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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM FEDDERSEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judges Brian Tollefson and Vicki L. Hogan

No. 06-1-02203-5

Brief of Respondent

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

1. Did defendant receive a fair trial when the statements made by the prosecutor in closing did not constitute prosecutorial misconduct?

2. Did the trial court abuse its discretion in admitting Deputy Sargent's identification of defendant when the identification was not impermissibly suggestive and was deemed reliable?

3. Was their sufficient evidence for the trier of fact to find defendant guilty of attempting to elude a pursuing police vehicle when there was sufficient evidence that the police vehicles were equipped with lights and sirens?

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5. Did defendant waive his right to challenge his criminal history and offender score when he did not object, and in fact did not dispute either? In the alternative, since the defendant did not object to his criminal history or offender score calculation, should this court remand for resentencing and allow the State to present new evidence?

6. Should defendant's prior convictions have been submitted to the jury when current case law does not require a jury determination of criminal history?

B. STATEMENT OF THE CASE.

1. Procedure

On May 16, 2006, the State charged defendant, William Feddersen, with one count of attempting to elude a pursuing police vehicle, and one count of driving while in suspended or revoked status in the third degree. CP 1-2. Defendant was brought to Pierce County from Shelton for arraignment on October 5, 2007. 10/5/07 RP 5.

On November 26, 2007, the case was assigned to the Honorable Brian Tollefson for jury trial. RP 1. The court held both a CrR 3.5 and CrR 3.6 hearing. RP 32-33. Finding no *Miranda* issue, the court ruled that all statements made by defendant were admissible. RP 32. The court also denied the defense motion to suppress, finding that the *Terry* stop was valid. RP 32-3. The court was also asked to rule on a motion to suppress Deputy Sargent's testimony identifying the defendant as the driver of the car on the night of the incident. RP 51-63, 76-90. The court ruled that the deputy's identification was not impermissibly suggestive and even if it was, it was reliable and should go to the jury. RP 88-90.

The jury found defendant guilty of both attempting to elude and driving with a suspended license. RP 194, CP. The court held sentencing on December 6, 2007. RP 204. Defendant's offender score was calculated as a seven, and his standard range on the felony count, the

attempted elude, was 14-18 months. RP 205. The court sentenced defendant to 18 months on the attempted elude, and 90 days on the suspended license charge to run concurrent. RP 206. Defendant filed this timely appeal. CP 16.

2. Facts

Deputy Winthrop Sargent was on duty on March 12, 2006. RP 94-5. Deputy Sargent was in his official uniform and driving a fully marked Pierce County Sheriff's patrol vehicle. RP 95. The vehicle was equipped with overhead lights, spotlights and wig wags as well as a siren. RP 95.

At approximately 2:00 am on March 12, Deputy Sargent approached the intersection at 112th Street South and C Street. RP 95-6. While he was stopped for a red light, the deputy saw a black pickup on the cross street to his left. RP 96. The deputy observed the pickup's headlights blink on and off a couple of times. RP 97. The deputy assumed that the pickup truck was trying to get his attention so he turned his vehicle around. RP 97. The deputy observed the pickup truck pull over as he started to pull in behind it. RP 97.

The deputy approached the driver of the pickup. RP 98. The deputy testified that the intersection was a major road with businesses and streetlights and was well lit for 2:00 am. RP 96. There was not much traffic at that time of night. RP 100. There was only one person in the pickup truck. RP 98. As the deputy approach the truck, he observed the

driver had some paperwork ready in his hands. RP 98. The deputy asked the driver how he was doing and the driver responded that he did not have any insurance. RP 99. The driver handed the deputy a driver's license. RP 100. The driver's license was for defendant, William Feddersen, and contained a photo. RP 100, 111. The deputy looked at the photo on the license and confirmed that the driver of the truck and the person pictured on the license were the same. RP 100.

The deputy described the driver of the truck, defendant, as a white male with a goatee and short hairstyle. RP 101. The defendant's driver's license differed a bit in that his hair was longer and he had a full beard. RP 101.

The deputy took the paperwork given to him by defendant and returned to his car. RP 102. Once he sat down in his patrol vehicle, defendant accelerated and drove away. RP 102. The deputy activated his lights and sirens and went after defendant. RP 103. Defendant was driving at a high rate of speed with his headlights turned off. RP 103-5. Defendant went through several uncontrolled intersections as well as intersections with stop signs and did not stop. RP 106. The deputy indicated that they were traveling at 70mph in a 35mph zone. RP 106.

Deputy Sargent lost sight of defendant at some point, but other marked patrol cars joined the chase. RP 109, 125. Deputy Christian spotted defendant, who still had his headlights off. RP 109, 126. Deputy Christian turned on his lights and sirens and the chase continued. RP 109,

127. Speeds reached up to 80 mph and defendant continued to ignore traffic rules at intersections. RP 128. The pursuit was terminated by a supervisor. RP 110, 130.

C. ARGUMENT.

1. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d

570 (1995), *citing State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998); *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). Prejudice on the part of the prosecutor is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), *quoting State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *accord Brown*, 132 Wn.2d at 561.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, *citing Gentry*, 125 Wn.2d at 593-594.

Defendant has failed to show either that the prosecutor erred or that if any error occurred, it was so flagrant and ill-intentioned that a curative instruction could not have cured it.

Defendant testified that he didn't have his license on the incident date because he had left his wallet, including his license, at his girlfriend's house since he didn't want to lose it while he was drinking. RP 136. Defendant testified that they broke up and he then went to get his belongings from her. RP 136, 140. Defendant testified that his ex-girlfriend, "let me search for the item—actually she just told me they were all gone and I took her word for that." RP 140. The ex-girlfriend, Erica Cooper, was not on defendant's witness list.

In closing argument, the prosecutor stated, "This is a woman, Erica Cooper, who's defendant's ex-girlfriend, dated for two to three years, knows his mom- knows her mom, they call her Duffy. He says that he contacted her, she said she didn't have it. *But you've heard no testimony from her.*" RP 177 (emphasis added). Defendant claims that this statement was erroneous because it shifted the burden of proof to defendant. However, this statement was not erroneous because (1) the statement showed the evidentiary deficiencies in defendant's case, and (2) the statement was permissible under the missing witness doctrine.

- a. The prosecutor did not shift the burden to the defense by pointing out the evidentiary deficiencies in their theory.

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *Dhaliwal*, 150 Wn.2d at 577; *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant's arguments. See *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

The prosecutor's statement in this case is similar to, though not as directed as, the prosecutor's statements in *State v. Gregory*, 158 Wn.2d 759, 859-860, 147 P.3d 1201 (2006). The *Gregory* court held that the prosecutor had not improperly shifted the burden of proof because (1) prosecutors do not shift the burden when they argue that a defendant's version of events is not corroborated by the evidence, and (2) a jury is presumed to follow the court's instructions regarding the proper burden of proof. *Id.* at 861-862. Gregory was convicted of aggravated first degree murder, and the State sought the death penalty. *Id.* at 812. At the close of the penalty phase, the prosecutor noted that, while Gregory hired a mitigation specialist, Gregory failed to call many witnesses who could have offered evidence to mitigate Gregory's conduct. *Id.* at 859. On rebuttal, the prosecutor again noted that Gregory:

hired a mitigation expert to try to dig up anything they could that was positive to say about Allen Gregory, anything they could.

....

And you can bet that they put on the very best and all the evidence they could scrape together that they thought could possibly mitigate his responsibility.

Id. at 860 (editorial markings omitted).

In the present case, the prosecutor's argument noted that defendant's arguments lacked evidentiary support. The prosecutor does not ever state that it was the defense who failed to call the witness, simply that the jury did not hear any testimony from her. RP 177. Defendant did not object to this remark at trial.¹ Moreover, the jury in this case was presumed to apply the proper burden of proof because the court instructed the jury on that burden. CP 21-37 (Instruction 2). This Court should affirm defendant's conviction because there is no evidence of burden shifting or improper argument.

¹ Defendant did object, during a motion outside the presence of the jury, to the State being able to argue any inference from the witness not testifying. RP 155-160. The court ruled that while he would not give the missing witness instruction, the court would allow the State to make a very limited comment on the witness not testifying. RP 160-1. Defendant did not renew this objection during the State's closing argument, and did not specifically object to any statement made by the State.

b. The prosecutor's statement was proper under the missing witness doctrine.

Even when a prosecutor does not respond directly to a defendant's claims, a prosecutor may comment on a defense failure to call a witness under the missing witness doctrine. Under this doctrine, a party's failure to produce a particular witness who would "ordinarily and naturally testify raises the inference . . . that the witness's testimony would have been unfavorable." *State v. David*, 118 Wn. App. 61, 66, 74 P.3d 686 (2003) (quoting *State v. McGhee*, 57 Wn. App. 457, 462-63, 788 P.2d 603 (1990)); *State v. Cheatam*, 150 Wn.2d 626, 652-653, 81 P.3d 830 (2003) *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991); *State v. Davis*, 73 Wn.2d 271, 277, 438 P.2d 185 (1968). Where a party fails to produce otherwise proper evidence within his or her control, the jury may draw an inference unfavorable to that party. *Russell*, 125 Wn.2d at 90. The "testimony must concern a matter of importance as opposed to a trivial matter, it must not be merely cumulative, the witness's absence must not be otherwise explained, the witness must not be incompetent or his or her testimony privileged, and the testimony must not infringe a defendant's constitutional rights." *Cheatam*, 150 Wn.2d at 652-653; *Blair*, 117 Wn.2d at 489-91.

The missing witness doctrine does not apply if the witness is equally available to both parties. *Blair*, 117 Wn.2d at 490. A witness is not equally available merely because he or she is physically present or subject to the subpoena power. *Davis*, 73 Wn.2d at 276. A witness's availability may depend upon his or her relationship to one or the other of the parties, and the nature of the testimony that he or she might be expected to give. *Davis*, 73 Wn.2d at 277. This instruction is appropriate only when an uncalled witness is "peculiarly available" to one of the parties. *Cheatam*, 150 Wn.2d at 652. Accordingly, a party seeking the benefit of the inference must show the missing witness was "peculiarly within the other party's power to produce." *Blair*, 117 Wn.2d at 491, (quoting *United States v. Williams*, 739 F.2d 297, 299 (7th Cir. 1984)).

Being "peculiarly available" to a party means:

[T]here 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.

Blair, 117 Wn.2d at 490 (quoting *State v. Davis*, 73 Wn.2d 271, 277, 438 P.2d 185 (1968)). Availability "is to be determined based upon the facts and circumstances of that witness's 'relationship to the parties, not merely

physical presence or accessibility.” *Cheatam*, 150 Wn. 2d at 654, quoting Thomas E. Zehnle, 13 CRIM. JUST. 5, 6 (1998).

As the court explained in *Blair*, the “rationale behind 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.” *Blair*, 117 Wn.2d at 490.

In the instant case, the defendant testified that his ex-girlfriend had gotten rid of his license so that he couldn’t possibly have been driving with his license on the date of the incident. RP 136, 140, 141. However, the defense did not call the ex-girlfriend to corroborate this alibi. On the stand, defendant stated that his ex-girlfriend currently lived in Washington, as did her mother. RP 139, 140. He also stated that he knew where she had been working at the time. RP 140-1. There was no evidence that he didn’t know where she worked now. There was no evidence that he had tried to contact her and couldn’t find her.

The ex-girlfriend was peculiarly available to the defense and they chose not to call her to confirm defendant’s alibi. As the State cannot interview defendant to find out what his testimony will be, the State found out about the ex-girlfriend when defendant testified. RP 158. The ex-

girlfriend was a logical witness, and defendant did not satisfactorily explain why she would not be available. The State's comment in closing that the ex-girlfriend did not testify, without stating that defendant failed to call her, merely pointed out the lack of corroboration, and was permissible under the missing witness doctrine.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DEPUTY SARGENT'S IDENTIFICATION OF DEFENDANT WHEN IT WAS NOT IMPERMISSIBLY SUGGESTIVE AND WAS DEEMED RELIABLE.

The trial court's admission of evidence regarding identification procedures is reviewed by this Court for an abuse of discretion. *State v. Kinard*, 109 Wn. App. 428, 431-32, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022, 52 P.3d 521 (2002). An appellate court will only disturb the trial court's ruling if it is manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.*

The defendant bears the burden of showing that an identification procedure was impermissibly suggestive. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (*citing State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984)). When a defendant fails to show impermissible suggestiveness, the inquiry ends. *Vaughn*, 101 Wn.2d at 609-10. Only after the defendant first shows impermissible suggestiveness does the

inquiry turn to whether the identification was nevertheless reliable. *Id.* 610-11. The court then reviews the totality of the circumstances to determine whether that suggestiveness created a substantial likelihood of irreparable misidentification. *State v. Taylor*, 50 Wn. App. 481, 485, 749 P.2d 181 (1988). To determine reliability, the court must consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977) (concluding that "reliability is the linchpin" for determining the admissibility of identification testimony).

The trial court did not abuse its discretion in admitting Deputy Sargent's identification of defendant. The court found that the Deputy was merely refreshing his recollection when he viewed the current booking photo. RP 88. Further, even though the court did not find the identification to be suggestive, the court still engaged in the analysis described in *Manson*, and determined that the identification was reliable. RP 88-90. Finally, defendant cross examined the Deputy on the identification procedure so the credibility of the identification was left to the jury. RP 120. The trial court's decision should be upheld.

- a. The trial court found that the identification procedure was not impermissibly suggestive as the deputy was merely refreshing his recollection.

The identification in this case was not impermissibly suggestive. “A witness’ memory may be refreshed by ‘a song, a scent, a photograph, an allusion even a past statement known to be false.’” *United States v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946). In the instant case, no one refreshed the deputy’s recollection, the deputy pulled defendant’s booking photo as part of his own preparation for court. The court found that the deputy was merely refreshing his recollection when he viewed defendant’s booking photo. RP 88.

The identification in this case was made at the scene of the incident, and not when the Deputy pulled the photo. The identification was made by a trained deputy. Deputy Sargent testified that on the night of the incident, he observed the defendant as the driver of the vehicle. RP 9. That defendant handed him a license and the person pictured on the license, defendant, was the same person that he contacted as the driver of the car. RP 81. In fact, the deputy could remember the slight difference in defendant’s appearance on the night of the incident in terms of facial hair and hair length as opposed to the license photo of defendant. RP 76-7. The lighting was good and there was nothing to distract the deputy

while he spoke with defendant. RP 12, 79. The window was down and the deputy was in close proximity to defendant. RP 79. The deputy was certain that defendant was the driver of the vehicle based on the comparison with the license photo the night of the incident.

The deputy testified that he pulled up the booking photo of defendant to make sure it was the same person as the one he contacted on the night of the incident. RP 76. The deputy was sure that it was the same person once he saw the booking photo and sure it was the same person when he saw defendant in the courtroom. RP 77, 80.

The identification of defendant was made at the scene of the incident. The deputy looked at the license that defendant voluntarily handed to him and confirmed that defendant was the person pictured on the license and the person sitting in front of him as the driver. The deputy looked at the booking photo to make sure that it was the same person he had contacted the night of the incident. The deputy was sure it was the same man. The court did not abuse its discretion in admitting the deputy's identification of defendant.

- b. Even if this court finds that the identification was impermissibly suggestive, the trial court's finding that the identification was reliable was not an abuse of discretion.

Although the court found that the deputy's use of the booking photo to refresh his recollection was not impermissibly suggestive, the

court still engaged in an analysis of the reliability of the officer's identification. A trial court has broad discretion to determine whether a tainted identification is reliable and therefore admissible. *Kinard*, 109 Wn. App. at 432. A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Defendant has failed to show that the court abused its discretion in allowing in the identification, especially after engaging in the analysis as required under *Manson*.

First, the court analyzed the deputy's ability to view the defendant at the time of the crime. RP 88. There was only one person at the scene of the crime for the deputy to focus on. RP 88. Further, the deputy looked at the identification given to him and determined that the person pictured in the driver's license and the person sitting before him in the driver's seat were the same person. RP 81. The deputy described the lighting conditions as being a well lit intersection and that there were not many cars passing through so his attention was not diverted from defendant. RP 12, 79, 88. The deputy had a conversation with defendant and had a good opportunity to view defendant. RP 88-9.

Second, the deputy focused his attention on the driver of the car. The deputy's task was to contact the person in the car whom he thought was flagging him down. RP 89. Without any other cars or people to divert his attention, the deputy was able to focus on the driver of the vehicle: defendant.

Third, the court looked at the accuracy of the deputy's prior description of defendant. The court found it to be fairly general though the court noted that the deputy described defendant as a white male with short hair and a goatee. RP 89. However, it should be noted that the deputy was also able to remember these distinguishing features in comparison to the photo on the license while still identifying the driver and the license picture as the same person. RP 76-7. This does show a degree of sophistication in describing and analyzing the driver.

Fourth, the deputy had a high level of certainty at the time of the incident that the person driving the car was the same person pictured in the license photo and that person was defendant. RP 81, 89. The deputy repeatedly testified that he was certain defendant was the person driving the vehicle on the night of the incident.

Finally, an analysis was made about the time between the crime and the identification in court. First, the deputy was certain that the person in front of him on the incident date was the same person on the driver's license. RP 81. That is a contemporaneous identification. There is nothing to indicate any hesitation in that identification on the part of the deputy. Second, the court found that the deputy did not look at the booking photo to find out what defendant looked like, but to confirm that it was the same person he has contacted a year and a half ago. RP 89. The deputy was certain that it was the same person.

The fact that the deputy looked at defendant's booking photo did not take away from the reliability of his initial identification. The deputy was still able to describe how defendant looked that night and to recall the differences between the defendant in person and his photo on the license. Looking at the booking photo did not affect the reliability of the identification made the night of the incident. The court did not abuse its discretion in ruling the identification was admissible.

- c. As defense was able to question the deputy about his viewing of the photo, the jury's credibility determination should not be disturbed.

In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The court ruled that the deputy could testify about his identification of defendant. RP 90. The jury was then left to decide whether the identification was credible or not. RP 90. Defense was given ample opportunity to question the deputy about how he identified defendant. In her cross examination, the defense attorney asked the deputy if he had looked at a photo of defendant the day before testifying.

RP 120. The deputy stated that he had. RP 120. The defense attorney then asked him why he had looked at the photo and the deputy responded, “Just to refresh my memory about the case.” RP 120. The defense attorney pressed the deputy on exactly what subject he was refreshing his memory about and the deputy responded, “Just what happened and what he looked like.” RP 120.

The prosecutor also asked the deputy about looking at the photo when she questioned him during redirect. RP 120-1. The deputy again responded that he looked at the photo to refresh his memory “about the case and what happened and who’s involved.” RP 121. The jury heard about the identification made in the field but also about the fact that the deputy had recently viewed a photo of defendant.

The jury had two sides to the story as well as defendant’s license to use in their deliberations. RP 102, Exhibit 3. It was up to the jury to decide how much weight to give to the deputy’s identification of defendant, as well as how much weight to give to defendant’s story that he has lost his license. The jury found the deputy’s identification of defendant credible.

3. THERE WAS SUFFICIENT EVIDENCE FOR A JURY TO FIND DEFENDANT GUILTY OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE WHEN THE EVIDENCE SHOWED THAT THE POLICE CARS WERE EQUIPPED WITH LIGHTS AND SIRENS.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *Theroff*, 25 Wn. App. at 593. All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide

disputed questions of fact. *Theroff*, 25 Wn. App., at 593. Credibility determinations are for the trier of fact and not subject to review.

Camarillo, 115 Wn.2d at 71.

The crime of attempting to elude a pursuing police vehicle is described in RCW 46.61.024(1) which states:

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.

Defendant only challenges the sufficiency of the evidence as to the requirement that the police vehicle be equipped with lights and sirens.

Defendant contends that the vehicle must be shown to be equipped with “sirens” plural and that showing that the car had a “siren” singular is insufficient.

A statute should not be interpreted in such a way as to lead to an unlikely, strained or absurd result. *Burns v. City of Seattle*, 161 Wn.2d 129, 150, 164 P.3d 475 (2007). The statute here clearly indicates that the officer must signal the driver to stop “by hand, voice, emergency light, or siren.” RCW 46.61.024(1). It would be absurd and unlikely that the intent was for the police vehicle to be shown to be equipped with sirens

and lights in the plural, when the signal to stop does not require proof of plural lights or sirens. Accepting defendant's argument leads to an absurd interpretation of the statute.

Further, there was sufficient evidence for the jury to find that the police cars in question were properly equipped. Deputy Sargent testified that his vehicle was equipped with a light and a siren. RP 95. When the defendant took off, the deputy activated his siren and maintained his pursuit with his lights and sirens activated. RP 102, 109. Further, other deputies who joined the chase also had their lights and sirens activated. RP 109, 125, 127. This evidence was uncontroverted. There was sufficient evidence for the jury to find that the deputy's patrol cars were properly equipped with lights and sirens, and that they signaled defendant to stop using their lights and sirens.

4. THE TO-CONVICT JURY INSTRUCTION DID NOT RELIEVE THE STATE OF ITS BURDEN OF PROVING THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED AND ANY ERROR IN THE WORDING WAS HARMLESS.

A trial court's jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole,

properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, *review granted*, 137 Wn.2d 1032, 980 P.2d 1285 (1999), *citing Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

The to-convict instruction for attempting to elude given in the instant case is the current instruction contained in the Washington Pattern Jury Instructions (WPIC).² *See* WPIC 94.02. However, the language of the WPIC reflects the language of former RCW 46.61.024, and not the current language. While this is an error, it is harmless under the circumstances.

"A jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis unless the error is structural and affects the framework under which the trial proceeds." *State v. L.B.*, 132 Wn. App. 948, 954, 135 P.3d 508 (2006), (*citing State v. Eaker*, 113 Wn. App. 111, 120, 53 P.3d 37 (2002), *State v. Jennings*, 111 Wn. App. 54, 62-63, 44 P.3d 1 (2002)). An error is harmless if it appears beyond a reasonable doubt that it did not contribute

² Defendant did not object to the giving of this jury instruction, even after being specifically asked by the court if the to convict instruction was acceptable to the defense. RP 144.

to the verdict. *Eaker*, 113 Wn. App. at 120 (citations omitted). The State bears the burden to prove the error was harmless beyond a reasonable doubt. *Eaker*, 113 Wn. App. at 120. When an element is omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." *Eaker*, 113 Wn. App. at 120 (quoting *Jennings*, 111 Wn. App. at 64). The error in the instant case is not structural and is subject to the harmless error analysis.

As stated above, the evidence is uncontroverted that the police cars involved were equipped with lights and sirens. No evidence contradicted this testimony. The error in omitting the "equipped with lights and sirens" element was harmless.

5. DEFENDANT DID NOT DISPUTE HIS CRIMINAL HISTORY OR OFFENDER SCORE AND THUS HAS WAIVED HIS RIGHT TO CHALLENGE THESE ITEMS. HOWEVER, IF THIS COURT FINDS THAT DEFENDANT DID NOT SPECIFICALLY AGREE TO HIS OFFENDER SCORE, THEN THIS COURT SHOULD REMAND THE CASE FOR RESENTENCING AND ALLOW THE STATE TO INTRODUCE NEW EVIDENCE OF DEFENDANT'S CRIMINAL HISTORY.

A sentencing court's calculation of an offender score is reviewed de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). It is the State's burden to prove the existence of prior convictions by a preponderance of the evidence. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007) (internal citations omitted). The best evidence to

establish a prior conviction of the defendant is a certified copy of the prior judgment and sentence. *Id.* Where a defendant, after trial, challenges the sentencing court's determination of his offender score based on insufficient evidence of the prior convictions, there are three ways for the court to analyze the situation. *Id.* "First, if the State alleges the existence of prior convictions at sentencing and the defense fails to 'specifically object' before the imposition of sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence. *Id.*, citing *State v. Lopez*, 147 Wn.2d 515, 520, 55 P.3d 609 (2002). Second, if the defense does specifically object at sentencing, but the State does not produce any evidence of the defendant's prior conviction, then the State is held to the initial record and may not present any new evidence at resentencing. *Bergstrom*, 162 Wn.2d at 93 (internal citations omitted). Finally, if the State alleges the existence of prior convictions at sentencing and the defense does not specifically object and agrees with the State's depiction of defendant's criminal history, then the defendant waives his right to challenge the criminal history after his sentence has been imposed. *Id.* at 94.

In the instant case, defendant did not sign the stipulation to his offender score. RP 205, CP (Stipulation). However, defendant did not object to the State's depiction of his criminal history or to the calculation of his offender score. RP 205. In fact, the defense attorney stated, "He's not disputing any of the crimes, Your Honor, we just don't stipulate after

trial, we stipulate because it's usually a condition of the plea agreement.”
RP 205. The defense attorney then went on to ask the judge to impose a sentence at the low end of the sentencing range and to run it concurrently with the time defendant was serving at the Department of Corrections. RP 206. Defendant never objected to his criminal history or offender score. In fact, defendant clearly stated he was not disputing the crimes, signifying that he was in agreement with the State's depiction of his criminal history, even acknowledging that he was currently serving time in the department of corrections for a previous crime. RP 205-6. This court should find that defendant has waived the right to challenge his criminal history and uphold the court's sentence.

Assuming, arguendo, that this court finds that defendant did not agree with the State's depiction of his criminal history, it is clear from the record that defendant did not object to the existence of his prior convictions prior to his sentencing. As such, this court should then remand this case for resentencing, but allow the State to present new evidence as defendant failed to put the court on notice of any apparent defects with his criminal history and offender score calculation.

6. AS DEFENDANT DID NOT RECEIVE AN EXCEPTIONAL SENTENCE, AND CURRENT CASE LAW DOES NOT REQUIRE A JURY DETERMINATION OF CRIMINAL HISTORY, DEFENDANT'S ARGUMENT IS MOOT.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court expressed the rule that: “*other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (Emphasis added). *Apprendi* did not overrule the Court’s earlier decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998), which held that a defendant did not have a right to a jury trial on facts of recidivism, specifically, prior convictions. The Court further clarified in *Jones v. United States*, 526 U.S. 227, 249, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999), that facts of prior convictions were distinguishable from other factors increasing a sentence, which would have to be found by a jury because a “prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” The Supreme Court specifically applied the rule of *Apprendi* to the SRA in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). Both *Apprendi* and *Blakely*

exclude “the fact of a prior conviction” from the proscription against using judicially determined facts to impose sentences beyond the statutory maximum. See, *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490).

In a post-*Apprendi*/pre-*Blakely* case, the Washington Supreme Court held that neither the federal nor state constitution requires prior convictions to be proved to a jury beyond a reasonable doubt. *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909, 124 S. Ct. 1616, 158 L.Ed.2d 256 (2004). The court noted that the “United States Supreme Court has never held that recidivism must be pleaded and proved to a jury beyond a reasonable doubt.” *Id.* at 141.

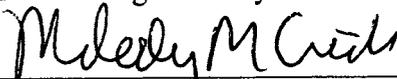
Current case law does not entitle defendant to a jury determination regarding his criminal history. In addition, defendant’s prior criminal history was not an element of the crime. Further, defendant was sentenced within his standard range. There were no aggravating factors that had to be pleaded and proved to a jury. Finally, defendant did not dispute any of the criminal history. Defendant’s argument on this point is moot.

D. CONCLUSION.

For the foregoing reasons, the state requests that this Court affirm defendant's conviction and sentence. In the alternative, if the court does not agree with the State's analysis as to the determination of defendant's criminal history and offender score, then this court should remand for resentencing while allowing the State to present new evidence at the sentencing hearing.

DATED: October 21, 2008.

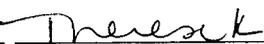
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Certificate of Service:

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.

10-21-08 
Date Signature

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