

NO. 37307-6

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

**STEVEN R. BOLDT, APPELLANT**

v.

**STATE OF WASHINGTON, RESPONDENT**

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Appeal from the Superior Court of Pierce County  
The Honorable Judge Warning  
Cowlitz County Superior Court Cause No. 02-1-01358-6

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DIVISION II  
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**BRIEF OF APPELLANT**

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6. Is the defendant entitled to relief under the cumulative error doctrine?

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The prosecutor committed misconduct by permitting a witness to violate ER 615 and failing to make discovery of that witness's notes.

2. The prosecutor committed misconduct when commenting on the defendant's exercise of the right not to incriminate himself.

3. The prosecutor's argument shifted the burden of proof to the defendant and thereby denied him his constitutional right to require the state to prove the crime charged beyond a reasonable doubt.

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7. The trial court abused its discretion when it refused to admit the entire video tape from the Minit Mart where the excluded portion was relevant to corroborate the defendant's account of the charged crimes.

8. The trial court abused its discretion when it refused to permit the defendant to use the video tape to impeach certain witnesses.

9. The trial court denied the defendant his right to a unanimous verdict when it failed to instruct the jury on the Petrich issue.

10. The state failed to prove beyond a reasonable doubt that the defendant committed the crimes of resisting arrest and failure to obey a police officer.

11. The defendant is entitled to relief under the cumulative error doctrine.

C. STATEMENT OF THE CASE.

1. Procedure.

a. Pretrial hearings:

On June 5, 2007, the state charged STEVEN R. BOLDT, hereinafter the defendant, with the crimes of failure to obey a police officer, third degree assault, driving while under the influence, and resisting arrest. RP 6/5/07 3; CP Designation 1.

At the time of this arraignment, the deputy prosecutor observed that the defendant appeared to be under the influence of controlled substances, noting, “. . . in just looking at him, at the moment, that maybe he’s not with us completely off of the drugs, at this point.” RP 6/5/07 4.

At the pretrial hearing on June 19, 2007, the defendant expressed difficulty obtaining the surveillance tape from Fred Meyer. RP 6/19/07 4. The defendant believed that the incident would have been captured on the tape. *Id.* The defendant asked the prosecutor's office to assist with obtaining and copying that tape as well as the tape from a nearby Exxon station. *Id.* The defendant obtained an order for production of the two surveillance tapes. RP 6/13/07 7.

At the omnibus hearing on August 8, 2007, the defendant moved to dismiss the case based on the state's failure to produce a tape from the mini-mart. RP 8/8/07 3. The court ordered the state to produce the tape within one week or else the court would consider the motion to dismiss. RP 8/8/07 4.

The court also ordered the state to provide to the defendant any information regarding prior convictions of any of the state's witnesses. RP 12/11/07 192. The state had faxed that information to the defendant at some point. RP 12/11/07 193.

On August 15, 2007, the defendant appeared before the court and noted that the tape had not yet been received. RP 8/15/07 3-4. The court continued the defendant's motion to dismiss to August 29, 2007. RP 8/15/07 5.

On September 7, 2007, the parties appeared before the court for a trial readiness hearing. RP 9/7/07 2-3. The state still had not provided the tapes to the defendant. RP 9/7/07 7.

On September 12, 2007, the defendant moved to dismiss the case because the state failed to provide the mini-mart tape in a usable form and also for violation of the defendant's speedy trial right. RP 9/12/2007 4-5. The state dismissed the driving while intoxicated charge and amended the information to add reckless driving. RP 9/12/2007 7-8. The court and the parties agreed that trial would proceed on September 17, 2007, before Commissioner Dennis Maher. RP 9/12/2007 10-11. The court denied the motion. RP 12/12/07 5.

b. First Trial:

On the day of trial, the state moved to prohibit the defendant from adducing evidence regarding "the procedural history of this action." RP 9/17/07 10. The defendant urged the court to deny the motion because the police observations regarding the defendant's alleged intoxication are replete with all the classic symptoms of intoxication by drugs or alcohol and the police were completely wrong about that. RP 9/17/07 11. The defendant argued that this evidence was relevant to impeach the credibility of the police witnesses. RP 9/17/07 11. The court denied the state's motion and also ruled

that the defendant could adduce evidence about the amendment of the information to drop the driving while intoxicated charge. RP 9/17/07 15.

The state also moved to exclude the video tape for lack of foundation and relevance. RP 9/17/07 17. The court reserved ruling on this motion. RP 9/17/07 20.

The first trial ended in a mistrial after the defendant's mother spoke to a juror acquaintance seated in the jury box. RP 9/17/07 50-52.

c. Second Trial:

On December 10, 2007, trial commenced before Honorable James Stonier. The court allowed the state to amend the information to add count 4, RCW 46.61.022 (See Appendix "G"), failure to obey a police officer and count 5, RCW 9A.76.404(1) resisting arrest. RP 12/10/07 22-23; CP Designation 36. The defendant thus was charged with assault in the third degree, counts 1 and 2; reckless driving, count 3; felony eluding, count 4, and resisting arrest, count 5. RP 12/10/07 72-73; CP Designation 36.

The court held a hearing pursuant to CrR 3.5<sup>1</sup>. Officer Taylor of the Longview Police Department [LPD] initiated the stop of the defendant on June 4, 2007. RP 12/10/07 27. LPD Officer Davis also was present at the stop. RP 27-28. Taylor testified that she first the defendant's car after he

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<sup>1</sup> CrR 3.5 is attached as Appendix A

passed her on Ocean Beach Highway. RP 12/10/07 28. The defendant drove diagonally across the highway, across traffic, and pulled into a parking lot at the Minit Shop. RP 12/10/07 29-30, 42. The defendant was not weaving while driving and he used his turn signals. RP 12/10/07 45. Officer Taylor turned on her emergency equipment as soon as she saw the diagonal lane travel. RP 12/10/07 30.

When Officer Taylor contacted the defendant at the driver's door she told him why she had stopped him. RP 12/10/07 30. She asked for the defendant's driver's license, registration, and proof of insurance. RP 12/10/07 30. The defendant declined to produce these items. RP 12/19/07 30-31.

Officer Taylor thought that the defendant exhibited constricted pupils. RP 12/10/07 31. She believed that constricted pupils were consistent with ingestion of a stimulant. RP 12/10/07 38. The defendant did not have bloodshot eyes or a flushed face. RP 12/10/07 40. The officer did not record that the defendant had slurred speech. RP 12/10/07 40.

She asked the defendant to perform field sobriety tests and he declined to do so. RP 12/10/07 32. The defendant informed her that he had not consumed alcohol for 15 years. RP 12/10/07 32. The defendant handed the officer some prescription medication, including oxycodone, which the

defendant mistakenly believed was heroin. RP 12/10/07 32. The pill bottles had been inside the glove compartment. RP 12/10/07 36.

Officer Taylor continued to ask the defendant to get out of his car and perform some field sobriety tests. RP 12/10/07 33. He declined. RP 12/10/07 33.

Officer Taylor then informed the defendant that he was under arrest. RP 12/10/07 33. The defendant then closed his door, rolled up his window, turned off his car, and got out. RP 12/10/07 33.

When Officer Taylor instructed the defendant to put his hands behind his back, she testified that he complied briefly and then took a swing at her. RP 12/10/07 33.

The defendant declined to take a BAC. RP 12/10/07 33. He volunteered to take a blood test. RP 12/10/07 34. The defendant's blood draw results affirmed no evidence whatsoever of alcohol and drugs, except for ibuprofen. RP 12/10/07 46.

Officer Taylor did not advise the defendant of his Miranda rights until they were at the hospital. RP 12/10/07 34.

En route to jail from the hospital, the defendant was upset and stated that he would never hit a woman. RP 12/10/07 35.

Officer Davis could not identify any person whose safety was endangered by the defendant's driving that night. RP 12/11/07 19-200. Likewise, Officer Davis could not identify anyone whose property was put at risk by the defendant's driving. RP 12/11/07 200. Officer Davis simplistically opined that if someone was driving in the manner in which she claimed the defendant drive, then "there's something seriously wrong. If there's something wrong, it's reckless." RP 12/11/07 202.

Officer Taylor did not recall any person or property which was endangered by the defendant's driving. RP 12/11/08 217-218.

LPD Officer Davis also testified. RP 12/10/07 48. On June 4, 2007, Officer Davis attempting to locate a possible DUI which had been reported from Fred Meyer. RP 12/10/07 50. Someone had reported that the defendant nearly struck a couple of vehicles and that once he got to Fred Meyer, the defendant staggered as he walked around his car. RP 12/10/07 50. After Officer Taylor stopped the defendant, Officer Davis assisted her. RP 12/10/07 51.

Officer Davis testified that when Officer Taylor tried to hand-cuff the defendant, he grabbed her fingers and then took a swing at her. RP 12/10/07 51-52. As a struggle ensued, Officer Taylor shot the defendant with taser darts. RP 12/10/07 52.

The defendant was placed under arrest after he was restrained. RP 12/10/07 52.

Officer Davis took possession of a dvd from the Minit Shop on June 5, 2007. RP 12/10/07 53. Officer Scott McDaniel had collected the dvd to give to Officer Davis. RP 12/10/07 54.

After oral argument regarding the admissibility of the defendant's statements, the court ruled that the statements were admissible. RP 12/10/07 65-66.

The state asked the court to reconsider the ruling regarding the admissibility of the Minitmart tape. RP 12/10/07 89. The defendant argued that the court should admit the tape because it was produced to police pursuant to a court order. RP 12/10/07 89. The prosecutor argued that since the police did not record the name of the police officer who picked up the tape, the tape was inadmissible. RP 12/10/08 90. The state conceded that the tape had been in the police evidence locker since it was picked up pursuant to the court order. RP 12/10/07 92. The court agreed with the state and held that the defendant would need to lay a foundation by calling either a Minitmart employee or the police officer who seized the video. RP 12/10/07 90.

The court ordered the prosecutor to provide the name of the officer who picked up the video from the Minitmart and emphasized that the officer's

name constituted *Brady* material. RP 12/10/-7 93-94. The court expressed its concern that the state had destroyed the defendant's ability to authenticate the video because they failed to preserve the name of the individual who acquired the video from the store. RP 12/10/07 94. The court suggested that the state review its position in light of the state's action which amounted to spoliation of the evidence. RP 12/10/07 94-95.

The state later informed the defendant that LPD Officer Jenkins had picked up the tape. RP 12/10/07 97. However, the state had failed to document the identity of the person who made the tape or was the custodian at the Minit Mart. The State argued that in the absence of any witness who could vouch for the accuracy of the video content the court could not admit the video. RP 12/10/07 97.

The court then ruled that because a police officer picked up the video at the Minit Mart a day after the charged crimes and the parties were identifiable in the tape, then the video was admissible. RP 12/10/07 98. Having ruled the video admissible, the court then prohibited the defendant from playing it. RP 12/10/07 98. The court then rule that the defendant could play the tape twice during its case and then again in closing argument. RP 12/10/07 99.

During the evidence phase of the trial, Officer Taylor testified from “annotated” reports. RP 12/11/07 127-128. The handwritten notes contained the officer’s anticipated responses to issues raised in the defendant’s opening statement. RP 12/11/07 128. The report also contained notes back and forth between the prosecutor and the police officer regarding trial testimony. RP 12/11/07 129.

Officer Taylor sat at counsel table during the trial and heard the defendant’s opening statement. RP 12/11/07 216.

During the continued cross-examination of Officer Taylor, she acknowledged that her observations of constricted pupils, bloodshot eyes, slurred repetitive rapid speech could not have been based on alcohol and/or drugs. RP 12/11/07 144-145., 146. Because she had been present during opening statements, she testified that she knew that the defendant previously had sustained serious physical trauma such as head and injury. RP 12/11/07 145.

After the state rested, the defendant moved to dismiss the charge of reckless driving based on the state’s failure to prove a prima facie case. RP 12/11/07 219-220.

During cross-examination of the defendant, the prosecutor asked, “Would you agree that you then refused to cooperate with the investigation to

the extent that it would allow Officer Taylor to confirm or dispel the suspicion that you were operating the vehicle under the influence of alcohol or drugs?” RP 12/12/07 34. The defendant objected to this question because the court earlier had ruled that the defendant had the right to refuse to do physical tests. RP 12/12/07 35. The court sustained the objection. RP 12/12/06 35.

Undeterred by the court’s ruling, the prosecutor continued, “Would you agree that based on the information that Officer Taylor was provided, that she was unable to confirm or dispel the suspicion that you were operating the vehicle under the influence of alcohol or drugs?” RP 12/12/07 35. Defense counsel failed to object to this question. RP 12/12/07 35.

The prosecutor than asked the defendant to confirm that he had never produced the bag and note regarding “taser boy” until the time of his testimony. RP 12/12/07 37. Defense counsel failed to object to the prosecutor’s suggestion that the defendant had any obligation to turn over evidence to the prosecutor or to provide to the state a preview of his testimony. RP 12/12/07 37.

Prior to final argument, the defendant also provided further argument regarding the admission of the Minit Mart video. RP 12/12/07 69. The defendant argued that the court erred in prohibiting the admission of the portions of the video which were consistent with the defendant’s theory of the

case and also those portions of the video which would have impeached the state's police witnesses. RP 12/12/07 69. The defendant emphasized that the video was the cornerstone its case and the court impermissibly restricted the defendant from showing to the jury relevant portions of the tape. RP 12/12/07 69.

The court ruled that the defendant could use the admitted portions of the video in closing argument and that he would allow the jury, in deliberations, to see it one or two times. RP 12/12/07 70. The court believed that it had discretion to limit the jury's access to the video so that they would not unduly emphasized this piece of evidence. RP 12/12/07 70.

Prior to closing argument, the court instructed the jury. RP 12/12/07 75-91.

During its closing argument, the prosecutor commented on the defendant's failure to take the field sobriety tests. RP 12/12/07 97:

He [the defendant] agrees that the officers respond, and officer that respond, in general, is (sic) executing their duties. The officer deserves to be protected under the law, and that good investigation would require getting all the possible information that you can get, and that getting al the information that you could get would require cooperation. Cooperation on the part of all persons involved.

But he acknowledges for us, that, yeah, I didn't – I didn't provide the information. And, sure, he had a right to refuse those field sobriety tests. Absolutely, I'm going to stand

up her and argue anything differently. But what he contends is that he wasn't operating a vehicle under the influence of alcohol. Officer Taylor had a duty to enforce the traffic laws. She had to investigate what reason, if not alcohol or drugs, is causing the defendant to drive in the manner that he is driving, that she observed firsthand, and that the reporting party described. . . .

RP 12/12/07 97. Defense counsel failed to object to this argument.

RP 12/12/07 97.

The jury reached verdicts on four of the five counts: The defendant was found not guilty on the charge of assault in the third degree in count 2; not guilty of the charge of reckless driving; guilty of the crime of resisting arrest; guilty of the crime of failure to obey a police officer. RP 12/13/07 10-11; CP Designation 49-52. The jury failed to reach a verdict on count I. RP 12/13/07 11.

On January 3, 2008, the court sentenced the defendant on count 4 to five days in jail and on count 5 to 10 days in jail. RP 1/31/08 6. CP Designation. 53.

The court granted the defendant's motion for appeal bond and stayed the sentence pending this appeal. RP 1/31/08 7.

The defendant thereafter timely filed this appeal. CP Designation 63.

2. Facts:

On June 4, 2007, Rebecca Abraham called 911 to report some erratic driving. RP 12/10/07 106-07. She noticed that the car was “off and on the road.” RP 12/10/07 108. The car was not speeding. RP 12/10/07 122, 124. She observed the vehicle turn into Fred Meyer and park before she called the police. RP 12/10/07 108. Abraham watched the defendant park his car and walk into the store. RP 12/10/07 110. About 5 minutes later, she watched the defendant come out of Fred Meyer with a bag. RP 12/10/07 110. When he started to drive away in his car, Abraham followed him. RP 12/10/07 110.

As Abraham drove, she saw the defendant cross all lanes of traffic to enter the Minitmart parking lot. RP 12/10/07 111-12. She watched as police officers entered the parking lot. RP12/10/07 114.

Abraham observed a police officer approach the defendant who ended up laying on the ground. RP 12/10/07 116. The police officer appeared to walk up to the defendant’s car where the defendant opened the door. RP 12/10/07 117. The police officer stepped back a little as several other officers rushed in. RP 12/10/07 117. These officers “just took him [the defendant] right down to the ground. RP 12/10/07 117.

Robert Karns also drove by the scene of the stop that night. RP 12/11/07 26. Karns observed police officers interrogating a man outside of his car. RP 12/11/07 30. The women officer had the defendant “in a head lock of some kind.” RP 12/11/07 37. The officers appeared to frisk the man and suddenly fists were flying. RP 12/11/07 30. Both officers worked to subdue the man. RP 12/11/07 30.

When Karns saw the video of the incident, he acknowledged that he had not seen the sudden movement of the woman officer as she slammed the defendant into the side of the car. RP 12/11/07 46.

Another citizen, Floyd Jacobs, also observed some of the encounter between police and the defendant. RP 12/11/07 52. Jacobs saw the defendant get out of his car and then heard the police officer order him back inside his car. RP 12/11/07 52. She ordered him to get back into his car because she had not yet ordered him to get out of the car. RP 12/11/07 52. Jacobs believed that the officer arrested the defendant and then handcuffed him. RP 12/11/07 52. As she did so, the defendant appeared to swing at her. RP 12/11/07 52. As this happened, Jacobs heard the woman officer holler, “I have to tase him.” RP 12/11/07 53. She tased the defendant more than once. RP 12/11/07 53. Prior to the physical altercation Jacobs heard the defendant state, “I didn’t do anything, I was just coming for a twinkie” or some kind of

pie and “that’s all I wanted.” RP 12/11/07 56. The defendant stated more than once that he had not done anything wrong. RP 12/11/07 56.

Officer Taylor was on duty on the evening of June 4, 2007. RP 12/11/07 82-83. She was attempting to locate a specific vehicle, later determined to belong to the defendant. RP 12/11/07 88. After the defendant made a diagonal turn across all lanes of traffic, she stopped him. RP 12/11/07 92. She advised Officer Davis that she was stopping the defendant. RP 12/11/07 93. After the stop, the defendant got out of his vehicle. RP 12/11/07 95. She ordered him back into his vehicle. RP 12/11/07 95. She assisted him in re-entering his car by kicking his foot inside and shutting the door. RP 12/11/07 147.

Officer Taylor than informed the defendant of the reasons for the stop. RP 12/11/97 95. She told him that a citizen had reported that he appeared to be driving drunk. RP 12/11/07 96. The defendant responded, “I haven’t drank for 15 years.” RP 12/11/07 96, 178.

Officer Taylor observed that the defendant’s body language and demeanor were “exaggerated” and that his pupils were constricted. RP 12/11/07 96. She noted several prescription bottles in the open glove compartment. RP 12/11/07 96.

She asked him to perform field sobriety tests and declined to do so. RP 12/11/07 98, 99. Officer Taylor then arrested the defendant for failure to provide information. RP 12/11/07 99.

When she arrested the defendant, she ordered him to get out of his car. RP 12/11/07 100. The defendant obeyed her and stated, "Oh sure you guys can arrest me because I was getting a cake." RP 12/11/07 100.

Officer Taylor then ordered the defendant to step to the back of the car and to put his hands behind his back with his fingers interlaced. RP 12/11/07 100. He complied. RP 12/11/07 101. She intended to grab two of the defendant's fingers and then handcuff him. RP 12/11/07 102. Officer Taylor thought that the defendant grabbed and twisted her fingers. RP 12/11/07 102. She yanked her fingers away and then she and Officer Davis attempted to restrain him. RP 12/11/07 102, 179-80. Officer Taylor believed that the defendant took a swing at her face. RP 12/11/07 103.

Officer Taylor then used her taser on the defendant. RP 12/11/07 103. After the defendant was tased, he was put into handcuffs. RP 12/11/07 107. She noted that the defendant continued to fight. RP 12/11/07 108.

The entire incident from the defendant's reaction to the notice of his arrest until his handcuffing lasted between 30-60 seconds. RP 12/11/07 183.

She noticed that the defendant had bruises all over his arms and ribs. RP 12/11/07 108. In addition, the defendant was bleeding from the eyebrow and torso where the taser dart had pierced his skin. RP 12/11/93 198.

Because the defendant had agreed to provide a blood drive, Office Taylor drove him to a hospital. RP 12/11/07 113. On the way, she called for assistance from a Washington State Patrol trooper who was a DRE (Drug Recognition Expert). RP 12/11/07 113.

At the hospital, the defendant submitted to the blood draw but not to the DRE tests. RP 12/11/07 114.

While at the hospital, the defendant was advised of his constitutional rights under Miranda. RP 12/11/07 114. During the interview that followed, the defendant declined to provide his name or address, although police had this information from his driver's license. RP 12/11/07 118.

Officer Taylor then transported the defendant to jail where he was booked into custody. RP 12/11/07 119-120.

Officer Taylor believed that the defendant was impaired by alcohol and/or drugs that night. RP 12/11/07 133.

The prosecutor's office charged the defendant with DUI. RP 12/11/07 136. Sometime later the State Toxicologist's report, Exhibit 20, was sent to the police. RP12/11/07140. The toxicologist confirmed that the defendant

did not have any alcohol or drugs [except ibuprofen] in his body that night. RP 12/11/07 141.

Thereafter the prosecutor dismissed the DUI and charged reckless driving. RP 12/11/07 159.

Robert Smart, a loss prevention manager at the Longview Fred Meyers, knew that employee Dave Morrison provided the video tape to the police in response to the court order. RP 12/11/07 167-68. The tape was admitted as Exhibit 21. RP 12/11/97 169.

The defendant testified at his trial. RP 12/11/07 228 *et. seq.* The defendant has had numerous back surgeries, most recently on April 12, 2007. RP 12/11/09 229. On June 4, 2007, he was still in physical therapy and had not yet returned to work as a longshoreman. RP 12/11/08 229-230. In June 2007, the defendant's car's suspension was "shot". RP 12/11/07 230. The defendant had not taken any pain medication since January or February of 2007. RP 12/11/07 231. His purpose in going to Fred Meyer had been to purchase a Hostell apple pie. RP 12/11/07 234. However, there were no such pies at Fred Meyer that night. RP 12/11/07 234.

On the way home, the defendant realized that perhaps he could acquire the desired Hostess apple pie at the Minit Shop. RP 12/11/07 234. The defendant previously had purchased Hostess apple pies at that vendor. RP

12/11/07 234. The defendant thus changed his mind at a point where he was turning right and decided to turn left. RP 12/11/07 235. There was no traffic near the defendant when he executed the turn into the Minit Mart. RP 12/11/07 236.

The defendant told the police that he simply wanted an apple pie after he was tasered and cuffed. RP 12/11/07 237.

When police stopped the defendant at the Minit Mart, the defendant opened his car door. RP 12/12/07 14. As the officer walked up, she kicked his foot back into the car and closed the door. RP 12/12/07 14. She told him to stay in the car. RP 12/12/07 14-15. She told the defendant that he appeared to be under the influence. RP 12/12/07 15. The defendant told her that he was not under the influence. RP 12/12/07 15. When the police officer asked for his registration and proof of insurance, he took those documents out of the glove compartment and handed them to her. RP 12/12/07 16, 28. The police officer never asked for his driver's license. RP 12/12/07 28.

The police officer asked the defendant if he was under the influence, and the defendant showed her his pill bottles and said, "If I wanted to be under the influence, I would be. That's some Oxycontin and, you know, like heroin." RP 12/1207 17.

The officer then ordered the defendant out of his car. RP 12/12/07 17.  
The defendant complied. RP 12/12/07 17.

The officer asked the defendant if he would do a field sobriety test. RP 12/12/07 18. When the defendant to perform the tests, the officer told him that he was under arrest. RP 12/12/07 18. The defendant asked “for what”. RP 12/12/07 18. The defendant did not perform field sobriety tests. RP 12/12/07 33. Officer Taylor then informed the defendant that he was under arrest. RP 12/12/07 18.

The defendant at no time was asked to put his hands behind his back. RP 12/12/07 32. His hands were behind his back later after the police officers ad tackled him to the ground. RP 12/12/07 36.

When the defendant asked to know why he was under the arrest, Officer Taylor shoved him back. RP 12/12/07 18.

Some of the roads on which the defendant drove prior to his arrest were in less than ideal condition. RP 12/11/07 241. When the defendant drove on Olympia Way, he hit a pothole. RP 12/11/07 241. At that time, the defendant was driving at 35 miles per hour. RP 12/11/07 241. When the defendant hit the pothole, the dashboard fell off. RP 12/11/07 241. The defendant did not drive on anyone’s lawns. RP 12/11/07 242. The defendant

produced photos documenting the bad road conditions and well as the condition of his car. RP 12/11/07 244-250.

When the defendant was booked into jail, no one looked at his hands. RP 12/12/07 18. the defendant denied that were any scuff marks or broken skin on his hands. RP 12/12/07 18.

The defendant did not ever strike any police officer. RP 12/12/07 19. The defendant recently had had shoulder surgery and he had a sore shoulder. RP 12/12/07 19. He made the officers aware of his medical condition. RP 12/12/07 19. The defendant did nothing to try to hurt a police officer. RP 12/12/07 19. The defendant had the opportunity to throw a punch prior to being tasered, but he did not because "it's not what I do." RP 12/12/07 21.

Sometime after the arrest, the defendant found a bag of Hostess apple pies on his door. RP 12/11/07 232. The defendant also found a handwritten note saying "stay home at night, taser boy."

D. ARGUMENT.

1. THIS COURT SHOULD REVERSE THE DEFENDANT CONVICTIONS FOR RESISTING ARREST AND FAILURE TO OBEY A POLICE OFFICER WHERE PROSECUTORIAL MISCONDUCT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS, HIS RIGHT AGAINST SELF-INCRIMINATION, AND HIS RIGHT TO A UNANIMOUS JURY VERDICT.

Prosecutors are quasi-judicial officers of the court and have the duty to make sure the accused receives a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.2d 899 (2005). In order to establish prosecutorial misconduct, the defendant has the burden of proof and must show that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. Boehning, 127 Wn. App. at 518; State v. Jungers, 15 Wn. App. 895, 106 P.3d 827, 830 (2005). Prejudice occurs where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Boehning, 127 Wn. App. at 518 (citations omitted).

In order to establish prosecutorial misconduct, a defendant must show "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." Sate v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). "Prejudice is established only if there is a substantial likelihood [that] the instances of misconduct affected the jury's

verdict.” Pirtle, 127 Wn. 2d at 672, citing State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). In determining whether prosecutorial misconduct has occurred, we first look at whether the defendant objected to the alleged misconduct. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). If the defendant objected, we evaluate (1) whether the prosecutor's comments were improper and (2) whether a substantial likelihood exists that the improper statements affected the jury's verdict. *Id.* The defendant bears the burden of showing both prongs of prosecutorial misconduct. Hughes, 118 Wn. App. at 727.

- a. The prosecutor committed misconduct by permitting a witness to violate ER 615 and failing to make discovery of that witness's notes.

ER 615<sup>2</sup> provides in pertinent part, “At the request of a party the court may order witnesses excluded so that they cannot hear testimony of other witnesses. . . . This rule does not authorize exclusion of . . . (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party’s cause.”

The rule embodies the practice of sequestering witnesses when needed to discourage or expose inconsistencies, fabrication, or collusion. Government of Virgin Islands v. Edinborough, 625 F.2d 472 (3d Cir. 1980).

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<sup>2</sup> See Appendix C

Review of an ER 615 (Appendix C) decision is de novo as to whether a witness qualifies under the exemption for a party representative. Opus 3 Ltd. V. Heritage Park, Inc., 91 F.3d 625, 628 (4<sup>th</sup> Cir. 1996). But "[q]uestions concerning the exclusion of witnesses and the violation of ER 615 are within the broad discretion of the trial court and will not be disturbed, absent manifest abuse of discretion." State v. Schapiro, 28 Wn. App. 860, 867, 626 P.2d 546; *overruled in part on other grounds by* State v. Fry, 30 Wn. App. 638, 638 P.2d 585 (1981).

If the defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is usually waived unless the misconduct was "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." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), citing State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

In this case, the state seated LPD Officer Taylor at counsel table to assist the state with the presentation of the case. In fact, Officer Taylor assisted the state in its presentation of the case by annotating her police report and taking it to the stand. She stated that after she heard the defendant's opening statement, she wrote notes on her police report so that she would remember to bring up certain points. Later, in her testimony, she used

information from the defendant's opening statement to explain the defendant's demeanor at the time of his arrest.

She then took her annotated police reports with her to the witness stand. Although defense counsel became aware of the annotations, defense counsel was not provided with a copy of the annotations.

The prosecutor's failure to provide a copy of the annotations violated CrR 4.7(a)(1)(i)<sup>3</sup> which requires the state to provide to the defense, *inter alia*, "any written statements" of a witness. An annotated police report is a written statement and is a modification of a previous statement. The prosecutor should have alerted the court to the witness's alteration of her police report and should have provided the report to the defense.

This court should find that the police officer's conduct of annotating her report during trial with the apparent knowledge of the prosecutor constituted prosecutorial misconduct sufficient to warrant reversal. Although defense counsel failed to object to this grave error, defendant has not waived the issue because the state's "egregious and ill-intentioned misconduct egregious misconduct" resulted in a verdict that was not reliable. Stenson, *supra*.

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<sup>3</sup> See Appendix B

This misconduct could not have been cured by an admonition to the jury. The only effective cure would have been vigorous cross-examination of the offending witness. The prosecutor's failure to provide the annotated reports thus also denied the defendant his right to cross-examination under the 6<sup>th</sup> amendment and Wash. Const. art. 1, sec. 22.

- b. The prosecutor committed misconduct when commenting on the defendant's decision to decline to take field sobriety tests where the trial court had excluded the evidence.

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel. And reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. Russell, 125 Wn.2d at 85. Failure to object to an improper remark waives error "unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Russell, 125 Wn.2d at 86.

If the defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is usually waived unless the misconduct was “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.” State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 139 (1997), citing State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

Prosecutorial misconduct requires reversal when the defendant demonstrates a substantial likelihood that the misconduct affected the verdict. State v. Barrow, 60 Wn. App. 869, 875, 809 P.2d 209 (1991).

In State v. Stalsbrotten, 138 Wn.2d 227, 978 P.2d 1059 (1999), the court held that although a criminal defendant has no fifth amendment or state constitutional protections under Wash. Const. art. 1, sec. 9<sup>4</sup> against self-incrimination regarding failure to take field sobriety tests, the trial court may exclude the evidence for other reasons. The court stated that exclusion, may be based, for example, on the irrelevance of the evidence and also if the probative value of the evidence is substantially outweighed by unfair prejudice or confusion to the jury. State v. Long, 113 Wn.2d 266, 788 P.2d 1027 (1989).

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<sup>4</sup> See Appendix D

In the instant case, the trial court granted the defendant's motion in limine to exclude evidence that the defendant decline to take field sobriety tests. The prosecutor was undeterred by the trial court's ruling and questioned the defendant about it so as to suggest that his failure to participate obstructed the police investigation. The trial court sustained the defendant's objection to this line of questioning to no avail. The prosecutor then referred to the subject in closing argument.

The prosecutor's blatant contempt for the trial court's order was misconduct. Viewed alone, this error warrants reversal. However, if this court finds that this error alone is insufficient for reversal, this court should find that the state's numerous errors in this case warrant relief under the cumulative error doctrine.

- c. The prosecutor's argument shifted the burden of proof to the defendant and thereby denied him his constitutional right to require the state to prove the crime charged beyond a reasonable doubt

To prevail in a criminal case, the state must prove the charge beyond a reasonable doubt with competent evidence. Toward that end, the state may not impose a burden of proof upon the defendant (except in certain defenses, none of which are applicable to the instant case). Burden-shifting is unconstitutional because it relieves the state of proving the crime beyond a

reasonable doubt. State v. Johnson, 100 Wn.2d 607, 617, 674 P.2d 145 (1983).

In the instant case, the state not only violated the trial court's ruling inadmissible evidence of the defendant's decision not take field sobriety tests, but also argued that the defendant had the duty to take the tests so that the police would be better able to perform their duties. E.g., RP 12/12/07 35.

In addition, the deputy prosecutor suggested to the jury that the defendant was required to provide exculpatory information to police. RP 12/12/07 35.

The defendant has no such duty and the state presumably knew that prior to starting the trial. The prosecutor's misconduct was flagrant and ill-intentioned sufficient to prejudice the defendant's right to a fair trial and undermine confidence in the verdict.

Viewed alone, this error warrants reversal. However, if this court finds that this error alone is insufficient for reversal, this court should find that the state's numerous errors in this case warrant relief under the cumulative error doctrine.

2. THIS COURT SHOULD REVERSE THE DEFENDANT'S CONVICTIONS WHERE HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

To prevail on an ineffective assistance claim, a defendant must show that defense counsel's representation was deficient and the deficient representation prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) A valid tactical decision cannot provide the basis for an ineffective assistance claim. State v. Alvarado, 89 Wn. App. 543, 533, 949 P.2d 831 (1998) (defense attorney's decision not to object to the admission of damaging evidence was not deficient performance because the evidence was admissible). The defendant must show an absence of legitimate strategic reasons to support the challenged conduct. Alvarado, 89 Wn. App. at 548.

- a. Defense counsel was ineffective for failure to request the notes that the police officer/complaining witness made on her police reports during opening statement and used during her testimony.

Credibility of the witnesses was a major issue in this case. The defendant and Officer Taylor provided conflicting testimony regarding the events in the case.

During her testimony, defense counsel observed Officer Taylor referring to handwritten notes on her police report. The officer testified that she had supplemented her report with her notes as she listened to the defendant's opening statement. Defense counsel failed to ask for a copy of these notes to which he was clearly entitled under CrR 4.7(a)3.

Defense counsel had no legitimate strategic or tactical reason for not requesting the annotated police report. The report likely would have provided fertile ground for cross-examination. This is so because the officer's annotations would have demonstrated deficiencies in her report written on June 4, 2007, and demonstrated her need to add facts to meet comments made during the defendant's opening statement. The defendant gave up the right to conduct a vigorous cross-examination of this police officer. Defense counsel's failure to conduct such a cross-examination prejudiced the defendant because it prevented the jury from making a fair assessment of the reliability and accuracy of the police officer's memory.

- b. Defense counsel was ineffective for failing to propose a Petrich instruction where the state failed to elect a specific act as the basis for each conviction and where there were multiple acts each of which could have been basis for the conviction.

Effective assistance of counsel is guaranteed under the federal and state constitutions. See U.S. Const., amend. VI;<sup>5</sup> Wash. Const., art. I, sec. 22<sup>6</sup>. This right was comprehensively discussed in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

In Strickland, the U.S. Supreme Court observed that the right to counsel is crucial to a fair trial because “access to counsel’s skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution. 466 U.S. at 685 (citations omitted). Any claim of ineffective assistance must be judged against this benchmark: “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” 466 U.S. at 686/

To prove ineffective assistance of counsel, an appellant must show that (1) trial counsel’s performance was deficient; and (2) the deficient

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<sup>5</sup> See Appendix E

<sup>6</sup> See Appendix D

performance prejudiced him. In re Pers. Restraint of Woods, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1998). Put another way, the defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. 466 U.S. at 687. The prejudice requirement is satisfied by a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* In other words, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

Although the reviewing court indulges a strong presumption that counsel's representation falls within the wide range of proper professional assistance, the defendant may overcome that presumption by showing that trial counsel had no legitimate strategic or tactical rationale for his conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991); State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To establish prejudice, the defendant must show that but for counsel's deficient performance, the result

likely would have been different. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

When the state presents evidence of several incidents that could form the basis of a single charged count, the state must either elect one incident for the jury to consider or the trial court must instruct the jury to agree unanimously on a specific incident. State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984). Failure to do so is prejudicial error that is harmless only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). This is so because the instructional error is “violative of a defendant’s state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” Kitchen, 119 Wn.2d at 409.

Counsel’s failure to request a Petrich instruction does not waive the issue for appeal where manifest constitutional error is present. RAP 2.5(a)(3)<sup>7</sup>. “A unanimity instruction is required, whether requested or not, when a jury could find from the evidence that the defendant committed a single charged offense on two or more distinct occasions.” State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998), review denied, 137 Wn.2d 1016,

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<sup>7</sup> See Appendix F

978 P.2d 1098 (1999). The jury instruction recommended for such cases in WPIC 4.25, which provides:

“There are allegations that the defendant committed acts of \_\_\_\_\_ on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.”

This principle recently was reiterated by the Washington Supreme Court in State v. Coleman, 159 Wn.2d 509, 210, 150 P.3d 1126 (2007). In that case, the court held that when the state presents evidence of several acts that could form the basis for one charged count, prejudice is presumed if the state fails to elect the particular act on which it will rely for conviction and on which the jury must rely in its deliberations and the trial court fails to instruct the jury to agree on a specific criminal act and be unanimous as to that act in returning a conviction. Further, the error is harmless only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Id.* The Coleman court further clarified that the trial court’s failure to give a unanimity instruction constitutes prejudicial error if the evidence as to at least one of the acts is controverted. Put another way, the error is not harmless if a rational juror could have a reasonable doubt as to whether at least one incident supporting the charge occurred.

In the instant case, the defendant was convicted of resisting arrest. To convict the defendant of the crime of resisting arrest, the state was required to prove beyond a reasonable doubt that the defendant prevented or attempted to prevent a peace officer from arresting him; that the defendant acted intentionally, that the arrest was lawful; and that the acts occurred in the State of Washington. RP 12/12/07 85-86.

In this case, the defendant denied that he had in any way prevented or attempted to prevent a peace officer from arresting him. The State asserted that the defendant had committed the crime when he refused to comply with her order to put his hands behind his back. The officer testified that the defendant placed his hands behind his back only fleetingly. The officer's order to the defendant to put his hands behind his back was made after the defendant was placed under arrest. RP 12/10/07 33. In addition, the defendant may have been convicted of resisting arrest because Officer Taylor testified that the defendant took a swing at her. RP 12/10/07 33. Officer Davis testified that he saw the defendant grab Officer Taylor's fingers prior to taking a swing at her. RP 12/10/07 52.

Any one of these acts could have formed the basis for the conduct relevant to whether the defendant acted to prevent a police officer from arresting him. In this case, the only evidence that the defendant grabbed

officer Taylor's fingers was given by officer Davis. However, some members of the jury may well have disbelieved officer Davis because they acquitted the defendant of assaulting Officer Davis.

Because the court's instructions failed to inform the jury that they needed to be unanimous on the act underlying the conviction, the defendant was deprived of a unanimous verdict. His counsel should have proposed the Petrich instruction.

- c. Defense counsel was ineffective for failing to object to prejudicial arguments made by the prosecutor in closing argument.

Although prosecutor's have "wide latitude" to make inferences about witness credibility, it is flagrant misconduct to shift the burden of proof to the defendant. Stenson, 132 WN.2d at 727 (1997) citing State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996).

In this case, the prosecutor argued that the defendant had frustrated the police investigation when he failed to perform the voluntary field sobriety tests. The prosecutor contended that the police had a duty to enforce the traffic laws and to investigate what reason, if not drugs and alcohol, caused the defendant to drive in the manner observed. The prosecutor then argued

that the defendant had failed to tell the police how recently, he had last taken his prescription medicine. RP 12/12/07 97-98.

Because the prosecutor argued to the jury that the defendant had a duty to cooperate with police to build the case against him and that he somehow should have told the police about the last date he took prescription medicine. This improper argument suggested to the jury that the defendant had a burden to offer evidence on these points. This improper argument formed the jury that he was guilty because he failed to so assist the police.

The prejudice from such argument is readily apparent. The prosecutor's argument undermined the state's burden to prove all the elements beyond a reasonable doubt. There is no legitimate tactical or strategic reason to fail to object to such argument.

Defense counsel's failure to object to these arguments permitted the State to shift the burden of proof of the defendant, thereby denying him his constitutional right to due process.

3. THIS COURT SHOULD REVERSE THE DEFENDANT'S CONVICTION WHERE THE TRIAL COURT FAILED TO GIVE A PETRICH INSTRUCTION FOR EACH OF THE CRIMES FOR WHICH HE WAS CONVICTED, THEREBY DENYING THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

This argument incorporates that made in section 2(b).

4. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ADMIT THE ENTIRE VIDEO TAPE FROM THE MINIT MART AND ALSO WHEN IT LIMITED THE DEFENDANT'S USE OF THE VIDEO TAPE DURING TRIAL, THEREBY DENYING THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO CROSS-EXAMINATION.

A trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). This court "will not disturb a trial court's rulings on ... the admissibility of evidence absent an abuse of the court's discretion." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Id.*

In this case, the defendant repeatedly asked the trial court to show the entire Minit Mart video to the jury. The defendant contended that the entire video tape was relevant for the impeachment of the civilian witnesses as well as the police officers. RP 12/10/07 99; 12/12/07 66-67.

The defendant's right to cross-examination witnesses is guaranteed by the Sixth Amendment of the U.S. Const., and article 1, sec. 22 of the Wash. Const. Impeachment is a legitimate goal of cross-examination. Impeachment of witnesses with videos taken contemporaneously with their own observations is especially probative. In this case, the court's ruling denied the defendant his constitutional right to cross examine the civilian witnesses who observed his driving and his actions at the Minit Mart.

Further, the trial court failed to find any legitimate reason for limiting the defendant's use of the video. The trial court's concern that the jury might put undue weight on the video was not sufficient to override the defendant's fundamental constitutional rights.

5. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT COMMITTED THE CRIMES OF RESISTING ARRET AND FAILURE TO OBEY A POLICE OFFICER.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 657 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Although this is a difficult standard for criminal defendants to meet, the standard is not impossible. As the United States Supreme Court noted, it is critical that our criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). “The reasonable doubt standard is indispensable for it “impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.” State v. Huntley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting Winship, 397 U.S. at 364).

Regarding the state’s failure to adduce proof beyond a reasonable doubt for the crime of resisting arrest, the defendant incorporates by reference the arguments made regarding the Petrich instruction. To convict the defendant of obstructing a police officer the state was required to prove on June 4, 2007, the defendant was being investigated for a traffic infraction; that during the investigation, a person reasonably identifiable as a law enforcement

officer, requested the defendant to identify himself; that the defendant refused to identify himself, and that the acts occurred in the State of Washington.

In this case, the state failed to present any evidence that police were investigating the defendant for a traffic infraction. The police witnesses testified that they were responding to a dispatch about a driving while intoxicated crime. Neither of the investigating officers responded to any traffic infraction. Although the jury instructions defined some infractions, the state failed to produce evidence from any witness that these infractions were the reasons police stopped the defendant.

When a reviewing court finds that the State has failed to prove any element of the crime for which the defendant was convicted, reversal is required. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” Id.

6. THE DEFENDANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

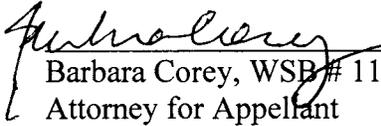
Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

This court should find that where the prosecutor commits repeated acts of misconduct, where defense counsel fails to provide effective assistance, where the court abuses its discretion by prohibiting impeachment with a video directly challenging the witnesses' memories, where the trial court failed to properly instruct the jury, and where the state failed to prove the crimes charged beyond a reasonable doubt, this court must grant the defendant the requested relief.

E. CONCLUSION.

For the foregoing reasons, the defendant respectfully asks this court to dismiss the convictions for resisting arrest and failure to obey a police officer where the state failed to prove the charges beyond a reasonable doubt. Alternatively, the defendant asks this court to reverse the convictions and remand the case for a new trial based on the other errors identified and argued herein.

DATED this 29<sup>th</sup> day of Sept., 2008.

  
Barbara Corey, WSB# 11778  
Attorney for Appellant

CERTIFICATE OF SERVICE:

The undersigned certifies that on this day she delivered by U.S. Mail or ABC-LMI delivery to Sue Baur, Cowlitz County Prosecuting Attorney, Appellate Unit, Hall of Justice, 312 SW First Street, Kelso, WA 98626 and to appellant, 2514 38<sup>th</sup> Avenue, Longview, WA 98632 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.

9-30-08      *[Signature]*  
Date                      Signature

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DIVISION II  
08 SEP 30 PM 2:07  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

APPENDIX "A"

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RULE 3.5  
CONFESSION PROCEDURE

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court To Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

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APPENDIX "B"

RULE CrR 4.7  
DISCOVERY

(a) Prosecutors Obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(iii) when authorized by the court, those portions of grand jury minutes containing testimony of the defendant, relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, and any relevant testimony that has not been transcribed;

(iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant; and

(vi) any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(2) The prosecuting attorney shall disclose to the defendant:

(i) any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof;

(ii) any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney;

(iii) any information which the prosecuting attorney has indicating entrapment of the defendant.

(3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged.

(4) The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.

(b) Defendant's Obligations.

(1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:

(i) appear in a lineup;

(ii) speak for identification by a witness to an offense;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of the crime charged;

(v) try on articles of clothing;

(vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof;

(vii) provide specimens of the defendant's handwriting;

(viii) submit to a reasonable physical, medical, or psychiatric inspection or examination;

(ix) state whether there is any claim of incompetency to stand trial;

(x) allow inspection of physical or documentary evidence in defendant's possession;

(xi) state whether the defendant's prior convictions will be stipulated or need to be proved;

(xii) state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their addresses;

(xiii) state whether or not the defendant will rely on a defense of insanity at the time of the offense;

(xiv) state the general nature of the defense.

(3) Provisions may be made for appearance for the foregoing purposes in an order for pretrial release.

(c) Additional Disclosures Upon Request and Specification. Except as is otherwise provided as to matters not subject to disclosure the prosecuting attorney shall, upon request of the defendant, disclose any relevant material and information regarding:

(1) Specified searches and seizures;

(2) The acquisition of specified statements from the defendant; and

(3) The relationship, if any, of specified persons to the prosecuting authority.

(d) Material Held by Others. Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

(e) Discretionary Disclosures.

(1) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the

relevant material and information not covered by sections (a), (c) and (d).

(2) The court may condition or deny disclosure authorized by this rule if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

(f) Matters Not Subject to Disclosure.

(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies except as to material discoverable under subsection (a)(1)(iv).

(2) Informants. Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

(g) Medical and Scientific Reports. Subject to constitutional limitations, the court may require the defendant to disclose any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which the defendant intends to use at a hearing or trial.

(h) Regulation of Discovery.

(1) Investigations Not To Be Impeded. Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(2) Continuing Duty To Disclose. If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(3) Custody of Materials. Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

(4) Protective Orders. Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's counsel to make beneficial use thereof.

(5) Excision. When some parts of certain material are discoverable under this rule, and other parts not discoverable, as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(6) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(7) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

[Amended effective September 1, 1986; September 1, 2005; September 1, 2007.]

Comment Supersedes RCW 10.37.030, .033; RCW 10.46.030 in part.

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APPENDIX "C"

RULE ER 615  
EXCLUSION OF WITNESSES

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

[Amended effective September 1, 1992.]

Comment 615

[Deleted effective September 1, 2006.]

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APPENDIX "D"

**ARTICLE I  
DECLARATION OF RIGHTS**

**SECTION 1 POLITICAL POWER.** All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

**SECTION 2 SUPREME LAW OF THE LAND.** The Constitution of the United States is the supreme law of the land.

**SECTION 3 PERSONAL RIGHTS.** No person shall be deprived of life, liberty, or property, without due process of law.

**SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE.** The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

**SECTION 5 FREEDOM OF SPEECH.** Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

**SECTION 6 OATHS - MODE OF ADMINISTERING.** The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

**SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED.** No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED.** No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

**SECTION 9 RIGHTS OF ACCUSED PERSONS.** No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

**SECTION 10 ADMINISTRATION OF JUSTICE.** Justice in all cases shall be administered openly, and without unnecessary delay.

**SECTION 11 RELIGIOUS FREEDOM.** Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. [AMENDMENT 88, 1993 House Joint Resolution No. 4200, p 3062. Approved November 2, 1993.]

**Amendment 34 (1957) -- Art. 1 Section 11 RELIGIOUS FREEDOM --** *Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.* [AMENDMENT 34, 1957 Senate Joint Resolution No. 14, p 1299. Approved November 4, 1958.]

**Amendment 4 (1904) -- Art. 1 Section 11 RELIGIOUS FREEDOM --** *Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of*

*licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment. Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary, and for such of the state reformatories as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. [AMENDMENT 4, 1903 p 283 Section 1. Approved November, 1904.]*

**Original text -- Art. 1 Section 11 RELIGIOUS FREEDOM --** *Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person, or property, on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment. No religious qualification shall be required for any public office, or employment, nor shall any person be incompetent as a witness, or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.*

**SECTION 12 SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED.** No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

**SECTION 13 HABEAS CORPUS.** The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety requires it.

**SECTION 14 EXCESSIVE BAIL, FINES AND PUNISHMENTS.** Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

**SECTION 15 CONVICTIONS, EFFECT OF.** No conviction shall work corruption of blood, nor forfeiture of estate.

**SECTION 16 EMINENT DOMAIN.** Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided*, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. [AMENDMENT 9, 1919 p 385 Section 1. Approved November, 1920.]

**Original text -- Art. 1 Section 16 EMINENT DOMAIN --** *Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.*

**SECTION 17 IMPRISONMENT FOR DEBT.** There shall be no imprisonment for debt, except in cases of absconding debtors.

**SECTION 18 MILITARY POWER, LIMITATION OF.** The military shall be in strict subordination to the civil power.

**SECTION 19 FREEDOM OF ELECTIONS.** All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

**SECTION 20 BAIL, WHEN AUTHORIZED.** All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great.

**SECTION 21 TRIAL BY JURY.** The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

**SECTION 22 RIGHTS OF THE ACCUSED.** In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [AMENDMENT 10, 1921 p 79 Section 1. Approved November, 1922.]

*Original text -- Art. 1 Section 22 RIGHTS OF ACCUSED PERSONS -- In criminal prosecution, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.*

APPENDIX "E"

## **U.S. Constitution: Sixth Amendment**

### **Sixth Amendment - Rights of Accused in Criminal Prosecutions**

Amendment Text | [Annotations](#)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX "F"



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RULE 2.5  
CIRCUMSTANCES WHICH MAY AFFECT  
SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) Generally. A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) Security. If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) Conflict With Statutes. In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

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APPENDIX "G"

**RCW 46.61.022**

**Failure to obey officer — Penalty.**

Any person who wilfully fails to stop when requested or signaled to do so by a person reasonably identifiable as a law enforcement officer or to comply with RCW 46.61.021(3), is guilty of a misdemeanor.

[1979 ex.s. c 136 § 5.]

**Notes:**

**Rules of court:** Bail in criminal traffic offense cases -- Mandatory appearance -- CrRLJ 3.2.

**Effective date -- Severability -- 1979 ex.s. c 136:** See notes following RCW 46.63.010.