

NO. 41687-5-II

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

STATE OF WASHINGTON, RESPONDENT

v.

BRUCE DEYMON PRICE, APPELLANT

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

No. 10-1-00466-3

Response Brief

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Table of Contents

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

 1. Was trial counsel’s performance effective when she did not request jury instructions for a defense that defendant was not entitled to? 1

 2. Was there sufficient evidence for the jury to determine that defendant’s actions endangered the life of another person besides a pursuing police officer during his commission of the crime of attempting to elude a police?..... 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts 2

C. ARGUMENT..... 6

 1. TRIAL COUNSEL WAS EFFECTIVE WHERE SHE DID NOT REQUEST JURY INSTRUCTIONS REGARDING DEFENDANT’S USE OF FORCE BECAUSE DEFENDANT WAS NOT ENTITLED TO RESIST AGAINST OFFICERS 6

 2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO DETERMINE THAT DEFENDANT HAD ENDANGERED OTHERS WHILE ELUDING POLICE IN HIS VEHICLE..... 18

D. CONCLUSION..... 24

Table of Authorities

State Cases

<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	18
<i>State v. Adams</i> , 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).....	7, 8
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988).....	19, 22
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	19
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987).....	19
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 227–29, 25 P.3d 1011 (2001).....	6, 8, 17, 18
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	20
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	19
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	19
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	19
<i>State v. Lewis</i> , 86 Wn. App. 716, 717–18, 937 P.2d 1325 (1997)	20
<i>State v. Lord</i> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991).....	7, 17
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	18
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	18
<i>State v. Rainey</i> , 107 Wn. App. 129, 135–36, 28 P.3d 10 (2001)	8
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	19
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	19
<i>State v. Westlund</i> , 13 Wn. App. 460, 467, 536 P.2d 20 (1975), review denied, 85 Wn.2d 1014 (1975).....	6, 7, 11, 12, 17

Federal and Other Jurisdictions

Premo v. Moore, 131 S. Ct. 733, 739, 178 L. Ed. 2d 649 (2011) 7

Strickland v. Washington, 466 U.S. 668, 687,
104 S. Ct. 2052 (1984)..... 6, 8, 24

Statutes

RCW 9.94A.834..... 20

Other Authorities

Webster's Third New International Dictionary 1848 (3d Ed. 2002)..... 23

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

1. Was trial counsel's performance effective when she did not request jury instructions for a defense that defendant was not entitled to?

2. Was there sufficient evidence for the jury to determine that defendant's actions endangered the life of another person besides a pursuing police officer during his commission of the crime of attempting to elude a police?

B. STATEMENT OF THE CASE.

1. Procedure

On February 1, 2010, the Pierce County Prosecuting Attorney's Office ("State") charged appellant, Bruce Deymon Price ("defendant"), with the felony of attempting to elude a pursuing police vehicle with an enhancement for endangerment of others, as well as three additional misdemeanors, driving while in suspended status in the first degree, obstructing a law enforcement officer, and resisting arrest. CP 1-2.

Defendant's jury trial began on November 18, 2010. RP 3. The Honorable Susan K. Serko empanelled a jury on November 22, 2010. RP 21. Although the defense objected, the court found sufficient evidence for the jury to receive a special verdict form regarding defendant's sentencing

enhancement for endangering others while eluding pursuing police. RP 262; CP 51.

The jury found defendant guilty on all charges on December 1, 2011. RP 331–36. The court sentenced defendant to a total of 38 months in custody on January 14, 2011. RP 353. This appeal was timely filed on January 19, 2011. CP 82–101.

2. Facts

On January 29, 2010, at 2:20 a.m., Officer Moody, a police officer for the City of Lakewood, observed a green Ford Thunderbird driving on South Tacoma Way. RP 157–58. During a routine registration check of the vehicle's license plate number, the officer discovered that the registered owner was an African-American male, a warrant had been issued for his arrest, and that the driver's license had been suspended. RP 161, 177–78. The officer testified that the vehicle had two occupants. RP 162. Although the officer was unable to see the driver's face, he testified that the driver was an African-American male with a bald head. RP 162. One officer was able to identify defendant as the driver when defendant passed him in pursuit. RP 237–38, 287.

Officer Moody activated his emergency lights to pull the Thunderbird over. RP 162, 165. Instead of slowing down, the vehicle speeded away from the officer, accelerating to speeds of 35–90 mph through a residential area. RP 171–72, 196, 198. Defendant disregarded several stop signs while being pursued. RP 166–67, 195.

In order to block oncoming traffic, another officer, Ryan Hamilton, positioned his car at an intersection where he anticipated defendant to speed through. RP 193–94. Moments later, defendant turned the corner and dangerously passed within ten feet of Officer Hamilton's parked vehicle. RP 195. After that, Officer Hamilton entered the pursuit as the second unit, taking charge of radio communications so that Officer Moody could focus on pursuing defendant. RP 195.

At one particular intersection, defendant sped through a red traffic light while Officer Moody, immediately behind defendant, slowed down, ensured the intersection was clear, and proceeded with the pursuit. RP 174, 200. Officer Hamilton, who was now following immediately behind Officer Moody and only a few car lengths behind defendant, had to wait for several cars to pass before continuing. RP 199–200.

The chase ended shortly after when Officer Moody lost control of his vehicle and crashed into two parked cars. RP 187. Both of the pursuing officers testified that although traffic was light, there still had been cars on the road throughout the pursuit. RP 159–60, 170, 189,

Several other officers, including deputies from the Pierce County Sheriff's Department, had been alerted about the chase and were requested to search the general area for defendant and his vehicle. RP 52, 103, 214–15, 234–35. One deputy, Christopher Todd, observed an individual, who matched the physical description of defendant, walking very quickly with his head down and refusing to make eye contact with the deputies as they

slowly passed. RP 56–57. As Deputy Todd and his partner drove by, they confirmed that it was defendant and attempted to contact him. RP 57.

Deputy Todd identified himself as an officer and requested defendant to come over to him. RP 57. Defendant responded, “Why?” and immediately fled from the deputies. RP 57. While Deputy Todd began pursuing defendant on foot, other deputies and a canine unit arrived at the scene. RP 67, 107. After approximately 100 yards, Deputy Todd deployed his taser. RP 67, 106–07. The taser had no effect on defendant and he continued to flee up an embankment. RP 67, 106–07.

Deputy Shaw, who had just arrived at the scene and joined the pursuit, commanded defendant to stop and get on the ground. RP 108. After seeing the taser have no effect against defendant, Deputy Shaw used his baton to hit the defendant a single time on his shoulder while chasing him. RP 107–08. The baton also had no effect on defendant. RP 119.

The officer in charge of the canine unit arrived to see defendant leading the deputies on foot. RP 242–43. He released his canine, which immediately chased defendant and apprehended him as he reached the top of the embankment. RP 244.

At the top of the embankment, defendant engaged in a fight with the deputies while they attempted to bring defendant to the ground. RP 67, 108. The deputies kept repeating their commands for defendant to stop resisting and show them his hands in order to ensure defendant was not

armed. RP 69–70, 246, 287. Instead of complying with the orders, defendant kept trying to hide his hands under his body. RP 70, 246.

Defendant struggled violently, flailed his arms, jerked away from officers, and separated himself from the canine during the fight. RP 244–45. He also tried pushing the officers away, struck at them, and even did a couple of push-ups while officers attempted to keep him on the ground. RP 71, 108–10, 244–47. The canine contacted defendant's leg again until officers had properly arrested defendant. RP 248. During the scuffle, Deputy Todd applied his taser again, but similar to the first time, the taser had no effect. RP 71.

Because officers had failed to apprehend defendant thus far, Deputy Shaw applied a non-lethal lateral vascular neck restraint to render defendant unconscious. RP 71, 108, 110, 121–22. The neck restraint is a defense technique used to render a suspect temporarily unconscious and is equal to pepper-spray in the level of force officers use to apprehend suspects. RP 46–47, 121–22, 126–27.

Officers called for medical aid to treat defendant's injuries as soon as they had controlled the situation and apprehended defendant in handcuffs. RP 94, 111, 249.

C. ARGUMENT.

1. TRIAL COUNSEL WAS EFFECTIVE WHERE SHE DID NOT REQUEST JURY INSTRUCTIONS REGARDING DEFENDANT’S USE OF FORCE BECAUSE DEFENDANT WAS NOT ENTITLED TO RESIST AGAINST OFFICERS

When determining whether trial counsel’s performance was ineffective for not requesting a particular jury instruction, the Washington State Supreme Court established a three-prong inquiry. *See State v. Cienfuegos*, 144 Wn.2d 222, 227–29, 25 P.3d 1011 (2001). First, the reviewing court must determine whether defendant was entitled to the specific jury instruction. *Id.* at 227. Second, the defendant must show that counsel’s performance was deficient. *Id.* at 227 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984)). Third, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 229 (citing *Strickland*, 466 U.S. at 687).

Regarding the first prong, whether a person is entitled to a jury instruction on resisting arrest, the Washington State Supreme Court stated, “Orderly and safe law enforcement demands that an arrestee not resist a lawful arrest” *State v. Westlund*, 13 Wn. App. 460, 467, 536 P.2d 20 (1975), *review denied*, 85 Wn.2d 1014 (1975). The *Westlund* court held that a “reasonable but mistaken belief” that one is about to be seriously

injured is insufficient to justify resistance against a lawful arrest—even if excessive. *Id.* at 466. Specifically, the court held:

[T]he arrestee’s right to freedom from arrest *without excessive force that falls short of causing serious injury or death* can be protected and vindicated through legal processes, whereas loss of life or serious physical injury cannot be repaired in the courtroom. However, in the vast majority of cases, . . . resistance and intervention make matters worse, not better. They create violence where none would have otherwise existed or encourage further violence, resulting in a situation of arrest by combat.

Id. at 467 (emphasis added). Thus, a defendant is not entitled to resist a lawful arrest absent a showing that defendant was actually going to sustain serious injury or death.

Under the second prong, whether counsel’s performance was deficient, defendant must show that counsel’s performance fell below an objective standard of reasonableness. *Premo v. Moore*, 131 S. Ct. 733, 739, 178 L. Ed. 2d 649 (2011) (citation omitted). The attorney’s representation must amount to incompetence. *Id.* at 740. “If defense counsel’s trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel.” *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). There is a strong presumption that counsel’s performance falls within the wide range of reasonable professional

assistance. *Id.* “The defendant bears the burden of showing there were no ‘legitimate strategic or tactical reasons’ behind defense counsel’s decision.” *State v. Rainey*, 107 Wn. App. 129, 135–36, 28 P.3d 10 (2001).

Under the third prong, the prejudice requirement is satisfied if the defendant shows that but for counsel’s performance, the result of the proceeding would have a reasonable probability of being different. *Cienfuegos*, 144 Wn.2d at 229 (citing *Strickland*, 446 U.S. at 687). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

In this case, defendant’s argument fails because he did not show that he was entitled to a jury instruction on resisting arrest. First, the record is void of any evidence that would prove he was in danger of serious injury or death. Every officer involved in the physical skirmish leading up to defendant’s arrest testified that any increase of force used against defendant was both non-lethal and necessary to detain him.

For example, deputies testified at trial that they use a ladder of force when placing somebody into custody, starting at the low end and increasing the level of force as necessary. RP 46–47, 100–01. The lowest level of force is having an officer present. RP 47. From there, officers are supposed to use verbal commands and soft empty hands. RP 47. If the officers are still unable to detain a person, they may use a taser, impact

weapon, neck restraint, or even pepper spray. RP 47. The use of a taser, baton, neck restraint, and a canine are all considered non-lethal ways to arrest someone. RP 49, 101, 233. One officer defined “nonlethal” as “anything that would not be considered anything that would *cause death or serious bodily injury.*” RP 47 (emphasis added).

Deputy Todd identified defendant walking down a sidewalk, matching defendant’s physical description with the driver and registered owner of the Ford Thunderbird who had led police on a high-speed chase minutes earlier. RP 54–57. The deputy was aware that defendant had a warrant out for his arrest. RP 55. The deputy first used a verbal command—pursuant to his training—to defendant, requesting defendant to stop and talk with the deputies, but defendant fled instead. RP 66–67.

While Deputy Todd began pursuing defendant on foot, Deputy Shaw arrived to assist in the pursuit. RP 106. Deputy Shaw also yelled a verbal command to defendant to stop, but defendant failed to heed it. RP 106. After pursuing defendant for a hundred yards, Deputy Todd thought it proper to deploy his taser in order detain defendant; the taser, however, had no effect. RP 67, 106–07.

Deputy Shaw, after witnessing the taser had no effect, increased the level of force necessary to apprehend defendant and struck defendant’s shoulder with a baton. RP 107–08. The baton also had no effect. RP 108.

Deputy Shaw continued to command defendant to stop and get on the ground. RP 108. Notwithstanding all of the deputies' attempts up to this point, defendant still refused to comply. RP 108.

While defendant continued to lead the deputies on foot, the officer in charge of the canine unit arrived. RP 242–43. The canine officer testified:

The suspect had already led officers on a high-speed chase through residential streets, so it was clear to me that he was willing to endanger the public in an attempt to escape. Deputies were chasing after him on foot, from what I could see *it didn't appear that they were going to catch him without assistance*. So, at that point, to apprehend a suspect I chose to use the dog to prevent him from escaping into the community.

RP 243 (emphasis added). The officer only released the canine because it seemed that defendant was not going to be caught on foot.

At the same time that the canine contacted defendant, another officer was able to catch defendant. RP 244. Despite all of the officers' and deputies' attempts to arrest defendant, he continued to flail violently as if trying to escape. RP 67, 108–10, 244–47. Subsequently, Deputy Todd employed his taser in another failed attempt to stop the defendant. RP 71. At some point during the scuffle, the canine re-contacted defendant on the leg because defendant had managed to kick it off. RP 244–45. The officer in charge of the canine testified that he did not recall the canine because

his training required it to remain involved until defendant was compliant or taken into custody. RP 248.

Defendant's actions included lifting the officers off the ground, RP 67, 110, striking out at officers and hiding his hands, RP 110, kicking the canine unit off of his leg, RP 244–45, jerking away, and continuing in a “violent struggle.” RP 244.

Finally, after an “exhausting” fight, RP 110, Deputy Shaw applied a non-lethal neck restraint to render defendant unconscious. RP 71, 108, 110, 121–22. Nobody testified that defendant was in immediate danger of serious bodily injury or death.

Defendant's argument that he was entitled to a jury instruction on using force to resist arrest fails because he offered no evidence that he was about to suffer serious bodily injury or death. Officers were attempting to arrest a suspect who had a warrant out for his arrest, led officers in a high-speed car chase, initiated a foot chase, and adamantly refused to comply with his arrest through violence. Absent a showing that defendant was about to suffer serious bodily injury or death, defendant was not entitled to resist officers who were conducting an entirely lawful arrest. *Westlund*, 13 Wn. App. at 467. Defendant was only at risk of injury after he escalated the situation by resisting.

Although defendant did ultimately receive some injuries during the event, including dog bites, defendant's injuries fall far short of *Westlund's* requirement of serious injury or death. *Westlund*, 13 Wn. App. at 467. Even if defendant was scared or reasonably mistaken that he was about to be subjected to some form of serious injury, his mistaken belief is not sufficient to justify his violent resistance. *Id.* at 466. As discussed above, every level of force used by the officers was both in accordance with their training and necessary to arrest the defendant. Accordingly, defendant was not entitled to the jury instruction.

Defendant does not satisfy the second prong either because he fails to show how his counsel's performance was deficient. Defense counsel's performance was effective for not requesting a jury instruction because it was a tactical decision that supported defendant's theory of the case. In her closing testimony, defense counsel argued that defendant resisted because he did not know that he was under arrest, that he did not receive a lawful command that he was under arrest, and therefore was entitled to try and elude the officers. RP 311–12. She stated:

Why did he run? Oh, is that stupid or what? Oh, yeah, that's stupid, right? But you can't make the assumption that somebody is running because all this that and the other thing. . . . *It doesn't matter because in America, unless you have a lawful command that tells you, that communicates to you that you have a lawful command that's being given to you, you don't have to stop, you don't have to come here,*

you don't have to tell me your name.

You say, Jane Pierson, you come here, you're under arrest. Yes, sir, I'm going. Jane Pierson, you're under -- well, yeah, I'm going, right? And maybe you're going to stop for the police, but not everybody reacts that way. *You don't have to until you know that you're getting a lawful command.*

RP 311–12 (emphasis added). If defense counsel had requested a jury instruction on defendant's use of force, it could have inferred that he understood that he was being placed under arrest, a point that defense counsel adamantly tried to prove otherwise.

Defense counsel's strategy is apparent in her cross-examination of all of the officers and deputies involved in the arrest. For example, after questioning Deputy Todd about how he first contacted defendant, she asked:

[Counsel]. Okay. And he still didn't look at you?

[Deputy Todd]. No, he never made eye contact with me.

Q. Were the overheads activated at any point?

A. I don't recall.

Q. Okay. And usually if the overheads are -- and we're talking about the overhead emergency lights, if they're activated, usually we'll see that in the report, correct?

A. Most of the time, yes.

Q. And it's not in the report, correct?

A. Correct.

Q. Okay. So you put the car in park and both of you get out at that point?

A. Correct.

Q. Okay. But not with a weapon drawn. You were with a flashlight certainly. Your partner was probably with a flashlight as well?

A. I could assume, yes.

Q. Did the two of you approach him physically or simply

command him to come to you?

A. I think we were approaching as I told him to come to me.

Q. But you're not sure about that?

A. I'm not a hundred percent sure.

Q. You say that you said two things; come here and come talk to me and what's your name, and the only response you got was "why", correct?

A. Correct.

...

Q. Okay. You never and you never heard another officer or deputy say to Mr. Price, "you're under arrest"; is that correct?

A. I never said it to Mr. Price. I don't recall --

Q. Okay. And you don't recall --

A. -- if anyone else did.

Q. -- hearing any other officer saying it. Okay. And you never answered his question as to why, did you?

A. Never had time to.

RP 83, 84, 87-88. Defense counsel continued this line of questioning when cross-examining Deputy Shaw:

[Defense Counsel]. Okay. And fighting with you how?

[Deputy Shaw]. He was trying to get us off of him and he was pulling away from us and not complying with our commands.

Q. And would it be fair to say that of the five officers, there are five officers yelling things like, stop, show us your hands, stop resisting?

A. Yes.

Q. Any other things? Does that pretty much cover it?

A. Pretty much covers it.

Q. But no one was yelling you're under arrest. Why is that?

A. I don't recall if anybody did or not.

RP 121. She questioned the officer in charge of the canine unit in a similar fashion:

[Defense counsel]. Okay. And with all the commands that were given and the excitement, I would imagine, during the struggle out there, no one -- none of the officers said, "you're under arrest," did they?

[Officer Syler]. I don't know. I don't know if they said that before or -- I didn't hear anyone say that.

Q. Okay. You were still there when he was receiving fire and medical aid though from the emergency folks, right?

A. Yes.

Q. Did you tell him he was under arrest?

A. I don't remember telling him that, no.

Q. Okay. And you don't remember another officer telling him that?

A. Not that I remember.

RP 282. Defense counsel's questions show a tactical decision to try and convince the jury that defendant did not know he was under arrest, and was therefore entitled to run away from the officers. This is even more apparent throughout defense counsel's closing argument. She stated:

Now are you resisting arrest at this point? Nobody has even told you you're under arrest. Are you obstructing, hindering or delaying a public servant in the discharge of his duties when nobody has told you why? You asked them why and you got no response. Fight or flight; isn't that a human reaction? Fight or flight.

RP 313.

You've been hit with a baton, whether you know you've been hit with the taser probes or not isn't significant. You've been asked -- you asked, why do you want me to come here? No response. You take off.

And so I submit to you, okay, some stitches, you know, the guy's here, he survived it, right? And instead of asking why, *he could have submitted, but nobody communicated to him you need to submit to lawful authority, nobody communicated to him.* It's more than just me wearing a badge and having a taser, having an ASP or

baton, whatever it is, or a canine or any of these things that I can deploy for defensive tactics or defensive purposes; or if I'm so carried away with emotion and the moment, I may use them in less than a defensive way and something other than that. And then this vascular thing that cuts off your circulation. Well, that did the trick all right.

And still even after he's rendered unconscious with whatever they call it and then regains consciousness and he's handcuffed, *still nobody tells him that he's under arrest. Nobody says, well, Mr. Price, you're under arrest.* I'm arresting you for blah-blah-blah-blah-blah, that doesn't happen.

RP 315 (emphasis added).

Is it his right to walk away from an officer who isn't clearly communicating a lawful command? Yes, it is. Yes, it is. He was not resisting arrest because he's got to do so intentionally or knowingly. The same thing with obstructing, hindering, or delaying a public servant. You've got to be doing what knowing that you're obstructing and what kind of investigation, because nobody told him. I want you to come here and tell me your name. Why? No response.

Tell him why. Now you've got a lawful command, then you can say, Jane Pierson, come on down for driving while suspended, whatever, right? *Until that happens, you don't have it.*

RP 317 (emphasis added).

You see, a defendant is presumed innocent and the defendant doesn't have to prove anything to you because the defendant has rights. Here in America, we have the right to remain silent. We have the right to say I don't need to come to you because you're a police officer, just because you tell me you want to talk to me, just because you tell me you want to know my name. You show me a warrant or you tell me that you're going to arrest me then I'm going to come, right? Then that right to walk away, to run away, has just stopped there, and we'll take up the rest of that whether or not that was lawful at a later date.

But when the officer tells you that, when that communication is made, then you stop. *And until that communication is made to you, there is no reason to stop because that's the society that we live in.*

RP 320 (emphasis added).

Requesting a jury instruction that defendant had a right to resist a lawful arrest due to excessive force would have been contradictory to the defense's strategy that defendant did not know he was under arrest. Defendant's argument does not thus serve as a basis for an ineffective assistance of counsel claim because defendant fails to show how counsel's trial conduct cannot be characterized as a legitimate trial strategy. *See Lord*, 117 Wn.2d at 883. Accordingly, defendant does not satisfy the first prong of *Strickland*.

Finally, defendant does not satisfy the third prong of the inquiry because there is no reasonable probability that the trial proceeding would have ended differently even if defendant were entitled to the jury instruction. *Cienfuegos*, 144 Wn.2d at 229. The jury could not have reasonably found that defendant was threatened serious bodily injury or death, and thus not entitled to resist arrest. As discussed above, no evidence was offered to show that defendant experienced the substantial injuries required by *Westlund*, 13 Wn. App. at 467. All of the officers involved testified to the appropriateness of the force used, and that any

increase of force was due to defendant's persistence in refusing to comply with their commands. Defendant's right to a fair trial was not prejudiced.

This court should deny defendant's claim that his trial counsel's performance was ineffective because defendant does not satisfy any of the three prongs outlined in *Cienfuegos*. Defendant was not entitled to a jury instruction on resisting arrest because there was no evidence that he was about to sustain serious bodily injury or death. His trial counsel's failure to request the instruction was a tactical decision that corresponded with the defense's theory of the case. Finally, when considering that no evidence was offered to show serious bodily injury, there is not a reasonable probability that the trial outcome would have differed even if counsel had requested the jury instruction. For these reasons, this Court should uphold defendant's conviction and deny defendant's claim.

2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO DETERMINE THAT DEFENDANT HAD ENDANGERED OTHERS WHILE ELUDING POLICE IN HIS VEHICLE

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is

whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). Specifically regarding witness credibility, the Supreme Court of Washington said, “Initially, we note the great deference that is to be given the trial court’s factual findings. . . . It, alone, has had the opportunity to view the witness’

demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

In Washington, the statute for endangerment by eluding a police vehicle states:

(1) The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle . . . when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

(2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering *one or more persons other than the defendant or the pursuing law enforcement officer*. . . . [I]f a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.

RCW 9.94A.834 (emphasis added).

Under principles of statutory construction, a statute is not subject to judicial interpretation where its language is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning. *State v. Lewis*, 86 Wn. App. 716, 717–18, 937 P.2d 1325 (1997).

In this case, the trial court gave a special verdict form to the jury that stated, “Was any person, other than Bruce Deymon Price or a

pursuing law enforcement officer, threatened with physical injury or harm by the actions of Bruce Deymon Price during his commission of the crime of attempting to elude a police vehicle?” CP 51. The jury answered “yes” to that question. CP 51.

There were several reasons for the jury to properly find that defendant’s actions had endangered other persons aside from the pursuing officer.

First, two officers testified that defendant ran through a red light while speeding through an intersection. RP 174, 199–200. Although defendant happened to cross the intersection without a collision, Officer Moody—the officer immediately behind defendant—was required to slow down and clear the intersection before crossing. RP 199–200. The officer following directly behind Officer Moody actually had to wait for several cars to pass through the intersection before safely crossing. RP 181, 199–200. It is a reasonable inference that defendant narrowly avoided a collision with oncoming traffic and that his actions endangered those driving through the intersection.

Second, Officer Moody testified that defendant had a passenger in his vehicle. RP 162. The passenger was in the vehicle while defendant accelerated upwards to 90 mph in a residential area, ignoring several stop signs and a red light. *See* RP 162–175. Defendant’s reckless driving

included cutting off Officer Moody's attempts to perform a PIT maneuver by hugging the curbs and preventing officers from passing him. RP 172. Officer Moody also testified that defendant passed other cars on the roadway during the pursuit. RP 189. By driving recklessly, defendant endangered his passenger as well as the drivers of the other vehicles on the road.

Defendant argues that there was insufficient evidence to show that there was a passenger in defendant's vehicle. Brief for Appellant at 9. However, the officer who led the pursuit and followed defendant closely for the duration of the chase testified that defendant indeed had a passenger and maintained that position during cross-examination. RP 162, 185. No evidence was submitted to refute Officer Moody's testimony. Because a challenge to the sufficiency of the evidence admits the truth of the State's evidence, *Barrington*, 52 Wn. App. at 484, there was sufficient evidence that defendant endangered his passenger.

Third, defendant endangered a police officer who was not yet engaged in pursuing defendant. RP 193–95. After hearing that defendant was driving southward, Officer Hamilton set up a roadblock to prevent traffic from entering the roadway where defendant was speeding. RP 193. As defendant sped around a corner, he passed within a vehicle's length of Officer Hamilton. RP 195.

Officer Hamilton testified that after defendant sped by him—thus completing his traffic block—“I circled around and *just became the Number 2 unit.*” RP 195 (emphasis added). Even Officer Hamilton considered himself as part of the pursuit only after he had finished his safety measures to block the road.

In this case, the court instructed the jury that defendant was guilty of the endangerment enhancement if his actions endangered a person other than “a pursuing law enforcement officer.” CP 51. *Webster’s* defines “pursuing” as “to follow, follow after, pursue . . . to follow [usually] determinedly in order to overtake, capture . . .” *Webster’s Third New International Dictionary* 1848 (3d Ed. 2002). Under the plain meaning of the statute, Officer Hamilton does not qualify as a pursuing law enforcement officer because he was not following defendant in order to overtake or capture him. When defendant nearly struck the officer’s vehicle, Officer Hamilton was setting up a roadblock to protect the drivers and passengers of other vehicles crossing defendant’s route.

When considering the evidence in the most favorable light to the State, there was sufficient evidence for the jury to find defendant guilty of endangering other persons besides the officers pursuing him. Defendant ignored a red light where officers immediately behind him had to slow down and stop for traffic before continuing. He endangered his passenger

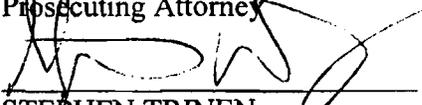
and other cars on the road with his reckless driving. He also endangered Officer Hamilton, who was not a pursuing law enforcement officer when defendant nearly struck him.

D. CONCLUSION.

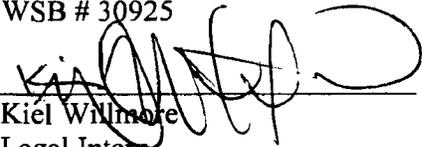
This Court should deny defendant's claim of ineffective assistance of counsel because his defendant was not entitled to a jury instruction on resisting arrest, and he cannot show how his counsel's performance satisfies either prong of *Strickland*. This Court should also uphold defendant's sentencing enhancement because there was sufficient evidence for the jury to reasonably determine that defendant had endangered others.

DATED: September 19, 2011.

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Pierce County
Prosecuting Attorney



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Deputy Prosecuting Attorney
WSB # 30925



Kiel Willmore
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ^eU.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.

9.19.11 
Date Signature

PIERCE COUNTY PROSECUTOR

September 19, 2011 - 1:21 PM

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