

NO. 49241-5-II

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

STATE OF WASHINGTON, RESPONDENT

v.

WALLACE GREENWOOD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 16-1-00446-8

BRIEF OF RESPONDENT

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

1. Has defendant failed to prove there was insufficient evidence of reckless driving to support his conviction for attempting to elude police as the crime was well supported by testimony he led a pursuing deputy on a high-speed chase through a high density residential area before crashing into a ditch?
2. Did the court properly admit proof defendant fled knowing there was a warrant for his arrest after he opened the door to that evidence by claiming he did not know about it during his case?
3. Should review of appellate costs await a bill?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant proceeded to trial for attempting to elude a pursuing police vehicle (Ct I) and escape from community custody (Ct II). CP 6-7. He pleaded guilty to escape before jury selection. CP 8-17; 1RP 75. Proof he had an outstanding warrant for his arrest when the elude occurred was admitted over defense objections grounded in relevance and prejudice. 3RP 202-05. It was deemed more probative than prejudicial on the issue of his motive to flee and to contradict the theory he unwittingly sped away from police because an accelerator malfunctioned. *Id.* Only the existence of the warrant was adduced until defendant disavowed pre-incident awareness of

it during his case-in-chief. 3RP 248, 322-23. The Court ruled his testimony opened the door to evidence his community corrections officer (CCO) told him about the warrant's existence. RP 328-33, 378; 4RP 389-91. That ruling overruled defense objections specifically grounded upon relevance, speculation, confusion and disagreement about the door opened. 3RP 327-28. He was convicted as charged. CP 26; RP 453-6. His notice of appeal was timely. CP 67.

2. Facts

Deputy Baker was patrolling in his fully marked patrol car near Graham, Washington. 3RP 226-8. Baker saw defendant ride a motorcycle at an "excessive speed" near an elementary school. 3RP 229, 233. When defendant failed to yield at a stop sign, Baker activated his lights and sirens. RP 235. Defendant sped away reaching speeds of 100 MPH and rode into a lane for oncoming traffic while leading Baker on a high-speed chase through a high-density residential area where pedestrians, children and pets were known to congregate. RP 236-41. The vehicle pursuit ended when defendant crashed into a ditch. RP 241-3. He took off on foot, but was captured when he ran into a bush. RP 243-5.

C. ARGUMENT.

1. THE JURY'S DECISION DEFENDANT RODE HIS MOTORCYCLE IN A RECKLESS MANNER WHILE ATTEMPTING TO ELUDE POLICE IS SUPPORTED BY PROOF HE FLED THROUGH RESIDENTIAL NEIGHBORHOODS AT UNSAFE SPEEDS BETWEEN 60-100 MPH, IGNORED STOP SIGNS AND RODE INTO A LANE FOR ONCOMING TRAFFIC.

Defendant claims the State failed to adduce sufficient evidence to support the "drove in a reckless manner¹" element of attempting to elude.

Conviction for the offense requires proof that:

1. on or about the 26th day of January, 2016, the defendant drove a motor vehicle;
2. he was signaled to stop by a uniform police officer by hand, voice, emergency light or siren;
3. the officer was in uniform and his vehicle was equipped with lights and sirens;
4. after being signaled to stop, the defendant willfully failed or refused to immediately stop.
5. he drove his vehicle in a reckless manner; and
6. the act occurred in the State of Washington.

CP 37; RCW 46.61.024 (1); WPIC 94.02. A person operates a vehicle in a "reckless manner" when the person drives in a "rash or heedless manner, indifferent to the consequences." *State v. Ratliff*, 140 Wn.App. 12, 15, 164 P.3d 516 (2007); *State v. Roggenkamp*, 153 Wn.2d 614, 622, 106 P.3d 196 (2005); RCW 46.61.500; CP 37; WPIC 90.05.

¹ Ap.Br.8-11. The remaining elements are uncontested and supported by the record. See e.g. 3RP 226-8, 235-9, 322-4, 331-2.

Equally reliable circumstantial evidence, direct evidence or some combination is sufficient to support convictions if it permits rational jurors to find an offense's elements are proved beyond a reasonable doubt. *State v. Moran*, 181 Wn.App. 316, 321, 324 P.3d 808 (2014). Courts defer to juror resolutions of credibility and persuasiveness. *State v. White*, 150 Wn.App. 337, 342, 207 P.3d 1278 (2009); *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1992). Courts keep in mind the prosecution need not rule out every hypothesis except guilt; when faced with conflicting inferences courts must presume the jury resolved conflicts in favor of the prosecution, and must defer to that resolution. *Id.* The State's evidence is to be accepted as true with every attending inference. *White*, 150 Wn.App. at 342.

There is ample evidence to support the jury's conclusion defendant rode his motorcycle in a reckless manner while fleeing from Deputy Baker. Baker initiated a traffic stop after defendant rode by at an excessive speed and failed to obey a stop sign near an elementary school. 3RP 233-4. Defendant responded to the activation of Baker's emergency equipment by racing away at speeds ranging 60 mph to 100 mph through a high density residential area. 3RP 236, 240-1. Baker "match[ed]" defendant's speed at "[a] hundred miles an hour" down Meridian where the posted speed limit is 55 mph. 3RP 236-37. On an adjacent stretch of road Baker was traveling at almost 100 mph, but still could not overtake defendant. 3RP 237.

Defendant turned onto an adjacent road without signaling at a speed that carried him into the oncoming lane of travel. 3RP 238. Barker was again able to "match" or "pace" defendant from about 20 or 30 yards behind after they cleared the interaction; at that time, defendant had accelerated to 60 mph despite the 25 mph speed limit. 3RP 240-41. Defendant then led Baker down a side road through a "high-density" residential area where the posted speed limit is 25 mph. 3RP 237. It was an area known to be frequented by pedestrian traffic, to include kids on bikes and people walking their dogs. 3RP 241. Defendant's speed through the area was so "very excessive for the roadway" Baker thought it "too fast even for [him]" in a police car. 3RP 240. Defendant's legs started coming off the seat as he rapidly descended down a hill. 3RP 241-42, 269-70.

A dead end cul-de-sac rapidly approached. 3RP 242. Baker slowed. *Id.* Defendant did not. *Id.* Momentum carried him into a ditch. 3RP 242. The impact force ejected him about 30 feet past the crash site. 3RP 242-43. He then took off "at a full sprint" as Baker identified himself as "police" and directed defendant to "stop." 3RP 245. Defendant ran around a house until he encountered a high blackberry bush that forced him to turn toward Baker; whereupon, defendant was directed to the ground at gun point. 3RP 246.

On appeal, defendant argues against the sufficiency of the evidence by improperly drawing inferences from the evidence in favor of his theory of the case despite the jury's implicit rejection of it at trial. Proof he rode in a rash-headless manner, indifferent to the consequences is manifest in him

racing through a high density residential area at speeds and using maneuvers manifestly beyond his control, as evidenced by his inability to remain in his lane or maintain control of the motorcycle. Anyone who ventured into the road during the pursuit would have been imperiled. There is no reason to assume he would have proved better able to prevent collision with a child who ran into the road than the ditch that transformed his motorcycle into a human catapult. Death or grave injury would have been the most probable result. That defendant rode as he did despite the foreseeability of the risk evinced his indifference to the consequences.

Defendant's repeated reference to the absence of known bystanders near the chase betrays a failure to distinguish reckless endangerment, which requires conduct that actually puts another at risk, from attempt to elude, which does not. *E.g. State v. Graham*, 153 Wn.2d 400, 410, 103 P.3d 1238 (2005); RCW 9A.36.050(1). "Both the language and [] history of RCW 46.61.024 indicate [] the Legislature enacted the [attempt to elude] statute to address the dangers of high-speed chases." *State v. Malone*, 106 Wn.App. 607, 611-12, 724 P.2d 364 (1986). "High-speed" does not necessarily mean [] driving in excess of the posted speed limit. [It] simply means driving substantially faster than conditions warrant[.]" *State v. Refuerzo*, 102 Wn.App.341, 348, 7 P.3d 847 (2000). Conviction for the crime "does not require [] the driving endangered anyone else, or [] a high probability of harm actually existed." *See State v. Treat*, 109 Wn.App. 419, 427, 35 P.3d 1192 (2001).

The risks attending defendant's conduct mirrored, albeit exceeded, the recklessness of the driving in *Ratliff*. There, an officer likewise had to drive 100 mph to catch Ratliff on a road with a posted speed limit of 60 mph. *Ratliff*, 140 Wn.App. at 14. Ratliff also engaged in evasive maneuvers in close proximity to the pursuing officer at speeds of about 70-75 mph before stopping. *Id.* Defendant's behavior showed he was headless to traffic laws and indifferent to risks his conduct posed to motorists, pedestrians and police. *He's lucky he didn't kill someone.* So much senselessly risked so a recidivist felon could avoid long overdue accountability for a warrant issued because he failed to comply with the terms of a lenient sentence a judge took a chance on him receiving. But, so it goes. Defendant's conviction should be affirmed.

2. THE TRIAL COURT SOUNDLY EXERCISED ITS DISCRETION WHEN IT ALLOWED THE STATE TO CONTRADICT DEFENDANT'S CLAIM HE WAS UNWARE OF THE WARRANT THAT PROBABLY MOTIVATED HIS FLIGHT AS HE OPENED THE DOOR TO THAT EVIDENCE.

A trial court's ruling on the admissibility of evidence will be affirmed absent an abuse of discretion. *State v. Johnson*, 172 Wn.App. 112, 124-26, 297 P.3d 710 (2013). Defendant stipulated to his community custody status. 1RP 6. He challenged the admissibility of evidence he had a warrant for his arrest when the incident occurred, claiming it was irrelevant and prejudicial. 1RP 25. The motion was overruled because the evidence was material to the

escape count. 1RP 26-27, 29. He pled guilty to escape before jury selection. CP 8-17; 1RP 75. Pre-plea rulings were not explicitly withdrawn. 1RP 75-119. Admissibility of the warrant and his community custody status were subsequently addressed. 3RP 203-05.

The State sought to elicit the fact of his warrant pursuant to ER 404 (b) as proof of his motive to flee as well as absence of mistake. 3RP 203-05, 287-88; 315-25. Defendant claimed the evidence was prejudicial. 3RP 204. There was no objection to its form. *Id.* The Court ruled:

[G]iven the fact [] the [] defense in this case is that there was a mechanical failure and motive, I think [] the fact [] he did have an outstanding warrant, without going into any further detail, is relevant if only for the State to be able to rebut this argument that it was a mechanical failure. I think the jury is entitled to hear [] there was an outstanding warrant for his arrest; and the jury could infer from that fact that [i]s the reason why he attempted to elude the police; so, [] given his defense that he has made it an issue as to whether or not there was another explanation, which, in this case, would be [] he knew there was an outstanding warrant for his arrest [] the probative value outweighs the prejudicial value, and we would certainly instruct them that the fact [] there was a warrant is only to be considered for a limited purpose.

3RP 205. The State's direct examination of the arresting officer conformed to that limitation, for only the fact of defendant's warrant was adduced. 3RP 248. A second deputy testified defendant acknowledged knowing about the warrant, but the deputy did not know if that awareness was attributable to the arresting officer's remarks to defendant. 3RP 285-87. There were three components to the case defendant elected to present:

(1) the speeding perceived by police as flight was actually caused by mechanical problems, (2) he did not realize an officer was pursuing him at the time, and (3) *he did not know he had an outstanding warrant for his arrest.*

E.g., 3RP 287-88; 315-25. He admitted to prior convictions for possessing a controlled substance, stolen property and a stolen vehicle. 3RP 311-12.

He disavowed pre-incident knowledge of the warrant:

[Counsel:] Okay, Now, at the time you're riding this motorcycle on the day of this incident, were you aware that you had a warrant?

[Defendant:] No. I was not aware that I did have a warrant at that moment, at that time, earlier. ...

[Counsel:] Okay. But you did not have any independent knowledge that there was an existing warrant?

[Defendant:] No, I didn't, no.

3RP 322-23 (emphasis added). His appeal appears to be predicated on a claim this testimony does not exist. The State claimed it opened the door:

Defense has opened the door to me bringing up the fact that defendant was advised by his corrections officer about the warrant being issued. This, again, in relationship to his DOSA² [.] ...

The defendant [] called his corrections officer [] on December 12, 2014. He was told to report on Monday, December 15th. On Monday, December 15, 2014, the defendant failed to report as directed. A warrant was issued at that time. On December 18th, the notes indicate the defendant called his corrections officer. He was, again told to report immediately to address [] violations. He was also notified at that time [] a warrant was issued on December 15, 2014. I think he's opened the door to this[.]

² Drug Offender Sentencing Alternative. RCW 9.94A.660.

3RP 325-27. Defendant argued the evidence was irrelevant, "speculation," "hearsay upon hearsay," the door had not been open and the evidence would "create confusion." 3RP 327-28. The State further proffered:

[T]he warrant was for escape from community custody. He was told he had a warrant in 2014. He knew he was on community custody for DOSA. He had been told to report. He was told a warrant was issued. He never reported again. He signed the conditions. He knew he was facing the revocation of his DOSA.

3RP 328. The Court ruled:

I think he has opened the door, and I will allow the State to go into questioning him. [] [T]he jury is the one who is going to have to draw what inferences they will from the testimony, you know. I mean, they could conclude it's quite likely [] he knew he had a warrant which is why the high-speed chase occurred. If they buy [] there was some kind of motor vehicle problems, then they may find that, you know, he wasn't trying to elude the police; and it was just coincidental [] the officer happened to be following him while he was experiencing these mechanical difficulties.

But, Counsel, you know, he basically says, as he sits here today, he had no knowledge of a warrant. He's opened the door. She can cross-examine him about [] the fact [] he was advised by his CCO [] he was -- or a warrant had been issued for him, and that was back in December of 2014 and then almost -- in over a year, he apparently made no attempts to report again to his CCO; so I think he's opened the door. I think she's entitled to cross-examine him about this, and that's the Court's ruling.³

³ 3RP 330.

The State initially intended to sanitize the evidence by withholding the nature of defendant's relationship with the CCO who told him about the warrant and reference to her title. 3RP 330. But that information became necessary when defendant denied being told the warrant issued:

[State:] Mr. Greenwood [] You know [] Timisha [] Gilbert?

[Defendant:] Yes, ma'am. []

[State:] And do you recall having a conversation with Ms. Gilbert on December 18, 2014?

[Defendant:] [] I don't know dates but somewhere about there, I've had a conversation with her.

[State:] And do you recall on that date and time Ms. Gilbert telling you that you had an active warrant outstanding [] had just been issued?

[Defendant:] I don't recall her saying it was issued. I am aware she said that one may be issued to me -- or if I didn't report. []

[Defendant:] I said that I wasn't aware of the warrant being issued. She said [] there would be one issued. I have no idea whether she did it or not.

[State:] Didn't she, in fact, tell you [] it was an active warrant, that it had been issued?

[Defendant:] I don't remember her telling me that.

3RP 331-33; 4RP 361-62. Similar testimony was adduced during redirect. 4RP 378. Defendant neither elaborated on earlier objections, nor asserted challenges raised on appeal. 4RP 362-64. The State recommended the use of a limiting instruction, but defendant did not request one. 4RP 382-84. Gilbert testified consistent with the proffer, *i.e.*, that she was his CCO and advised him of the warrant's existence before the incident. 4RP 389-91. An instruction limiting consideration of his prior convictions was given. CP 35 (Inst.6). Argument stayed true to the rulings on admissibility. 4RP 420, 440.

- a. Defendant's failure to assign error to the warrant's admissibility or reassert objections raised below preclude review of the challenged ruling as he cannot assert new objections on appeal.

Defendants cannot challenge evidence on a different ground than the specific objection made in the trial court. *State v. Guloy*, Wn.2d 412, 421, 705 P.2d 1182 (1985); *State v. Mak*, 105 Wn.2d 692, 718–719, 718 P.2d 407, *overruled on other grounds*, *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). Courts do not err by neglecting to consider unasserted theories of exclusion. *See* ER 103(a); RAP 2.5(a)(3).

Defendant challenges the introduction of evidence proving he had pre-incident knowledge of his warrant. Error was not assigned to the ruling that admitted proof of the warrant. Nor does defendant renew the specific objections made in the trial court. His new theories of improper cross-examination of claimed ignorance and use of extrinsic evidence to prove a collateral matter were never preserved below, so should not be reviewed.

- b. Defendant's failure to seize upon the offer of an instruction to confine the challenged evidence to its limited purpose precludes review.

Properly instructed jurors are regularly entrusted to appropriately use or completely disregard evidence pertaining to a defendant's convictions. *State v. Ruzick*, 89 Wn.2d 217, 229-30, 570 P.2d 1208 (1977); *Spencer v. Texas*, 385 U.S. 544, 87 S.Ct. 648 (1967). Prior convictions and community custody status attending them are often considered as predicate offenses. *E.g.*, RCW 72.09.310; RCW 9.41.050; *Old Chief v. United States*, 519 U.S.

172, 177-78, 117 S.Ct. 644 (1997). Citizen jurors are regularly trusted to consider such evidence only for a permissible purpose identified in their instructions. *E.g.*, **Ruzick**, 89 Wn.2d at 230; ER 404(b); ER 608; ER 609. So when error can be obviated by an instruction, it is deemed waived if an instruction is not requested. **State v. Ramirez**, 62 Wn.App. 301, 305-06, 814 P.2d 227 (1991); **State v. Barber**, 38 Wn.App. 758, 771, 689 P.2d 1099 (1984); **State v. Crawford**, 21 Wn.App. 146, 151, 584 P.2d 422 (1978); 5 Wash.Prac., Evid. § 24 (3d ed. 1989). This invited error rule bars defendants from relying on prejudice they create as a basis to overturn their convictions. **In re Pers. Restraint of Coggin**, 182 Wn.2d 115, 124, 340 P.3d 810 (2014).

The State said a limiting instruction on the warrant issue would be a good idea. 4RP 382. Defendant apparently felt differently. Although he was free to make that tactical choice, he cannot have it both ways, *i.e.*, refrain from requesting the instruction then complain about potential prejudice the instruction would have cured. **State v. Price**, 126 Wn.App. 617, 649, 109 P.3d 27 (2005); **Ramirez**, 62 Wn.App. at 305. Review of this claim should be denied.

- c. Defendant's new claim the court wrongly permitted impeachment of testimony claiming no memory is predicated on a misstatement of the record and a misapplication of the rule he invokes.

Although the justification supporting impeachment may require the witness remember the prior event, it does not require the witness recall making a particular statement for which the impeaching evidence is offered.

State v. Newbern, 95 Wn.App. 277, 292-94, 975 P.2d 1041 (1999) (citing *see State v. Hancock*, 109 Wn.2d 760, 748 P.2d 611 (1988); *see also* 5A Teglund, § 256, at 309-10. Typically if a witness testifies about an event at trial but claims to have no knowledge of a material detail, or no recollection of it, most courts permit a prior statement indicating knowledge of the detail to be used for impeachment. *Id.* Prior inconsistent statement testimony is permitted to allow an adverse party to show the witness tells different stories at different times, for jurors may disbelieve the trial testimony. *Id.* William Strong, McCormick on Evidence § 34, at 114 (4th ed. 1992); Teglund, § 255, at 300. Only if a witness claims a total lack of memory *and gives no testimony about the facts at issue*, will a prior statement about the facts be excluded as there is no testimony to impeach. *Id.* So:

If a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach. [] But conversely, even if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling.

Id. A contrary rule would enable cunning witnesses to expose juries to half-truths while obstructing adversarial testing by allowing them to testify about aspects of an event they find favorable and claim memory failures to keep unfavorable facts from the record.

Beyond being procedurally barred, defendant's position on this issue is substantively flawed as it is founded upon a misstatement of the record.

He frames the trial court's ruling as being based on his claimed inability to recall conversations he had with the deputies about the warrant. But the challenged evidence was admitted to contradict the testimony wherein he affirmatively disavowed awareness of the warrant during the elude:

[Counsel:] Okay. Now, at the time you're riding this motorcycle on the day of this incident, were you aware that you had a warrant"

[Defendant:] No. I was not aware that I did have a warrant at that moment, at that time, earlier. ...

[Counsel:] Okay, but you did not have any independent knowledge [] there was an existing warrant?

[Defendant:] No, I didn't. no.

3RP 322-23. The entirety of the challenged evidence contradicts these two averments through proof CCO Gilbert told him about the warrant prior to the incident. 3RP 325-30.

Defendant's reliance on the rule against permitting impeachment in response to claims of no memory would be conceptually flawed if the record conformed to his description, for he gave a robust account of the incident. This is not a "no testimony" case where he disavowed knowledge of what happened. His testimony about the incident, to include what he knew or did not know about his warrant, defeats his improper cross examination claim.

d. There is no merit to defendant's claim that evidence proving his pre-incident awareness of the warrant amounted to impeachment on a collateral matter.

Relevant evidence is not collateral. ER 402. Evidence is relevant if it has any tendency to make a fact of consequence to the determination of

an action more or less probable. ER 401. Only minimal logical relevance is required. *State v. Bebb*, 44 Wn.App. 803, 814, 723 P.2d 512 (1986) aff'd, 108 Wn.2d 515 (1987). Facts are of "consequence," so not collateral, when they directly or impliedly tend to prove a claim, bear upon credibility or the probative value of other admitted evidence. *State v. Aguirre*, 168 Wn.2d 350, 362, 229 P.3d 669 (2010). *State v. Rice*, 48 Wn.App. 7, 12, 737 P.2d 726 (1987). For this reason, evidence showing bias or motive to lie is never collateral. *State v. Lubers*, 81 Wn.App. 614, 623, 915 P.2d 1157 (1996).

i. Proof defendant knew about his warrant was admissible evidence of motive and absence of mistake.

Motive is impulse, desire, or any power which impels or stimulates an individual to act. *State v. Powell*, 126 Wn.2d 244, 259-60, 893 P.2d 615 (1995). Proof of motive is "of consequence" when a person's mental state must be proved through circumstantial evidence. *Id.* A claim of mistake may also be contradicted by evidence of uncharged acts that demonstrate an absence of mistake. *State v. Brown*, 113 Wn.2d 520, 526, 782 P.2d 1013 (1989); *State v. Woolworth*, 30 Wn.App. 901, 906, 639 P.2d 216 (1981); *State v. Teuber*, 109 Wn. App. 640, 36 P.3d 1089 (2001); *State v. Essex*, 57 Wn.App. 411, 788 P.2d 589 (1990); *State v. Robinson*, 38 Wn.App. 871, 691 P.2d 213 (1984).

The trial court admitted proof CCO Gilbert told defendant about his warrant prior to the elude under the open-door rule. That ruling can be

affirmed on any basis. *State v. Cervantes*, 169 Wn.App. 428, 433, 282 P.3d 98 (2012). Knowledge of the warrant explained his flight. It does not appear this Court has addressed warrants as motivation for flight as directly in a published decision as it just did in the unpublished decision of *State v. Britain*, 195 Wn.App. 1029, *rev. denied*, 186 Wn.2d 1031, 385 P.3d 115 (2016). That case is only cited as non-binding authority for its persuasive value in accordance with GR 14.1(a).⁴ Britain made a claim opposite to the one raised by defendant below, *i.e.*, the warrant was not probative on the issue of motive in an elude case where the State *did not prove knowledge of the warrant's existence*. *Id.* at 4. (pagination from 2016 WL 4132555). This Court correctly held:

[T]he State was required to prove [] Britain willfully failed to stop when pursuing deputies signaled him. [] Evidence [] he had a motive to resist contact with police was highly probative of [his] willfulness in failing to stop. Evidence of the warrants, even without further evidence that Britain was aware of them, allowed the jury to reasonably to infer [he] was afraid to stop the vehicle because he believed he would be arrested for a reason unrelated to the traffic stop.

Id. Additional evidence the fleeing person actually knew about the warrant only adds to the proof of motive that justifies a warrant's admissibility.

⁴ (a) Washington Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. [Adopted effective September 1, 2007; amended effective September 1, 2016.]

ii. **Defendant also opened the door to the evidence.**

"The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit[.]" *Michelson v. United States*, 335 U.S. 469, 479, 69 S.Ct. 213 (1948). The "open door" rule provides for an opposing party to introduce evidence necessary to explain, clarify or contradict a fact the other party put at issue. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); *State v. Lile*, 193 Wn.App 179, 373 P.3d 247 (2016). Admission of extrinsic evidence under the open-door rule for contradiction will be affirmed absent an abuse of discretion. *State v. Riconosciuto*, 12 Wn.App. 350, 354, 529 P.2d 1134 (1974); *State v. McFadden*, 63 Wn.App. 441, 450, 820 P.2d 53 (1991); *State v. Brush*, 32 Wn.App. 445, 448, 648 P.2d 897 (1982); *United States v. Giese*, 597 F.2d 1170, 1189-95 (9th Cir. 1979); Wash.Prac. Evid. § 103.14 (6th ed.). "To close the door after receiving only part of the evidence not only leaves the matter suspended in air at a point [] advantageous to the party who opened the door, but might well limit the proof to half-truths." *Gefeller*, 76 Wn.2d at 455; *State v. Hanson*, 46 Wn.App. 656, 662-64, fn.7, 731 P.3d 1140 (1987).

Defendant unnecessarily put his credibility at issue by disavowing pre-incident knowledge of the warrant's existence. Prior to his testimony, the State proved the warrant existed, but it remained ambiguous as to whether

defendant had been alerted to the warrant before his arrest. And the theory defendant was unwittingly carried away by a malfunctioning motorcycle oblivious to the officer in pursuit did not require he disprove knowledge of the warrant. For if one believed his account, he would not have been alerted to the need to flee even if that was a natural response for him. He was also able to argue the State failed to prove his awareness of the warrant without putting his knowledge of it at issue. He nevertheless chose to affirmatively disavow pre-incident awareness of the warrant, which put that fact as well as the credibility of his statement about it directly at issue. And in that way opened the door to extrinsic evidence material to those two highly relevant facts. When he further called upon the jury to make a credibility call between him and Gilbert by denying she alerted him to the warrant, it was critical for the jury to understand her official role as his CCO as otherwise it would have no basis to assess if he should have perceived her to be a credible source on the subject of whether there was a warrant for his arrest.

iii. **Evidence he learned of the warrant from his CCO was harmless.**

Evidence merely cumulative of overwhelming untainted evidence is harmless. *State v. Flores*, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008). And nonconstitutional evidentiary errors are harmless unless the trial's outcome would have been different had the error not occurred. *State v. Jackson*, 102 Wn.2d 689, 696, 689 P.2d 76 (1984).

Defendant did not assign error to either deputy's testimony about the warrant. Defendant exposed the jury to the fact of his 2013 conviction for a felony crime of dishonesty. This untainted evidence of criminal history made proof of his community custody status cumulative as jurors would logically attribute it to his conviction. So the reference to community custody did not expose jurors to evidence of past misconduct beyond that which was already properly before them. Evidence of defendant's attempt to elude was also impressive. His defense, less so. For even without the dispute over pre-incident awareness of the warrant, his innocent explanation was internally inconsistent. He acknowledged knowing how to immobilize the motorcycle by engaging the clutch or kill switch, yet inexplicably did not. 3RP 345-46; 4RP 374-75. His exceedingly well-proved conviction for eluding a pursuing police vehicle should be affirmed.

3. IT IS PREMATURE TO DECIDE IF APPELLATE
COSTS SHOULD BE AWARDED.

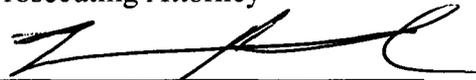
A ruling on costs should await a bill. RAP 14.1-14.6, 15.1-15.6.

D. CONCLUSION.

Ample evidence proves defendant rode his motorcycle in a reckless manner while attempting to elude police. The trial court properly exercised its discretion in admitting proof he knew about the warrant that probably motivated his flight and contradicted his theory of mistake. Review of costs should await submission of a bill.

RESPECTFULLY SUBMITTED: May 16, 2017.

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Neil S. Brown
Rule 9 Intern

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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.

5.16.17 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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