

NO. 49811-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY SAMNANG HEM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 15-1-02513-1

BRIEF OF RESPONDENT

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

1. Was sufficient evidence adduced for the trial court to find that the victim was not a participant in the challenged element of the crime of Second Degree Felony Murder which requires the victim not be a participant to the predicate felony crime when the court found credible evidence that the defendant was exclusively responsible and that the victim was not a participant? (Defendant's assignments of Error 1, 2, 3, and 4).
2. Has the defendant incorrectly claimed that the burden of proof was shifted to him through proper argument and findings which established that the victim in the Second Degree Felony Murder count was not a participant in the underlying felony crime of Attempting to Elude a Pursuing Police Vehicle? (Defendant's Assignments of Error 5, 6, and 7).

B. STATEMENT OF THE CASE.

1. Procedure

On August 30, 2016, the State filed an Amended Information charging Anthony Samnang Hem, hereinafter "the defendant," with robbery in the first degree (RCW 9A.56.190, .200), murder in the second

degree (RCW 9A.32.050), vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), assault in the second degree (RCW 9A.36.021), and attempting to elude a pursuing police vehicle (RCW 46.61.024). CP 82-89 (FoF I).¹

On August 30, 2016, the defendant pleaded guilty to vehicular homicide, vehicular assault, assault in the second degree, and attempting to elude a pursuing police vehicle (Counts III-VI). *Id.* In his plea of guilty, the defendant stated:

In Pierce County Washington, on or about May 10, 2015, knowing it was a crime to do so, I drove a motor vehicle in a reckless fashion at a high rate of speed, lights out on a rural road. As a direct result, I collided with a telephone pole. As a proximate result Marisa Richie was killed and Pierre Jennings suffered substantial injury (counts 3 and 4). Before the collision, I was trying to outrun a police vehicle that was fully marked and had lights and siren.

Before the collision, I drove the same vehicle in the direction of TPD officer Waubanasum using it as a deadly weapon intending to strike and create fear of being struck.

CP 31-41.

The defendant waived his right to a jury trial and proceeded to bench trial on the robbery in the first degree and murder in the second degree counts. CP 82-89 (FoF I).

Following the bench trial, the Honorable Edmund Murphy found the defendant guilty of robbery in the first degree and murder in the

¹ (FoF #) refers to the trial court's Findings of Fact and the specific finding number. (CoL #) refers to the trial court's Conclusions of Law and the specific conclusion number.

second degree (Counts I and II). *Id.* Written Findings of Fact and Conclusions of Law were entered on October 21, 2016. CP 82-89. The court sentenced the defendant to a period of confinement totaling 360 months and imposed mandatory legal financial obligations. CP 90-104. The defendant timely appealed. CP 114.

2. Facts

On May 9, 2015, at approximately 11:49 p.m., Officer Steve Parr responded to an apartment building located at 5915 99th St. S.W., in Lakewood, Washington, regarding a vehicle theft and assault allegedly committed by two males and a female, later identified as the defendant, Pierre Jennings, and Marisa Richie. RP 149-50, 172; CP 82-89 (FoF II).² Upon arrival, Officer Parr noted the victim, Mr. Terry Sumey, was being treated by Fire and Medical. RP 173; CP 82-89 (FoF II). Officer Parr noted that Mr. Sumey had an obvious head injury, was bleeding from lacerations to his face, had a golf ball sized lump on the left side of his face, and that other areas of his face were swollen. *Id.*

Sumey later explained that he had arrived home alone that evening in his 2004 GMC pickup truck at about 11:40 p.m. when he noticed an occupied vehicle (blue Monte Carlo) parked in his assigned apartment

² The verbatim reports of proceedings are contained in four volumes and have consecutive pagination. Some volumes have multiple trial and hearing dates contained within.

parking stall. RP 199; CP 82-89 (FoF II). Sumey's description of the occupants of the Monte Carlo matched the descriptions of the defendant, Jennings, and Richie. RP 149-50, 202, 236; CP 82-89 (FoF II). Sumey asked them to move their car. RP 205; CP 82-89 (FoF II). Either the defendant or Jennings got out of the vehicle, approached Sumey, and punched him in the face with a closed fist, knocking him to the ground. RP 206-08, 234, 236-37; CP 82-89 (FoF II). Richie stayed in the car. RP 202, 207, 236. Both the defendant and Jennings repeatedly punched and kicked Sumey before they got into Sumey's truck and fled. RP 183, 339-40; CP 82-89 (FoF II). Richie got into the truck with them. *Id.*

When police arrived at the scene, they identified a witness, Crystal Thomas. RP 150; CP 82-89 (FoF II). Thomas had been hanging out with Jennings earlier that day, and the two of them had been driving around in her Monte Carlo, which was the car parked in Sumey's stall. RP 136, 138; CP 82-89 (FoF II). About 30 or 40 minutes before the incident, Thomas and Jennings picked up Richie and the defendant at Richie's brother's house. RP 138; CP 82-89 (FoF II). Thomas was driving when the four of them stopped at the apartments and parked in Sumey's stall. RP 141-42; CP 82-89 (FoF II). Thomas went inside her friend's apartment to take a shower. RP 148; CP 82-89 (FoF II). The defendant, Richie, and Jennings stayed behind in Thomas's car. RP 149; CP 82-89 (FoF II).

When Thomas came back outside, police and medical aid were in the immediate area of the apartment parking lot, and Richie, Jennings, and the defendant were gone. RP 150; CP 82-89 (FoF II). However, Thomas's Monte Carlo was still parked in Sumey's stall. RP 151; CP 82-89 (FoF II). Thomas went back inside her friend's apartment and got her friend to come out with her to contact police. *Id.* Thomas eventually identified Richie, Jennings, and the defendant as the three people who she left in her car when she went inside to take a shower. RP 149-50; CP 82-89 (FoF II).

Officer Parr broadcast the description and license plate of Sumey's stolen truck. RP 184. Approximately eleven minutes after officers arrived on scene at the robbery, Officer Robillard spotted Sumey's dark green truck in the parking lot of a small apartment complex. RP 324-25. Officer Robillard could see the defendant, Jennings, and Richie inside the truck. RP 326. Officer Robillard could tell they could see him as well. RP 324-26. As Officer Robillard pulled in behind the truck, the driver, later identified as the defendant, backed up towards his patrol car, then turned as if to park in a nearby stall. RP 325, 425-26; CP 82-89 (FoF III). The defendant rapidly accelerated, drove over a curb, over some bushes, across the sidewalk and off the curb before speeding away westbound on 38th. *Id.* Officer Robillard notified dispatch. *Id.*

Officers Zach Spangler and Dean Waubanasum proceeded to an East Tacoma Residence believed to be connected with the suspects. RP 264. When they arrived, the officers saw Sumeey's truck parked to the south of the residence, backed up to a fence that separates the parking area from the yard. *Id.* Officer Spangler could tell the driver of the truck was male and that the two passengers, a male and female, were sitting in the front seat. RP 266-67. The defendant was driving when he sped toward Officer Spangler's patrol car, and Officer Spangler had to accelerate away from the truck to avoid being hit. RP 266; CP 31-41(FoF III). The defendant initially drove the truck about 50 or 60 in a 25 mph zone, then he sped up to somewhere around 80 to 100 mph. RP 271. Officer Spangler did not observe any effort on the part of the passengers trying to take physical control of the truck, trying to guide the defendant while he was driving, or otherwise communicating with the defendant. RP 292.

Officer Spangler performed a U-turn and pursued the truck. RP 268. The officers briefly lost contact with the truck as it crested a hill, but when the officers came to the top of the hill, they observed the truck had crashed, flipped over, and started a fire. RP 271, 273-74. By the time the officers arrived at the truck, they found the defendant trapped in driver's seat, Jennings hanging out of the passenger side window, and Richie unconscious in the middle seat. The officers were unable to tell whether

she was in the front or back of the truck due to the damage. RP 274, 277, 298-99, 300-01.

At trial, the defendant testified that he is used to being on the run, so he is alert to police. RP 378. He also testified that when he learned he was being pursued by a police vehicle, it was his instinct to flee. *Id.* Both the defendant and Jennings claimed that Richie told the defendant to “go” when the police pulled up to the truck. RP 363, 380. However, the trial court found these self-serving statements not credible. RP 425-26; CP 82-89 (FoF III). Jennings’s only reference to Richie saying “go” was made in response to a leading question where defense counsel sought Jennings’s agreement. RP 363, 425-26. Further, Jennings’s attitude and demeanor while testifying made it clear he did not take the proceedings seriously. RP 422; CP 82-89 (FoF II).

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS ADDUCED FOR THE COURT TO FIND THAT THE VICTIM IN THE SECOND DEGREE FELONY MURDER COUNT WAS NOT A PARTICIPANT IN THE UNDERLYING FELONY CRIME OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

Evidence is sufficient to support a conviction of Second Degree Felony Murder when the State has proven the elements of the crime beyond a reasonable doubt.

RCW 9A.32.050 provides:

- (1) A person is guilty of murder in the second degree when
...
- (2) He or she commits or attempts to commit any felony ... and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.

The defendant's only challenge as to the sufficiency of the evidence is in regards to the "participant" element. While "participant" is not defined by statute, the Washington Supreme Court defined the term in *State v. Carter*, 154 Wn.2d 71, 109 P.3d 823 (2005). The *Carter* court said,

[i]t is clear a participant must either be a principal, i.e., one who actually participates directly in the commission of the crime, or an accomplice, i.e., one who meets the statutory definition of accomplice[.]

154 Wn.2d at 79. Under RCW 9A.08.020 (3) (i)-(ii), an accomplice is one who,

[w]ith knowledge that it will promote or facilitate the commission of the crime ... solicits, commands, encourages ... or aids or agrees to aid [another person in committing a crime].

More than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice. *State v. Landon*, 69 Wn. App. 83, 848 P.2d 724 (1993); *In re Wilson*, 91 Wn.2d

487, 491-92, 588 P.2d 1161 (1979); *State v. McDaniel*, 155 Wn. App. 829, 863, 230 P.3d 245 (2010); WPIC 10.51.

The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

In considering the 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)). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

“Bench trials place unique demands on judges, requiring them to sit as both arbiters of law and as finders of fact.” *State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26, 30 (2002). A reviewing court is required “to give due regard ‘to the trial judge’s opportunity to observe the demeanor of the witnesses’ and the trial court’s determination as to credibility.” *State v. Read*, 163 Wn. App. 853, 864, 261 P.3d 207, 213 (2011) (quoting *Bose*

Corp. v. Consumers Union of U.S., Inc., 466 U. S. 485, 486, 104 S. Ct. 1949, 1952, 80 L. Ed. 2d 502 (1984)).³

When reviewing a trial court’s findings of fact and conclusions of law, the court determines whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Circumstantial evidence and direct evidence are equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Unchallenged findings of fact are verities of appeal. *Id.* Findings of fact erroneously labeled as conclusions of law are reviewed as findings of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Likewise, conclusions of law erroneously labeled as findings of fact are reviewed as conclusions of law. *State v. Gaines* 122 Wn.2d 502, 508, 859 P.2d 36 (1993). Conclusions of law are reviewed *de novo*. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

A challenge to the sufficiency of the evidence admits the truth of the State’s evidence. *Id.* “All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant” when the sufficiency of the evidence is challenged. *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be

³*State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26, 30 (2002), and *State v. Read*, 163 Wn. App. 853, 864, 261 P.3d 207, 213 (2011) are two different cases with two different defendants.

inferred from the conduct where “it is plainly indicated as a matter of logical probability.” *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed *de novo*. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

- a. Credible evidence shows the defendant maintained exclusive control of the truck as he eluded police and made all decisions regarding how to drive independently.

When Officer Spangler approached the truck, the defendant sped towards him at a high rate of speed. RP 266. Officer Spangler could see figures in the car, and he identified a female sitting in the middle seat, between the two men. RP 267. The defendant was driving about 50 or 60 in a 25 mph zone, then he sped up to somewhere around 80 to 100 mph. RP 271. Given the driving the defendant was engaged in, it was clear he made up his mind about how to drive in the absence of any assistance, aid, or encouragement by the passengers. RP 426.

Upon cross-examination, Officer Spangler testified that he did not see any indication that either of the passengers were making an effort to interfere with the driver’s operation of the vehicle. RP 292. Viewed in the light most favorable to the State, the evidence supports that the defendant was the driver and made all decisions regarding how to drive. This finding

supports the trial court's legal conclusion that Richie was not a participant in the attempt to elude. CP 82-89 (CoL IV).

The trial court found, and the defendant does not dispute, that he willfully failed or refused to immediately bring his vehicle to a stop after being given a visual or audible signal to do so by a uniformed officer in a vehicle equipped with lights and sirens and that it was the defendant alone who chose to drive off and run from law enforcement during the elude and pursuit. CP 82-89 (FoF III). These findings support the trial court's written finding of fact which states the defendant was the driver and made all decisions regarding how to drive. *Id.*

b. Credible evidence shows that the defendant had an independent motive and intent to elude the police

The defendant had a strong motive and independent intent to elude the police. After assaulting Sumey and stealing his truck, the defendant had his own reason to escape, independent of any passenger's in the truck. RP 183, 206-08, 236-37; CP 82-89 (FoF II).

The defendant testified that he is used to being on the run and is alert to police. RP 378. He also testified that when he learned he was being pursued by police, during this incident, it was his instinct to flee. RP 378. Viewed in the light most favorable to the state, the defendant's prior assault and robbery combined with his own testimony shows that he was

aware of the choice he made to elude and that he made that choice in the absence of any assistance, aid, or encouragement by the passengers.

c. Credible evidence supports that Richie was not an accomplice to the attempt to elude

The trial court determined, and the defendant does not dispute, that neither Jennings's nor the defendant's testimony was credible. CP 82-89 (FoF II). Credibility determinations are for the trier of fact and cannot be reviewed upon appeal, and unchallenged findings of fact are verities of appeal. *Hovig*, 149 Wn. App. at 8, 202 P.3d 318; *Camarillo*, 115 Wn.2d at 71, 794 P.2d 850 (citing *Casbeer*, 48 Wn. App. at 542, 740 P.2d 335, review denied, 109 Wn.2d 1008).

Both the defendant and Jennings testified that Richie told the defendant to "go" when the truck was spotlighted by law enforcement. RP 363, 380. However, the court found the defendant's statement to be self-serving and fabricated in order to make Richie seem to be a participant in the elude. CP 82-89 (FoF III). The court also found that Jennings's testimony was not credible and that his attitude and demeanor while testifying made it clear he did not take the proceedings, or his oath to testify, seriously. CP 82-89 (FoF II); RP 422, 345. Such credibility

determinations cannot be reviewed on appeal. *Hovig*, 149 Wn. App. at 8, 202 P.3d 318; *Camarillo*, 115 Wn.2d at 71, 794 P.2d 850 (citing *Casbeer*, 48 Wn. App. at 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008).

The law does not require people who are present during a crime to try to stop that crime in order to not be found as an accomplice even if they assent to the crime. See *State v. Landon*, 69 Wn. App. 83, 848 P.2d 724 (1993); *In re Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979); See *State v. McDaniel*, 155 Wn. App. 829, 863, 230 P.3d 245 (2010). In this case, since the trial court found that neither the defendant's nor Jennings's testimony was credible,⁴ the credible evidence only shows that Richie was merely present at the scene during the elude, and mere presence does not make her an accomplice. *Id.*

In this case, the underlying felony crime to the count of Second Degree Felony Murder is Attempting to Elude a Pursuing Police Vehicle. RP 424. Therefore, whatever involvement Richie had in the robbery prior to the elude⁵ has no bearing on whether Richie was an accomplice to the elude. Brief of Appellant at 7, 11. Further, even if Richie had knowledge that the defendant was attempting to elude while she was present, more than mere presence combined with knowledge of the criminal activity

⁴ RP 425-25; CP 82-89 (FoF II).

⁵ RP 199, 324-25; CP 82-89 (FoF II).

must be shown in order to establish that she was an accomplice. *State v. Truong*, 168 Wn. App. 529, 539-40, 277 P.3d 74 (2012); WPIC 10.51.

The fact that Officer Spangler did not see any physical manifestations showing guidance or encouragement by the passengers inside of the truck shows that Richie was not soliciting, commanding, encouraging, requesting, or aiding the defendant at the time the officer saw the truck. RP 292. If a passenger were participating as an accomplice to an elude, one might expect to see that passenger pointing her fingers as if to direct the driver or otherwise gesturing to the driver. Further, no testimony was given as to whether the truck was swerving around or making delayed reactions in response to directions given to him by a passenger. *Id.* The fact that the defendant drove through several signed intersections without stopping and accelerated to speeds between 50-60 mph in a 25 mph zone and then up to 80-100 mph showed, as the trial court concluded, that the defendant alone was making decisions regarding how to drive and that Richie was not commanding, encouraging, or aiding him in those decisions. RP 271, 297, 426; CP 82-89 (FoF III).

2. THE DEFENDANT HAS INCORRECTLY CLAIMED THAT THE BURDEN OF PROOF WAS SHIFTED TO HIM WHEN, THROUGH PROPER ARGUMENT AND FINDINGS, THE TRIAL COURT FOUND THAT THE VICTIM IN THE SECOND DEGREE FELONY MURDER CHARGE WAS NOT A PARTICIPANT IN THE UNDERLYING FELONY CRIME OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE

The State bears the burden of proving each and every element of its case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Fleming*, 83 Wn. App. 209, 215, 912 P.2d 1076 (1996); *Mullaney v. Wilbur*, 421 U.S. 684, 701-02, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). It may not shift any part of that burden to the defendant. *Id.* As such, the defendant has no burden to present any evidence at all. *See Fleming*, 83 Wn. App. at 215, 912 P.2d 1076.

Failure to object to an improper statement made by the prosecutor at trial constitutes a waiver of error on appeal unless the remark is deemed 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.” *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43, 46 (2011) (citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)); RAP 2.5(a).

In a bench trial, the reviewing court presumes that a trial judge will apply the law correctly. See *State v. Adams*, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); *Read*, 147 Wn.2d at 245-46, 53 P.3d 26 (2002). That presumption can only be overcome by a strong showing that the trial judge misunderstood and misapplied the law. *State v. Cantu*, 156 Wn2d 819, 826-27, 132 P.3d 725 (2006).

- a. The State did not shift the burden of proof to the defendant in its closing argument to the trial court

In his closing argument, the prosecutor stated:

The accomplice in this case, Richie, this is the defense position because they are saying she's a participant based on the evidence, must associate herself with the venture and participate in it as something she wishes to bring about, and by an action do something to make it succeed. ... Elude, there has to be some action on the part of Richie that the Court finds in evidence that shows she did something, an action, in order to help this joint action, this crime, even with knowledge of the crime, does not subject her to criminal liability, unless she shares the criminal intent of Mr. Hem, and she demonstrates a community of unlawful purpose.

RP 389; Brief of Appellant at 15.

The defendant elected to present evidence on its theory that Richie said "go." Such evidence was an attempt to refute the State's evidence that Richie was not an accomplice, but the defense failed to present any credible evidence supporting its theory. The defendant suggests that the State shifted the burden to the defendant in its closing argument by stating

that there would have to be some evidence supporting the defendant's claim that Richie was a participant in order to support his theory of the case. Brief of Appellant at 15. But the above statement does not shift the burden to the defense. The State was merely challenging the defendant's theory in its closing argument, and the defense did not object. Given the context of the State's overall argument, it is clear that the argument was made in response to the defense's claim that Richie was a participant. RP 388-89. Accordingly, the State was correct in its statement above, and it did not improperly shift the burden to the defense.

As previously mentioned, failure to object to an improper statement made by the prosecutor at trial constitutes a waiver of error on appeal unless the remark is deemed 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." *Thorgerson*, 172 Wn.2d at 443, 258 P.3d 43 (citing *Russell*, 125 Wn.2d at 86, 882 P.2d 747); RAP 2.5(a). In a bench trial, the reviewing court presumes that a trial judge will apply the law correctly. See *State v. Adams*, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); *Read*, 147 Wn.2d at 245-46, 53 P.3d 26 (2002). Since there was no jury to prejudice, the defense waived its right to appeal the prosecutor's statement when it failed to object to it at trial. RP 390.

- b. The trial court did not shift the burden of proof to the defendant in its oral ruling or when it found at CP 82-89 (FoF III) that “[c]redible evidence does not support that Richie was an accomplice to the attempting to elude a police vehicle count[.]”

The defendant challenges the trial court’s oral ruling when it said:

Because it is clear that the defendant was driving during the elude that ended in Richie’s death, the Court must look at whether or not Richie was an accomplice to the elude.

The credible evidence does not support a finding that Richie was an accomplice to the Attempting to Elude charge, therefore the Court finds the defendant guilty of the crime of Murder in the Second Degree.

RP 425-27; Brief of Appellant at 15.

The defendant suggests that the trial court’s oral ruling shows that the court mistakenly believed it was required to find evidence of participation by Richie in order to acquit, when in fact it was required to find evidence of nonparticipation by Richie before it could convict. Brief of Appellant at 15. However, a trial court’s oral opinion is no more than an expression of its informal opinion at the time it is rendered, and it has no final or binding effect unless incorporated into the findings, conclusions, and judgment. *State v. Mallory*, 69 Wn. 2d 532, 533–34, 419 P.2d 324, 325 (1966) (citing *Ferree v. Doric Co.*, 62 Wn.2d 561, 383 P.2d 900 (1963); *Clifford v. State*, 20 Wn.2d 527, 148 P.2d 302 (1944)).

Accordingly, the court's oral statement as to the credibility of the evidence does not show that it shifted the burden to the defendant.

The defendant then argues that the trial court misunderstood the elements of Second Degree Felony Murder and shifted the burden to the defendant in its finding of fact which states: “[c]redible evidence does not support that Richie was an accomplice to the attempting to elude a pursuing police vehicle count[.]” CP 82-89 (FoF III). However, this is not an inaccurate statement of the facts, and it does not show that the court shifted the burden. While the defendant has no burden to present any evidence at all, *See Fleming*, 83 Wn. App. at 215, 912 P.2d 1076, he elected to do so by having witnesses testify that Richie was an accomplice to the elude. Since a court sitting as both trier of fact and arbiter of law must make credibility determinations of witnesses,⁶ it was proper for the court to make this finding.

The court found that the State proved a lack of participant status by the victim when it showed that the defendant had complete control of the vehicle at the time of the elude, and the court stated this finding in its oral ruling when it said,

Mr. Hem is the only one who chose to take off from the police, ... He is the one who chose how he was going to drive, and he is the one who drove into the power pole.

⁶*Read*, 163 Wn. App. at 864, 261 P.3d 207 (quoting *Bose Corp.*, 466 U.S. 485, 486, 104 S. Ct. 1949, 1952, 80 L. Ed. 2d 502 (1984))

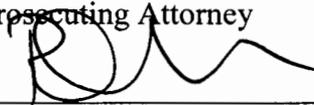
RP 426. The court then memorialized that ruling in its written finding of fact which states: "Ms. Richie was not a participant in the elude[.]" CP 82-89 (FoF III). Accordingly, the trial court did not shift the burden to the defendant in its oral ruling or findings of fact.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court affirm the defendant's conviction of Second Degree Murder.

DATED: July 3, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



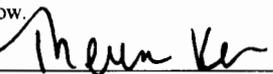
MICHELLE HYER For
4/1/08
Deputy Prosecuting Attorney
WSB # 32724



Madeline Anderson
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ mail or ABC-LMI delivery to the attorney of record for the defendant and defendant 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.

7.3.17 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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