

NO. 49882-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ADRIAN TROY ABRAM, APPELLANT

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

No. 16-1-00003-9

Brief of Respondent

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

1. Did the court abuse its discretion by instructing the jury on expert witness testimony when the police officers were qualified based on their knowledge, experience, and training?
2. Did the trial court abuse its discretion by admitting evidence of unrelated arrest warrants when the testimony was offered to show motive pursuant to ER 404(b)?
3. Did the State impermissibly elicit testimony that made a passing reference about the defendant declining to answer an officer's question, when he waived his *Miranda* rights and the State elicited the information to support its burden of proving defendant acted willfully?
4. Did the court abuse its discretion by allowing officers to present out of court statements made by Ms. Sandoval that were not offered to prove the truth of the matter asserted?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Defendant was charged with attempting to elude a police vehicle and driving while in suspended or revoked status in the first degree. CP 16-17. A 3.5 hearing was held. RP 9-78. The court found defendant waived his right to remain silent when he voluntarily answered officer questioning after being read his *Miranda* rights. CP 8-12. Outside the presence of the jury the State informed the court it wanted to offer into evidence defendant's outstanding warrants as motive for eluding police. RP 171. The court heard

arguments from both parties. RP 171-73. After conducting a balance test under ER 403 and ER 404(b), the court found the probative value of the evidence to outweigh the possible undue prejudice to defendant, and admitted it. RP 173. During the trial, the State elicited testimony from Officer Maas regarding Ms. Sandoval's statements at the scene. RP 221. Defense objected on hearsay grounds. *Id.* The court overruled the objection. *Id.* Defendant was convicted on both charges. CP 39-40.

2. FACTS

On January 2, 2016, Officers Maas and Nicodemus were on duty in a fully marked 2015 Ford Explorer when they encountered defendant speeding around the 8400 block of McKinley Ave. in Tacoma. RP 194, 266. It was 1:20 in the morning. RP 196. Defendant was driving a 1994 Jeep Cherokee. RP 198. The officers turned their vehicle around to follow defendant. RP 199. After they turned around defendant increased his speed and turned the first corner. *Id.* Defendant continued to gain speed and made several quick turns. RP 199-200. Defendant was travelling approximately 70 miles per hour through neighborhoods, at which point the officers turned on their emergency lights. RP 200-201. 266-262.

Defendant continued his reckless driving by disobeying traffic signals and speeding down heavily travelled roads. RP 201-208, 266- 273. Defendant went through several intersections without stopping. *Id.* His

driving showed no regard for potential oncoming vehicles. RP 273-274. Defendant continued to increase his speed and exceeded 100 miles per hour. RP 211-212. Defendant displayed no signs he was going to stop as the chase continued for miles. RP 209. During the chase other police vehicles joined with their emergency lights on. Once the officers determined they were at a safe speed, they attempted to stop defendant's vehicle with a PIT maneuver. *Id.* Defendant swerved his vehicle and the attempt failed. RP 210. Defendant continued to elude the officers and disobey traffic signals. *Id.* Officers attempted another PIT which succeeded and stopped defendant's vehicle. RP 211-212. After the vehicle was stopped, defendant put his vehicle in reverse and hit a patrol car. RP 219.

After the vehicle was stopped, officers discovered there were two passengers in the vehicle with defendant. RP 220. The passengers were Ms. Sandoval and her and defendant's three year old son. RP 220-221. Officers Maas and Nicodemus had defendant exit the vehicle RP 219. When officers questioned defendant about why he refused to stop he acknowledged he knew they were behind him but that he thought they were following another vehicle that was chasing him. RP 222. Defendant claimed he was being chased by an individual with whom he had an altercation previously at Safeway. *Id.* When challenged on there not being

another vehicle between the officers and defendant, defendant declined to answer the question. RP 223. Officers also questioned Ms. Sandoval. RP 221. She initially answered questions stating that they left Safeway, defendant told her he was in an altercation there, and then the police were behind them. RP 223.

The officers ran a check on defendant's driver's license and discovered it was suspended in the first degree. *Id.* Additionally, officers discovered there was an outstanding misdemeanor warrant for defendant's arrest. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON ITS ROLE AS THE SOLE JUDGE OF WITNESS CREDIBILITY BY GIVING THE "EXPERT WITNESS" INSTRUCTION INSURING NO UNDUE DEFERENCE WAS GIVEN TO ANY WITNESS.

"[R]eview of jury instructions is guided by the familiar principle jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." (internal quotation omitted) *Cox v. Spangler*, 141 Wn. 2d 431, 442, 5 P.3d 1265, 1271 (2000), opinion corrected, 22 P.3d 791 (2001). A trial court's choice of jury instructions will not be disturbed on review except upon a clear showing of abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996),

overruled on other grounds by *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

Legal errors in jury instructions are reviewed de novo. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn. 2d 851, 860, 281 P.3d 289, 294 (2012). An erroneous instruction is reversible error only if it is prejudicial to a party. *Id.* The party challenging an instruction bears the burden of establishing prejudice. *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001); *Miller v. Yates*, 67 Wn. App. 120, 125, 834 P.2d 36 (1992).

- a. Officers Maas and Nicodemus gave opinion testimony based on their experience and training.

It is the trial courts discretion to qualify a witness as an expert on a particular subject. *State v. Flett*, 40 Wn. App. 277, 284, 699 P.2d 774, 779 (1985). A witness may be qualified as an expert by his or her knowledge, skill, experience, training, or education. ER 702; *State v. Kalakosky*, 121 Wn.2d 525, 540–41, 852 P.2d 1064, 1072 (1993).

The State provided a more than sufficient foundation for the officers' qualifications as experts on direct examination. The State elicited the following regarding Officer Maas's qualifications:

- Q. How long have you been with the Pierce County Sheriff's Department?
- A. I started working as a corrections deputy in '96

and then went to the patrol in 2007.

Q. So what's the difference in -- what's a corrections deputy do and what's a patrol deputy do?

A. Corrections works in the jail, jail guard, and then patrol is on the street.

Q. Okay. Did you have to go to an academy or some kind of education to become a deputy?

A. Yes.

Q. Tell me about that briefly.

A. It's just one month of basic law enforcement academy, and then you have approximately two months of classroom with the county in-house stuff, and then about four-and-a-half months of working with a field training officer. □

Q. So like a field training officer is basically a senior officer that makes sure you're going to do what you're supposed to do?

A. Correct. You ride in the car and then he helps you when you need assistance and shows you what to do and that kind of thing.

Q. I assume that there were a number of tests and requirements that you had to pass in order to get through the academy, get through the Pierce County Sheriff's Department internal education system and then get through FTO.

A. Yes.

Q. And presumably you successfully completed all of those.

A. Yes.

Q. What kind of topics do they cover at the academy just generally?

A. Just the basic rules of Washington State; traffic laws, domestic violence laws.

Q. They teach you how to drive a patrol vehicle?

A. We had a week of in-house at the EVOC in Shelton and then we spent a week there during the academy.

Q. And do you have any ongoing kind of training that you go through through the sheriff's department?

A. We go down there and do the training once a year.

Q. Okay. So let's fast forward to when did you start at the sheriff's department as a deputy?

A. Early 2007. □

Q. And since 2007, have you been always in patrol?

A. Yes.

□Q. Any special duties or assignments?

□A. No. □

Q. Okay. So what does a patrol deputy do for the Pierce County Sheriff's Department? □

A. The main function is you answer 911 calls. And then when you're not doing that, then you will go do traffic enforcement, look for suspicious vehicles, youth thefts, that kind of thing.

Q. So basically when community members call 911 to report crimes or need help, you respond to that; and when you're not responding to their calls, you're essentially on patrol?

A. Correct.

□Q. Looking for violations or enforcement of law?

A. Correct. □

RP 191-93.

The State presented Officer Nicodemus's qualifications in the same manner:

Q. And where are you employed, sir?

A. Pierce County Sheriff's Department.

Q. What do you do for the Pierce County Sheriff's Department?

A. I work patrol.

Q. And how long have you been with the Pierce County Sheriff's?

A. Been with the department since 1998.

Q. And what did you do for the department back in 1998?

A. In November I started working corrections; and then in February of 2003, I started working patrol.

Q. So February of 2003 is when you started working patrol as a deputy for the sheriff's department?

A. Yes.

Q. Any other law enforcement experience before 1998?

- A. No.
- Q. Okay. So when you started working patrol in 2003, did you successfully attend and pass the academy?
- A. Yes.
- Q. Did you successfully pass all the intern classes that the sheriff's office has for beginning officers?
- A. Yes.
- Q. Did you have a field training program?
- A. Yes.
- Q. Did you successfully pass that?
- A. Yes.
- Q. All right. So through your career, since 2003 with the sheriff's department, have you ever had any other special duties or assignments besides patrol?
- A. Yes.
- Q. Tell me about that.
- A. I've done search and rescue. I'm a firearms instructor. I'm a field training officer.
- Q. So if you're a field training officer, does that mean that you actually train and evaluate other new officers?
- A. Yes.
- Q. Sorry, go on. Besides the search and rescue and the FTO program.

A. I've done marine services unit, which is working with the boats on the water. I've worked in investigations for domestic violence unit. I worked in Pierce Transit for a while, for about five years; three of those five years I was an investigator for Pierce Transit. I think that about sums it up.

RP 263-65.

Defendant argues the officers did not testify to any specialized training in speed estimations or driving safety and therefore they do not qualify as experts. BOA 8. However, this argument fails because it has no foundation in the Rules of Evidence or Washington State case law. An expert witness does not have to be "a rocket scientist"; in the appropriate context, "[p]ractical experience is sufficient to qualify a witness as an expert." *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). Officer Maas's and Officer Nicodemus's years of training and experience qualified them to give opinion testimony to aid the trier of fact in understanding the evidence admitted. Officer Maas and Nicodemus easily fall within the requirements set forth by the Rules of Evidence and Washington State case law.

Regarding the "expert witness" instruction, the court heard both sides' arguments during the following exchange:

THE COURT: The second one is the proposed Instruction No. 6, which is the WPIC 6.51 on expert witness. Who are we having as an expert witness?

STATE: Well, I don't know if they -- I think the police did -- the deputies in this case did provide testimony that relates to like an opinion about the speed that the defendant was going through the intersections and things like that whether or not he could safely clear intersections. I think that that is based on their training and experience and in motor vehicle operation and pursuit driving. Obviously the defendant has testified that he thought he was driving safely. So I think that could be considered an expert opinion in as much as they relied on their expertise. I also think the records custodian is obviously an expert in records and how they are maintained.

THE COURT: Mr. Ryan, do you have any objections or thoughts in regards to the State's proposed?

DEFENSE: Your Honor, I would ask the Court not give it. I don't think anybody's really given an opinion as to anything in this case other than what they actually witnessed.

RP 370. The trial judge, guided by ER 702, evaluated the officers' testimonies and reasoned that:

I think it may provide some information to the jury. While lay witnesses can testify about speed, I think that there's some additional experience and training that law enforcement officers have in regards to these situations.

RP 370-71. This reasoning was founded on the experience and training the officers have in motor vehicle operations and pursuit driving, which play a major role in an elude case. Even when it is assumed that the fact finder is

generally knowledgeable about a topic, expert testimony may still be of assistance to an understanding of the issue. *Swartley v. Seattle Sch. Dist. No. 1*, 70 Wn.2d 17, 22, 421 P.2d 1009 (1966); ER 702.

Defendant makes the argument that the officers never presented evidence that their speedometer was properly calibrated. BOA 7. This has no bearing on the case at bar. To the extent defendant's argument is that a speedometer must be authenticated before evidence of its speed readings are admissible, he is correct if the offense that must be proved is speeding. *City of Bellevue v. Mociulski*, 51 Wn.App. 855, 859, 756 P.2d 1320 (1988). However, when the offense that must be proved is not speeding, the State only has the burden to prove that the stop was valid based on probable cause, authentication is not necessary. The burden then shifts, and the defendant must show that the stop was not valid. See *Clement v. Dep't of Lic.*, 109 Wn.App. 371, 375, 35 P.2d 1171 (2001). Here, the offense charged is not speeding. CP 16-17.

Moreover, defense never raised objections to the officers' opinion testimony or qualifications as experts. As such, any argument that relies on questioning admissibility of their opinions or their qualifications as expert witnesses is meritless.

- b. The “expert witness” instruction is a cautionary instruction that does not give deference to expert witness testimony.

The party challenging an instruction bears the burden of establishing prejudice. *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001); *Miller v. Yates*, 67 Wn. App. 120, 125, 834 P.2d 36 (1992). The jury alone decides the weight of evidence. *State v. Ortiz*, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992).

The instruction used by the trial court was drawn directly from WPIC 6.51. The instruction reads:

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

CP 25 (WPIC 6.51). It is a cautionary instruction which does not include the phrase “expert witness.” Its terms carefully address both the expert and non-expert alike, and make it very clear that the jury alone decides what weight, if any, to give the witness’ testimony. The entire focus of the instruction is to guard against the over probative effect of expert testimony. While it can be error to refuse to give an expert witness instruction when an

expert witness testifies, giving the instruction out of a surfeit of caution is not.

Here, defendant's only argument that he was prejudiced is based on non-binding decisions by the Ninth Circuit. BOA 9-12. Defendant argues that the court must instruct the jury on the dual role of an officer if they give both lay and expert testimony. *Id.* There is no binding authority that requires the trial court to give such instruction.

Further, the decision of the Ninth Circuit to require an instruction describing the dual role of the witness arose because case officers serving as both lay and expert witnesses invaded the province of the jury by opining on subjects beyond the scope of their qualification as an expert or by giving opinions about the meaning of clear statements. *United States v. Vera*, 770 F.3d 1232, 1246 (9th Cir. 2014); *United States v. Freeman*, 498 F.3d 893, 902-04 (9th Cir. 2007). That is not the case here. Officers Maas's and Officer Nicodemus's opinions were confined to their observations during the pursuit and were based on their experience and training in motor vehicle operation and pursuit driving. RP 191-93; 207-55; 263-73.

Moreover, the proposed Ninth Circuit curative instruction for these situations closely resembles WPIC 6.51. The instruction reads:

You [have heard] [are about to hear] testimony from [name] who [testified] [will testify] to both facts and opinions and the reasons for [his] [her] opinions.

Fact testimony is based on what the witness saw, heard or did. Opinion testimony is based on the education or experience of the witness.

As to the testimony about facts, it is your job to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. [Take into account the factors discussed earlier in these instructions that were provided to assist you in weighing the credibility of witnesses.]

As to the testimony about the witness's opinions, this opinion testimony is allowed because of the education or experience of this witness. Opinion testimony should be judged like any other testimony. You may accept all of it, part of it, or none of it. You should give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Manual of Model Criminal Jury Instruction for the District Courts of the Ninth Circuit 4.14A. The instruction informs the jury how to evaluate the witness' testimony and the absence of it prejudices the defendant. *United States v. Vera*, 770 F.3d 1232, 1246 (9th Cir. 2014). The Ninth Circuit instruction and WPIC 6.51 serve the same purpose, to instruct the jury on how to evaluate witness testimony and that it, the *jury*, is the sole judge of witness credibility and how much weight to give to a witness' testimony. Therefore, WPIC 6.51 ("expert witness" instruction) *is* the curative instruction for which defendant argues.

If the court abused its discretion by giving the “expert witness” instruction, the defendant failed to show he was prejudiced by it. However, the trial courts instruction did not misstate the law, mislead the jury, or prevent the defendant from presenting his theory of the case. Thus, the trial court did not abuse its discretion and there is no error.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING ER 404(B) EVIDENCE FOR THE PURPOSES OF SHOWING MOTIVE.

Trial court rulings admitting or excluding evidence are reviewed for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). Trial courts have wide discretion in determining the admissibility of evidence. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Evidence of past crimes, wrongs, or acts is admissible to show motive. ER 404(b). To admit evidence of prior bad acts, the trial judge must “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Gunderson*, 181 Wn. 2d 916, 923, 337 P.3d 1090, 1093 (2014).

The State was required to prove, inter alia, that defendant willfully failed to stop when the pursuing officers signaled him. RCW 46.61.024(1). At trial, the State sought to elicit testimony pertaining to a warrant out for the defendant's arrest at the time officers Maas and Nicodemus attempted to pull him over. RP 171. The purpose of this testimony was to show motive for evading law enforcement, pursuant to ER 404(b). *Id.* Evidence that he had a motive to resist contact with police was highly probative of defendant's willfulness in failing to stop. Evidence of the warrants, even without further evidence that defendant was aware of them, allowed the jury to reasonably infer he was afraid to stop the vehicle because he believed he would be arrested for a reason unrelated to the traffic stop.

The trial court heard arguments from both parties on whether the evidence was relevant:

DEFENSE: And certainly, I'm sure Mr. Horibe would ask that question of Mr. Abram if he testifies: "Isn't it true that you had a warrant outstanding and that's why you were running?" It would become relevant at that point.

STATE: Well, I think it's relevant even if he doesn't testify. It provides a motive for why he would commit the criminal act that he did.

RP 173. After hearing each side's argument, the trial judge conducted a balancing test of probative value and prejudicial effect pursuant to ER 401 and ER 403. RP 173. The trial court ruled that:

I do find that it is relevant. The Court has to do a balancing under 401 and 403 Evidence Rules. The relevance is to show what may have been the mindset of Mr. Abram at the time that the officers were behind him, the fact he had an outstanding warrant.

The prejudicial effect of that can be substantial if the jury hears that he has a warrant. But I think that can be limited by having it be described as a misdemeanor warrant rather than a felony warrant and not going into the nature of it being a reckless driving warrant. So that could be an outstanding misdemeanor warrant I think is accurate. I think that minimizes the prejudice to therefore the probative value of it. The relevance of it is not substantially outweighed by the danger of unfair prejudice. I will allow the admissibility of the fact that he had an outstanding misdemeanor warrant.

Id.

The trial court's ruling constituted a proper exercise of the broad discretion granted to lower courts to rule on the admissibility of evidence. The trial court grounded the admission of the challenged testimony in ER 403 and ER 404(b), and expressed its reasoning on the record

Defendant argues that the trial court erred in finding that the warrants were sufficiently probative, because the State was required to prove he was aware of the warrants. However, there is no authority requiring the State to prove defendant had knowledge of the warrants. The potential prejudice from evidence of the warrants lay in the inference that defendant had a propensity for lawlessness. The trial court limited the potency of the inference by barring evidence of the underlying crimes and

described the warrants as misdemeanor warrants and not felony warrants. RP 173.

The trial court's admission of testimony pertaining to the defendant's warrants was a proper exercise of discretion. The decision was grounded in the Rules of Evidence and based on tenable reasons. The trial court properly recognized that the high probative value outweighed the potential for the evidence to unduly prejudice defendant. The court's tactful and considerate approach of allowing important evidence while confining any bias from it was not an abuse of discretion.

3. THE STATE'S PERMISSIBLE ELICITATION REGARDING DEFENDANT'S RESPONSES TO OFFICER QUESTIONING TO SUPPORT ITS BURDEN OF PROVING DEFENDANT WILLFULLY FAILED OR REFUSED TO STOP HIS VEHICLE WAS NOT A COMMENT ON HIS RIGHT TO REMAIN SILENT.

A defendant's exercise of his right to remain silent may not be used as substantive evidence of guilt. *State v. Fuller*, 169 Wn. App. 797, 815-16, 282 P.3d 126 (2012). A mere reference to the defendant's silence is not necessarily a violation of the rule against using silence as evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). It is only when the State invites the jury to infer guilt from the defendant's silence that the Fifth Amendment and Article I, Section 9 of the Washington State Constitution are violated. *Id.* The State has the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*,

397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

The State was required to prove, inter alia, that defendant willfully failed or refused to bring his vehicle to a stop after being signaled to stop by police. WPIC 94.02; RCW 46.61.024. To prove this, the State had to prove that defendant knew the police were pursuing him and signaling him to stop. When questioned by Officer Maas, defendant told him he was in an altercation with a man with a gun and he thought he was chasing him. RP 222. Officer Maas asked defendant if he thought the man chasing him had emergency lights and sirens. *Id.* To which defendant said he was under the impression the police were chasing the man who was chasing him. *Id.*

For the defendant to believe the police were chasing someone who was chasing him there would have to be a car between the officers and defendant. There was not a car between them. *Id.* Officer Maas questioned defendant about there not being a car between them and how close his car was to defendant's. RP 222-23. The State asked Officer Maas what the defendant's response was to those questions, and that is when the challenged statement occurs. *Id.* Officer Maas answered the State's question by saying, "he would just decline to answer those ones." *Id.* The State elicited the testimony while fulfilling its duty to prove each element of the

crime charged and did not invite the jury to infer guilt from defendant's silence.

- a. The State properly elicited testimony regarding defendant's responses to officer questioning was used to prove the elements of the crime charged and did not comment on defendant's right to remain silent.

"A police witness may not comment on the defendant's silence so as to infer guilt from a refusal to answer questions." *State v. Steen*, 164 Wn. App. 789, 813, 265 P.3d 901, 913 (2011), as amended (Dec. 20, 2011). A comment on the defendant's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the defendant's silence was an admission of guilt. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A statement will only be considered a comment on the right to remain silent if it was intended to be a comment on the right; otherwise, mention of silence constitutes a " 'mere reference' " that is not a violation unless prejudice is shown. *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008) (citing *State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991) and *Lewis*, 130 Wn.2d at 705, 927 P.2d 235).

In the case at bar, the statement which referenced defendant's declination to answer Officer Maas's questions which challenged his explanation of why he failed to stop when signaled to do so does not amount to a comment on defendant's right to remain silent. The statement was the

result of the State providing the necessary evidence for the jury to make an informed decision. On direct examination the State asked Officer Maas the following:

Q. Were there ever any cars between you and Mr. Abram during the majority of this pursuit?

A. No.

Q. Did you challenge Mr. Abram about that?

A. Yes. He just said he thought there was other cars; thought we were chasing the car chasing him and that guy just happened to take every turn and every direction that he took.

Q. Did you ever confront Mr. Abram about how close you were and there being no car between you?

A. Yes. And he would just decline to answer those ones.

RP 222-23.

Officer Maas's testimony was offered to prove defendant was aware the officers were pursuing him and not a vehicle behind him. Officer Maas's questions addressing the absence of a vehicle between defendant and the officers along with the proximity of the officers to defendant directly challenged the explanation defendant offered for not stopping. *Id.*

Officer Maas's statement of, "he would just decline to answer those ones" does not comment on defendant's right to remain silent. *Id.* For the

statement to rise to the level of being a *comment* on defendant's right to remain silent the State would have to offer it to the jury as "substantive evidence of guilt" or "to suggest to the jury that the defendant's silence was an admission of guilt." *Lewis*, 130 Wn.2d at 705, 927 P.2d 235. It did not. The State offered the evidence to show defendant was unable to reconcile the incongruity between his explanation that he thought the police were chasing a vehicle that was chasing him and the fact there was no car between the officers and defendant and the officer's close proximity to defendant's vehicle. Simply mentioning a defendant's silence does not invite the jury to infer guilt based on that silence. *Lewis*, 130 Wn.2d at 706, 927 P.2d 235 ("Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence.").

As such, Officer Maas's statement is a "mere reference" to defendant's silence and does not violate his right to remain silent.

b. Defendant waived his *Miranda* rights when he voluntarily answered officer questions.

A waiver of *Miranda* rights need not be explicit but may be inferred from particular facts and circumstances. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). A defendant may invoke his right to silence after questioning begins, but the invocation must be clear and unequivocal. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375

(2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004). The Court of Appeals “will not disturb a trial court's conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding.” *State v. Athan*, 160 Wn. 2d 354, 380, 158 P.3d 27, 40 (2007).

After police executed a PIT maneuver to stop defendant’s vehicle and end the pursuit, defendant was read his *Miranda* rights. CP 8-12. Defendant was aware of his rights and understood them. *Id.* Defendant knowingly, intelligently, and voluntarily waived his rights when he spoke to the officers. *Id.* At no point did defendant invoke his right to remain silent- explicitly or implicitly- nor did he indicate he wanted to discontinue the questioning. *Id.*

However, defendant argues that his silence in the face of police questioning “is quite expressive” of his intent to invoke his right to remain silent. BOA 17. This assertion is without merit. A defendant’s failure to answer a question is not a clear and unequivocal invocation of his right to remain silent. *State v. Hodges*, 118 Wn. App. 668, 672–73, 77 P.3d 375, 377 (2003). When a defendant freely answers officers’ questions then fails to answer some questions, but continues to answer others, his right to remain silent has not been invoked. *Id.*

Further, because Defendant has not challenged the trial court's factual determinations, they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *City of Seattle v. May*, 151 Wn. App. 694, 697, 213 P.3d 945 (2009).

The State did not comment on the defendant's right to remain silent, when the right was not invoked. Defendant's argument is without merit and must fail.

4. THE TRIAL COURT PROPERLY ADMITTED OFFICER MAAS'S TESTIMONY REGARDING MS. SANDOVAL'S STATEMENTS AT THE SCENE WHEN SUCH TESTIMONY DID NOT CONTAIN HEARSAY OR VIOLATE DEFENDANT'S CONFRONTATION RIGHTS.

An appellate court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001); *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306 (1987) ("The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse."). A trial court abuses its discretion when its decision is based on manifestly unreasonable or untenable grounds. *Powell*, 126 Wn.2d at 258.

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

matter asserted.” ER 801(c). Absent an applicable exception, hearsay is generally inadmissible. ER 802.

- a. Defendant failed to preserve his claim by not objecting to the challenged testimony during trial.

“A party may assign error on appeal only on a specific ground made at trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)). “This objection gives a trial court the opportunity to prevent or cure error. *Id.* (citing *State v. Boast*, 87 Wn.2d 447, 451, 533 P.2d 1322 (1976)). “For example, a trial court may strike testimony or provide a curative instruction.” *Id. see also* ER 103; RAP 2.5.

Defendant did not object to the statements which he assigns error. The defense’s only objection based on hearsay occurred during the State’s direct examination of Officer Maas, when the following exchange occurred:

Q. Did you ask Ms. Sandoval about whether she observed police cars behind her?

A. Yes.

Q. And what did she say?

MR. RYAN: I’m going to object, Your Honor.

THE COURT: Basis?

MR. RYAN: Hearsay.

THE COURT: Overruled.

THE WITNESS: She stated that she knew that – every time I would ask her a question, she would not answer it.

RP 221. Immediately after the Officer Maas answers to the question, the State begins questioning him about defendant's statements at the scene. RP 222. It is during this line of questioning Officer Maas states defendant claimed he thought the officers were chasing another vehicle. RP223. It is because of that statement the State elicited further testimony about Ms. Sandoval's statements at the scene, and that is when the first of statements challenged on appeal occurred. BOA 19. The exchange went as follows:

Q. And did you ask Mr. Abram if he knew it was the police behind him?

A. Yes.

Q. What did Mr. Abram say?

A. He said he knew there were police behind him, but he thought we were trying to stop the other car.

Q. And I want to go back to Ms. Sandoval. Did she ever answer and of your questions initially?

A. Initially she stated that they were at Safeway. He told her that he got in an argument with somebody; and when they left Safeway, we got behind them.

Q. Did she ever mention there being another vehicle pursuing them besides you?

A. No.

RP 223. Defense made no objections during this line of questioning. *Id.* This statement, which defendant assigns error, occurs nine questions after defense objection and the subject matter of those questions were defendant's statements, not Ms. Sandoval's. RP 221-223. Defendant's objection cannot be reasonably seen to have applied to the challenged statement.

The second statement defendant challenges occurs during the State's redirect of Officer Maas:

Q. The defense just asked you about the passenger, Armita Sandoval. In your report, did you -- well, let me ask it this way: Did you ask her about whether she knew that there was a police car behind them?

A. Yes.

Q. So I mean, if you can kind of look at your report and refresh your memory, to the best of your recollection, what exactly did she say about that?

A. She stated that -- basically all she would say is that once they left Safeway, we got behind them and he just didn't stop when we turned our lights on.

RP 261. Defendant made no objection during this line of questioning. *Id.* Defendant's objection cannot conceivably be applied to the challenged statement. It comes 40 pages before the statement in question. RP 221-61.

Defendant has failed to preserve his claim on appeal. The objection made did not sufficiently, or in any way, direct the court's attention to the statements to which error is assigned. As such, the trial court was deprived of any opportunity to address defendant's concerns or take any curative measures.

- b. The State properly elicited non-hearsay testimony that defendant had knowledge officers were pursuing him and signaling him to stop.

To meet its burden of proving every element of the crime charged, the State had to prove defendant knew the police were pursuing *him* and signaling *him* to stop, pursuant to RCW 46.61.024 and WPIC 94.02. Defendant's theory of the case was that he was eluding a vehicle driven by an individual he had a verbal altercation with at Safeway; and he believed Officers Maas and Nicodemus were pursuing this third party, not defendant. RP 317. The State presented evidence there was no other vehicle defendant could have believed the officers were following besides his to prove defendant knew the officers were pursuing *him* and not a third party.

Among this evidence was Officer Maas's testimony, and this is where the challenged statements arise. Defendant argues the court violated the confrontation clause by admitting the out of court statements by Ms. Sandoval. BOA 19. This assertion is predicated on the mistaken belief that

Ms. Sandoval's out of court statements were hearsay. Looking at whether a statement is hearsay is not a factors test. While the statement in question is "a statement, other than one made by the declarant while testifying at the trial or hearing," this is only part of the requirement for it be hearsay. ER 801(c). The crux of whether a statement is hearsay is the purpose for which it is offered as evidence. ER 801(c) makes this requirement clear by stating the statement must be "offered in evidence to prove the truth of the matter asserted."

Defendant misrepresents the record when he presents the exchange where the challenged statements occurs as follows:

Q: Did she ever mention there being another vehicle pursuing them besides you?"

A: No.

[...]

Q: Did she ever answer any of your questions initially?

A: Initially she stated that they were at Safeway. He told her that he got in an argument with somebody; and when they left Safeway, we got behind him.

BOA 19. The manner in which defendant represents the record above could mislead the reader into thinking the statement was offered to prove the positioning of the officers' vehicle, behind defendant's vehicle. However, when the record is read in correct order the purpose for which the State

offered the evidence becomes clearer. The exchange actually occurred as follows:

Q. And did you ask Mr. Abram if he knew it was the police behind him?

A. Yes.

Q. What did Mr. Abram say?

A. He said he knew there were police behind him, but he thought we were trying to stop the other car.

Q. And I want to go back to Ms. Sandoval. Did she ever answer and of your questions initially?

A. Initially she stated that they were at Safeway. He told her that he got in an argument with somebody; and when they left Safeway, we got behind them.

Q. Did she ever mention there being another vehicle pursuing them besides you?

A. No.

RP 223. The State's purpose is more easily discerned when the record is read in the correct order. The State did not offer the statement to prove that defendant and Ms. Sandoval left Safeway, that defendant told her he was in an argument, or that the officers were in fact behind them. The evidence was offered to show that when Ms. Sandoval gave officers her account of what happened she did not mention another vehicle chasing them, a fact that would be significant and worthy of mentioning. "Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring

something else, are not hearsay.” *State v. Collins*, 76 Wn.App. 496, 498–99, 886 P.2d 243 (1995).

The second statement defendant challenges as hearsay occurred during the following redirect of Officer Maas:

Q. The defense just asked you about the passenger, Armita Sandoval. In your report, did you -- well, let me ask it this way: Did you ask her about whether she knew that there was a police car behind them?

B. Yes.

Q. So I mean, if you can kind of look at your report and refresh your memory, to the best of your recollection, what exactly did she say about that?

A. She stated that -- basically all she would say is that once they left Safeway, we got behind them and he just didn't stop when we turned our lights on.

RP 261. The State elicited this statement in response to defense questioning during cross examination of Officer Maas. The following exchange occurred during cross examination of Officer Maas:

Q. The passenger you also talked to, Ms. Sandoval, right?

A. Yes.

Q. Did she indicate that there had been an altercation at Safeway?

A. She stated that Mr. Abram told her that he had an altercation with somebody. She didn't say that she witnessed it.

RP 260-61. The defense questioning refers only to a portion of the statement made Officer Maas during direct examination. On redirect, the State was making clear there was a more complete statement and wanted to insure its contents were made fully aware to the jury. The focus was on the completeness of Officer Maas's statement, not to prove the assertion made by Ms. Sandoval as true.

The trial court did not error in allowing Officer Maas to testify about Ms. Sandoval's statements at the scene when those statements did not contain hearsay or violate the confrontation clause.

- c. If the court did error by admitting Officer Maas's testimony regarding Ms. Sandoval's statements at the scene, the error was harmless.

When a claimed error is a violation of an evidentiary rule, the standard of review is whether "the outcome of the trial would have been materially affected had the error not occurred." *State v. Elliott*, 159 Wn. App. 1006 (2010). "The improper admission or exclusion of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole and did not affect the outcome of the trial." *Id.*

Here, the overwhelming evidence shows that defendant willingly refused or failed to stop his vehicle after being signaled to stop by officers. It would have been obvious officers were pursuing defendant and not

another vehicle when they chased him down dark streets at speeds between 70 and 100 miles per hour with sirens and bright LED emergency lights on and no more than 3 to 4 car lengths between defendant and pursuing officers as defendant blew through intersections without concern for other travelers. RP 194-212, 266-274.

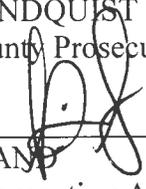
“Whether a witness has testified truthfully is entirely for the jury to determine.” *State v. Ish*, 170 Wn. 2d 189, 196, 241 P.3d 389, 393 (2010). The jury weighed the evidence and returned a guilty verdict. The jury rejected the defendant’s account of what happened, and as such accepted Officer Maas’s and Officer Nicodemus’s accounts. “There is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.” *State v. Vassar*, 188 Wn. App. 251, 261, 352 P.3d 856, 862 (2015). Therefore, even if the challenged testimony had been excluded, the overwhelming evidence would have led a reasonable jury to convict defendant of attempting to elude a police vehicle.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court affirm the defendant's convictions below.

DATED: October 16, 2017.

MARK LINDQUIST
Pierce County Prosecuting Attorney



ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

Chris Paul
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and ~~appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.16.17 Sheila Ker
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

October 16, 2017 - 3:57 PM

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