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Court of Appeals  
Division II  
State of Washington  
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No. 52629-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JOHNATHAN SUTLEY-RHOADS,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Judge Carol Murphy  
Cause No. 18-1-01106-3

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

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

C. ARGUMENT ..... 7

    1. The prosecutor did not misstate the facts or law during his closing argument and even if the prosecutor’s argument was not supported by the evidence, Sutley-Rhoads cannot demonstrate prejudice or that any misstatement was so flagrant or ill-intentioned that it could not have been cured with an instruction from the Court ..... 7

    2. The prosecutor did not misstate the law in regard to the definition of knowledge, and if any argument of the prosecutor is deemed improper, Sutley-Rhoads cannot demonstrate prejudice or that the argument was so flagrant or ill-intentioned that any prejudice could not have been alleviated by a curative instruction. .... 12

    3. The State does not oppose remand for the purpose of correcting boilerplate language that fails to reflect the current law regarding interest on non-restitution legal financial obligations..... 20

D. CONCLUSION..... 21

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>Bonney Lake v. Delany</u> , 22 Wn. App. 193, 588 P.2d 1203 (1978).....	7
<u>Spokane County v. Bates</u> , 96 Wn. App. 893, 982 P.2d 642 (1999).....	9
<u>State v. Bryant</u> , 89 Wn. App. 857, 950 P.2d 1004 (1998).....	13, 14
<u>State v. Goodwin</u> , No. 77912-5-I; 2019 Wn. App. LEXIS 1195 2019 WL 1897667 (Apr. 29, 2019) .....	17
<u>State v. Hoff</u> , 31 Wn. App. 809, 644 P.2d 763, 765 (1982).....	7
<u>State v. Johnson</u> , 61 Wn. App. 235, 809 P.2d 764 (1991), <i>aff'd</i> , 119 Wn.2d 167, 829 P.2d 1082 (1992) .....	14

### **Decisions Of The Court Of Appeals**

<u>Jones v. Hogan</u> , 56 Wn.2d 23, 351 P.2d 153 (1960) .....	8
<u>State v. Allen</u> , 182 Wn.2d 364, 341 P.3d 268 (2014) .....	14, 15-18
<u>State v. Dhaliwal</u> , 150 Wn.2d 559, 79 P.3d 432 (2003) .....	7
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012) .....	10, 19

<u>State v. Leech</u> , 114 Wn.2d 700, 790 P.2d 160 (1990) .....	14
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995) .....	7
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994) .....	8
<u>State v. Shipp</u> , 93 Wn.2d 510, 610 P.2d 1322 (1980) .....	13-15
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990) .....	8, 17

### **Statutes and Rules**

RCW 7.68.035(1)(a) .....	20
RCW 9A.08.010 .....	14
RCW 9A.08.010(1) and (2) .....	13
RCW 46.61.024(1) .....	12
RCW 10.82.090 .....	20, 21
WPIC 10.02 .....	1, 14

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the prosecutor misrepresented facts during his closing argument where the facts discussed were elicited on direct examination of the arresting officer, and if so, whether any misstatement was so flagrant and ill-intentioned that it could not have been cured with an instruction from the trial court.

2. Whether the prosecutor misrepresented the applicable legal standard when he referred the jury to an instruction regarding the definition of knowledge, identical to WPIC 10.02, and argued that the evidence demonstrated that Sutley-Rhoads acted intentionally, and if so, whether any misstatement was so flagrant or ill-intentioned that it could not have been cured with an instruction from the trial court.

3. Whether it is appropriate to remand the matter for the purpose of correcting boilerplate language regarding interest on non-restitution legal financial obligations.

B. STATEMENT OF THE CASE.

On June 29, 2018, Deputy Brett Campbell of the Thurston County Sheriff's Office contacted Jonathan Sutley-Rhoads after a pursuit that began on 183<sup>rd</sup> Avenue SW, continued down Leitner Road SW, and ended on Danby Road SW. The interaction began

when Deputy Campbell was driving westbound on 183<sup>rd</sup> Avenue and spotted a white Honda Accord driving eastbound that “appeared to be going above the posted speed limit.” RP 159, 179. Deputy Campbell executed a three-point turn and accelerated “to nearly 100 miles an hour” to try to contact the vehicle. RP 160.

Deputy Campbell watched the Accord make a left turn onto Leitner Road and followed the vehicle. RP 160. The vehicle’s speed on Leitner Road forced the Deputy to activate the emergency lights and accelerate his vehicle to “nearly 70 miles per hour” to attempt to catch up. RP 161. The Deputy watched the car make a right at the intersection of Leitner Road and Danby Road “as fast as [the suspect could] negotiate . . . without crashing,” without stopping for the posted stop sign. RP 163. Deputy Campbell activated his siren and made a safe turn at Leitner Road and Danby Road RP 164.

The Deputy followed the vehicle eastbound on Danby Road at “nearly 85 miles an hour.” RP 164. When he finally caught up to the vehicle, Deputy Campbell’s radar clocked the vehicle’s speed at 60 miles an hour in a zone with a 35 mile an hour speed limit. RP 164-165. The driver of the Accord did not yield to the Deputy’s lights and sirens, and he continued at the high rate of speed through a bend in Danby Road RP 166. Taking the bend at

approximately 60 miles an hour caused the Accord to cross over the double solid yellow median line of the road and the tires on the passenger side of the vehicle to come off the road. RP 166.

After an unspecified distance, the Deputy finally “noticed that the vehicle finally began to yield. [He saw] the brake lights come on, and [the vehicle] continued on at roughly about 25 mile an hour for a short distance” ending in “an open field construction type zone.” RP 166. Sutley-Rhoads placed his hands outside of the driver’s side window, but Deputy Campbell did not approach the vehicle until Deputy Schoenberg of the Thurston County Sheriff’s Office arrived as backup for Deputy Campbell. RP 169. The Deputies placed the driver in handcuffs and the driver identified himself as Sutley-Rhoads. RP 170.

Deputy Campbell read Sutley-Rhoads his constitutional rights from the department-issued card. RP 171. He indicated that he understood his rights and agreed to talk to the deputies. RP 171. Sutley-Rhoads stated that he did not stop for the Deputy’s lights and sirens because he “didn’t want to get another ticket.” RP 172. He explained that he did not yield because he was “being stupid.” RP 172. He told the Deputy, which the Deputy later noted in his police report, “I just wasn’t going to stop today.” RP 174. Deputy

Campbell compiled all of this information in his report “after midnight” on June 29, 2018. RP 174. The report was completed during the shift in which the events occurred. RP 193.

Deputy Campbell testified that he had a chance to review his police report before testifying in the trial. RP 156. The police report was not admitted into evidence by the State; however, the report was used by Deputy Campbell to refresh his recollection of events. RP 173.

When the State asked if there was anything about the report that the Deputy thought was inconsistent with the events of the traffic stop, the Deputy confirmed that the times regarding the beginning of the stop had not been recorded properly. RP 156-157.

Q. Have you had the chance to review your report in this case?

A. Yes, I did.

Q. Was there any discrepancy in the time listed at the beginning of the stop?

A. There was.

Q. And what was that discrepancy?

A. Working night shift, sometimes it can be a little lagging, and it gets long. So at the beginning of my shift, it said 219 hours. It was actually supposed to be 2159 hours. We use 24-hour times. So 2159 would have been 9:59 p.m.

Q. So the 5 was left off in that?

A. That is correct.

Q. And that is in your narrative section?

A. Yes, that's correct.

RP 156-157.

Here, Deputy Campbell established that the beginning of the stop began at 9:59 p.m. RP 156-157. The Deputy confirmed this information again during cross examination by defense counsel. RP 193-194.

Q. You said there was a time discrepancy that you wrote down, and I want to make sure I have that correct. In your report it says 019 hours?

A. I believe it says 219.

Q. I beg your pardon, 219. So the correct reading of that is 2219?

A. No, the time that should have been on there was - - should have been 2159. I missed the 5. 2159 would be 2159 hours, which is 9:59 p.m.

RP 193-194.

Deputy Campbell testified that he read Sutley-Rhoads his constitutional rights before speaking with him. RP 171. He testified that he read the rights at 2208 hrs, which he explained in civilian time as 10:08 p.m. RP 207.

The State referenced this time-frame between 9:59 p.m. and 10:08 p.m., which had been established by the Deputy's testimony, during closing argument. RP 315. "We know when this stop happened. It started at 9:59 and ended at 10:08. It was nine minutes." RP 315. Defense counsel rebutted the State's

calculations, asking the jury to make their own calculations of time.

RP 319.

I suggest to you that you do the calculations yourself when you are deliberating. You will get a clear idea, based on a physical piece of evidence, not video, not something that has a timer on it that we can time, but I would suggest to you that this exhibit shows you that this did not take nine minutes.

RP 323. In rebuttal closing argument, the State clarified that “[t]he officer never said the pursuit lasted nine minutes. He said he flipped on his radar detector, nine minutes later, he read [the defendant] his *Miranda* rights.” RP 327.

The jury was instructed about the mens rea elements of the attempting to elude a police vehicle and the definition of knowingly. CP 33-34. During the closing argument, the prosecutor described the “knowledge” element to the jury as follows:

So willful is that knowing portion, and in this one, it tells you you are allowed to consider what would lead a reasonable person in a same situation to know. So we don't have to try and climb into some else's head and say what does that person know. That would be impossible. What it does is says, hey, would a reasonable person know this?

RP 308. Defense counsel did not object to this argument when it was made. RP 308. The jury convicted Sutley-Rhoads for attempting to elude a pursuing police vehicle as charged. CP 4, 36.

The trial court imposed a sentence of 20 days and a \$500 crime victim assessment with an interest accrual provision, CP 41, 43, 45.

This appeal follows.

C. ARGUMENT.

1. The prosecutor did not misstate the facts or law during his closing argument and even if the prosecutor's argument was not supported by the evidence, Sutley-Rhoads cannot demonstrate prejudice or that any misstatement was so flagrant or ill-intentioned that it could not have been cured with an instruction from the Court.

“A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). These “rules of procedure apply equally to a defendant represented by counsel or appearing pro se.” State v. Hoff, 31 Wn. App. 809, 812, 644 P.2d 763, 765 (1982) (citing Bonney Lake v. Delany, 22 Wn. App. 193, 196, 588 P.2d 1203 (1978)). “Any allegedly improper statements should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a “substantial likelihood the instances of misconduct affected the jury’s verdict.” Id.

A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

A reviewing court examines allegedly improper arguments in the context of the total argument, the issues in the case, the instructions given the jury, and the evidence addressed in the argument. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error.

Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999).

In this case, the prosecutor described the stop in his closing argument, stating “[w]e know when this stop happened. It started at 9:59 and ended at 10:08. It was nine minutes.” RP 315. Sutley-Rhoads’ argument that the prosecutor misstated the facts is misplaced since the prosecutor’s presentation of the stop is supported by the witness testimony in the record. During the trial, Deputy Campbell repeatedly confirmed that the beginning time of the stop was 9:59 p.m. RP 156-157; RP 194. He also indicated that the time when he read to the defendant his constitutional rights was 10:08 p.m. RP 207. During the closing argument, the prosecutor referred to this time frame as the stop, which lasted nine minutes. RP 315. Accordingly, the prosecutor properly presented key facts to the jury with the support of witness testimony. The prosecutor further clarified the argument by referring to the testimony during rebuttal, stating, “[t]he officer never said the pursuit lasted nine minutes. He said he flipped on his radar detector, nine minutes later, he read [the defendant] his *Miranda* rights.” RP 327.

There was no misrepresentation of the facts during the State's closing argument. Sutley-Rhoads has failed to demonstrate that the prosecutor's argument was improper.

Even if the court finds that the prosecutor's presentation of a nine-minute stop in closing argument was potentially improper, the defense cannot show that this statement was prejudicial or had resulted in a substantial likelihood of affecting the jury verdict. State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012).

The jury is "the sole judge[] of the credibility of each witness." CP 30. It is within its power and discretion to give more weight to one witness testimony over the other. Id. While the defense counsel alleged that the pursuit lasted less than a minute, RP 321-22, and suggested that the jury should calculate the length of the stop by itself, RP 319, in light of the inconsistent and sometime contradictory testimony given by the defendant, RP 250; RP 253-55, the jury may have decided to give more credibility to Deputy Campbell's testimony, which supports a finding of a nine-minute stop.

Moreover, defense counsel incorporated arguments regarding the duration of the stop into his closing argument, clearly informing the jury of the issue and referring them to the facts from

the defense perspective. RP 323. Furthermore, immediately before the jury deliberation, the prosecutor clarified that the nine-minute time frame pertains to the entire time span from when Deputy Campbell detected defendant's vehicle to when he read the defendant his constitutional rights. RP 327. Since this clarification came directly before the jury deliberation, it would have obviated any potential prejudicial effect of the prosecutor's prior statement.

Accordingly, the prosecutor's presentation of the stop was properly supported by evidence in the record. It was not an improper "prosecutorial invention." Appellant's Opening Brief at 11. Also, due to the clarification from the prosecutor right before the jury deliberation, any potential prejudicial effect of the prosecutor's prior presentation would have been obviated. Therefore, this Court should conclude that the prosecutor's discussion of a nine-minute stop in closing argument was not improper or prejudicial and did not constitute prosecutorial misconduct.

The trial court also properly instructed the jury that the statements of the attorneys during argument are not evidence. CP 30. Looking at the case as a whole, the prosecutor's statements were not improper, did not prejudice the outcome of the case, and even if improper, were certainly not so flagrant or ill-intentioned that

they could not be cured with an instruction from the Court. Sutley-Rhoads' claim of prosecutorial misconduct in regard to the facts argued by the prosecutor must fail.

2. The prosecutor did not misstate the law in regard to the definition of knowledge, and if any argument of the prosecutor is deemed improper, Sutley-Rhoads cannot demonstrate prejudice or that the argument was so flagrant or ill-intentioned that any prejudice could not have been alleviated by a curative instruction.

To prove the crime of attempting to elude, the State needs to prove that the defendant "willfully fails or refuses to immediately bring his or her vehicle to a stop" and "drives . . . in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop." RCW 46.61.024(1); see *also* CP 34. The trial court's instructions to the jury included the definitions of knowledge and willfully. CP 33.

During the closing argument, the prosecutor described the "knowledge" element to the jury as follows:

So willful is that knowing portion, and in this one, it tells you you are allowed to consider what would lead a reasonable person in a same situation to know. So we don't have to try and climb into some else's head and say what does that person know. That would be impossible. What it does is says, hey, would a reasonable person know this?

RP 308. Defense counsel did not object to this argument when it was made. RP 308. Sutley-Rhoads' assignment of error to this argument is without merit.

The Supreme Court has repeatedly held that the "reasonable person" standard used in jury instruction for the mens rea element is constitutional as it follows the statutory definition of knowledge as construed in State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980). State v. Bryant, 89 Wn. App. 857, 872, 950 P.2d 1004 (1998); State v. Allen, 182 Wn.2d 364, 372, 341 P.3d 268 (2014) (finding that the jury instruction correctly stated the definition of "knowledge" with respect to the "reasonable person" standard and satisfied the constitutional requirement).

Here, the definition of "knowledge" as included in Instruction No. 6 is a correct statement of the law. RCW 9A.08.010(1); RCW 9A.08.010(2). The relevant portion is identical to the one held constitutional in Allen and states:

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 33 (emphasis added). The defense relies upon Shipp to argue that using "reasonable person" language in the jury instruction had

prejudicial effect. However, its reliance on that case is misplaced. In that case, the Court held that it is unconstitutional to create a mandatory presumption that the defendant has knowledge when a reasonable person in the same situation would have knowledge, and the instruction at issue, which directed the jury to find knowledge based on an objective standard, was “an incorrect interpretation” of RCW 9A.08.010. Shipp, 93 Wn.2d 510 at 512.

Here, Instruction No. 6 fully complies with the statutory language and expressly states that the jury may infer *actual knowledge* from circumstantial evidence but is *not required* to do so. CP 33. This does not “redefine knowledge with an objective standard” or conflate it with “negligent ignorance.” Shipp, 93 Wn.2d 510 at 515-16. In fact, the relevant language in the second paragraph of the instruction was added exactly to address the constitutional challenge in Shipp, and has been repeatedly held adequate and constitutional by the Supreme Court. Bryant, 89 Wn. App. at 872; State v. Leech, 114 Wn.2d 700, 710, 790 P.2d 160 (1990); State v. Johnson, 61 Wn. App. 235, 240, 809 P.2d 764 (1991), *aff'd*, 119 Wn.2d 167, 829 P.2d 1082 (1992); 11 WASHINGTON PRACTICE: Washington Pattern Jury Instructions: Criminal 10.02, at 206-207 (3<sup>rd</sup> Edition, 2008), (“Language to this

effect was added for the 1986 revisions to the first edition in order to address State v. Shipp).

The prosecutor correctly stated the law by citing the relevant portion of the jury instruction and stating that “[Instruction No. 6] tells you you are allowed to consider what would lead a reasonable person in a same situation to know.” RP 308; Allen, 182 Wn.2d at 371 (finding that the prosecutor initially stated the law correctly by referring to the “reasonable person” standard as used in the jury instruction). RP 307.

Read as a whole, the prosecutor’s statements only emphasized the instructions’ express statement that jurors may, but are not required to, infer actual knowledge from circumstantial evidence and do not need to “climb into someone else’s mind.” RP 308. Sutley-Rhoads’ argument takes the prosecutor’s statements out of context. In context, the prosecutor’s comments were directly tied to the properly given instruction and further argued that the evidence demonstrated that Sutley-Rhoads acted intentionally. The prosecutor did not argue or imply that the jury should only apply an objective standard or reasonableness. In rebuttal, the prosecutor specifically asked the jury to read the instruction. RP 328.

Even if the Court finds that the prosecutor's statements of the law as to the definition of "knowingly" in the closing argument were improper, they were not so flagrant or ill-intentioned that they could not have been cured and Sutley-Rhoads cannot demonstrate that he was actually prejudiced by the statements.

Typically, a jury is presumed to follow the instructions provided by the court. Allen, 182 Wn.2d at 380-81. This presumption is only rebutted where the record reflects that the jury considered an improper statement to be a proper statement of the law. Id. at 381. In Allen, the prosecutor's misstatements had a manifested prejudicial effect on the jury verdict when the prosecutor repeatedly used the "should have known" in numerous instances and visually displayed the misstatement on slides, none of which indicated that the jury was required to find actual knowledge. Id. at 371-72. During deliberations, the jury asked the court: "If someone 'should have known' does that make them an accomplice?" indicating that the jury was influenced by the prosecutor's misstatement of the definition of "knowledge" and unsure whether it could convict Allen using the incorrect "should have known" standard. Id. at 378.

In contrast, in State v. Goodwin the court found the defendant was not prejudiced even when the prosecutor misstated the definition of “knowledge” using the “should have known” standard. State v. Goodwin, No. 77912-5-I; 2019 Wn. App. LEXIS 1195 2019 WL 1897667 (Apr. 29, 2019).<sup>1</sup> The court explained that those statements were not repeated throughout the prosecutor’s closing or rebuttal or displayed visually, nor was there indication in the record showing that the jury was influenced by the improper statements of the law as it was in Allen. Id. at 7.

The alleged improper statements of the prosecutor in this case rise nowhere near the level of the misconduct in Allen – there was no repeated use of imagery or text stating “should have known” in the prosecutor’s closing argument or rebuttal. In fact, the prosecutor’s argument focused on questioning the defendant’s testimony and highlighting evidence suggesting that the defendant *actually knew* that the pursuing vehicle was a police vehicle. RP 306, 330. The absence of an objection by defense counsel “strongly suggests to a court that the argument . . . in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

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<sup>1</sup> Unpublished Opinion, offered only for whatever persuasive authority the Court deems appropriate pursuant to GR 14.1.

Furthermore, the defense has not pointed to anything in the record indicating that the jury was affected by the prosecutor's statements. Unlike Allen, where the jury was evidently misled by the prosecutor's misstatements and requested further instruction on the "knowledge" element, Allen, 182 Wn.2d at 378, the jury in this case did not request further clarification regarding the knowledge instruction.

The evidence presented at trial overwhelmingly supported a conclusion that Sutley-Rhoads was willfully attempting to elude a pursuing police vehicle. Deputy Campbell testified that he had to accelerate his vehicle to "nearly 70 miles per hour" to attempt to catch up to Sutley-Rhoads. RP 161. The Deputy watched the car make a right at the intersection of Leitner Road and Danby Road "as fast as [the suspect could] negotiate . . . without crashing," without stopping for the posted stop sign. RP 163. Deputy Campbell followed the vehicle eastbound on Danby Road at "nearly 85 miles an hour." RP 164. When he finally caught up to the vehicle, Deputy Campbell's radar clocked the vehicle's speed at 60 miles an hour in a zone with a 35 mile an hour speed limit. RP 164-165. Sutley-Rhoads did not yield to the Deputy's lights and sirens, and he continued at the high rate of speed through a bend in Danby

Road, taking the bend at approximately 60 miles an hour causing the vehicle to cross over the double solid yellow median line of the road and the tires on the passenger side of the vehicle to come off the road. RP 166.

When Sutley-Rhoads was questioned by law enforcement regarding his actions, he stated that he did not stop for the Deputy's lights and sirens because he "didn't want to get another ticket." RP 172. He explained that he did not yield because he was "being stupid." RP 172. He told the Deputy "I just wasn't going to stop today." RP 174. Additionally, the record established it was dark after sunset and easier for the defendant to see the emergency lights. RP 167-68.

In the context of the entire trial, there is virtually no chance that the jury convicted Sutley-Rhoads based on only a reasonable person standard. The prosecutor's statements, even if found improper, could have been cured by an instruction to the jury reminding them that finding actual knowledge is required. Emery, 174 Wn.2d 741 at 764 ("Such an instruction would have eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's improper remarks."). In this instance, the prosecutor repeated the instruction that was given, which was a

correct recitation of the law. There can be no showing of actual prejudice, and any slight misstatement could easily have been cured with further instruction.

3. The State does not oppose remand for the purpose of correcting boilerplate language that fails to reflect the current law regarding interest on non-restitution legal financial obligations.

When a person is found guilty of having committed a crime, a penalty assessment in the amount of five hundred dollars for each case shall be imposed in addition to any other penalty or fine imposed by law. RCW 7.68.035(1)(a). RCW 10.82.090 provides that “[r]estitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.”

In this case, the trial court correctly imposed the \$500 crime victim’s assessment. CP 44. The judgment and sentence included antiquated boilerplate language “The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.” CP 45. This paragraph should have read, “No interest shall accrue on non-restitution obligations imposed in this

judgment. RCW 10.82.090.” While the language used references the correct RCW, it does not reflect the 2018 amendment to RCW 10.82.090. As such, the State does not oppose remanding for the sole issue of correcting the boilerplate language.

D. CONCLUSION.

The prosecutor did not misstate the law or the facts during his closing argument and rebuttal. Any slight error that may have occurred did not prejudice Sutley-Rhoads in any way, and certainly was not so flagrant or ill-intentioned that it could not have been alleviated by a curative instruction. Sutley-Rhoads’ claims of prosecutorial misconduct must fail. The State does not oppose remand for the sole purpose of correcting boilerplate language regarding interest on non-restitution legal financial obligations. The State respectfully requests that this Court affirm the conviction and sentence in all other aspects.

Respectfully submitted this 11<sup>th</sup> day of September, 2019.

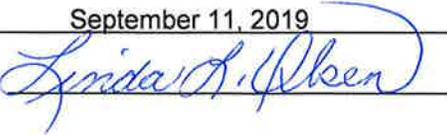
  
\_\_\_\_\_  
Joseph J.A. Jackson, WSBA# 37306  
Attorney for Respondent

**DECLARATION OF SERVICE**

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: September 11, 2019

Signature: 

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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