

No. 284689
Consolidated with 284719

**COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON**

State of Washington,
Respondent,

vs.

Wesley Oscar Kronick,
Appellant.

Appeal of Klickitat County Superior Court Cause No. 08-1-00140-9

State of Washington,
Respondent,

vs.

Scott P. Davis,
Appellant.

Appeal of Klickitat County Superior Court Cause No. 08-1-00141-7

**APPELLANT'S BRIEF (RAP 10.2(a))
AND
PROOF OF SERVICE OF APPELLANT'S BRIEF**

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I. INTRODUCTION

The appellants were convicted of Reckless Driving and acquitted of Attempting to Elude. Although the defense moved motion *in limine* to exclude speed evidence based on a speedometer, the trial judge denied the motion and let the State to elicit prejudicial testimony of speed based an unauthenticated speedometer without any foundation. The trial judge also permitted the untrained testifying officer to testify repeatedly about speed estimates, approximations, and opinions, based on the inadmissible speedometer evidence, and to offer evidence about time and distance measurements without an adequate foundation and in violation of the speed trap statute. The admission of this evidence was reversible error.

If the Court on appeal finds that objections to the speed evidence, including the time and distance evidence were not properly preserved for appeal, in spite of the defense motion *in limine*, trial counsel was ineffective for failing to object to this evidence, as there was no tactical reason not to object. Moreover, even if the trial court errors individually do not constitute reversible error, under the cumulative error doctrine the collective errors deprived the appellants of a fair trial and require reversal.

Finally, the sentence imposed by the judge was disproportionate, excessive, and amounted to a trial tax and sentence on the charge for which the appellants were acquitted.

II. APPELLANTS' ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

1. The Trial Court committed reversible legal error and abused its discretion when it denied the defense motion *in limine* and permitted the state to elicit speed evidence based on the DFW truck speedometer.
2. The Trial Court committed reversible legal error and abused its discretion when it denied the defense motion *in limine* and permitted the state to elicit unauthenticated and unreliable speed evidence based on the DFW truck speedometer when Officer Vance had no idea if the speedometer was calibrated.
3. The Trial Court committed reversible legal error and abused its discretion when it permitted the State to introduce speedometer evidence and testimony based on speedometer evidence without an offer or showing of authentication, foundation, or reliability.
4. The Trial Court committed reversible legal error and abused its discretion when it permitted the State's witness to testify about speed in the absence of personal knowledge of the speed.
5. The Trial Court committed reversible legal error and abused its discretion when it permitted the State to introduce speed evidence and testimony as an approximation, opinion, estimate, or other calculation when the speed evidence and testimony is based on an inadmissible speedometer reading.
6. The Trial Court committed reversible legal error and abused its discretion when it denied the defense motion *in limine* and permitted the state to elicit speed evidence based on the DFW truck speedometer.
7. The Trial Court committed reversible legal error and abused its discretion when it denied the defense motion *in limine* and permitted the state to elicit unauthenticated and unreliable speed evidence based on the DFW truck governor when the State failed to make an offer or showing of authentication, foundation, or reliability.

8. The Trial Court committed reversible legal error and abused its discretion when it permitted the State's witness to testify about speed based on the truck governor in the absence of personal knowledge of the governor.
9. The Trial Court committed reversible legal error and abused its discretion when it permitted Officer Vance to offer an opinion of speed when officer Vance had no special training or experience in estimating speed.
10. The Trial Court committed reversible legal error and abused its discretion when it permitted Officer Vance to offer a lay opinion of speed.
11. The Trial Court committed reversible legal error and abused its discretion when it permitted Officer Vance to testify about times and distances without requiring a foundation, authentication or some showing of reliability.
12. The Trial Court committed reversible legal error and abused its discretion when it permitted Officer Vance to testify about times and distances in violation of the speed trap statute.
13. The Trial Court committed reversible legal error and abused its discretion when it admitted speed, time, and distance evidence.
14. If this Court finds objections to evidence of speed, time, and distance were not preserved at the trial court level, trial counsel was ineffective for failing to object to the speed, time, and distance evidence, and appellants were prejudiced by trial counsel's deficient performance.
15. The effect of the Trial Court's evidentiary errors cumulatively denied appellants their right to a fair trial and constitute reversible error.
16. The Trial Court's sentence was disproportionate and excessive sentence, and amounted to a trial tax and a felony eluding sentence imposed on a reckless driving conviction in spite of the jury's acquittal on the felony eluding count.

17. The Trial Court's unlawfully imposed a felony crime victim's penalty assessment for a misdemeanor conviction.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court commit reversible legal error and abuse its discretion when it admitted evidence based on the DFW truck speedometer without an offer or showing of authentication, foundation, or reliability in the face of defense objection?
2. Did the trial court commit reversible legal error and abuse its discretion when it denied the defense motion *in limine* and permitted the state to elicit unauthenticated and unreliable speed evidence based on the DFW truck speedometer when Officer Vance had no idea if the speedometer was calibrated?
3. Did the trial court commit reversible legal error and abuse its discretion when it permitted the State to introduce speedometer evidence and testimony based on speedometer evidence without an offer or showing of authentication, foundation, or reliability?
4. Did the trial court commit reversible legal error and abuse its discretion when it permitted the State's witness to testify about speed in the absence of personal knowledge of the speed?
5. Did the trial court commit reversible legal error and abuse its discretion when it permitted the State to introduce speed evidence and testimony as an approximation, opinion, estimate, or other calculation when the speed evidence and testimony was based on an inadmissible speedometer reading?
6. Did the trial court commit reversible legal error and abuse its discretion when it denied the defense motion *in limine* and permitted the state to elicit speed evidence based on the DFW truck speedometer and governor?
7. Did the trial court commit reversible legal error and abuse its discretion when it denied the defense motion *in limine* and permitted the state to elicit unauthenticated and unreliable speed evidence based on the DFW truck governor without an offer or showing of authentication, foundation, or reliability?

8. Did the trial court commit reversible legal error and abuse its discretion when it permitted the State's witness to testify about speed based on the truck governor in the absence of personal knowledge of the governor?
9. Did the trial court commit reversible legal error and abuse its discretion when it permitted Officer Vance to offer an opinion of speed when officer Vance had no special training or experience in estimating speed?
10. Did the trial court commit reversible legal error and abuse its discretion when it permitted Officer Vance to offer a lay opinion of speed and Officer Vance lacked the facts necessary to offer a lay opinion?
11. Did the trial court commit reversible legal error and abuse its discretion when it permitted Officer Vance to testify about times and distances without requiring a foundation, authentication or some showing of reliability?
12. Did the trial court commit reversible legal error and abuse its discretion when it permitted Officer Vance to testify about times and distances in violation of the speed trap statute?
13. If this Court finds objections to evidence of speed, time, and distance were not preserved at the trial court level, was trial counsel ineffective for failing to object to the speed, time, and distance evidence when there was no tactical reason to fail to object, and the appellants were prejudiced by trial counsel's deficient performance?
14. Did the effect of the Trial Court's evidentiary errors cumulatively deny appellants their right to a fair trial and constitute reversible error?
15. Was the trial sentence disproportionate and excessive sentence, amounting to a trial tax and a felony eluding sentence imposed on a reckless driving conviction in spite of the jury's acquittal on the felony eluding count?

III. STATEMENT OF THE CASE

A. Procedural Facts & Theory of the Case

The State charged the defendants, Scott P. Davis and Wesley O. Kronick, with Attempting to Elude a Pursuing Police Vehicle and Reckless Driving alleged to have occurred on 23 August 2008 in Klickitat County. 1RP 7, 11.¹ The state originally filed the cases as misdemeanor Reckless Driving charges in District Court on 25 August 2008, but the State re-filed the cases as felony charges in Superior Court prior to trial. 4RP (8/17/2009) 5.

The State's theory of the case was that the defendants were speeding and attempted to elude Officer Vance in his DFW pickup truck. According to the State, the defendants drove at speeds in excess of 100 miles an hour and made dangerous passes in no passing zone in the course of an 11 to 12 mile stretch of Highway 14. 2RP 33-36.

The defendants denied any attempt to elude Officer Vance, 2RP 36-39, and testified they did not see or hear Officer Vance until shortly before each of them pulled over. 3RP 176-77, 240, 245. They conceded they might have gone as fast as 80, maybe 85 miles per hour, 3RP 170, but not the speeds claimed by officer Vance, but not the speeds claimed by

¹ The Verbatim Report of Proceedings is contained in four volumes, designated as follows: 1RP – 1/5/2009, 1/20/2009, 2/2/2009, 3/16/2009, 3/30/2009/ 4/6/2009/ 7/20/2009; 2RP – 8/5/2009; 3RP – 8/6/2009; and 4RP – 8/17/2009.

officer Vance, and denied making unsafe passes or passing any vehicles, and challenged the State's assumption that the motorcycles and riders initially observed by Officer Vance were the same motorcycles and riders ultimately pulled over by Officer Vance. 3RP 200-01, 214, 262.

If anything, the description of the two motorcycles and riders first seen and followed by Officer Vance didn't match the two motorcycles and riders Officer Vance stopped two minutes after losing sight of the motorcyclists he was chasing, 3RP 299-302. All of this occurred on a weekend many motorcyclists from around the state were going to a motorcycle event on the Maryhill Loops Road. 3RP 220-221.

A Klickitat County Superior Court jury found the defendants not guilty of Attempting to Elude, and guilty of Reckless Driving on 6 August 2009. 3RP 316-317. neither Mr. Kronick nor Mr. Davis had any criminal history, let alone even a speeding violation or an accident on a motorcycle. 4RP 3-4, 15-16.

The State requested 365 days in jail with 320 days suspended, and standard fines, financial obligations, filing fees, victim/witness assessments, and costs of incarceration. 4RP 4. The State referenced an average speed of 106 or 107 miles an hour, described the case as "an extremely dangerous situation," "miraculous that we aren't here for a vehicular assault, or a vehicular homicide, with the way the driving went

on this.” *Ibid.* Going on, the prosecutor said, “this was an extremely dangerous situation, that a point needs to be made and this type of sentence would get that point across.

Defense counsel argued that it was each Defendant’s first criminal conviction of any kind, the case began as a misdemeanor, there was clearly no intent to run from the officer, and the Prosecutor’s recommendation, “assuming they were guilty of elude . . .,” was “significantly less jail time . . ., three days at that point.” 4RP 6, 15.

When sentencing Mr. Kronick, the trial judge said he sat through the trial, referenced the jury’s split verdict, characterized reckless driving as “a very serious offense,” admitted he didn’t know “how accurate that [the speed evidence] is,” and said that even driving 85 miles an hour “was abhorrent” and “almost shocks my conscience in a way.” 4RP 9.

The Court sentenced Mr. Kronick to 365 days in jail with 335 days suspended, a \$2,500.00 fine, a \$500.00 victim’s penalty assessment, and \$200.00 in court costs with various conditions. RP (8/17/2009) 9-10. The judge denied work release or other jail or sentencing alternatives because Mr. Kronick was not a resident of Klickitat County, and refused to let Mr. Kronick the opportunity to serve his sentence in another jurisdiction.

For Mr. Davis, the court imposed “the same sentence as the previous case,” except for lower financial obligations. 4RP 15-16. The

Court sentenced Mr. Davis to 365 days in jail with 335 days suspended, a \$1,000.00 fine, a \$500.00 victim's penalty assessment, and \$200.00 in court costs with various conditions. RP (8/17/2009) 15-16. The Court set a \$5,000.00 appeal bond in each case. RP (8/17/2009) 12, 16. This appeal ensued.

B. Speed Evidence and Argument

The defense moved *in limine* to bar the State from introducing evidence of the defendant's speed in the absence of an adequate foundation for the accuracy of the officer's speedometer, as well as a governor in the officer's vehicle. 2RP 28 – 29. The Court ruled the officer could testify “as to whether or not the vehicle was equipped with a speedometer, whether or not it had been calibrated, and as to what he read on the speedometer.” 2RP 29. The Court further ruled the officer could testify as to his opinion as to the speed that the defendants allegedly were going. *Ibid.* The Judge also permitted the officer to testify about the governor “if he has personal knowledge if his vehicle was governed and at what speed.” *Ibid.*

In its opening, the State described the officer's anticipated testimony: that he attempted to pace a pair of motorcycles; that speeds reached approximately 100 miles per hour; that the officer's vehicle reached its top maximum speed of about 104 miles per hour; and that the

officer estimated the motorcycles' speed by the way they pulled away from the officers car at approximately 120 miles per hour. 2RP 34-35.

Department of Fish and Wildlife ["DFW"] Officer Brendan Vance was the State's witness. Officer Vance, a commissioned law enforcement officer, testified he went to the Basic Law Enforcement Academy and has been a law enforcement officer for 4 years at the time of trial in August 2009, 2RP 40-41, although he had only been with DFW since January of 2006. 2RP 83.

Officer Vance had a week of traffic training at the WSP academy, and received Emergency Vehicle Operation and Control training through his department. *Ibid.* Although asked by the State to make an approximation of speed based on his training and experience, 2RP 52, he has not received any formal training for estimating speed. 2RP 83.

Officer Vance's primary duties are doing "Fish & Wildlife type of stuff," chiefly relating to checking licenses, hunters and anglers. 2RP 82. He does not give out many speeding tickets, maybe 1 or 2 a month some months, and other times he won't give out a speeding ticket for two months. 2RP 83-84. He limits his citation writing to "about 25 miles an hour over the limit." 2RP 83.

Officer Vance was driving a DFW marked Ford F-150 pickup truck of indeterminate age. 2RP 43. The truck apparently had a

speedometer but no radar gun. *Ibid.* The officer had no idea if the speedometer had been calibrated. 2RP 44. The defense objected to any further reference to the officer's speedometer, *ibid.*, and after the Court sustained the objection, the officer nevertheless testified that "we were doing approximately 100 miles per hour," and that "the governor stops at approximately 103 miles an hour. . . ." 2RP 45. The officer later testified that he was doing "about 103 miles an hour in a Ford pickup," 2RP 49.

When later asked to make an approximation of the motorcycles' speed based on his training and experience, the officer "approximated that they were going well over 120 miles an hour." 2RP 52. After losing sight of the motorcycles for a minute or two, 2RP 53, the officer regained visual contact of the motorcycles, which had slowed to under 100 miles an hour. 2RP 53-54.

As he caught up to within 10 feet of the rear motorcycle, it pulled over to the shoulder and slowed. 2 RP 54. As the rear motorcycle slowed, Officer Vance used his PA to tell the rear motorcyclist to follow him and 2RP 54-55 accelerated to catch up to the lead motorcycle, who accelerated back to what Officer Vance estimated as 100 to 120 miles an hour. 2RP 54. As he was catching up to the lead motorcycle, since the officer's "engine's governor kicked in again," and the officer estimated he was

going 100 miles an hour or more. 2RP 57-58. The officer then arrested and identified the defendants. 2RP 58-60.

On cross-examination, the officer affirmed that he received traffic training, but did not have any formal training for estimating speed. 2RP 83-84. In rebuttal examination, the officer testified that he activated his sirens and lights as soon as he “paced them at a hundred miles an hour.” 3RP 268.

In closing, the State emphasized speed, time and distance to buttress its arguments. The State described a 12-mile section of road where the alleged driving occurred. 3RP 286. The motorcycles accelerated to what officer Vance “estimated to be about 120.” 3RP 288. The vehicle was driven in a reckless manner, “double the speed limit, plus. . . . at an average speed of almost 107 miles an hour. . . . Hundred and twenty miles an hour or faster, on those curves?” 3RP 288-89.

“Officer Vance told you he had these people – while they got a distance on him – in sight the whole time from milepost 90 to just about the junction of 14 and 97. He didn’t lose them before that. He lost them when they crested that little ridge there and dropped down over the intersection, and he was behind them. He didn’t tell you they were cornering at 120 miles an hour. He said that’s what they got up to, and they had to slow down to go around the corners, allowing him to catch up. In his words, it’s the only way they could have made it without killing themselves.

3RP 294.

C. Time and Distance Evidence

The officer testified that he was on Highway 14 traveling eastbound at *approximately* milepost 89 when he first observed a pair of motorcycles. 2RP 42. As he followed them, it took him “about seven minutes, eight minutes possibly” to go from “Milepost 89, 90” to “the junction between 14 and 97”, a distance of “[a]pproximately 11 or 12 miles.” 2RP 53. After losing sight of the motorcycles, the officer regained visual contact at “approximately Milepost 101, 101 and a half, somewhere around there.” 2RP 53-54.

From the time the officer first began to follow the motorcycles until the time everything came to a stop, the officer later testified they traveled “approximately 12 miles” in “seven or eight minutes.” 2RP 57-58. Other than the officer’s approximations of the times and distances, no measurements of the distances or logs of the time were presented as evidence.

In closing, the State also emphasized a time and distance calculation based on Officer Vance’s testimony. Essentially, the State argued that the motorcycles traveled 12 or 12 ½ miles with Officer Vance following them, in 7 or 8 minutes:

[W]hat we do know, from Officer Vance, is he had a direct visual contact of Mr. Kronick and Mr. Davis the entire time, from milepost 90 till just about the end of this, at

milepost 102-1/2, when he lost them going over that little rise where the two highways intersect.

You have Officer Vance telling you it took about eight minutes to go that fast. And you've all driven that route. In fact, when he said "eight minutes," Mr. Mason questioned him about it based on the radio logs, and it turned into seven, which is even faster.

The facts are stubborn things. To make it in seven minutes, with someone he's watching, that he said, yeah, they slowed down on some of the corners. They had to; that's when I'd catch up. And then they'd hit those straightaways and they'd be gone.

You have to average 1.78 miles a minute. That's an average speed of 106.8 miles per hour, give or take. You know, maybe it's milepost 102 1/4 or 1/3. So you've all heard of the "new math." 107 is still a lot different than 85.

3RP 309-10.

D. Other Driving Evidence

The majority of the trial focused on the State's evidence of attempting to elude, whether the defendants were the drivers of the motorcycles originally seen by the officer, and whether the drivers of the motorcycles knew the officer was behind them and attempting to stop them.

In addition to the speed evidence, Officer Vance testified about a couple of passes performed by the motorcycles. The first pass occurred shortly after Officer Vance turned on his lights and siren. 2RP 46. The pass occurred in a no passing zone with a double yellow line on a left hand

corner, where the motorcycles passed 2 cars. 2RP 47. At least “one or two more sets of cars were passed in no-passing zones.” 2RP 50.

The state also emphasized the passing evidence in closing:

And that this person drove the vehicle in a reckless manner: Double the speed limit, plus. Down past Horsethief, up Maryhill Loop – excuse me; so much talk about Maryhill Loop Road – up the Wishram curves, through the intersection at 97 and 14, at an average speed of almost 107 miles an hour. Passing, at least twice – by Officer Vance's count and testimony – on blind corners, in no-passing zones; at least one of them, two cars at the same time.

2RP 288-89.

E. Defense Objections to Speed, Time & Distance Evidence

As noted above, the Defendants moved *in limine* to bar the State from introducing evidence of the defendant's speed in the absence of an adequate foundation for the accuracy of the officer's speedometer, as well as a governor in the officer's vehicle, based on the absence of a proper foundation, ER 901, and proof the speedometer was accurate and calibrated. 2RP 28-29. The defense subsequently objected to the officer's testimony based on the officer's vehicle speedometer, referencing *Spokane v. Knight*, and the judge sustained the objection. 2RP 44. The defense apparently did not object to any of the time and distance approximations, or, with the exception of an objection that the prosecutor was being argumentative rather than cross-examining a witness, to the prosecutor's use of the time and distance approximations.

F. Jury Instructions

The judge instructed the jury as on the definition and elements of attempting to elude, reckless driving, and defined the terms willful and wanton using the standard instructions from the WPIC. 3RP 279-283. Although the judge defined “in a reckless manner” consistent with the attempting to elude statute, 3RP 281 17:19, and “reckless” consistent with the willful or wanton disregard standard in the reckless driving statute, 3RP 281-283, 283 9:16, the judge did not clarify that the “in a reckless manner” standard did not apply to the charge of reckless driving, and vice versa. 3RP 274-86.

IV. SUMMARY OF THE ARGUMENT

The trial court committed reversible legal error when it denied the defense motion *in limine* to bar evidence from the officer’s speedometer and references to a governor in the officer’s truck. Permitting Officer Vance to testify about what he read on the speedometer, about his opinion of the appellant’s speed, and about a governor on the truck he was driving without authentication or a foundation for that evidence and testimony was an abuse of discretion, and prejudiced the appellants.

The trial court compounded its error by not only permitting repeated references to speed derived from what Officer Vance saw on his

speedometer and heard on the truck's governor, but by permitting time and distance evidence that lacked foundation and authentication.

Whether derived from a speedometer, a radar device, an airplane timer, or a distance-measuring device, speed evidence requires a foundation. Because Officer Vance had no idea if his speedometer was calibrated, the State made no showing of reliability, and Officer Vance lacked personal knowledge about the speedometer and the governor in his truck, the evidence was inadmissible and its admission was an abuse of discretion.

Nor was Officer Vance's speed testimony admissible as either an expert or a lay opinion of speed. Officer Vance had no training or experience in estimating speed, and his testimony (derived in part from his observation of his speedometer) was far too specific to be admissible as a lay opinion of speed.

The Court's admission of time and distance evidence violated RCW 46.61.470. In addition, the time and distance evidence lacked foundation and authentication. Admission of the time and distance evidence was prejudicial to the defense and thus reversible error.

If this Court finds that objections to speed evidence (including time and distance evidence) were not preserved, trial counsel was ineffective for failing to object to the evidence of speed, time and distance. There is

no legitimate trial tactic or reason for counsel to have repeatedly failed to object to the evidence of speed, time, and distance, save for the Court's denial of trial counsel's motion *in limine* regarding the speed evidence. Because there was a reasonable probability that the outcome on the reckless driving charge would have been different had counsel objected to the speed, time and distance evidence, and had that evidence excluded from the jury's consideration, any failure by counsel to make those objections was prejudicial error and requires reversal.

Even if the trial court errors individually did not constitute reversible error, the cumulative effect of the errors denied the appellants a fair trial. The admission of the speed, time, and distance evidence, coupled with the trial counsel's failure to object to the admission of that evidence, was a series of errors that combined to prejudice the appellants, and deprive them of a fair trial. This Court should reverse and remand for a new trial based on cumulative error.

The trial judge's 30-day sentence for reckless driving was disproportionate, excessive, and amounted to a trial tax on the appellants. Although the appellants were found not guilty of Attempting to Elude, the judge imposed a 30 day sentence, which was the maximum standard range sentence (given the appellant's lack of criminal history) the judge could impose for Attempting to Elude. Compare this to the State's offer of 3

days in jail pre-trial for pleading guilty to Reckless Driving. Because the sentence is grossly disproportionate, excessive, and amounts to a trial tax, this Court should reverse the judgment and sentence and remand for resentencing.

V. ARGUMENT

A. Standard of Review on Appeal.

This Court reviews questions of law *de novo*. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007); citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

A trial court's decision to admit or exclude evidence is reviewed only for abuse of discretion. *State v. Willis*, 151 Wn.2d 255, 87 P.3d 1164 (2004); *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000). Our courts hold:

Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. *Maehren v. City of Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

State v. Castellanos, 132 Wn.2d 94, 935 P.2d 1353 (1997). Put another way, *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001) [citations omitted], provides:

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. An abuse of discretion exists “[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.” The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law.

If evidence is improperly admitted, a trial court’s error is harmless “if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *State v. Bourgeois*, 133 Wash.2d 389, 403, 945 P.2d 1120 (1997). Reversible error occurs when an appellate court determines that, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Smith*, 106 Wash.2d at 780, 725 P.2d 951 (quoting *State v. Cunningham*, 93 Wash.2d 823, 831, 613 P.2d 1139 (1980)).

B. The Trial Court Committed Abuse of Its Discretion When It Denied The Defendant’s Motion *In Limine* And Permitted The State To Elicit Uncalibrated And Unreliable Speed Evidence Based On The Officer’s Vehicle’s Speedometer.

The Trial Court’s denial of the Defendant’s motion *in limine* and its ruling that the officer could testify about (1) what the officer “read on the speedometer,” 2RP 29, (2) the officer’s opinion as to the speed the motorcycles and the officer were going, *ibid.*, and (3) the governor, *ibid.*, was legal error. The trial court compounded its error by letting Officer Vance testify repeatedly about speed in terms of approximations and

estimates based only on what Officer Vance saw on his speedometer, and in doing so, denied the defendants a fair trial.

Washington law is well settled that, to admit evidence of speed, the State must lay a proper foundation. *Spokane v. Knight*, 96 Wash. 403, 165 P. 105 (1917); *Seattle v. Peterson*, 39 Wn.App. 524, 693 P.2d 757 (1985); *Bellevue v. Lightfoot*, 75 Wn.App. 214, 877 P.2d 247 (1994), *rev. denied*, 125 Wn.2d 1025 (1995); *State v. Smith*, 87 Wn.App. 345, 941 P.2d 725 (1997).

Consistent with the speed measurement cases, the Supreme Court this month affirmed the need for the proponent of measurement evidence to make a preliminary showing that the evidence is reliable. In *State v. Bashaw*, __ Wn.2d __, __ P.3d __ (Slip op. at 7/1/2010), the Court affirmed that “results of a mechanical device are not relevant, and therefore are inadmissible, until the party offering the results makes a prima facie showing that the device was functioning properly and produced accurate results.” Whether denominated as foundation, authentication, or a preliminary showing of reliability, absent that preliminary showing, measurement evidence is not admissible.

This is true regardless of whether the speed measurement is determined by a speedometer, a speed-measuring device such as radar, or an airplane timing a vehicle moving on the ground. *Ibid.* The burden of

authentication falls on the proponent; in this case the state. *Smith, supra*, 87 Wn.App. at 348; citing *State v. LeFever*, 102 Wn.2d 777, 787, 690 P.2d 574 (1984). Even if an officer is testifying about speed based on the officer's opinion, a proper foundation is required to admit the officer's opinion evidence whether based on ER 701 or ER 702. *State v. Farr-Lenzini*, 93 Wn.App. 453, 459-65, 970 P.2d 313 (1999).

Speedometer Evidence Requires a Foundation.

The State must provide a proper foundation for speedometer evidence to be used in a trial. *Spokane v. Knight, supra*, is Washington's seminal case regarding foundation for speedometer evidence when an officer paces another driver. In *Knight*, although the officer testified that he used a "tested speedometer," 96 Wash. 405, the appellant argued that the speedometer evidence was insufficient to convict him of speeding because the speedometer could get out of calibration. The Court recognized that measurement devices can get out of calibration, but ruled against the appellant, recognizing that

Speedometers, like other machines, may get out of order; but, **where they are tested regularly, they may be relied upon with reasonable certainty to determine accurately the rate of speed at which a machine is driven.**

Ibid. [emphasis supplied.] Because the officer testified he used a tested speedometer, the speedometer evidence was admissible, and sufficient for

a jury finding, and the Appellant's arguments went to the jury to weigh. Speedometer speed measuring evidence requires authentication.

Radar Evidence Requires a Foundation.

This same result is true when the speed measurement evidence comes from a radar reading; the proponent must lay a proper foundation. In *Seattle v. Peterson*, 39 Wn.App. 524, 527-29, 693 P.2d 757 (1985), the court required a foundation that the radar device was authenticated; *i.e.*, shown to be designed and constructed so that the results produced are reliable before evidence of its results become admissible. *Accord Bellevue v. Lightfoot*, 75 Wn.App. 214, 220-223, 877 P.2d 247 (1994), *rev. denied*, 125 Wn.2d 1025 (1995); *Bellevue v. Mociulski*, 51 Wn.App. 855, 756 P.2d 1320, *rev. denied*, 111 Wn.2d 101 (1988). Radar speed measuring evidence requires authentication.

Airplane Highway Distance Markings Require a Foundation

The Court of Appeals reversed a speeding ticket issued by an airplane trooper due to insufficient foundation. In *Smith*, the trooper used a stopwatch along with highway markings placed on the highway by the Washington State Department of Transportation at ½-mile intervals to determine the vehicle's speed from his aircraft. 87 Wn.App. at 350-351. The defense objected that the trooper either lacked personal knowledge of the distance between the markers or must have relied on hearsay about the

measurement of the highway markings.

The Court of Appeals found *Smith* was governed by ER 602.

Under ER 602, the pilot's statement is admissible if "evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Because the rule only requires evidence sufficient to support a finding of personal knowledge, courts admit testimony if a "trier of fact could reasonably find that the witness had firsthand knowledge." Stated negatively, the rule bars testimony purportedly relating facts, when they are based only on the reports of others. "Personal knowledge of a fact cannot be based on the statement of another."

...

The crucial passage here is the pilot's sworn statement . . . [which] . . . does not resolve whether the pilot assumed, rather than knew, that the ASTMs [highway markings] were "accurately measured off, or otherwise designated or determined." Because the state failed to demonstrate the pilot's personal knowledge, it did not satisfy the speed trap admissibility statute, and the district court erred in admitting the pilot's statement that the ASTMs were one-half mile apart.

Smith, 87 Wn.App. at 351-52. As *Smith* confirms, highway measurements used to determine speed require authentication.

Mechanical Distance-Measuring Devices Require A Foundation

In *Bashaw*, *supra*, the appellant argued the trial court's admission of results from a distance-measuring device required a showing that the device was functioning properly and produced an accurate result. Because the State produced no evidence that the distance-measuring device gave

accurate results, admission of this evidence was error and an abuse of discretion. The Supreme Court agreed.

[W]e hold that the principle articulated in the context of speed measuring devices also applies to distance measuring devices: a showing that the device is functioning properly and producing accurate results is, under ER 901(a), a prerequisite to admission of the results.

Bashaw, Slip op. at 7-8. Although the State showed that the device displayed numbers and that it “click[ed] off feet and inches” while pushed by the detective, no testimony or evidence even suggested the numbers were accurate. *Ibid.* at 8. Nor was there a comparison of results generated by the device to a known distance, or evidence the device was ever inspected or calibrated. *Ibid.* Because there was no showing whatsoever the results were accurate, the Court abused its discretion when it admitted those results. Distance measurement devices require authentication.

The State Laid No Foundation For Speed

The trial judge’s erroneous ruling on the *motion in limine* relieved the State of its obligation to lay a foundation for the speed evidence. Officer Vance, who testified that he didn’t know if the speedometer was calibrated, 2RP 44, had no personal knowledge and could not provide the foundation for the speedometer readings; his testimony was plainly insufficient to admit the speed evidence.

Officer Vance’s speed statements were based on the speedometer

in his truck. The truck speedometer – a mechanical device that shows a number – is little different from the mechanical measuring device condemned in *Bashaw*, Slip op. at 8, where the device displayed numbers and “click[ed] off feet and inches.” Absent authentication – some preliminary showing of reliability and accuracy, the speedometer numbers are meaningless as evidence, and their use in any fashion to provide testimony without foundation was legal error.

The erroneous admission of Officer Vance’s speed testimony without a proper foundation, whether based on the officer’s speedometer, what the officer read on the speedometer, or the officer’s estimates based on the speedometer, was clear error and an abuse of the Court’s discretion.

Officer Vance Had No Idea If The Speedometer Was Calibrated

Officer Vance had no idea if his speedometer was tested or otherwise calibrated. RP (8/5/2009) 44. The entirety of his testimony about his truck and its speedometer subsequent to the motion *in limine* was extraordinarily limited:

Q. Were you using a radar gun at that point?

A. No, I don’t have a radar gun.

Q. Is your vehicle equipped with a speedometer?

A. It is.

Q. What kind of vehicle is it?

A. It is a Ford F-150 pickup truck.

...

Q. And then you said it was equipped with a speedometer?

A. Yes.

Q. Is that speedometer calibrated --

A. I --

Q. -- or do you have any idea?

A. -- I don't know if it is.

Q. When you first approached the vehicles, did you have any reason to believe that they were exceeding the speed limit?

A. When I first approached, I believe they were doing approximately the speed limit because they were sitting up in the seated position. But --

Q. What is the speed limit, based on your experience, for that area?

A. The speed limit is 60 miles per hour.

Q. Did you -- while it's not calibrated, did you look at your speedometer at that point?

A. I --

MR. MASON: Your Honor, I'm going to object to any further reference to the speedometer, as the witness has indicated he doesn't know whether it was calibrated. Under *Spokane v. Knight* and all the other case law, he can give his opinion of the speed, but --

THE COURT: Sustained.

The Court's ruling on the motion *in limine* let Officer Vance testify about what he saw on the truck's speedometer without any evidence of testing or calibration, and permitted Officer Vance to continue to testify based on what he saw on his speedometer. This occurred after the defense motion *in limine* and the defense objection. It flies in the face of the

Knight, Peterson, and Smith requirement that the State lay a foundation for the introduction of speed evidence. In contrast to the *Knight* case, where the officer testified about using a “tested speedometer,” 96 Wash. at 405, Officer Vance **had no idea** if his speedometer had been calibrated. RP (8/5/2009) 44.

The State Made No Offer or Showing of Reliability

Nor was there **any** offer of reliability in showing a particular speed for Officer Vance’s speedometer. A proponent of measurement evidence must make an initial showing that the machine, device, or instrument was functioning properly and produced accurate results at the time it was used. *Bashaw*, Slip op. at 8; *Lightfoot*, 75 Wn.App. at 221-222. There was no preliminary showing of authentication or reliability in the appellant’s case, and admission of the speed and speedometer evidence was error.

Officer Vance Lacked Personal Knowledge About the Speed

In addition to failing to make a showing of for what Officer Vance saw on the speedometer, the officer’s testimony of speed based on the speedometer is also inadmissible based on the officer’s lack of personal knowledge regarding speed as required by the *Smith* case. Note that In *Smith*, the officer’s statement was, in essence, that he used stopwatches to time a vehicle between fixed marks placed on the highway surface by the Department of Transportation to determine the vehicle’s speed. *Smith*, 87

Wn.App. at 351-52. From the pilot's declaration, the Court could not determine whether "the pilot assumed, rather than knew," the highway marks were accurately measured. *Id.* at 352. This showing was insufficient to satisfy the personal knowledge requirement, and admission of the evidence was error. *Ibid.*

Similarly, Officer Vance's testimony about, based on, or derived from the untested and uncalibrated speedometer in the DFW truck fails to demonstrate Officer Vance's personal knowledge. Officer Vance is a DFW officer, who although commissioned, has no training in speed estimation. 2RP 83. Any estimates, assumptions, approximations, paces, or other speed calculations are either guesses and inadmissible speculation, or statements derived from the speedometer, also inadmissible. Officer Vance's testimony, based on what the truck speedometer showed, was not based on personal knowledge and is no different than the testimony found inadmissible in *Smith*; this Court is unable to determine what Officer Vance "assumed, rather than knew," 87 Wn.App. at 352, and for that reason as well, Officer Vance's speed testimony is inadmissible. Officer Vance did not testify about his knowledge of speed; only based on what the truck's speedometer shows. Admission of this testimony was an abuse of discretion.

The Truck Governor Evidence Was Likewise Inadmissible

The trial judge ruled Officer Vance could testify about the governor if he had personal knowledge if his vehicle was governed and at what speed. 2RP 83. As Officer Vance's testimony showed, he did not have personal knowledge. Although Officer Vance testified that the governor "stops at approximately 103 miles an hour," 2RP 45, the only basis for that belief is Officer Vance's comparison between when the governor comes on and what is showing on his speedometer.

As noted in *Smith, supra*, this is not enough. Because the Court cannot determine whether Officer Vance "assumed, rather than knew," the speedometer was accurate and calibrated, the testimony is inadmissible. *Smith*, 87 Wn.App. at 352. Such a showing is insufficient to satisfy even the less stringent evidentiary personal knowledge requirement, and admission of the governor speed testimony was error.

Admission of The Speed Evidence Was An Abuse of Discretion

The erroneous admission of Officer Vance's testimony about the speed of the motorcycles, whether taken directly from his truck's speedometer, an estimate derived from what he read on his truck's speedometer, or approximated from what he saw on his truck's speedometer, was unauthenticated, lacked foundation, and was not based on Officer Vance's personal knowledge. This error was compounded by

the State's repeated references to speed, whether in the State's opening, 2RP 34-35, Officer's Vance's testimony, or the State's closing, and whether denominated as an approximation, 2 RP 45, 2 RP 52, a pace, 3 RP 268, an estimate, 2RP 57-58, or some other speed measurement or calculation. 2 RP 49 ("about 103 miles an hour in a Ford pickup, . . ."), 2 RP 53-54, (under 100 miles an hour), 2 RP 54 (accelerated back to 100 to 120 miles an hour).

C. Officer Vance's Speed Testimony Was Not Admissible as a Lay Opinion Of Speed.

As a general rule, courts uphold the admission of lay opinions of speed under ER 702, so long as it is rationally based on the witness's own perceptions and helpful to the jury. *State v. Kinard*, 39 Wn.App. 871, 874, 696 P.2d 03 (1985); *see also Clevenger v. Fonseca*, 55 Wn.2d 25, 34-35, 345 P.2d 1098 (1959).

Foundation or authentication is required for a lay opinion of speed. *See, e.g., Ashley v. Hall*, 138 Wn.2d 151, 978 P.2d 1055, 1058 (1999)(lay opinion of speed inadmissible where witness lacked either "actual knowledge of certain relevant factors, such as speed and distance, or expertise in accident reconstruction"). Finally, even though a non-expert witness may offer a lay opinion in many cases, the opinions that have been

ratified by the Courts have been narrowly limited. *See, e.g., Clevenger*, 55 Wn.2d at 34 (car was “traveling at a great rate of speed”).

An officer’s visual observation is not by itself sufficient to support a finding that defendant was speeding. *See Froemming v. Spokane City Lines*, 71 Wn.2d 265 (1967); *Golub v. Mantopoli*, 65 Wn.2d 361 (1965); *Sanders v. Crimmins*, 63 Wn.2d 702 (1964); *Charlton v. Baker*, 61 Wn.2d 369 (1963); *Dunsmoort v. North Coast Transportation Co.*, 154 Wn. 229 (1929). Similarly, in *State v. Farr-Lenzini*, 93 Wn.App. 453, 970 P.2d 313 (1999), an attempt to elude police case, the court required foundational support for an officer’s opinion evidence on speed under either ER 701 or ER 702.

In order for Deputy Vance’s speed testimony to have been admissible as a lay opinion, the State needed to make an initial showing that Deputy Vance personally knew certain relevant factors before he could offer a limited lay opinion. They did not make this showing, and Deputy Vance’s testimony was far more than lay opinion testimony.

First, as previously noted, Deputy Vance knew his truck had a speedometer, but otherwise lacked any personal knowledge about it. This is far short of the actual knowledge required for a lay opinion. *Compare* Deputy Vance’s testimony with the actual knowledge found insufficient in *Ashley v. Hall*, 138 Wn.2d 151, 978 P.2d at 1058, where the witness didn’t

have actual knowledge of speed and distance.

Second, Deputy Vance's testimony far exceeded a limited lay opinion of an estimate of speed, or a statement similar to the statement approved in *Clevenger* that the vehicles were traveling at a great rate of speed. Instead, Deputy Vance testified to specific numbers over half a dozen times, and in part, based on his extraordinarily limited "training and experience," which did not include speed estimation training. RP (8/5/2009) 52, 84.

The motorcycle's speed was a core issue relating to the State's theory of the case, *see Farr-Lenzini*, 93 Wn.App. at 462-65, and because the Deputy was testifying about the motorcycle's speed without an adequate factual basis, in fashion much broader than a lay opinion, on a core issue of the State's proof, Deputy Vance's speed testimony was not admissible as a lay opinion, and its admission was an abuse of discretion.

D. The Trial Court's Admission Of Times and Distances Violated RCW 46.61.470 and Lacked Foundation or Authentication.

RCW 46.61.470 provides:

**RCW 46.61.470
Speed traps defined, certain types permitted –
Measured courses, speed measuring devices, timing
from aircraft.**

No evidence as to the speed of any vehicle operated upon a public highway by any person arrested for violation of any of the laws of this state regarding speed or of any orders, rules, or regulations of any city or town or other political

subdivision relating thereto shall be admitted in evidence in any court at a subsequent trial of such person in case such evidence relates to or is based upon the maintenance or use of a speed trap except as provided in subsection (2) of this section. **A “speed trap,” within the meaning of this section, is a particular section of or distance on any public highway, the length of which has been or is measured off or otherwise designated or determined, and the limits of which are within the vision of any officer or officers who calculate the speed of a vehicle passing through such speed trap by using the lapsed time during which such vehicle travels between the entrance and exit of such speed trap.**

(2) **Evidence shall be admissible** against any person arrested or issued a notice of a traffic infraction for violation of any of the laws of this state or of any orders, rules, or regulations of any city or town or other political subdivision regarding speed **if the same is determined by a particular section of or distance on a public highway, the length of which has been accurately measured off or otherwise designated or determined and either: (a) The limits of which are controlled by a mechanical, electrical, or other device capable of measuring or recording the speed of a vehicle passing within such limits; or (b) a timing device is operated from an aircraft, which timing device when used to measure the elapsed time of a vehicle passing over such a particular section of or distance upon a public highway indicates the speed of a vehicle.**

(3) **The exceptions of subsection (2) of this section are limited to devices or observations with a maximum error of not to exceed five percent** using the lapsed time during which such vehicle travels between such limits, and such limits shall not be closer than one-fourth mile.

[Emphasis supplied.]

The lone exception to the speed trap rule is when the length of highway has been (1) accurately measured, (2) is no shorter than one

quarter mile long, and (3) the devices or observations have “a maximum error of not to exceed five percent using the lapsed time during which such vehicle travels between such limits.” RCW 46.61.470(3).

Officer Vance’s testimony and the State’s use of his testimony about time and distances to establish the motorcycle’s speed violates the speed trap statute in several respects. First, the statute applies because the distances were on roadway mileposts which were placed on the roadway by some state agency, and were somehow measured or otherwise determined.

Second, the speed trap statute makes such evidence inadmissible unless the requirements of the exception are met. Here, they are not.

Third, contrary to the requirements of RCW 46.61.470(2), there was no showing the length of the distance traveled was “accurately measured off or otherwise designated or determined.” The State presented no evidence about how measured nor how they measured the distance traveled, other than references to milepost, and no evidence of the accuracy of the measurement.

Fourth, there was no calculation or determination of the maximum error of Officer Vance’s observations. RCW 46.61.470(3) limits the admissibility of evidence to devices “**and observations with a maximum**

error of not to exceed five percent.” [Emphasis supplied.] The State provided no testimony about any error rate.

Because the State failed to provide any evidence or showing about how the distance was measured, whether the distance measurement was accurate, and what error rate applied to the distance measurement (greater or less than 5%), the time and distance speed measurement was inadmissible under the speed trap statute.

An even more fundamental reason makes this time and distance speed measurement inadmissible. As noted in *Bashaw*, a distance measurement requires authentication, and just because a measurement device generates a number does not make that numerical result admissible.

The proponent may lay a foundation by showing the measurement result is accurate, the measuring device is functioning properly, the device produced accurate results, the device had been compared to a known distance, or the device had been inspected or calibrated. *Bashaw*, Slip op. at 7-8. Without authentication, the distance portion of the time and distance speed measurement evidence is inadmissible, and the Court erred by letting the State use this evidence.

E. The Trial Court's Admission Of Speed, Time and Distance Evidence Was Prejudicial and Reversible Error.

An appellate court reviews the admission of evidence for abuse of discretion. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). "Abuse of discretion exists '[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.'" *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008) (alteration in original) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). See also *Bashaw*, Slip op. at 4.

An erroneous ruling is not reversible error unless the court determines that, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Smith*, 106 Wash.2d at 780, 725 P.2d 951 (quoting *State v. Cunningham*, 93 Wash.2d 823, 831, 613 P.2d 1139 (1980)). Improper admission of evidence is harmless error if the evidence is of minor significance when compared with the evidence as a whole. *State v. Neal*, 144 Wash.2d 600, 611, 30 P.3d 1255 (2001). To show reversible error, an appellant must show "within reasonable probabilities' that but for the alleged error the outcome of his trial would have been different." *State v. Sipin*, 130 Wn.App 403, 421, 123 P.3d 682 (2005), citing *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

Error is not harmless error in a pair of evidentiary situations. First, where the admitted evidence is of a highly prejudicial nature, *State v. Wilson*, 144 Wn.App. 166, 178, 181 P.3d 887 (2008); *Sipin, supra*, 130 Wn.App. at 421-22, and not insignificant, the error is reversible error. Second, when the outcome of the trial “might reasonably have been different if the trial court had excluded the challenged evidence,” *Sipin, id.* at 421, reversal is compelled.

Under either analysis, the Court’s admission of speed, time, and distance evidence was prejudicial and reversible error. The State offered a single witness, Officer Vance. Both Defendants testified. 2 RP 129; 3RP 215. Although both defendants admitted going in excess of the speed limit in the vicinity of 80 to 85 miles per hour, 3 RP 170, 229, they denied the speeds asserted by Officer Vance and Mr. Kronick denied passing any other vehicles. 3 RP 200.

The State’s theory was that the defendants were speeding and attempted to elude Officer Vance in his DFW pickup truck. According to the State, the defendants drove at speeds in excess of 100 miles an hour and made dangerous passes in no passing zone in the course of an 11 to 12 mile stretch of Highway 14. 2RP 33-36.

The defendants denied any attempt to elude Officer Vance, 2RP 36-39, and testified they did not see or hear Officer Vance until shortly

before each of them pulled over. 3RP 176-77, 240, 245. They conceded they might have been going 80, maybe 85 miles per hour, 3RP 170, but not the speeds claimed by officer Vance, and denied making unsafe passes, passing any vehicles, or the State's assumption that the motorcycles and riders initially observed by Officer Vance were the same motorcycles and riders ultimately pulled over by Officer Vance. 3RP 200-01, 214, 262.

The defense argued the description of the two motorcycles and riders first seen and followed by Officer Vance didn't match the two motorcycles and riders Officer Vance stopped two minutes and 4 miles later (according to Officer Vance's 120 miles per hour estimate) after losing sight of the motorcyclists he was chasing, 3RP 299-302. All of this occurred on a weekend a "lot of motorcyclists" from around the northwest converging for a motorcycle rally on the Maryhill Loops Road. 2 RP 61, 3RP 220-221.

There is little doubt the State's speed evidence was prejudicial. Jurors hearing an officer toss about 100+ mile an hour speeds would naturally give credence to an officer's speed testimony, which makes the Court's erroneous introduction of the speed evidence all the more acute.

More importantly, the jury found the appellants not guilty of the Attempting to Elude charge, and convicted solely on the reckless driving

charge. Each party presented “persuasive evidence” regarding the driving. *See Sipin*, 130 Wn.App. 421. Given that each party presented “persuasive evidence,” there is a more than reasonable probability that but for the error in admitting the speed evidence, the outcome of the reckless driving charge might have been different.

Admission of the speed testimony was reversible error, which seriously tainted the reckless driving portion of the trial. Because there is a reasonable probability the outcome of the trial might have been different but for the admission of the speed evidence, the conviction must be reversed.

F. If this Court Finds Any Objections to Speed Evidence, Including Time and Distance, Were Not Preserved, Counsel Was Ineffective For Failing to Object to the Evidence of Speed, Time and Distance.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460-471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

If this Court finds the defense failed to preserve objections to the admissibility of speed evidence and measurements, including measurements of time and distance, and the Court did not abuse its discretion in admitting the speed and measurement evidence, then counsel was ineffective for failing to move *in limine* to limit the testimony and failing to object to the testimony regarding speed and measurement evidence.

A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. “Representation of a criminal defendant entails certain basic duties Among those duties, defense counsel must employ ‘such skill and knowledge as will render the trial a reliable adversarial testing process.’” *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). To prevail on a claim of ineffective assistance of counsel, the petitioner must overcome a strong presumption that defense counsel was effective. *State v. McFarland*, 127 Wash.2d 322, 335, 899 P.2d 1261 (1995).

To prove that failure to object rendered trial counsel ineffective, Appellants must show that not objecting to the admission of the testimony of speed, time, and distance fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of

the trial would have differed if the evidence had not been admitted. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

This is not a case where a defense attorney may have made a decision not to object to the admission of damaging evidence where the evidence was admissible, as in *State v. Alvarado*, 89 Wn.App. 543, 533, 949 P.2d 831 (1998), *rev. denied*, 135 Wn.2d 1014, 960 P.2d 937 (1998). Rather, defense counsel, following the Court's adverse ruling on the motion *in limine*, yet after the objection to the speedometer evidence was sustained, did nothing more about the speed evidence. The defense moved *in limine* to bar evidence from the speedometer, 2RP 28-29, and the judge denied the motion; ruling that any challenges would be subject to cross-examination. 2RP 29. In essence, the judge ruled that the defense challenges went to the weight of the evidence. The defense then objected to any further reference to the speedometer, 2 RP 44, but made no other objections, in spite of the State's numerous references to speeds, whether labeled as an approximation, 2 RP 45 ("approximately 103 miles an hour . . ."), 2 RP 52 ("approximated that they were going well over 120 miles an hour"), a pace, 3 RP 268, "paced them at a hundred miles an hour.", an estimate, 2RP 57-58 (officer estimated 100 miles an hour or more), or some other speed measurement or calculation. 2 RP 49

(“about 103 miles an hour in a Ford pickup, . . .”), 2 RP 53-54 (under 100 miles an hour), 2 RP 54 (accelerated back to 100 to 120 miles an hour).

There was no legitimate strategic reason to permit the continued introduction of speed evidence subsequent to the Court granting the defense objection. It was as if the defense attorney didn’t hear the judge granting the objection. Letting the jury continuously hear the State talk about speeds typically in excess of 100 miles per hour serves no legitimate trial tactical purpose.

There were numerous instances in which defense counsel should have objected, and there was no legitimate strategy in failing to object to this testimony. Defense counsel obviously felt the same way about the speed evidence because he initially brought a motion *in limine*, which was rebuffed by the trial court’s erroneous reasoning, and he then brought an objection to the speed evidence upon testimony Officer Vance had no idea if the speedometer was calculated. And then, . . ., defense counsel did nothing about the speed evidence, with the exception of a few softball questions of the defendants.

Error of this type is prejudicial and requires reversal when

the defendant establishes, with reasonable probability, that but for counsel's errors the outcome of the proceedings would have been different. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

State v. Brett, 126 Wn.2d 136, 199, 892 P.2d 29 (1995) [citations omitted]. It is not necessary, however, for an appellant to show that counsel's "deficient conduct more likely than not altered the outcome in the case." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); citing *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2068.

The *Thomas* case is instructive, and should guide the result in the instant appeal. In *Thomas*, the appellant alleged her counsel's deficient performance deprived her of a fair trial by failing to properly investigate a defense witness and failing to submit a "to convict" jury instruction that correctly stated the law.

Noting that competent trial counsel does not guarantee a successful verdict, *Thomas*, 109 Wn.2d at 228, and that there was substantial evidence to support the defense contention, the court nevertheless found its "confidence in the outcome is undermined such that we cannot say Thomas received effective assistance of counsel." *Id.* at 229.

The same result should obtain in the Appellant's case. There was substantial evidence in the case to support both the State's and the defense's theory of the case. Significantly, the bulk of the State's evidence of reckless driving consisted of testimony about speed and a couple of unsafe passes. If trial counsel is found to have failed to preserve the defense objection to the speed evidence, then trial counsel was deficient in failing to do so. The speed evidence was inadmissible, and its admission greatly prejudiced the

defendant's on the reckless driving charge. Absent the speed evidence, there is a more than reasonable probability that the outcome would be different, and this Court must reverse the trial court convictions.

G. Even If The Trial Court's Errors Individually Do Not Constitute Reversible Error, Cumulative Error Deprived Mr. Kronick and Mr. Davis of a Fair Trial.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146 (1994). Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone independently warrants reversal. *State v. Hodges*, 118 Wn.App. 668, 673, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1013, 94 P.3d 960 (2004).

The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. (three instructional errors and the prosecutor's remarks during voir dire required reversal); (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) [internal citations omitted].

Reversal is required when the combined errors effectively deny a defendant a fair trial. *Hodges* at 673-74. Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990). In this case, the trial court's ruling on the motion *in limine* permitting the introduction of unauthenticated speed and speedometer evidence was an abuse of discretion, legal error, and prejudicial to the Defendant's case. That ruling, coupled with the repeated references to speed that should have been ruled inadmissible, and/or the trial attorneys' failure to object to the admission of the inadmissible speed evidence, constituted a series of errors that combined to prejudice the appellants, and deprive them of a fair trial. This Court should reverse and remand for a new trial based on cumulative error.

H. The Sentence Imposed Was Disproportionate, Excessive, Amounted to an Attempting to Elude Sentence, and Constituted a Trial Tax on the Defendants for Taking Their Case to Trial.

The defendants were charged with Attempting to Elude a Police Officer (RCW 46.61.024) and Reckless Driving (RCW 46.61.500). Attempting to Elude is a Class C felony, RCW 46.61.024(1), and is classified with a seriousness level of I. RCW 9.94A.515 Table 2. With an

offender score of 0, and a seriousness level of I, the standard sentence range on conviction for each defendant was 0-60 days. RCW 9.94A.510 Table I.

Reckless driving is a gross misdemeanor punishable by not more than one year in jail and by a fine of not more than \$5,000.00. RCW 46.61.500.

Both the federal and the Washington constitutions prohibit punishment which is grossly disproportionate to the gravity of the offense. *See State v. Fain*, 94 Wash.2d 387, 617 P.2d 720 (1980) (proportionality under Const. art. 1, § 14); *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001 77 L.Ed.2d 637 (1983) (Eighth Amendment). *Solem* denounced practices where punishment for a lesser offense is more severe than a greater offense. 463 U.S. at 293, 103 S.Ct. at 3011. *But see State v. Bowen*, 51 Wn.App. 42, 751 P.2d 1226 (1988)(not unconstitutional to sentence someone convicted of a gross misdemeanor to a sentence higher than the highest presumptive sentence for someone convicted of a felony with the same criminal history).

Absent an exceptional sentence on the Attempt to Elude, the maximum sentence the Court could impose on the defendants with their criminal history for the felony conviction was 60 days – the standard range

is 0-60 days and the mid-point is 30 days. RCW 9.94A.515 Table 2; RCW 9.94A.510 Table 1.

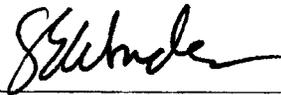
The judge's sentence for the reckless driving conviction was the mid-point for an Attempt to Elude conviction, *see* RCW 9.94A.510 Table 1, in spite of the fact the appellants were found not guilty of Attempt to Elude, only the reckless driving. The Court's decision to impose an Attempt to Elude sentence for the reckless driving conviction was grossly disproportionate and excessive. This is particularly true in light of the State's original offer of 3 days for a guilty plea on the felony Attempt to Elude, 4RP 6. The sentence imposed constituted a trial tax on the Defendants for exercising their right to a trial on the Attempt to Elude charge; a trial that ultimately resulted in a not guilty finding. The Defendants must not be penalized for refusing to plead guilty to Attempting to Elude – a crime the jury found they did not commit – and this case must be reversed.

VI. CONCLUSION

For the reasons set forth above, this Court should reverse the appellants' convictions and remand this matter to the Klickitat County Superior Court for retrial.

Respectfully submitted this 2nd day of July, 2010.

**GODDARD
WETHERALL
WONDER PSC**

By: 

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PROOF OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct: I am competent to testify. I am the Appellants' attorney in this action. On 2 July 2010 I served the original and a copy of the document bearing this PROOF OF SERVICE on the Washington Court of Appeals, Division III, 500 N Cedar ST, Spokane, WA 99201-1905, by personal service, and by emailing a copy to David B. Trefry, Counsel for Respondent at TrefryLaw@wegowireless.com pursuant to Counsel for Appellants' and Counsel for Respondent's stipulation and agreement for service of documents of 500 pages or less entered into by email dated 10 November 2009 (Appellant's Counsel has preserved copies of this email correspondence).

Signed at Bellevue, Washington, this 2nd day of July, 2010.

By: 

SCOTT E. WONDER