

FILED

MAR 31 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 284689
Consolidated with
NO. 284719

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

STATE OF WASHINGTON, Respondent
v.
WESLEY O. KRONICK, Appellant.

Consolidated with

STATE OF WASHINGTON, Respondent
v.
SCOTT P. DAVIS, Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-00140-9
Consolidated with
Superior Court No. 08-1-00141-7

BRIEF OF RESPONDENT

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JESSICA M. MAXWELL
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A. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court acted within its discretion in admitting evidence regarding speed, time and distance.
2. Whether the defendants were afforded effective assistance of counsel.
3. Whether defendants' list of non-meritorious claims, taken together, constitute reversible error under cumulative error analysis.
4. Whether the trial court acted within its discretion in sentencing the defendants to a sentence within the allowable range.

B. STATEMENT OF THE CASE

PROCEDURAL HISTORY

On December 9, 2008, Wesley O. Kronick and Scott P. Davis were charged by Information in Klickitat County Superior Court with the crimes of Attempting to Elude a Pursuing Police Vehicle (felony elude) RCW 46.61.024 and Reckless Driving RCW 46.61.500. These crimes were alleged to have occurred on August 23, 2008. CP 1-2, 177-178. Kronick's and Davis' cases were consolidated for trial. 3RP at 3¹, CP 166, 340.

¹ Citations to the verbatim report of proceedings are to the transcripts filed with the Court of Appeals in the consolidated appeal of State v. Kronick and State v. Davis, COA No. 28468-9-III. The various volumes of transcripts will be cited as follows:

| | | | |
|-----|----------------|-----|-----------------|
| 1RP | August 5, 2009 | 3RP | August 17, 2009 |
| 2RP | August 6, 2009 | | |

Jury trial was conducted on August 5, 2009. 1RP at 1. At trial, Department of Fish and Wildlife (DFW) Officer Brendan Vance (“Officer Vance”) testified for the State. 1RP at 39. Officer Vance testified that his DFW vehicle was not equipped with a radar device but did have a speedometer. 1RP at 43. Kronick and Davis objected both in a *motion in limine* and orally at trial to speed evidence based on the DFW speedometer. 1RP at 28-29, 44.

The Court sustained the oral objection and excluded further mention of the speedometer. 1RP at 44-45. Kronick and Davis agreed, however, that Officer Vance could give his opinion of the speed at which they were traveling. 1RP at 28-29 (“I know the case law is clear that he can give a lay witness opinion of speed based on an estimate...”), 44 (“Under *Spokane v. Knight*² and all the other case law, he can give his opinion of the speed...”). Officer Vance estimated that Kronick and Davis were traveling at speeds of 100 -120 miles per hour. 1RP at 45, 54, 56, 100, 104, 117-118. This evidence was elicited without objection on both direct and cross examination. *Id.* In support of his speed estimate, Officer Vance testified that he had completed a full week of traffic training through the Washington State Patrol (1RP at 83), had gone through additional Emergency Vehicle and Operational

² *City of Spokane v. Knight*, 96 Wn. 403, 165 P. 105 (1917).

Control training through his department (1RP at 83) and had conducted traffic based speed contacts in the past. (1RP at 52). Officer Vance also testified that there was a governor on his DFW vehicle which limited his ability to go beyond certain speed, and that this device became activated at approximately 103 miles per hour. 1RP at 45, 56. He also testified that the governor activated while he was pursuing Kronick and Davis. 1RP at 45, 56. Both defendants testified to traveling 85 miles per hour. 2RP at 170-71, 229, 258.

Kronick and Davis were convicted of reckless driving and acquitted of felony eluding. 2RP at 316-319. The State requested a sentence of 45 days in jail. 3RP at 4. At sentencing, the Court described reckless driving as a “very serious offense,” 3RP at 8, labeling the defendants’ driving “abhorrent.” 3RP at 9. The Court also stated that the defendants’ driving “almost shocked [his] conscience in a way.” 3RP at 9. For this reason, the Court sentenced both defendants to 30 days incarceration. 3RP at 9, 15; CP 168, 342. Kronick was assessed a \$2,500 fine plus assessments. Davis was assessed a \$1,000 fine plus assessments. 3RP at 9, 15; CP 170, 344. Both defendants were sentenced to 24 months bench probation. 3RP at 9, 15; CP 168-69, 342-43. Kronick and Davis each filed a timely notice of appeal. CP 171-72, 345-46.

SUBSTANTIVE FACTS

On the morning of August 23, 2008, DFW Officer Brendan Vance was traveling eastbound on Highway 14 in Klickitat County, Washington. 1RP at 41. Near milepost 89, Officer Vance came up behind two motorcyclists. 1RP at 41. As he watched, they exchanged hand signals, “crouched down” and accelerated to “a high rate of speed.” 1RP at 42. Officer Vance activated his emergency lights and siren and followed the defendants for approximately 11 to 12 miles, unable to get them to pull over. 1RP at 45, 53. Throughout the pursuit, Officer Vance observed the defendants traveling at speeds of 100-120 miles per hour while passing other vehicles on “blind corners” and in no passing zones. 1RP at 45-47, 50, 54, 56. Officer Vance was eventually able to stop Kronick and Davis and place them under arrest. 1RP at 59-60.

C. SUMMARY OF THE ARGUMENT

Officer Vance testified to his estimation of the defendants’ speed after observing them for a distance of 11-12 miles. This testimony was encouraged by the defendants and properly admitted under ER 701. Officer Vance also testified to his personal knowledge of the governor in

his DFW vehicle. There was no error as admission of this evidence was proper.

The defendants made a *motion in limine* as well as numerous objections at trial. In establishing ineffective assistance, the defendants cannot rely on trial strategy or tactics. The defendants' sole allegation of ineffective assistance is counsel's failure to object to evidence. The decision of whether or not to object is a classic example of trial tactics. Therefore, the defendants failed to establish that they were denied effective assistance of counsel.

Kronick and Davis have not raised any actual error. If this Court finds that the trial court committed error, it should also find that such error was clearly harmless. There is no reasonable probability that the outcome would have been materially different if any alleged errors had not occurred. The cumulative error doctrine does not apply because non-prejudicial error cannot amount to cumulative error which warrants reversal.

Kronick and Davis were sentenced within the allowable range for reckless driving, the crime of which they were convicted. The trial court stated its reasons for the sentence given. It is within the trial court's

discretion to sentence anywhere in the standard range. The sentence was not excessive. No error occurred.

D. ARGUMENT

1. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION IN ADMITTING EVIDENCE OF TIME, SPEED AND DISTANCE.

Kronick and Davis assert that the trial court abused its discretion in allowing Officer Vance to estimate their speed. Brief of Appellant at 4 (Issues 4, 5), 5 (Issues 9, 10). No error occurred because Officer Vance observed the defendants' driving, and because that is the sole requirement for a lay estimate of speed. Further, this issue was not properly preserved for appeal and should be precluded from review under the invited error doctrine.

Kronick and Davis also argue the trial court abused its discretion in admitting evidence of speed (based on the DFW truck speedometer and governor) and of time and distance. Brief of Appellant at 4 (Issues 1, 2, 3, 6, 7) and 5 (Issues 8, 11, 12). The court limited this evidence, which was thereafter not properly objected to at trial. Thus, this issue was not preserved for appeal and should not be considered by this Court. *See, e.g., State v. Mathes*, 47 Wn. App. 863, 737 P.2d 700 (1987); *State v. Christian*, 44 Wn. App. 764, 766, 723 P.2d 508 (1986). If the Court does

elect to consider this issue and finds the evidence was admitted in error, such error is harmless. There is no reasonable probability that, barring admission of the testimony, the outcome of the trial would have been materially affected. *State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159, *cert. denied* 419 U.S. 1093 (1974).

The appellate court reviews evidentiary rulings under the abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999); *United States v. Soulard*, 730 F.2d 1292 (9th Cir. 1984). "An abuse of discretion occurs only when the decision or order of the court is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

Speed Estimate

Evidence Rule 701 governs lay witness testimony:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

Wash. R. Evid. 701.

“[T]he trial court is vested with wide discretion under ER 701.” *State v. Kinard*, 39 Wn. App. 871, 696 P.2d 603, *review denied*, 103 Wn.2d 1041 (1985). The rule is intended to emphasize what a witness knows rather than how the witness expresses his or her knowledge (Comment 701, WASH. CT. RULES at 131 (1999)). It assumes a witness will testify to observations but permits the witness to resort to inferences and opinions when such testimony will be helpful to the jury. Washington case law predating the rule held lay opinion testimony admissible in a variety of cases, including opinions regarding the speed of a vehicle. *See, e.g., Clevenger v. Fonseca*, 55 Wn.2d 25, 345 P.2d 1098 (1959) (lay opinion regarding vehicle's approximate speed admissible), *overruled in part on other grounds by, Danley v. Cooper*, 62 Wn.2d 179, 381 P.2d 747 (1963).

It is well settled that any person who has observed a moving vehicle may estimate its speed. *Keyes v. Amundson*, 391 N.W.2d 602 (N.D. 1986). It is an abuse of discretion for a court to prohibit a lay opinion of speed by a witness who observed the vehicle in motion. *Id.* The witness' background and previous experience may factor into the weight given the estimate, but lack of specialized training or experience will not prohibit the opinion from being offered. *Day v. Frazer*, 59 Wn.2d 659, 369 P.2d 859 (1962); *Nicktovich v. Olympic Motor Transit Co.*, 150

Wn. 278, 272 P. 736 (1928); *Hiscock v. Phinney*, 81 Wn. 117, 142 P. 461 (1914).

Officer Vance observed the defendants' motorcycles in motion for a distance of approximately 11 to 12 miles. 1RP at 53. When asked to estimate the defendants' speed during that observation, Officer Vance responded "I approximated they were going well over 120 miles per hour." 1RP at 52. This testimony is clearly based on the witness's perception of the defendant's vehicles in motion as required by ER 701. Officer Vance also gave testimony as to his professional training and experience, thereby increasing the weight that could be given to his lay opinion. He testified that he had completed a full week of traffic training through the Washington State Patrol (1RP at 83), had gone through additional Emergency Vehicle and Operational Control training through his department (1RP at 83) and had conducted traffic based speed contacts in the past (1RP at 52).

The Officer's speed estimate was based on his perception and bolstered by his background, training and experience. The evidence was admissible under ER 701 and established case law.

Further, Kronick and Davis are prohibited from challenging this testimony on appeal as it was not objected to at trial and was invited error.

The defendants made no objection at trial to Officer Vance's lay opinion estimating speed. In fact, defense counsel stated twice on the record that it was permissible for Officer Vance to estimate the defendants' speed. 1RP at 28-29 ("I know the case law is clear that he can give a lay witness opinion of speed based on an estimate..."), 44 ("Under *Spokane v. Knight* and all the other case law, he can give his opinion of the speed..."). The invited error doctrine precludes a party from creating error at trial, then complaining of invited error on appeal. *State v. Belgarde*, 62 Wn. App. 684, 694-95, 815 P.2d 812 (1991), *aff'd*, 119 Wn.2d 711 (1992); *State v. Carlson*, 61 Wn. App. 865, 877, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022, 844 P.2d 1017 (1993). Not only was there no objection to Officer Vance's speed estimate, defendants agreed that it was allowed. Kronick and Davis should not be permitted on appeal to assert its inadmissibility.

There is no basis for defendants' assertions of error created by admission of speed, time, and distance evidence. The initial ruling admitting speedometer evidence was later overruled when the court sustained defendants' objection based on Officer Vance's inability to testify concerning certification of the instrument. 1RP at 44-45. Thereafter the officer's testimony had nothing to do with the device but was based instead on his perception and his ability to estimate the defendants' speed both as a lay

witness and, potentially, as an expert. Foundation for the admission of this testimony was proper as to both forms: lay and expert. Kronick and Davis' focus on speedometer certification issues fails to recognize the fact that Officer Vance gave only admissible opinion evidence based on his observation of the defendants' actions. The testimony was that an officer in a clearly marked law enforcement vehicle, with lights and siren activated, could not keep up with Kronick and Davis as they zigzagged in and out of traffic at speeds of 100-120 miles per hour and passed illegally on a busy main highway in Klickitat County. The jury reasonably found these actions reckless.

The testimony about the "governor" is no different than the defendants' testimony about various aspects of their motorcycles. Officer Vance had personal knowledge that there was a device on his vehicle which limited its ability to go beyond a certain speed, a governor. 1RP at 45-46. This was personal knowledge of a matter that formed the basis of his testimony. *State v. Ortiz*, 119 Wash. 2d 294, 831 P.2d 1060 (1992). This testimony was based on witness perception, i.e. that the governor kicked in at about 103 miles per hour. There is no meaningful difference between this evidence and the defendants' testimony that the exhausts on their motorcycles were loud or that their mirrors did not move.

Speedometer and Governor

Further, Kronick and Davis should be prohibited from alleging error as to any speedometer or governor evidence because proper objections were not made at trial. Therefore, the error has not been preserved for appeal. "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). "The rules set forth ... contemplate that a *timely* objection be made to the reception of the evidence." *State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638 (1966) (emphasis in original). The rule ensures that the trial court is given timely opportunity to avoid error and the necessity of a new trial. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). When a pretrial *limine motion* is granted, and the proponent of the evidence attempts to introduce it in violation of the exclusion order, the opponent must make a timely objection when the evidence is introduced. Otherwise, the objection is deemed waived. *State v. Sullivan*, 69 Wn. App. 167, 171-172, 847 P.2d 953, *review denied*, 122 Wn.2d 1002, 859 P.2d 603 (1993); *Accord City of Bellevue v. Kravick*, 69 Wn. App. 735, 742, 850 P.2d 559 (1993). A timely objection, motion to strike, or other curative action is also required to preserve a claim of error when a witness makes an inadvertent remark or gives an unresponsive answer that violates a pretrial ruling. *State v. Neukom*, 17 Wn. App. 1, 4, 560 P.2d 1169 (1977).

Here, the trial court denied the defense *motion in limine* but limited speedometer testimony to whether Officer Vance's DFW truck had a speedometer, whether it was calibrated, and what he read on the speedometer. 1RP at 28-29. At trial, Officer Vance testified that his DFW truck had a speedometer but that he didn't know if it had been calibrated. 1RP at 43-44. The State then asked Officer Vance if he looked at the speedometer, a question to which the defense objected based on his previous statement that he didn't know if the speedometer was calibrated. 1RP at 44. The trial court sustained the objection. 1RP at 45. The defendants did not object to any other testimony regarding speed which was based on the speedometer or governor, including testimony that defendants assert was admitted in error, i.e. "we were doing approximately 100 miles per hour," "the governor stops at approximately 103 miles an hour[...]" Appellant's Brief 11. In fact, defense counsel questioned Officer Vance regarding the defendants' speed and pacing, thereby eliciting further evidence regarding the speedometer. 1RP at 100, 104, 117-118.

The law is well settled: a clear objection must be made in order to preserve error for appeal. *See, e.g. State v. Fiddler*, 57 Wn.2d 815, 360 P.2d 155 (1961). This includes situations in which a proponent of

evidence either purposefully or in artfully elicits testimony ruled inadmissible in a pretrial motion from a witness. *State v. Neukom*, 17 Wn. App. At 4. Where no objection, motion to strike or request for a curative instruction is made, the error is not preserved and it is within this Court's discretion to deny review of that issue. RAP 2.5(a). This Court should refuse to review for error any evidence of speed based on the DFW speedometer or governor which was not properly preserved for appeal.

Defendant's argue that officer testimony alone is insufficient to support a conviction for speeding, relying on cases such as *Froemming v. Spokane City Lines*, 71 Wn.2d 265, 427 P.2d 1003 (1967). This argument is irrelevant – this is not a speeding case requiring proof of a specific speed. Kronick and Davis were charged with attempting to elude a pursuing law enforcement officer. Speed is relevant to establish the commission of this crime. It is not in and of itself a necessary element to be proved beyond a reasonable doubt. Speed was just one of many factors of reckless driving, the crime of which the defendants were ultimately convicted.

Kronick and Davis also cite numerous cases involving airplanes and speed traps. Those cases are not relevant to the facts of this case.

This is a case of reckless driving and eluding where an officer was following two motorcyclists. The officer testified to the defendants' estimated speed based on his trained and experienced opinion. The jury could just as easily have found the appellants guilty based solely on the totality of the defendants' acts without the officer's speed evidence. The defendants themselves admitted to traveling more than twenty miles per hour over the posted speed limit of 60 miles per hour. Even if this court were to find the speed evidence inadmissible, its erroneous admission would be harmless. There is no reasonable probability that the outcome of the trial would have been different had it not been admitted given the other evidence: defendants' admitted speed of over 80 miles per hour, the illegal passing and lane changing, etcetera. *See, e.g. State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159, *cert. denied*, 419 U.S. 1093 (1974).

2. THE DEFENDANTS WERE AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL

Kronick and Davis argue that if this Court finds that the issues they have raised were not properly preserved for appeal, trial counsel was ineffective. Brief of Appellant at 1.

Defendants have failed to show either that trial counsel's performance was deficient or that they were prejudiced by such deficient performance.

They have thus failed to overcome the strong presumption that counsel was adequate and efficient. Therefore their convictions must be affirmed.

To establish ineffective assistance of counsel, a defendant must show not only that counsel's performance was deficient, but also that the deficient performance resulted in prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P. 2d 1251 (1995). To establish ineffective assistance, a defendant must overcome a strong presumption that his counsel's representation was adequate and effective. *Id.* To show prejudice, a defendant must show within reasonable probability that, absent defense counsel's deficient performance, trial outcome would have been different. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004)

To prove deficient performance, a defendant cannot rely upon trial strategy and/or trial tactics. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). This is especially true of allegations that counsel failed to object – deciding whether and when to object to the admission of evidence is “a classic example of trial tactics.” *State v. Madison*, 53 Wn. App 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989).

A reviewing court need not find that the challenged conduct was based upon a specific strategy or tactic, but only whether the challenged

conduct “can be characterized as legitimate trial strategy or tactics.” *State v. McNeal*, 145 Wn. 2d 352, 362, 37 P. 3d 280 (2002).

Here, defendants’ allegation that trial counsel was ineffective is without factual basis. The record is clear that counsel made a well reasoned motion to exclude the use of any information gathered by the officer from his speedometer. The court initially allowed the State to present this testimony. After the officer testified that he did not know whether the device had been calibrated, trial counsel again raised the issue by objecting to speed testimony based on the speedometer. That objection was sustained. There was no further mention of the speedometer. Trial counsel effectively eliminated evidence gathered from this device.

Defendants’ acquittal on the felony eluding charge is even stronger evidence of counsel’s competence. The defendants were convicted of reckless driving, a gross misdemeanor, despite evidence that they traveled 100-120 miles per hour in a 60 mile per hour zone while passing vehicles on blind corners and in no passing zones. Defendants’ themselves admitted to traveling 25 miles per hour over the legal limit. Defense counsel convinced the jury that his clients were credible when they claimed to be unaware of Officer Vance in hot pursuit. There is nothing in the record indicating that counsel was ineffective. Rather, the record is

replete with actions taken to present an effective defense. The ultimate proof of effective performance is that his two clients walked out of the courtroom without felony convictions.

3. THE DEFENDANTS' LIST OF NON-MERITORIOUS CLAIMS DOES NOT EQUAL CUMULATIVE ERROR.

Defendants allege that application of the cumulative error doctrine results in reversible error; that the effect of all alleged errors combined denied them a fair trial. Brief of Appellant at 3 (Assignment of Error 15). Because the errors, if any, were not prejudicial to the defendants the cumulative error doctrine does not apply and defendants' convictions should be affirmed.

The doctrine of cumulative error recognizes the possibility that numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant a fair trial. *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998). Only the accumulation of prejudicial errors can amount to cumulative error. *See State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990). Non-prejudicial errors will not combine to mandate reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice.

Id. (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

Because there has been no showing of error there is no basis for this Court to even consider cumulative error. If this Court finds error, it should also find such error harmless and non-prejudicial. Cumulative error does not apply. Kronick and Davis have failed to set forth anything with factual basis in this record which would affect the outcome of their trial. Speed evidence was properly placed before the trier of fact. Because there was no error, and if this Court finds error it should be recognized as harmless, the cumulative error doctrine does not apply and Kronick and Davis’ convictions must be affirmed.

4. THE TRIAL COURT DID NOT ABUSE ITS’ DISCRETION IN SENTENCING THE DEFENDANTS AS THE SENTENCING REFORM ACT DOES NOT APPLY TO NON-FELONIES AND THE SENTENCE GIVEN WAS WITHIN THE PERAMITERS ALLOWED FOR THE CRIME BY STATUTE.

Kronick and Davis argue that the sentence given them by the trial court was disproportionate and excessive, resulting in a “trial tax” and a felony eluding sentence on a conviction of reckless driving. Brief of Appellant at 3 (Issue 16). The sentence must be affirmed because the Sentencing Reform Act (SRA) does not apply to non-felonies and because the sentence given was

within the range specified for the crime the defendants were convicted of.

The Sentencing Reform Act of 1981, RCW 9.94A, *et seq.*, provides that felons must be sentenced within a range determined by the seriousness level of the crime and the criminal history of the defendant. The SRA applies only to the sentencing of felony offenders. RCW 9.94A.010.

Reckless Driving, the crime both Kronick and Davis were convicted of by a jury of their peers, is classified as a gross misdemeanor. RCW 46.61.500. It is punishable by "imprisonment of not more than one year and by a fine of not more than five thousand dollars." *Id.* Because reckless driving is not a felony offense, the SRA does not apply.

The trial court is allowed the discretion to sentence an individual within the range set forth by law. *State v. Smith*, 93 Wn.2d 329, 610 P.2d 869, *cert. denied sub nom. Smith v. Washington*, 449 U.S. 873, 101 S. Ct. 213 (1980). "Appellate courts may review a trial court's imposition of sentence for abuse of discretion. Discretion is abused only when it can be said no reasonable person would adopt the view which was adopted by the trial court." *State v. Derefield*, 5 Wn. App. 798, 491 P.2d 694 (1971).

Action is excessive if it "goes beyond the usual, reasonable, or lawful limit." Thus, for action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for

untenable reasons, or an action that no reasonable person would have taken. *State v. Strong*, 23 Wn. App. 789, 794, 599 P.2d 20 (1979).

At the sentencing hearing, a rational basis was given for the sentence imposed. The Court noted that although Kronick and Davis were acquitted of the more serious charge, they were found guilty of reckless driving, a crime which the Court referred to as a “very serious offense.” 3RP at 8. The State requested a sentence of 45 days in jail. 3RP at 4. In pronouncing sentence, the Court described the driving of the defendants as “abhorrent” and stated that it “almost shocked [his] conscience in a way.” 3RP at 9. For this reason, the Court sentenced both Kronick and Davis to a 30 day jail sentence, fines and assessments. 3RP at 9, 15. The Court had the ability to sentence the defendants to anywhere within the prescribed range for the charge they were convicted of; up to one year in jail and a five thousand dollar fine. The Court stated on the record the basis for the sentence, and the sentence was within the limitations for the crime the defendants were convicted of. If sufficient reasoning was given the court could have sentenced Kronick and Davis to the full term of 365 days and five thousand dollars and the sentence wouldn’t have been “outside the standard range” or, in other words, an “exceptional sentence.” There is no error to impose a higher sentence when convicted, as here, to a “lesser”

crime. The law allows the trial court judge that discretion. *State v. Bowen*, 51 Wn. App. 42, 751 P.2d 1226 *review denied*, 111 Wn.2d 1017 (1988).

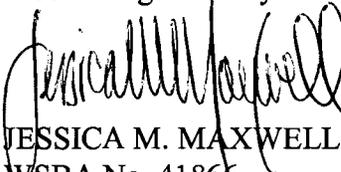
E. CONCLUSION

For the foregoing reasons, Kronick and Davis' conviction and sentence should be affirmed.

DATED March 28, 2011.

Respectfully submitted,

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