No. 30220-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

Jona R. Zeigler, Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Court should affirm Ms. Zeigler's conviction with special verdict despite her assertion that her absence during a 3.5 hearing on the admissibility of her statements at trial violated her right to due process on several grounds. First, a 3.5 hearing is procedural meant to safeguard constitutional rights with judicial efficiency rather than having constitutional magnitude itself. Ms. Zeigler cannot raise the issue for the first time on appeal and she waived her right to be present by never raising the issue at trial. Second, Ms. Zeigler's attorney, being authorized to make strategic decisions regarding a 3.5 hearing, including whether to waive the hearing altogether, waived Ms. Zeigler's presence by telling the court that is how she wanted to proceed. Third, Ms. Zeigler's due process rights were not violated because in the totality of the circumstances, her lack of presence does not meet the test of reasonably substantial relation to her defense, a 3.5 hearing is the type of proceeding where there is no due process right to be present, and Ms. Zeigler has not alleged any information upon which a due process claim could be based. Fourth, given the great deal of evidence, the voluntariness of the statements, and the fact that virtually none of the evidence in the State's case refuting the

defense's theory of the case relied on Ms. Zeigler's statements, any error was harmless beyond a reasonable doubt.

I. STATEMENT OF THE CASE

On January 24, 2011 in Moses Lake, Corporal Tufte came into contact with Jona Zeigler, the Appellant, while she was sitting in her running vehicle. RP 126; 135. His assigned car was equipped with a camera that recorded the later part of the encounter. RP 130. Corporal Tufte recognized Appellant from a picture and knew there was a warrant for her arrest. RP 129. After initially denying who she was and then admitting it, she starting talking about not wanting to go to jail. RP 136. Ms. Zeigler then put the vehicle in reverse, weaved around the patrol car, and made a left out of the parking lot. RP 139.

Corporal Tufte immediately got into his car and began to follow her and turned on his lights and siren upon exiting the parking lot. RP 144-145. Corporal Tufte was close enough at the time Appellant made a left turn from Broadway onto Burress to see her make that turn. RP 149. He witnessed that during that turn she missed the car in front of her by "a foot or two at most" and cut off an oncoming car "almost head-on." RP 150.

After Corporal Tufte followed Ms. Zeigler through numerous turns in a residential area, the "chase" ended when Appellate attempted to get out

of her vehicle while it was still moving and it rolled on top of her. RP 153-154.

On August 3, 2011, the court held a 3.5 hearing in the case against Jona Zeigler. 8/3/11 RP 3. At this time, the court asked if Ms. Zeigler was present. *Id.* Her attorney responded that she was not, but that she was ready to proceed, that she had requested that Ms. Zeigler be present that day, but "given the nature of the hearing in her absence I will proceed." *Id.* There were two sets of statements made by the defendant in this case. *Id.* at 8. One to Corporal Tufte before any eluding or reckless driving was alleged to have taken place and one to Sergeant Adkinson ten days after that while Ms. Zeigler was in the hospital. *Id.* at 8-9.

The State began by examining a witness regarding statements Ms. Zeigler made to Corporal Tufte. *Id.* at 4-6. Ms. Zeigler's attorney stated that she was not challenging the statements her client made to Corporal Tufte because she was not in custody at that time and thus there was no custodial interrogation. *Id.* at 9-10. Rather, Appellant's counsel was challenging only the statements made to Sergeant Adkinson after the incident. *Id.* In an "abundance of caution," the State entered a transcript of an interview done with Corporal Tufte rather than accept Appellant's attorney's stipulation. *Id.* 12-14. This transcript was provided to Appellant in discovery. *Id.* at 15.

As to the statements made to Sergeant Adkinson, the court found that there was "not any way" to find that Appellant's waiver of her *Miranda* rights was not knowing and intelligent. *Id.* at 38. The court based that on the evidence that she was read her rights, that she responded, and said she wanted to waive her rights in an appropriate way. *Id.* at 39. Further, the court found that the State had met its burden of proof that Ms. Zeigler was capable of understanding and making the decision. *Id.*

On August 24, 2011, before the trial commenced, the court heard Appellant's request to have a substitute attorney. RP 85. She based this on her assertion that her attorney, Ms. Oglebay told her the trial would not occur until the following Monday and did not call her to tell her otherwise, so she scheduled a job out of town during the scheduled trial. RP 85-86. When her attorney informed her that the trial would be the Wednesday before, as Ms. Zeigler had been informed by the judge, the two argued and Appellant became upset. RP 85-86. The court questioned Appellant on whether she was present at the readiness hearing (and therefore knew the case was subject to being called that Wednesday), if she had prior opportunity to discuss the case with her attorney, and whether anything would have been different had her attorney not made the alleged statements. RP 88. Appellant's attorney stated that the two had had "numerous discussions over the phone, in my office, [and] regarding the

plea..." RP 97. The court indicated that it did not think Appellant's assertions affected the case in "any significant way," (RP 97), but it did have misgivings about one strategic decision of the attorney (RP 98), so the court considered the defendant's complaint to be pending. RP 102.

On August 25, 2011, court began with denying Appellant's request to declare a mistrial and appoint other counsel because the strategic decision of her attorney had not prejudiced the defendant in the presentation of her defense. RP 182-183.

At this time, and in the Ms. Zeigler's presence, the Findings and Conclusions of Law ("Findings") from the 3.5 hearing were entered. RP 184. Neither Ms. Zeigler nor her counsel made any objection to the Findings at that time. *Id.* In fact, they were agreed and Appellant's attorney wrote them. RP 7. Then, "[i]n an abundance of caution," a statement made to Sergeant Adkinson was addressed once again so that Ms. Zeigler's counsel could argue its exclusion outside the hearing of the jury. RP 184-185. The court ruled that a portion of the statement be excluded as prejudicial, but allowed the statement that the defendant ran because she did not want to go to jail. RP 190. Again Ms. Zeigler did not object to the admissibility of Adkinson's statements other than her attorney's objection that a portion of the statement was prejudicial.

During Sergeant Adkinson's testimony, he testified about the statements and the conditions under which they were made. RP 192-199. Ms. Zeigler heard Adkinson assert that she was "lucid," (RP 194) "coherent," (*Id.*), and that she understood what was going on (RP 195). She did not contradict any of these statements during her direct testimony even though it would have been in the best interests of the "defense theory of the case" for her to do so if they were inaccurate. She also did not object during Sergeant Adkinson's testimony or cause her attorney to do so. When her attorney asked on cross-examination whether he had asked Ms. Zeigler when she first heard sirens or saw overhead lights, the Sergeant Adkinson stated he had not. RP 200.

During the trial, Ms. Zeigler admitted that she was eluding for at least a portion of time. RP 207. Ms. Zeigler also admitted that she didn't stop for a stop sign in a residential area or even slow down after she knew that Corporal Tufte was signaling for her to stop. RP 209-210. She could not recall the fence on the left side of the street that would have impeded her vision as she approached that stop sign. RP 215-216.

Ms. Zeigler's attorney did not attempt to argue that Ms. Zeigler was not eluding citing her client's own testimony. RP 242. Instead, she based her argument there being a reasonable doubt that Ms. Zeigler had seen or heard a signal to stop prior to her endangering others, which would result

the jury not finding the State had not proved the special allegation. RP 242-247.

The State's main arguments that Ms. Zeigler had either heard the siren or saw the signal were (1) "she knew right there in the parking lot that she was not free to go," (RP 237) and thus "had a pretty good idea that he was going to come behind her," (RP 238); (2) that many other cars could see/hear the signals and were getting out of the way on Broadway (RP 238); (3) the siren was "toggling" "between the three different pitches" one of which went through two subwoofers that "only goes for ten seconds because it's got a kind of base you hear in your teeth," (RP 238); (4) and that the defendant could see or knew the Corporal Tufte was following her because "Otherwise, why would she have driven so fast [on Broadway]," and "Otherwise, why make the left turn," (RP 238-239).

After going back to deliberate, the jury sent back the question, "If we find her eluding in the parking lot, then we can't find her for reckless Count II?" RP 251. The court acknowledged that the "question betrays more than a usual misunderstanding perhaps of the Court's instructions." RP 251. Thus, it asked the attorneys input on how to respond and gave an additional instruction that broke down the charge of eluding into sequential steps as well as referring the jury back to Instruction Number 8. RP 264-265.

The jury found Ms. Zeigler guilty of eluding (RP 267), not guilty of reckless endangerment (RP 269), and answered "yes" to the special verdict question of whether Ms. Zeigler threatened a person other than herself and Corporal Tufte with physical injury or harm during the commission of the crime of attempting to elude (RP 271).

III. ARGUMENT

1. EVEN IF MS. ZEIGLER HAD A RIGHT TO BE PRESENT AT THE SUPPRESSION HEARING, IT WAS WAIVED BY HER AND BY HER ATTORNEY.

A. Because a 3.5 hearing is not of constitutional magnitude, Ms. Zeigler waived her right to be present at the suppression hearing, and her ability to appeal the issue, when she did not raise the issue at trial.

"The purpose of a pretrial confession hearing under CrR 3.5 is to allow the court, prior to trial, to rule on the admissibility of sensitive evidence" outside the hearing of a jury. *State v. Fanger*, 34 Wn. App. 635, 637, 663 P.2d 120 (1983) (citing *State v. Taylor*, 30 Wn. App. 89, 92, 632 P.2d 892 (1981)). It is not meant to be of "constitutional magnitude," but is a "procedural device" and thus may be "waived if done knowingly and intentionally. *Id.* (citing *State v. Myers*, 86 Wn.2d 419, 425-26, 545 P.2d 538 (1976); *State v. Woods*, 3 Wn. App. 691, 697, 477 P.2d 182 (1970)).

In *State v. Williams*, 137 Wn.2d 746, 975 P.2d 963 (1999), the court held because violations of "mere procedural requirements" of 3.5 hearings (such as not advising the defendant that he had the right to testify at the

3.5 hearing) were not "constitutional errors," the defendant could not raise the objection for the first time on appeal. *Id.* at 173-174. The court went on to state that the right protected by a 3.5 hearing is the assessment of the voluntariness of an incriminating statement prior to its admission to trial, and if that right is not jeopardized, there is no constitutional error.

Tellingly, CrR 3.5(b) clearly states that the court fulfill this "mere procedural requirement" with forceful language: "It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement." There is no discussion of the defendant's right or necessity of presence within CrR 3.5. Similarly, a 3.5 hearing is not listed as one of the times a defendant's presence is "necessary" in CrR 3.4(a)..

Ms. Zeigler should be barred from raising this issue on appeal. She did not raise this issue during the trial despite being present throughout and addressing the court personally about her many complaints regarding her representation. If not being told one has a right to testify does not jeopardize the assessment of voluntariness of an incriminating statement where the case turned on that admission, more cannot be said here, where Ms. Zeigler's statements are tangential to the defense's theory of the case and Appellant did not bother to testify about those statements either to mitigate them or discredit them. The voluntariness of one set of statements

was so obvious that defense counsel was willing to stipulate. The court had the opportunity to fairly to assess the statements outside the hearing of the jury. Appellant was present when the Findings (written by her attorney) were entered and when one of the statements made Sergeant Adkinson's was again addressed without the jury and did not raise any objections.

In *Fanger*, 34 Wn. App. at 638, the court found that the defendant "impliedly waived his rights under CrR 3.5…by failing at trial to raise the issue of invalid express waiver and to object to the officers' testimony. (Citing *Myers*, 86 Wn.2d at 427 and *State v. Woods*, 3 Wn. App. at 697); *Cf. State v. Nogueira*, 32 Wn. App. 954, 650 P.2d 1145 (1982) (defendant objected at trial to admission of his statements without CrR 3.5 hearing being held).

Even if this issue is not barred by Appellant's failure to raise the issue at trial, Appellant impliedly waived her rights under CrR 3.5 by not objecting to the testimony or raising the issue of her absence.

B. Ms. Zeigler's attorney had the authority to waive Ms. Zeigler's presence at the 3.5 hearing and did waive any right to be when she agreed to proceed without Ms. Zeigler's presence.

A 3.5 hearing is a procedural matter to which an attorney is impliedly authorized to stipulate and waive. *Fanger*, 34 Wn. App. at 637. An express waiver of 3.5 by the defendant on the record is not required. *State*

v. Johnson, 35 Wn. App. 380, 385-386, 666 P.2d 950 (1983) ("While an express waiver of the CrR 3.5 hearing by the defendant on the record would have been the preferable course, we know of no authority for the proposition that when trial defense counsel feels a defendant's statements will be helpful to the defense, a CrR 3.5 hearing must be held nonetheless.") In fact, a defendant's counsel has the authority to waive a 3.5 hearing on defendant's behalf, and a waiver is not invalid, even if the record does not show that the attorney consulted with his client before waiver. *Fanger*, 34 Wn. App. at 637.

In *Johnson*, the court held that where defense counsel deliberately made the decision as a matter of trial strategy to waive the hearing and possible objections to admissibility of the defendant's statements, failure to hold such a hearing was not in error. *Id.* The court agreed with another case that to hold otherwise, "would enable counsel for a defendant to try one strategy by deliberately using…evidence that could be claimed to be constitutionally tainted and then, if not satisfied with the result, to get a second trial by claiming that the constitutional taint requires a reversal in spite of his tactical decision." *Id.*

Waiving a defendant's presence at a 3.5 hearing certainly has less impact, and is more procedural, than waiving the 3.5 hearing in its entirety. Appellant's attorney had implied authority to waive part of the

hearing and stipulate to admissibility. She still brought the main argument against admissibility of statements to Sergeant Adkinson to the court's attention and the court considered it outside the presence of the jury. Given that Appellant's attorney could have waived the 3.5 hearing without proof she consulted her client (though Appellant's attorney alleged that they had multiple discussions about the case), she was certainly able to make the tactical decisions she made at the 3.5 hearing without her client's presence.

2. MS. ZEIGLER'S ABSENCE AT THE SUPPRESSION HEARING DOES NOT VIOLATE HER RIGHT TO DUE PROCESS BECAUSE IT DOES NOT HAVE A REASONABLY SUBSTANTIAL RELATION TO HER ABILITY TO DEFEND AGAINST THE CHARGE.

"The core of the constitutional right to be present is the right to be present when evidence is being presented." *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (citing *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). A defendant has the right to be present at proceedings where his or her presence has a "reasonably substantial relation 'to the fullness of his opportunity to defend against the charge . . . .'" *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934) (overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

"[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder*, 291 U.S. at 107-08. Thus, the defendant need not be present "when presence would be useless, or the benefit but a shadow." *Id.* at 106-107. "The exclusion of a defendant from a … proceeding should be considered in light of the whole record." *Gagnon*, 470 U.S. at 526-27.

Appellant's absence from the CrR 3.5 hearing did not have a reasonably substantial relation to the fullness of her opportunity to defend against the charge and a fair and just hearing was not thwarted by her absence. Appellant had full opportunity to offer refuting or mitigating evidence to her admitted statements during her trial, but did not exercise that opportunity. Her attorney argued for suppression of the statements made to Sergeant Adkinson on the best grounds possible and was correct that there was no argument that the statements to Corporal Tufte were not voluntary as she was not in custody at the time. The courts were written by the defendant's own attorney and the statements had little bearing on the defense theory of the case.

A defendant does not have a Due Process right to be present during in-chambers or bench conferences on legal matters which do not require a resolution of disputed facts. In *State v. Bremer*, 98 Wn.App. 832, 991 P.2d

118 (2000), discussions involving proposed jury instructions were not a critical stage of the proceedings, and the court found important that defendant was fully represented by counsel at the hearing. Thus, the defendant's absence in that case had no reasonable relation to his opportunity to defend. In *Pers. Restraints of Pirtle*, 136 Wn.2d 467, 428-84, 965 P.2d 593 (1998), the court stated that a defendant "does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters." In *Pers. Restraint of Woods*, 154 Wn.2d 400, 432-33, 114 P.3d 607 (2005) (overruled on other grounds *State v. Woods*, 143 Wn.2d 561; 23 P.3d 1046 (2001), the court held that a defendant's presence is not required in a meeting about juror misconduct where his attorney stated the defendant's presence was not necessary. Finally, in *State v. Sublett*, 156 Wn.App. 160, 182-183, 231 P.3d 231 (2010), the court held that a defendant did not have a right to be present at the trial court's in-chambers conference addressing a purely legal issue and did not require the resolution of disputed facts.

A suppression hearing does not require the resolution of disputed facts. In *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972), the Court found that the State only has to prove that a confession is voluntary by a preponderance of evidence because "the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with

improving the reliability of jury verdicts." *Id.* at 486. The Court has "repeatedly pointed [out] that the interests underlying a voluntariness hearing do not coincide with the criminal law objective of determining guilt or innocence." *United States v. Raddatz*, 447 U.S. 667, 677-678, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980). Therefore a 3.5 hearing bears more resemblance to a bench conference than it does to a trial. It does not involve a presentation of the evidence as considered by the Due Process Clause and that clause does not require the defendant's presence.

Even if Appellant should have been present, a defendant "must demonstrate how his presence was necessary to secure his due process rights; prejudice will not be presumed." *State v. Wilson*, 141 Wn.App. 597, 604, 171 P.3d 501 (2007) (citing *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 307, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994). Ms. Zeigler has offered no facts to support her assertion of a due process violation. Her counsel was able to make her argument for suppression, even though not even attorney presence or argument are necessarily required by the Due Process Clause. *Id.* at 605. Like *Wilson*, Appellate tries to argue that she "may have been able to offer information to counsel that would have been relevant," but that reasoning has been already been rejected as not rising "to the level of showing her presence bore a reasonably substantial relation to the fullness of [her] opportunity to

defend [herself], or that a fair and just hearing was thwarted by [her] absence. *Id.* Speculation and allegations are not enough to support a due process violation. *See, e.g. United States v. Kenrick*, 221 F.3d 19, 33 (1st Cir.). When Ms. Zeigler had the opportunity to give additional information as one of the statements was being considered for admissibility in her presence and when she was testifying, she did not.

3. GIVEN THE EVIDENCE PRESENTED AGAINST MS. ZEIGLER, THE COURT SHOULD STILL AFFIRM THE CONVICTION EVEN IF THERE WAS A CONSTITUTIONAL ERROR BECAUSE THAT ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

"A violation of the due process right to be present is subject to harmless error analysis." *State v. Irby*, 170 Wn.2d 874, 885, 246 P.3d 796 (2011). "[T]he burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt." *Id.* at 886 (citing *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)).

A statement is not rendered inadmissible even in situations where the court fails to hold a 3.5 hearing if the statement is freely given and there is no record of an issue concerning its voluntariness and remand for a 3.5 hearing in such a case is unnecessary. *E.g. State v. McKeown*, 23 Wn. App. 582, 596 P.2d 1100 (1979); *State v. Lopez*, 67 Wn.2d 185, 189-190, 406 P.2d 941 (1965). CrR 3.5 does not apply to noncustodial statements. *State v. DeCuir*, 19 Wn. App. 130, 574 P.2d 397 (1978). In *State v.*

Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997), the court held that "[F]indings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged; and, if challenged, they are verities if supported by substantial evidence in the record." The test for voluntariness is "whether, under the totality of the circumstances, the confession was coerced." *Id.* at 132 (citing *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

Ms. Zeigler's attorney was correct. Ms. Zeigler was not in custody at the time she spoke to Corporal Tufte, there was no custodial interrogation and those statements were voluntary, so there would have been no basis for excluding the statements she made to Corporal Tufte during the 3.5 hearing. Further, rather than Corporal Tufte's testimony or a defense stipulation, the 3.5 hearing on the set of statements he heard consisted of admitting an interview that was provided in discovery that Appellant had ample time to review with her attorney.

As for the statements made to Sergeant Adkinson, Appellant did not challenge the Findings (authored by her counsel) at any time during the trial, even though she was there when they were entered, and is not challenging them on appeal other than vague statements that we do not know what Appellant might have added to the record. Though the issue was argued during the 3.5 hearing, there was substantial evidence

supporting the Findings, including Sergeant Adkinson's testimony that Ms. Zeigler stated that she understood her rights and wanted to waive them. Therefore, these Findings are verities on appeal regardless of Appellant's lack of assertions that would challenge voluntariness.

Appellant argues, "The record is silent as to what testimony Ms. Zeigler might have offered at the hearing," and, "Because Ms. Zeigler was not present at the hearing, she could not know that the findings misrepresented the defense stipulation." Appellant Br. 6. However, there was no misrepresentation; a transcript provided in discovery was entered rather than accepting a defense stipulation and Appellant's attorney wrote the Findings for the 3.5 hearing. Further, Ms. Zeigler was present when those Findings were entered, when the testimony was given, and when there were additional arguments made as to the exclusion of her statements to Sergeant Adkinson.

Appellant did not offer any objection to the statements at any stage nor did she refute them during her testimony. Statements being admitted after a 3.5 hearing does not preclude the defense from presenting its evidence casting doubt on the credibility or weight to be given that evidence. CrR 3.5(d). The absence of this during the trial shows that there was no doubt to cast or, if there was, that the discussion not further the defense's case.

Ms. Zeigler admitted she was eluding and her attorney did not attempt to argue that she was not eluding. The defense's theory of the case was that the special allegation could not be proved because there was reasonable doubt as to when Ms. Zeigler saw the signals or heard the sirens and thus did not begin eluding until after she had made a left turn off of West Broadway, the time of most obvious endangerment. Of the State's four main arguments on this point, *supra*, only the first, that Ms. Zeigler knew she was not free to leave when she first left the parking lot, is even implicated by Corporal Tufte and Sergeant Adkinson's statements. There's no argument against this assertion (this is clearly shown in the video and no argument was made against it at trial), only against it application to the charges (knowing that she was likely to be followed was not enough, the defendant had to have actually seen or heard a signal). The State's other three arguments on this point are completely independent of Ms. Zeigler's statements. Ms. Zeigler's attorney even went so far as to question Sergeant Adkinson on this point directly and he indicated Ms. Zeigler did not say when she first saw the lights or heard the siren.

Alternatively, the jury might have found the special allegation because they found that Ms. Zeigler satisfied the special allegation when she did not stop at the stop sign, at which time she told the jury she was eluding, or that Ms. Zeigler was eluding from the time she exited the parking lot

after getting a signal from Corporal Tufte's person to stop after she began to move her vehicle. Neither of these theories would be affected by Ms. Zeigler's statements to the officers.

Thus, because there is nothing that could come to light in another 3.5 hearing that would make Ms. Zeigler's admitted statements inadmissible, anything exculpatory Ms. Zeigler had to say on this subject would have come up during her numerous opportunities to object to or refute the evidence, the Findings are verities on appeal, and defense's theory of the case was not affected by Ms. Zeigler's admitted statements, the State has proved that any error was harmless beyond a reasonable doubt.

4. THERE IS NO BASIS TO GRANT A NEW TRIAL OR 3.5 HEARING BASED ON THE ARGUMENTS IN THE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

First, Appellant's counsel was not ineffective. *Strickland v. Washington*, 466 U.S. 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984), states that for ineffective assistance of counsel two prongs must be satisfied: the attorney's conduct must be unreasonable and the attorney's acts must have prejudiced the defendant. As that case notes, "scrutiny of counsel's performance must be highly deferential." *Id.* at 689. The trial court already addressed all of Ms. Zeigler's complaints and found that there would be no difference but for the counsel's alleged actions, failing the prejudice prong. Additionally, there is no evidence under a highly

deferential review that Ms. Oglebay's conduct and strategies were unreasonable. In fact, she demonstrated many times during the case that she had a coherent theory and was well-prepared. She also stated that she had discussed the case with Ms. Zeigler on numerous occasions.

Secondly, the instructions to the jury do not warrant a new trial. Jury instructions are sufficient if they allow the parties to argue their theory of the case and, when read as a whole, properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999) (citing *State v. Rice*, 110 Wn.2d 577, 603 757 P.2d 889 (1988)). A trial court's refusal to give an instruction based on the facts of the case is a matter of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996). Though Appellant argues that the instructions were confusing, they were clear enough and complete enough to allow both sides to argue their case. When the jury expressed confusion, the court added an additional instruction and failure to add additional, clarifying instructions was within his discretion. He did not abuse that discretion as evidenced by the jury's finding Ms. Zeigler guilty beyond a reasonable doubt on one, but not another, count.

Thirdly, it is irrelevant whether Ms. Zeigler began on private property. Washington courts have never addressed whether eluding may only occur on public land or highways. This is probably because it is not a

requirement of the statute. It is unlikely that the legislature would to want to allow a defendant to escape prosecution because they eluded across private property rather than staying on public highways. Most statutes that are limited to public highways are civil rather than criminal matters (for example, assault, trespass, theft, possession of illegal substances, etc. are all illegal on private property).

IV. CONCLUSION

For the reasons set out above, the State respectfully requests that the Court affirm the trial court's conviction, including the special verdict, and has several legal bases to do so. A 3.5 hearing is not of constitutional magnitude and Ms. Zeigler failure to raise the issue during trial bars her from raising the issue on appeal. Ms. Zeigler also impliedly waived her right to be present at the 3.5 hearing by never raising the issue at trial. Ms. Zeigler's attorney also waived her presence and was legally able to do so, so Ms. Zeigler cannot attack this decision on appeal. Ms. Zeigler's due process rights were not violated because neither the type of hearing nor her (lack of) assertions entitle her to consideration under that right. Further, under the totality of the circumstances, Ms. Zeigler's lack of presence was not have a reasonably substantial relation to her defense. There was a great deal of evidence against Ms. Zeigler in this case, including a video of Ms. Zeigler's conduct. At no time during trial did Ms.

Zeigler mitigate her statements, refute the voluntariness of those statements, nor offer additional evidence on their credibility. The defense theory of the case was largely independent of these statements. Thus, any error was harmless beyond a reasonable doubt. None of the additional bases requires the Court to remand for a new trial or 3.5 hearing. Therefore, the Court should affirm the conviction and special verdict.

DATED: November 27, 2012

Respectfully submitted:
D. ANGUS LEE,
Prosecuting Attorney

Elise Abramson

Elise Abramson, WSBA # 45173
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, vs. JONA RENEE ZEIGLER, Appellant.	)	No. 30220-2-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Janet Gemberling
admin@gemberlaw.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Jona R. Zeigler
22220 Rd 22 NE
Marlin WA 98832

Dated: November 28, 2012.

Kaye Burns