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Court of Appeals
Division III
State of Washington

No. 30236-9-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ELUTERIO MORFIN-CAMACHO

Appellant.

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

The Honorable Judge Craig Matheson

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Eluterio Morfin-Camacho was convicted of second-degree taking a motor vehicle without permission, second-degree malicious mischief and failure to stop/hit and run. He allegedly committed these crimes when trying to escape and get help after having been stripped naked and robbed at gunpoint by two unknown men in the middle of the night outside of Pasco, Washington. The court found that it was reasonable after the attack for the defendant to seek safety inside a farm warehouse, but the court did not find it necessary to take a truck that was inside the warehouse and drive through a door back to town to seek help.

The issues in this case are whether reversal is required because (1) the court failed to enter written findings of fact on any of the mental culpability elements for any of the crimes; (2) the charging document was deficient; (3) there is insufficient evidence to support any of the crimes; and (4) defense counsel was ineffective for failing to argue in the alternative the defense of duress.

B. ASSIGNMENTS OF ERROR

1. The court erred by entering finding of fact 2 that the defendant “rammed” the potato truck through the warehouse door. Defendant drove the truck through the door, but no evidence established that he “rammed” it through the door.
2. The court erred by entering finding of fact 3, which was not supported by the evidence or the legal standard to convict for failure to stop after damaging property.

3. The court erred by entering finding of fact 6 as this was contrary to the court's oral findings and conclusion of law number 1.
4. The court erred by entering conclusions of law 1-5.
5. The court erred by failing to enter findings of fact or conclusions of law on the mens rea elements of the crimes
6. The court erred by failing to enter findings of fact or conclusions of law on the elements to support a conviction under RCW 46.52.010(2).
7. The court erred by convicting the defendant pursuant to a deficient charging document.
8. The court erred by convicting the defendant without sufficient evidence.
9. Defense counsel was ineffective for failing to argue the defense of duress.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the court erred by failing to enter findings of fact and conclusions of law addressing the essential elements of the crimes, especially the mens rea elements.

Issue 2: Whether the information charging Mr. Morfin-Camacho with "failure to stop and identify at the scene" was legally deficient.

Issue 3: Whether there is insufficient evidence to support Mr. Morfin-Camacho's convictions for failure to stop, taking a motor vehicle without permission and malicious mischief.

Issue 4: Whether defense counsel was ineffective for failing to raise the defense of duress.

D. STATEMENT OF THE CASE

After midnight on the morning of May 22, 2011, Eluterio Morfin-Camacho was in Pasco, Washington, helping his girlfriend Rose “Erica” McKay¹ move a couple miles from Motel 6 to The Airport Motel or the next-door Starlite Hotel. (RP 17, 89) At some point, he and the woman misplaced a dog, and Mr. Morfin-Camacho approached two Hispanic men in a white vehicle outside the Motel 6 to ask if they had seen it, which they said they had not. (RP 13-14, 18, 22, 50, 68, 90) After locating the animal, Mr. Morfin-Camacho re-encountered the two men as he was leaving the Motel 6. (RP 91-93) They said they were from out of town, asked Mr. Morfin-Camacho for gas money and asked whether he wanted to “party” with them to go drinking and find some girls. (RP 13, 22, 50, 91-93, 114) Mr. Morfin-Camacho agreed, but explained he would need a ride to a friend’s home where he had left his wallet earlier. (RP 93)

The two men followed Mr. Morfin-Camacho and Ms. McKay back to the Airport Motel in their vehicles, although Mr. Morfin-Camacho and his girlfriend had a disagreement while driving and she refused to go with him and the men. (RP 16, 51, 93, 121) At the Airport Motel, Mr. Morfin-Camacho got into the other vehicle with the two Hispanic men. (RP 10, 68) Mr. Morfin-Camacho gave them directions to his friend’s home to

¹ Mr. Morfin-Camacho initially refused to disclose Rose McKay’s true name and referred to her with police as “Erica.”

retrieve his wallet, but the passenger of the vehicle instead pointed a shiny, automatic, black gun at Mr. Morfin-Camacho and then began giving him orders. (RP 14, 19, 51, 95, 122-23)

The men asked Mr. Morfin-Camacho whether he was a “cop.” (RP 51, 68, 95) Initially, he said he a “cop” in hopes of scaring the men, but they ordered him at gunpoint to remove all of his clothing, shoes, jewelry and belongings or they would “blow [his] brains out.” (RP 10-11, 51-52, 68-69, 95-97) He did so as he was afraid for his life. (RP 98) After driving a few miles from the hotel into “the middle of nowhere”, the men pulled off the road near a farm warehouse and ordered Mr. Morfin-Camacho to exit the vehicle. (RP 52-53, 68, 95, 97) He was afraid they would shoot him and, after exiting the vehicle, Mr. Morfin-Camacho ran around the warehouse to find a safe place inside since he was in fear for his life. (RP 64, 78, 80, 97-98) The men drove their vehicle back in the directions toward the Airport Motel, and Mr. Morfin-Camacho was able to get into the potato warehouse under a partially-opened roll-up door. (RP 52-53, 99-100) He tried to locate a phone or lights in the dark warehouse, but was unsuccessful. (RP 99-100)

Mr. Morfin-Camacho did locate a potato-transport semi-truck in the warehouse, and he put on coveralls that he found inside the vehicle. (RP 10-11, 26, 54, 68-69, 101) He also tried to operate the C.B. radio to

get help, but he was not successful. (RP 54, 68-69, 101) Mr. Morfin-Camacho then heard a vehicle driving outside, and, fearing that the two men “would come back and finish me,” he drove the potato truck through the roll-up door and back to the Airport or Starlite Motel to find his girlfriend and get help. (RP 10-11, 48, 52-55, 68-70, 100, 102, 103, 112, 117, 129) Mr. Morfin-Camacho did not know what other options he had as time was “clicking” by and he was afraid for his life. (RP 117) Over \$1,000 damage was caused to the truck in this process. (RP 9, 11, 24-25, 43, 45; Exhibits 1-4)

The manager at the Airport Motel heard Mr. Morfin-Camacho outside trying to drive the truck, causing minor damage to a balcony at the motel. (RP 31, 34, 55) Mr. Morfin-Camacho was quite agitated, did not have any shoes, appeared scared, told the manager that two men had tried to kill him and asked the manager for the phone. (RP 31-32, 41, 103, 104) The manager did not want to get involved and told Mr. Morfin-Camacho to move the truck because he was about to hit the building. (RP 33, 40-41, 104) Mr. Morfin-Camacho moved the truck to the next-door gas station. (RP 104) He then asked someone else at the motel to call the police, but the person did not want to get involved with police and only allowed Mr. Morfin-Camacho to use the phone to contact a friend for help. (RP 105) Mr. Morfin-Camacho called the friend, and, while awaiting his friend’s

arrival, police arrived shortly thereafter at about 5:15 a.m.; police apparently had been summoned by the motel manager, who had tried to remain anonymous. (RP 8, 18, 40-41)

Mr. Morfin-Camacho explained to several different officers what had happened that morning and showed them the potato warehouse. (RP 15-16, 47, 105) He still had the keys to the truck, had no shoes and appeared very excited. (RP 10-11, 16) Some of the circumstances described by Mr. Morfin-Camacho did vary slightly between discussions with different officers, and Mr. Morfin-Camacho became increasingly agitated during interviews with the various law enforcement officials. (RP 56-57) There were slight variations in the description of the men and the gun, the timing of the various events during those early morning hours, whether Mr. Morfin-Camacho asked the hotel manager to call the police or just to use the phone, at which of the three hotels Mr. Morfin-Camacho contacted the two unidentified men and at which neighboring hotel the girlfriend had been left. (RP 10, 54-55, 56, 70-73, 106-07, 122-23, 126) Also, Mr. Morfin-Camacho refused to reveal the names of his girlfriend or the person at the motel who loaned him a phone and explained that people there did not want to get involved with police. (RP 70-71, 104-05, 115)

Mr. Morfin-Camacho was arrested and charged with malicious mischief, burglary, failure to stop and taking a motor vehicle without permission. (CP 28-29)

A week after Mr. Morfin-Camacho was arrested, he informed officers at the jail that his new cellmate, who had been arrested on gun charges, appeared to be the assailant driver who had abducted him. (RP 58-60, 82-83, 107-09) He could not be certain of the identification since the man in the jail did not have a deformed arm like he thought the driver did who had abducted him, but he insisted that officers investigate and move him to another cell. (RP 61, 107-09, 124-25) Mr. Morfin-Camacho was moved, the other man denied any abduction, and that man was then deported before any further investigation could take place. (RP 82-83)

Mr. Morfin-Camacho ultimately waived his right to a jury against counsel's advice and proceeded to a bench trial. (CP 30) The court heard testimony regarding the above facts from law enforcement, the motel manager, the potato truck driver and manager, the manager of the potato warehouse, and Mr. Morfin-Camacho.

The court found that Mr. Morfin-Camacho was not a credible witness. (RP 132) The court then found that, while it was reasonable for Mr. Morfin-Camacho to enter the warehouse to seek safety when he was robbed at gunpoint, it was not reasonable for Mr. Morfin-Camacho to

drive the potato truck through the door, drive back to the motel in the direction the men had gone, and contact a friend instead of immediately calling the police. (RP 132) The court opined that it was unlikely the assailants would have come back and that the “smart” thing to do would have been to wait in the warehouse until workers arrived to help. (*Id.*) The court found Mr. Morfin-Camacho ‘not guilty’ of burglary, but it rejected his defense of necessity argument and found him guilty of failure to stop, 2nd degree taking a motor vehicle without permission and 2nd degree malicious mischief. (RP 132; CP 7, 20-21) Mr. Morfin-Camacho timely appealed. (CP 4) Additional facts will be referenced as pertinent to the arguments that follow.

E. ARGUMENT

Issue 1: Whether the court erred by failing to enter findings of fact and conclusions of law addressing the essential elements of the crimes, especially the mens rea elements.

Mr. Morfin-Camacho was a victim of violence and acted in a desperate manner in fear for his life. He never contested the fact that he entered the warehouse without permission or took and caused damage to the potato truck and the warehouse in his fearful, agitated state. Instead, he maintained that he did not possess the necessary mental culpability to be convicted because, as the court acknowledged, he had just been robbed at gunpoint and was afraid for his life. Yet the court failed to enter any

findings regarding the mental culpability elements of the various crimes. This error prejudiced Mr. Morfin-Camacho and either warrants reversal or, at a minimum, remand for additional findings.

“In criminal cases tried to the court without a jury, the court must enter written findings of fact and conclusions of law.” *State v. Heffner*, 126 Wn. App. 803, 810, 110 P.3d 219 (2005) (citing CrR 6.1(d)).

“Following a bench trial, the findings of fact and conclusions of law must address each element of the crime separately, and each conclusion of law must be supported by a factual basis.” *Id.* at 810-11 (citing *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003); *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)). “In addition, the findings must specifically state that an element has been met.” *Banks*, 149 Wn.2d at 43 (citing *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995)).

“The purpose of CrR 6.1(d)’s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal.” *Head*, 136 Wn.2d at 621-22. A trial court’s oral opinion is generally insufficient to facilitate appellate review since it is “no more than oral expressions of the court’s informal opinion at the time rendered.” *Id.* at 622 (internal quotations omitted) (“An oral opinion ‘has no final or binding effect unless formally incorporated into the findings, conclusions and judgments.’”)

Generally, “the failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand² for entry of written findings and conclusions.” *Head*, 136 Wn.2d at 624. However, “reversal may be appropriate where a defendant can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same.” *Id.* at 624-25 (e.g., prejudice exists where there is a strong indication that findings on remand were “tailored” to meet the issues raised on appeal.)

Ultimately, “[i]nsufficiency of findings of fact and conclusions of law from a bench trial is subject to a harmless error analysis.” *Heffner*, 126 Wn. App. at 811 (citing *Banks*, 149 Wn.2d at 43). The question is “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* (quoting *Banks*, 149 Wn.2d at 44). *See e.g. Heffner*, 126 Wn. App. at 811 (court found harmless error in omitting finding on necessary element, because the parties there stipulated to five single-spaced pages of facts that supported the missing element so that the reviewing Court had no doubt every element was met); *Banks*, 149 Wn.2d at 46 (failure to find knowledge element constituted harmless error since court’s other findings

² On remand, the trial court may not take any additional evidence, and it is not bound by its earlier decision. *Head*, 136 Wn.2d at 625.

demonstrated that the court had considered and, by inference, found the knowledge element).

Here, the court failed to find the “knowledge” and “maliciousness” elements for malicious mischief, and it failed to find the “intent” element for taking a motor vehicle without permission. Furthermore, the court did not enter any findings of fact as to whether Mr. Morfin-Camacho acted “knowingly,” “failed to take reasonable steps to notify” or damaged property “fixed, placed upon or adjacent to any public highway” in order to support the failure to stop conviction. Also, the court did not enter any findings regarding mental culpability from which these aforementioned elements could be inferred. These mens rea elements were critical in this case since Mr. Morfin-Camacho’s defense was largely based on the fact that he had been the victim of a violent abduction and he did not intentionally, knowingly or maliciously commit the crimes charged (see further discussion in issue 3 below). Without adequate findings, Mr. Morfin-Camacho is at a significant disadvantage understanding the court’s ruling or preparing this appeal.³

³ Mr. Morfin-Camacho has prepared the arguments contained herein to the best of his ability with the inadequate findings, but additional argument(s) may become necessary if the matter is ultimately remanded for further written findings. For example, the prosecutor may have committed misconduct during closing by arguing facts not in the record – namely, that Mr. Morfin-Camacho smelled of alcohol, for which there was no evidence to support such an argument. But, since the court made no finding regarding alcohol and none is expected even if the case is remanded, Mr. Morfin-Camacho respectfully reserves argument on such an issue until and unless prejudice can be shown.

The court's insufficient findings do not constitute harmless error in this case. This case is not like *Heffner* or *Banks, supra*, where the court's other written or oral findings were so thorough that the missing element findings could be inferred. In fact, the trial court's actual findings were inconsistent with the missing element findings. The court found that Mr. Morfin-Camacho had been robbed at gunpoint and acknowledged the defendant's fear. Yet it remained silent on whether Mr. Morfin-Camacho acted maliciously, knowingly, or intelligently, which was critical given the circumstances of this case and the proof required to convict.

Also, the court failed to find that the defendant failed to take "reasonable steps" to notify the owners of the property he had damaged. And, since this case was apparently mistakenly tried under an entirely separate and inapplicable failure to stop/hit and run statute (see issue 2 below), there is no way for the court's missing findings on this particular charge to be extrapolated from elsewhere in the court's decision.

In sum, one cannot conclude beyond a reasonable doubt that the court's omitted findings did not contribute to the verdict obtained. As such, the error is not harmless. Furthermore, given that these omitted findings were the sole source of contention in the case below, Mr. Morfin-Camacho has suffered prejudice in preparing this appeal. Examples of prejudice in preparing this appeal have been highlighted throughout this

brief. The Appellant respectfully requests that this matter be reversed and dismissed given the gravity of the CrR 6.1 error and its impact on preparing this appeal, or that the case be reversed and dismissed based on the evidence sufficiency arguments below. Alternatively, Mr. Morfin-Camacho requests the case be remanded for entry of appropriate findings with the opportunity for further argument if necessary on review.

Issue 2: Whether the information charging Mr. Morfin-Camacho with “failure to stop and identify at the scene” was legally deficient.

The multiple hit and run statutes vary in their elements depending on whether a driver causes damage to another attended versus unattended vehicle, causes damage to property only, or causes death or injury to a person. Mr. Morfin-Camacho was charged with failure to stop and identify at the scene of an unattended accident in which property was damaged (see RCW 46.52.010(2); CP 28), but the charging elements incorrectly conflated the various hit and run statutes. This charging error was exacerbated when the State and defense counsel argued the case based on these misapplied statutory elements, resulting in an improper and unsupported conviction for failure to stop. The remedy is reversal.

“Both the state and federal constitutions guarantee a criminal defendant the right to know the charge against him. To be constitutionally adequate, a charging document must identify the crime charged...” *State*

v. Borrero, 97 Wn. App. 101, 104, 982 P.2d 1187 (1999); Wash. Cont. Art. I, §22; U.S. Const. Amend. VI. “[T]he information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” CrR 2.1(a)(1).

“The ‘essential elements’ rule requires that a charging document allege facts supporting every element of the offense, in addition to adequately identifying the crime charged.” *State v. Sutherland*, 104 Wn. App. 122, 129, 15 P.3d 1051 (2001) (quoting *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). “All essential elements of the charged crime, including nonstatutory elements, must be included in the charging document so that the defendant can properly prepare a defense.” *Id.* (internal citations omitted). “The primary goal of the ‘essential elements’ rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.” *Id.*

When a defendant challenges the adequacy of the information for the first time on appeal, the Court applies the following two-prong analysis: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; if so, (2) can the defendant nonetheless show that the inartful language caused actual prejudice.” *Sutherland*, 104 Wn. App. at 129-30 (internal citations omitted). Under the first prong, “[w]hen an information wholly omits an

element, the remedy is to reverse the conviction and dismiss the charge without prejudice to the State refileing the charge.” *State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212 (2010); *Sutherland*, 104 Wn. App. at 130-31 (“[a]n information omitting essential elements charges no crime at all... when a liberal interpretation of an information does not uphold its validity, a defendant need not show prejudice.”) If the first prong is satisfied – i.e. “if the essential elements appear in the information, though inartfully, under some fair construction...,” – dismissal is still required where the defendant shows that the inartful language caused actual prejudice. *Brown*, 169 Wn.2d at 198-99; *Sutherland*, 104 Wn. App. at 129-30.

Here, Mr. Morfin-Camacho was charged as follows:

“FAILURE TO STOP AND IDENTIFY AT THE SCENE OF AN UNATTENDED A, [RCW 46.52.010], A MISDEMEANOR,
Committed as follows:

“That the said Eluterio Camacho in the County of Franklin, State of Washington, on or about March 22, 2011, then and there, while driving a motor vehicle, with knowledge that an accident occurred, was involved in an accident resulting in property damage to an unattended vehicle or other property, failed to immediately stop his vehicle at the scene of the accident or as close thereto as possible, and locate or attempt to locate, and notify the operator or owner or person in charge of the damaged property of his name and address, or failed to leave in a conspicuous place upon the damaged property a written notice containing his name and address.”

(CP 28)

The charging information above conflated multiple hit and run (i.e. failure to stop) statutes that had no application in this case, and the information never properly charged Mr. Morfin-Camacho with failure to stop after striking property.

A person may be charged with hit and run when the vehicle he is driving collides with “any other vehicle which is unattended” and the driver fails to “immediately stop” and provide notice to the other vehicle’s owner or operator. RCW 46.52.010(1) (emphasis added); WPIC 97.06. A driver may instead be charged with hit and run if the vehicle he is driving collides with another attended vehicle and the driver fails to immediately stop at the scene of the accident or as close thereto as possible or to fulfill certain duties including notification, reporting and rendering aid as needed. RCW 46.52.020; WPIC 97.04. Conversely, a driver who knows an accident has occurred may be charged with hit and run under RCW 46.52.020 where the accident results in injury or death to any person or involving striking the body of a deceased person and the driver fails to “immediately stop such vehicle at the scene of such accident or as close thereto as possible...” or fails in his duties to notify, report or render aid. RCW 46.52.020 (emphases added); WPIC 97.02.

None of the above hit and run subsections or their particular elements applied in this case. Mr. Morfin-Camacho did not cause injury

or death to any person or collide the vehicle he was driving into any other vehicle, attended or unattended, so RCW 46.52.010 subsection (1) and RCW 46.52.020 are inapplicable here. Yet, among other misstated language, the charging information accused Mr. Morfin-Camacho of a crime because he failed to “immediately stop his vehicle at the scene of the accident or as close thereto as possible, and attempt to locate, and notify the operator or owner...or...leave [written notice] in a conspicuous place...” CP 28. This language was improperly extracted from the hit and run statutes that had no application in this case where only property damage was involved.

It appears the State intended to charge Mr. Morfin-Camacho with violating RCW 46.52.010, subsection (2), which states:

“The driver of any vehicle involved in an accident resulting only in damage to property fixed or placed upon or adjacent to any public highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of the name and address of the operator and owner of the vehicle striking such property, or shall leave in a conspicuous place upon the property struck a written notice, giving the name and address of the operator and of the owner of the vehicle so striking the property, and such person shall further make report of such accident as in the case of other accidents upon the public highways of this state.

RCW 46.52.010(2) (emphases added); WPIC 97.07.

The elements of RCW 46.52.010(2) apply when a driver collides with property and are entirely different from the other hit and run statutes that involve collisions with other vehicles or causing injury or death. For

instance, there is no duty to “immediately stop” at the scene of the accident or “as close thereto as possible” to provide notice to the vehicle owner, report the accident or render aid, when only property damage is involved. C.f. RCW 46.52.010(1), (2) and RCW 46.52.020. Instead, the driver who collides with property must merely “take reasonable steps to locate and notify the owner...” RCW 46.52.010(2) (emphasis added). Furthermore, the duty to report the property damage accident is less stringent, since the driver has four days to make the report to law enforcement. See RCW 46.52.030(1).

Here, the first prong inquiry is dispositive. The necessary facts and elements of RCW 46.52.010(2) do not appear in any form, or by fair construction can they be found, in the charging document. For instance, the charging document contains no allegation that Mr. Morfin-Camacho failed to “take reasonable steps to locate and notify the owner [of the property]...” See RCW 46.52.010(2); WPIC 97.07. The charging document conflated the other hit and run statutes, which had no application here, and omitted the essential elements for hit and run that caused property damage. Since the information omitted this essential element, it charged no crime at all. Dismissal without prejudice is required.

The second prong need not be reached since even a liberal interpretation of the charging document does not adequately charge the crime under RCW 46.52.010(2). Regardless, even if the second prong is analyzed, the prejudice to Mr. Morfin-Camacho due to the inadequate charging document cries for reversal.

The court convicted Mr. Morfin-Camacho based on the argument that he failed to immediately stop at the scene of the accident or as close thereto as possible. This was not the correct standard for convicting in this case. There was never any evidence or argument as to whether Mr. Morfin-Camacho took “reasonable steps” to notify the property owner, or whether he would have been able to fulfill his four-day reporting requirement if given the opportunity. Mr. Morfin-Camacho was either convicted of a crime he did not commit – hit and run involving injury or death or a separate vehicle than that which he was driving –, or he was convicted of a crime for which he was never charged, tried with evidence or found to have committed by the court– hit and run involving property damage. There is no other viable option for this conviction but to reverse.

Issue 3: Whether there is insufficient evidence to support Mr. Morfin-Camacho's convictions for failure to stop, taking a motor vehicle without permission and malicious mischief.

There is not sufficient evidence to affirm Mr. Morfin-Camacho's convictions of failure to stop, taking a motor vehicle without permission or malicious mischief.

The State must prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). To determine whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the State to determine whether "any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Romero*, 113 Wn. App. 779, 797, 54 P.3d 1255 (2002) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); *State v. Wilson*, 141 Wn. App. 597, 608-09, 171 P.3d 501 (2007) (citing *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Circumstantial evidence is considered equally as reliable as direct evidence. *Romero*, 113 Wn. App. at 798; *Wilson*, 141 Wn. App. at 608. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997)).

A. Failure to Stop/Hit and Run – property

As set forth in Issue 2 above, a person commits the crime of failure to stop/hit and run – property damage – when:

“he or she is the driver of a vehicle and knowingly collides with property fixed or placed upon or adjacent to any public highway and he or she fails to take reasonable steps to locate and notify the owner or person in charge of such property of such fact and give that person his or her name and address and the name and address of the owner of the vehicle he or she was operating or leave in a conspicuous place upon the property struck a written notice giving his or her name and address and the name and address of the owner of the vehicle he or she was operating and fails to report the accident as in the case of other accidents.”

WPIC 97.09; RCW 46.52.010(2)⁴.

Here, this Court need not reach the evidence sufficiency issue on the failure to stop conviction because Mr. Morfin-Camacho was never properly charged (see issue 2 above). Regardless, even had he been properly charged, there was no evidence, argument or findings as to whether the damaged property was fixed, placed upon or adjacent to any public highway. And, there was no evidence, let alone argument or findings by the court, that he failed to take “reasonable steps” to locate and notify the owner or person in charge of the property.

Under the circumstances of having been abducted, ordered at gunpoint to strip down naked and taken to a dark and isolated warehouse where Mr. Morfin- Camacho thought he would be executed, it cannot be

⁴ C.f., RCW 46.52.010(1) and RCW 46.52.020, failure to stop/hit and run involving a separate vehicle or causing injury or death.

said that he did not take “reasonable steps” after his scared escape since he took police to the warehouse to report the accident as soon as help arrived early that morning, before any property owners even knew of the damage. The court’s focus was on whether Mr. Morfin-Camacho “immediately” or as “close thereto as possible” stopped and notified the property owners. This was the wrong inquiry under the statute. RCW 46.52.010(2) did not require Mr. Morfin-Camacho to immediately stop at the accident scene or as close thereto as possible, but to take “reasonable steps.” There was no evidence or finding on the proper inquiry under the statute to support this conviction.

Finally, it is also interesting to note that RCW 46.52.010(2) and RCW 46.52.030(1) impose four-day time limit reporting requirements for drivers that cause property damage. Here, Mr. Morfin-Camacho was nowhere close to failing in that four-day duty as he was arrested and reported the facts to law enforcement the same day as the accident.

In sum, the evidence failed to support Mr. Morfin-Camacho’s conviction pursuant to RCW 46.52.010(2).

B. Taking a Motor Vehicle Without Permission

“A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any

automobile or vehicle... that is the property of another.” RCW 9A.56.075.

“A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.”

RCW 9A.08.010.

There was not sufficient evidence that Mr. Morfin-Camacho possessed the necessary culpability to be convicted of taking a motor vehicle without permission. To wit, Mr. Morfin-Camacho did not “act with the objective or purpose to accomplish a result which constitute[d] a crime.” RCW 9A.08.010. Mr. Morfin-Camacho had been abducted and his life threatened at gunpoint, a finding that prevented the court from finding him guilty of burglary beyond a reasonable doubt. After seeking safety inside the warehouse, Mr. Morfin-Camacho heard a car driving outside and feared that the assailants had returned to “finish” him off. He took the vehicle to escape in a situation where he felt there were no other choices, and no evidence suggested there was any ulterior objective or purpose for Mr. Morfin-Camacho taking the vehicle.

The State was required to prove beyond a reasonable doubt that Mr. Morfin-Camacho acted with the objective or purpose to accomplish a result which constituted a crime. Instead, the State sought to prove, and the court found, that it was not reasonable or necessary for the defendant to have taken the truck. Whether Mr. Morfin-Camacho’s actions were

reasonable in hindsight is not the proper threshold inquiry under this statute. The State needed to prove that the defendant acted with the objective or purpose to accomplish a result that constitutes a crime, but it never did so.⁵ Mr. Morfin-Camacho did not take the truck in order to commit any crime. He was escaping what he feared were the assailants returning to execute him. There is not sufficient evidence to support this conviction.

C. Malicious Mischief

“A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously...[c]auses physical damage to the property of another in an amount exceeding seven hundred fifty dollars...”
RCW 9A.48.080(1)(a).

A person knows or acts knowingly when:

“(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

“(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.”

RCW 9A.08.010(1)(b).

Malice and maliciously mean an “evil intent, wish, or design to vex, annoy, or injure another person.” RCW 9A.04.110(12). “Malice

⁵ As set forth in Issue 1 above, the court also did not make a written finding on this element, so Mr. Morfin-Camacho’s ability to more thoroughly address this issue is necessarily limited.

may be [but is not required to be] inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.” *Id.*; WPIC 2.13. The trier of fact may, but is not required, to rely on this permissive inference to find malice so long as there is a rational connection between the inferred fact and the proven fact and the inferred fact flows “more likely than not” from the proven fact. *State v. Ratliff*, 46 Wn. App. 325, 330-31, 730 P.2d 716 (1986); *County Court of Ulster Co. v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Comments to WPIC 2.13.

For example, malice was inferred in *Ratliff*— that is, the defendant ‘more probably than not’ acted in willful disregard of the rights of another — where the defendant there continued to pull radio wires loose after he did not succeed in obtaining a radio in the police van, the defendant admitted he was frustrated at the time, and the defendant pulled the officer’s jacket through the window area of the van into the prisoner holding area. *Ratliff*, 46 Wn. App. at 330-31. “Given these facts, the inference of malice flows more likely than not from the conduct of the defendant.” *Id.* at 331.⁶

⁶ *C.f.*, *State v. Johnson*, 23 Wn. App. 605, 608, 596 P.2d 1047 (1979) (permissive inference not allowed under former standard where permissive inference had to flow ‘beyond a reasonable doubt’ from the proven fact, rather than ‘more probably than not’ as set forth later in *Ratliff*, *supra*. In *Johnson*, defendant who was tried for arson argued the

Here, there is not sufficient evidence that Mr. Morfin-Camacho acted knowingly or maliciously, so his conviction for malicious mischief should be reversed. First, a reasonable man would not necessarily believe that escaping from the threat of death by using someone else's vehicle to escape a violent location would constitute a crime. In its oral ruling, the court discussed that the "smart" thing to do would have been to hide in the warehouse until the workers arrived. But, even if this were true, such a finding in hindsight would not establish the knowledge element beyond a reasonable doubt as the proper standard is what facts a reasonable man in defendant's circumstances would have believed constituted a crime. The defendant could not have known that workers would arrive in an hour, and, regardless, there was not sufficient evidence that the defendant knew or even should have known that his actions would constitute a crime.

Furthermore, there was not sufficient evidence that Mr. Morfin-Camacho acted with malice or maliciously. No evidence established that

fire was accidental and that he did not extinguish it because he thought two men outside the door planned to kill him. The Court acknowledged that the State could establish an act wrongfully done without just cause or excuse or an omission of duty betraying a willful disregard of social duty. But, given the circumstances, simply because Johnson should have prevented the fire, it did not automatically follow beyond a reasonable doubt that he caused the fire with an 'evil intent, wish, or design to vex, annoy or injure another person.')

And c.f. City of Bellevue v. Kinsman, 34 Wn. App. 786, 791, 664 P.2d 1253 (1983) (decided under former "beyond a reasonable doubt" standard for permissive inferences, court held: "Given the possibility that a jury could improperly label negligent behavior as malicious under the facts of this case, we find the [permissive inference for malice] to be inapplicable.")

the defendant had an evil intent, wish, or design to vex, annoy, or injure another person. Mr. Morfin-Camacho had no desire to harm anyone's property, and he certainly was not operating with an evil intent. He was operating out of fear for his life upon hearing a vehicle outside the warehouse that he feared meant his doom. There was simply no evidence, let alone a finding of fact, on the element of malice.

Finally, to the extent the court may have relied on the permissive inferences set forth in RCW 9A.04.110(12) to find malice (see Closing Argument VRP pg. 5-6), it would violate Mr. Morfin-Camacho's due process rights for the court to have done so.⁷ Even under the less stringent standard set forth in *Ratliff, supra*, there are not sufficient facts here to support a permissive inference for malice under this "more probably than not standard."

This case is unlike *Ratliff, supra*, where the inference of malice flowed more likely than not from the defendant's actions (defendant there had pulled an officer's jacket through a police van window, defendant continued to pull van wire radios out even when he was not successful in obtaining the van radio he claimed he needed to call for help, and defendant admitted he was 'frustrated' when he did so). Here, there were no such facts from which to conclude more probably than not that Mr.

⁷ It is difficult to ascertain how the court came to its decision since there were no findings of fact or conclusions of law on the malice element.

Morfin-Camacho acted with any ill will or disregard or without just cause or excuse. The inference of malice did not flow more likely than not from the defendant's actions. There were not sufficient facts to find malice beyond a reasonable doubt.

Accordingly, since none of Mr. Morfin-Camacho's convictions are supported by sufficient evidence, he respectfully requests that they be reversed at this time so he can continue to live and work in society without the negative impact of a criminal record.⁸

Issue 4: Whether defense counsel was ineffective for failing to raise the defense of duress.

Defense counsel was ineffective when she failed to raise or argue the defense of duress as an alternative to contesting the State's prima facie case, and instead only relied on the likely inapplicable defense of necessity.

To demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The alleged deficiency cannot be attributed to a legitimate strategic or tactical decision by trial counsel. *State v. Hendrickson*, 129

⁸ Mr. Morfin-Camacho's record reflects a juvenile third-degree nonviolent assault from 1996, but Mr. Morfin-Camacho should be successful in having this record expunged since he had no other offenses until these convictions in 2011. *See* RCW 13.50.050.

Wn.2d 61, 78-79, 917 P.2d 563 (1996). A defendant suffers prejudice if there is a reasonable probability that, but for counsel's performance, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The competency of counsel is based on the entire record, and there is a strong presumption that counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

“Duress is an affirmative defense, which the defendant must prove by a preponderance of the evidence.” *State v. Frost*, 160 Wn.2d 765, 773, 161 P.3d 361 (2007). The defense of duress is available where:

“(a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and

“(b) That such apprehension was reasonable upon the part of the actor; and

“(c) That the actor would not have participated in the crime except for the duress involved.”

RCW 9A.16.060(1). “The defense of duress is not available if the actor intentionally or recklessly places himself or herself in a situation in which it is probable that he or she will be subject to duress.” RCW

9A.16.060(3). The “question whether a threat is imminent is, in all but the clearest of cases, to be decided by the trier of fact after considering all of

the surrounding circumstances, including the defendant's opportunity and ability to avoid the harm." *State v. Turner*, 42 Wn. App. 242, 246-47, 711 P.2d 353 (1985).

Here, defense counsel did appropriately challenge the mens rea elements of the crimes, arguing that Mr. Morfin-Camacho lacked the necessary mental culpability to be convicted. But, without conceding the mens rea elements, counsel should have then raised the defense of duress in the alternative, since Mr. Morfin-Camacho did not contest the fact that he entered the warehouse and drove the potato truck through its door without permission. *See e.g. State v. Frost*, 160 Wn.2d 765. The question that should have been put before the court was, first, whether Mr. Morfin-Camacho possessed the necessary mental culpability and, if so, whether alternatively Mr. Morfin-Camacho did these acts under duress.

That is, counsel should have argued and the court should have determined whether the defendant acted under the compulsion of the two men who, by their threats, created a reasonable apprehension in Mr. Morfin-Camacho that he would be liable to immediate death or grievous bodily injury if he did not so act, and he would not have so acted except for the duress involved. There was certainly greater than a preponderance of the evidence to support this theory, and counsel should have put it

before the court as an alternative argument to challenging the State's prima facie case.

Defense counsel relied on the defense of necessity instead of raising the affirmative defense of duress, but this was not an appropriate trial tactic.

The defense of necessity may excuse otherwise unlawful conduct where the defendant proves by a preponderance of the evidence that:

“(1) he or she reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, and (3) no legal alternative existed.”

State v. Gallegos, 73 Wn. App. 644, 651, 871 P.2d 621 (1994).

But, “[w]here the pressure upon the defendant comes from another human being, instead of from the physical forces of nature, the jury should be instructed on the defense of duress rather than the defense of necessity.” WPIC 18.02 (citing *Turner*, 42 Wn. App. at 247. *See also Gallegos*, 73 Wn. App. at 650-51.

Here, the court focused its ruling on whether there was a reasonable alternative to Mr. Morfin-Camacho's actions, such as hiding in the warehouse until the workers arrived (see defense of necessity elements above). Counsel's choice to pursue a defense of necessity weighed heavily on the court's decision and had grave impact on the defendant's case. Instead, the focus should have been on whether a preponderance of

evidence established that Mr. Morfin-Camacho had acted under duress. Since the facts of this case fit squarely within the duress elements, as set forth above, and since it was unlikely the defense of necessity would legally apply under *State v. Gallegos, supra*, counsel was ineffective in pursuing the defense of necessity instead of duress theory, and the ineffectiveness cannot be attributed to legitimate trial tactics or strategy.

F. **CONCLUSION**

Sufficient evidence does not support Mr. Morfin-Camacho's convictions, so the appropriate remedy in this case is to reverse and dismiss with prejudice. Furthermore, Mr. Morfin-Camacho was prejudiced by the court's failure to enter adequate written findings of fact and conclusions of law, the deficient charging document, and his trial counsel's illegitimate trial tactics. Accordingly, the Appellant respectfully requests the matter be reversed.

Respectfully submitted this 26th day of January, 2012.

/s/ Kristina M. Nichols
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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 30236-9-III
vs.)
ELUTERIO MORFIN-CAMACHO) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on January 26, 2012, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Eluterio Morfin-Camacho
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Pasco, WA 99301

Having obtained prior permission, I also served Shawn Sant at ssant@co.franklin.wa.us by e-mail.

Dated this 26th day of January, 2012.

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