

No. 32697-7-III

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

**FILED**  
**Feb 10, 2015**  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

DAVID F. ARCH,

Appellant.

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

The Honorable Judge Christopher Culp

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APPELLANT'S OPENING BRIEF

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JILL S. REUTER, Of Counsel  
KRISTINA M. NICHOLS  
Nichols Law Firm, PLLC  
Attorneys for Appellant  
P.O. Box 19203  
Spokane, WA 99219  
(509) 731-3279  
Wa.Appeals@gmail.com

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## **A. SUMMARY OF ARGUMENT**

David Arch drove his car approximately twelve miles at varying speeds above the posted speed limit. A State Trooper was in pursuit of Mr. Arch throughout his drive. According to Mr. Arch, he slowed down and proceeded to pull over as soon as he saw the State Trooper behind his car. The State charged Mr. Arch with one count of attempting to elude a police vehicle and one count of driving while license suspended or revoked in the third degree. At trial, no witnesses testified that the State Trooper was in uniform at the time he was in pursuit of Mr. Arch. There was also no testimony presented regarding the reason alleged in the Information that Mr. Arch's driver's license or driving privilege was suspended or revoked. Mr. Arch appeals, challenging the sufficiency of the evidence to support both convictions. Should this Court reject the sufficiency of the evidence arguments, Mr. Arch argues in the alternative that the jury was not properly instructed and that he was denied effective assistance of counsel.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding Mr. Arch guilty of attempting to elude a police vehicle, where the evidence was insufficient that Mr. Arch was signaled to bring his car to a stop by a uniformed police officer.

2. The trial court erred in finding Mr. Arch guilty of DWLS in the third degree, where the evidence was insufficient that Mr. Arch's driver's license or driving privilege was suspended or revoked for the reason alleged in the Information.

3. The trial court erred in not providing defense counsel's requested jury instruction regarding the mental state for attempting to elude a police vehicle.

4. To the extent defense counsel was required to preserve Mr. Arch's rights, trial counsel provided ineffective assistance of counsel by failing to take exception to the trial court's jury instructions.

5. Mr. Arch was denied his constitutional right to effective assistance of counsel when defense counsel failed to request a jury instruction defining the term "willfully."

6. The trial court erred in instructing the jury on an alternate means of committing DWLS in the third degree not charged in the Information.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: The trial court erred in finding Mr. Arch guilty of attempting to elude a police vehicle and DWLS in the third degree, where the evidence was insufficient.

- a. The trial court erred in finding Mr. Arch guilty of attempting to elude a police vehicle, where the evidence was insufficient that Mr. Arch was signaled to bring his car to a stop by a uniformed police officer.
- b. The trial court erred in finding Mr. Arch guilty of DWLS in the third degree, where the evidence was insufficient that Mr. Arch's driver's license or driving privilege was suspended or revoked for the reason alleged in the Information.

Issue 2: Should this Court find the evidence sufficient to support Mr. Arch's conviction for attempting to elude a police vehicle, then the jury was not properly instructed on the required mental state for the crime.

- a. The trial court erred in not providing defense counsel's requested jury instruction regarding the mental state for attempting to elude a police vehicle.

- b. To the extent defense counsel was required to take further exception to the trial court's jury instructions, defense counsel was ineffective for failing to do so.
- c. In the alternative, Mr. Arch was denied his constitutional right to effective assistance of counsel when defense counsel failed to request a jury instruction defining the term "willfully."

Issue 3: Should this Court find the evidence sufficient to support Mr. Arch's conviction for DWLS in the third degree, then the trial court erred in instructing the jury on an alternate means of committing DWLS in the third degree not charged in the Information.

#### **D. STATEMENT OF THE CASE**

On the afternoon of May 30, 2013, Washington State Patrol (WSP) Trooper Lex Lindquist was on duty, driving a fully marked white WSP car with a light bar on top and WSP seals on the doors. (RP 79-80, 82, 157). He saw a black Mercedes driven by David F. Arch traveling northbound on Highway 97 near Tonasket at a speed that appeared to be faster than normal. (RP 79-81, 84, 90-91, 155). Trooper Lindquist measured Mr. Arch's speed at 80 miles per hour (mph) in a 60 mph zone. (RP 81-82, 109, 148, 157). He made a U-turn in order to follow Mr. Arch. (RP 82, 109).

There were three other vehicles between Trooper Lindquist and Mr. Arch. (RP 81-82, 148, 157). Once Trooper Lindquist was behind the third vehicle, he activated his siren, emergency flashing lights on the top of his car, and wigwag headlights. (RP 83, 85, 105-106, 111). The three vehicles yielded to the right, and Trooper Lindquist accelerated to 150

mph in order to get directly behind Mr. Arch, with a lot of distance between them. (RP 83-84, 96, 106-107). Trooper Lindquist slowed down to 137 mph and kept pace with Mr. Arch. (RP 85, 96, 107).

Mr. Arch drove approximately twelve miles, with speeds between 130 and 147 mph, then slowed down to between 20 and 25 mph. (RP 86-88, 99-101, 107). Trooper Lindquist estimated that until Mr. Arch slowed down, the closest he came to Mr. Arch's vehicle was approximately 10 car lengths away. (RP 87, 104-107, 110-111).

Mr. Arch waved his hand out of the sun roof, then put his hand out of the driver's side window and pointed to the left. (RP 88-89, 100-101, 151, 164, 208). Mr. Arch crossed over to the left side of the road, turned down a driveway, and drove a short distance in order to pull into the driveway of his residence. (RP 89-90, 101, 123, 149-151, 208). Trooper Lindquist then placed Mr. Arch under arrest. (RP 90-91, 214, 216).

The State charged Mr. Arch with one count of attempting to elude a police vehicle and one count of driving while license suspended or revoked (DWLS) in the third degree.<sup>1</sup> (CP 135-136). The Information alleged Mr. Arch committed DWLS in the third degree in the following manner:

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<sup>1</sup> The State also alleged a sentencing enhancement, pursuant to RCW 9.94A.834, that Mr. Arch's actions endangered one or more persons. (CP 136). This sentencing enhancement is not challenged here.

On or about May 30, 2013, in the County of Okanogan, State of Washington, the above-named Defendant did drive a motor vehicle when his or her driver's license or driving privilege was suspended or revoked solely because the person has committed an offense in another state(s) that, if committed in this state, *would not be grounds* for the suspension or revocation of the person's driver's license. . .

(CP 136) (emphasis added).

The case proceeded to a jury trial. (RP 74-278). Trooper Lindquist testified consistent with the facts stated above. (RP 78-113, 199-212). No witnesses testified that Trooper Lindquist was in uniform on the date in question. (RP 74-278).

Mr. Arch stipulated that on the day in question, his driver's license was suspended in Florida and Georgia, and the stipulation was admitted as an exhibit. (RP 71-72, 127-128; Pl.'s Ex. 11). Richard Letteer of the Washington Department of Licensing testified that a certified copy of Mr. Arch's driving record indicates that on the day in question, his driver's license was invalid. (RP 128, 131-132). He further testified that Mr. Arch's driver's license was cancelled because he was suspended in another state. (RP 132). The certified copy Mr. Arch's driving record was not admitted into evidence as an exhibit. (RP 128-133, 267-268).

Mr. Arch took the stand in his own defense. (RP 139-170). He testified that he was driving north on Highway 97 and he saw Trooper Lindquist pass him in the southbound lane. (RP 140-141, 155, 163). He

testified he looked behind him and also checked his rear-view mirror, and he did not see that Trooper Lindquist had his vehicle lights on. (RP 141-142, 163). Mr. Arch testified that the driver's side mirror on his car is defective, and therefore, he could not see clearly out of it. (RP 143-146, 157-161). He also testified his windows were rolled up that day, and that the tinted windows made it difficult to see out of that mirror. (RP 147, 158, 161).

Mr. Arch acknowledged he was travelling 80 mph when he passed the first three vehicles and that he accelerated as he drove. (RP 148, 157, 162-163, 169). However, he testified he looked in his rear-view mirror a couple times as he was driving, and he did not see an officer behind him nor did he hear anything. (RP 148-149, 163). Mr. Arch testified he was approximately one-fourth of a mile from his residence when he first noticed Trooper Lindquist's lights. (RP 151, 164). He testified that as soon as he saw Trooper Lindquist, he slowed down to 39 mph. (RP 147-149, 151, 164). Mr. Arch testified he drove to his residence so he could put his car in his driveway. (RP 149-150, 165-166).

Mr. Arch also acknowledged that on the day in question, he had no right to drive. (RP 157).

During the jury instructions conference, defense counsel requested a definitional instruction regarding the mental state for attempting to elude a police vehicle:

There was one -- additional instruction -- And it -- it's -- not an additional instruction; it's also a comment on -- the attempting to elude, 94.02. There is an additional comment that says an attempt to elude, "attempt to elude" in quotation, requires knowledge that there is a pursuing police vehicle. Defense would say that that would also be another appropriate instruction to give here. There has been testimony as to -- the question is when knowledge of a pursuing police vehicle seems to be at issue here, and it seems that that would be an appropriate comment or an appropriate instruction to give the jury, so they can consider when Mr. Arch had knowledge of a pursuing police vehicle.

(RP 186).

The State argued such an instruction was not necessary, because the to-convict instruction was sufficient to inform the jury of the required mental state. (RP 188). The trial court declined to give the requested mental state instruction, stating that the jury instructions allow defense counsel to argue his theory of the case, and the word "knowledge" is not mentioned in the statute or in the to-convict jury instruction. (RP 189-190).

At the close of the evidence, the trial court asked for exceptions to the jury instructions. (RP 220-221). Defense counsel did not take exception to any of his proposed instructions that the trial court declined to

give. (RP 221). Defense counsel's proposed definitional instruction regarding the mental state for attempting to elude a police vehicle was not included in his written proposed jury instructions. (CP 80-117).

The jury was instructed that in order to find Mr. Arch guilty of attempting to elude a police vehicle, it had to find the following elements beyond a reasonable doubt:

- (1) That on or about May 30, 2013 the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency lights or siren;
- (3) That the signaling police officer's vehicle was equipped with lights and siren;
- (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle the defendant drove his or her vehicle in a reckless manner; and
- (6) That the acts occurred in the state of Washington.

(CP 36; RP 227-228).

The jury was instructed that in order to find Mr. Arch guilty of DWLS in the third degree, it had to find the following elements beyond a reasonable doubt:

- (1) That on or about May 30, 2013 the defendant drove a motor vehicle;
- (2) That at the time of driving an order was in effect that suspended or revoked the defendant's driver's license or driving privileges in this or any other state because the defendant committed an offense in another state that if committed in this state *would be grounds* for the

suspension or revocation of the defendant's driver's license; and  
(3) That the driving occurred in the County of Okanogan.

(CP 41; RP 229-230) (emphasis added).

In his closing argument, defense counsel argued that the question for the jury was when Mr. Arch had knowledge that Trooper Lindquist was pulling him over. (RP 243-250). Specifically, defense counsel argued:

If we turn to the jury instruction, -- No. 4. And this is the instruction on the definition of knowing somebody's trying to elude a police vehicle. A person commits the crime of attempting to elude a police vehicle when he or she willfully fails or refuses to bring his or her vehicle to a stop after being given a signal. Ladies and gentlemen, "willful" has a specific meaning. That's what we call a mental state. To be willful, you have to have knowledge. Here, Mr. Arch did not have knowledge until he was about 100 yards away from his driveway. That's when he had the knowledge.

(RP 246).

Defense counsel also argued "Mr. Arch freely admits his license was suspended. He's not arguing that." (RP 242-243).

The jury found Mr. Arch guilty as charged. (CP 27-28; RP 271-278). Mr. Arch timely appealed. (CP 2).

## **E. ARGUMENT**

**Issue 1: The trial court erred in finding Mr. Arch guilty of attempting to elude a police vehicle and DWLS in the third degree, where the evidence was insufficient.**

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)). Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The

remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

- a. The trial court erred in finding Mr. Arch guilty of attempting to elude a police vehicle, where the evidence was insufficient that Mr. Arch was signaled to bring his car to a stop by a uniformed police officer.**

A person is guilty of attempting to elude a police vehicle if he:

[W]illfully fails or refuses to immediately bring his . . . vehicle to a stop and who drives his . . . vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop. . . . The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal *shall be in uniform* and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1) (emphasis added).

In order to support a conviction for attempting to elude a police vehicle, the State must present evidence proving beyond a reasonable doubt that the officer was in a uniform at the time he signaled the vehicle to stop. *See State v. Hudson*, 85 Wn. App. 401, 403, 932 P.3d 714 (1997); *State v. Fussell*, 84 Wn. App. 126, 128, 925 P.2d 642 (1996); *see also* CP 36; RP 227-228.

In *Hudson*, the defendant attempted to elude two pursuing officers in a marked patrol vehicle with its emergency lights and sirens activated. *Hudson*, 85 Wn. App. at 404. The testimony at trial did not indicate whether the officers were in uniform. *Id.* On appeal, the court held “[t]he

eluding statute clearly requires evidence that the officer giving the signal to stop shall be in uniform.” *Id.* at 405. The court then reversed and dismissed the defendant’s conviction for attempting to elude a police vehicle based upon insufficient evidence. *Id.*

In *Fussell*, the defendant appealed his conviction for attempting to elude a police vehicle, arguing insufficient evidence supported his conviction where there was no evidence presented at trial that the pursuing officers were in uniform. *Fussell*, 84 Wn. App. at 127-28. The court agreed with the defendant’s argument and dismissed his conviction. *Id.* at 128-29. The court held “[n]either the fact the deputies were on duty in a marked patrol car, nor evidence [the defendant] and his passenger realized the deputies were law enforcement officers, without more, is sufficient to permit a rational trier of fact to infer, beyond a reasonable doubt, that either deputy was in uniform.” *Id.* at 128-29. The court reasoned “[t]he requirement that the police officer be in uniform is an express element of the crime with which Mr. Fussell was charged.” *Id.* at 128 (citing RCW 46.61.024).

Here, as in *Fussell* and *Hudson*, the State did not present evidence that Trooper Lindquist was in uniform when he was attempting to stop Mr. Arch. (RP 74-278); *see also Hudson*, 85 Wn. App. at 404; *Fussell*, 84 Wn. App. at 127. The eluding statute requires evidence that Trooper

Lindquist was in uniform when he signaled Mr. Arch to stop his car. *See* RCW 46.61.024(1) (“[t]he officer giving such a signal shall be in uniform. . . .”); *Hudson*, 85 Wn. App. at 405; *Fussell*, 84 Wn. App. at 128.

Therefore, the State’s evidence was insufficient to support the jury’s verdict for attempting to elude a police vehicle.

A rational trier of fact could not have found Mr. Arch guilty, beyond a reasonable doubt, of attempting to elude a police vehicle. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). His conviction for attempt to elude a police vehicle should be reversed and the charge dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (setting forth this remedy).

**b. The trial court erred in finding Mr. Arch guilty of DWLS in the third degree, where the evidence was insufficient that Mr. Arch’s driver’s license or driving privilege was suspended or revoked for the reason alleged in the Information.**

The DWLS statute provides “[i]t is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state.” RCW 46.20.342(1). A person can be found guilty of DWLS in the third degree, a misdemeanor, if his driver’s license or driving privilege is suspended or revoked solely because of one, or a combination of, seven enumerated reasons. RCW 46.20.342(1)(c).

Here, the State charged Mr. Arch with DWLS in the third degree based upon one of these enumerated reasons:

On or about May 30, 2013, in the County of Okanogan, State of Washington, the above-named Defendant did drive a motor vehicle when his or her driver's license or driving privilege was suspended or revoked *solely because the person has committed an offense in another state(s) that, if committed in this state, would not be grounds for the suspension or revocation of the person's driver's license.* . . .

(CP 136) (emphasis added); *see also* RCW 46.20.342(1)(c)(v).

The underlying reason for a license suspension or revocation is an essential element that the State must prove in order to support a conviction. *See Smith*, 155 Wn.2d at 504; *see also State v. Johnson*, 179 Wn.2d 534, 543, 315 P.3d 1090 (2014) (explaining that a DWLS in the third degree conviction requires the State to prove both that the defendant drove with a suspended license and the alleged enumerated statutory basis for the suspension).

In *Smith*, the defendant was charged with DWLS in the first degree, on the basis that he was a habitual traffic offender. *Smith*, 155 Wn.2d at 498. To support this charge, the State offered into evidence as an exhibit a certified statement from DOL asserting that the defendant's driving privilege was suspended or revoked in the first degree. *Id.* at 499. The defendant also testified that his license was suspended in the first degree on the date in question. *Id.* And, in closing argument, defense

counsel argued the State had proven the DWLS in the first degree conviction beyond a reasonable doubt. *Id.* at 500.

On appeal, our State Supreme Court found there was insufficient evidence to prove an essential element of DWLS in the first degree, the reason that the defendant's license was revoked, that he was a habitual traffic offender. *Id.* at 502-04. For this reason, the Court reversed the conviction and dismissed the charge with prejudice. *Id.* at 505-06. The Court rejected the State's argument that defense counsel's closing argument rendered the error harmless, reasoning that the attorneys' arguments are not evidence. *Id.* at 500, 505.

Here, as in *Smith*, the State did not present evidence supporting an essential element of DWLS in the third degree, the reason that Mr. Arch's license was revoked. (RP 71-72, 127-133, 157, 242-243; Pl.'s Ex. 11); *see also Smith*, 155 Wn.2d at 499, 502-04; RCW 46.20.342(1)(c)(v) (the reason for suspension or revocation alleged in the Information). Although Mr. Arch stipulated that his driver's license was suspended in Florida and Georgia, no evidence was presented as to why Mr. Arch's license was revoked in Georgia or Florida. (RP 71-72, 127-133, 157; Pl.'s Ex. 11). No evidence was presented as to what, if any, offense(s) Mr. Arch committed in either State, nor was there any evidence presented that such offense(s) *would not* be grounds for suspension or revocation of his

driver's license had the offense(s) been committed in Washington. (RP 71-72, 127-133, 157; Pl.'s Ex. 11); *see also* RCW 46.20.342(1)(c)(v).

Because the State did not prove the reason for which Mr. Arch's driver's license was suspended or revoked, the State's evidence was insufficient to support the jury's verdict for DWLS in the third degree.

As in *Smith*, the fact that defense counsel argued that Mr. Arch admits his license was suspended does not relieve the State of its burden of proof. *See Smith*, 155 Wn.2d at 500, 505.

In addition, the to-convict jury instruction for DWLS in the third degree contains a different essential element than the Information. *See* CP 136 (the Information, stating "...*would not be grounds* for the suspension or revocation of the person's driver's license. . . ."); CP 41 (the to-convict instruction, stating "... *would be grounds* for the suspension or revocation of the defendant's driver's license. . . .). As a threshold matter, this does not affect Mr. Arch's sufficiency of the evidence argument for DWLS in the third degree, because both the federal and the Washington constitutions "require[ ] that sufficiency of evidence be tested with respect to the crimes charged[,]" not with respect to the crimes set forth in the to-convict instructions. *State v. Kirwin*, 166 Wn. App. 659, 672-73, 271 P.3d 310 (2012); *see also In re Winship*, 397 U.S. at 364. Regardless, there is also insufficient evidence to support a conviction based upon the to-

convict instruction. (CP 41; RP 229-230). No evidence was presented as to what, if any, offense(s) Mr. Arch committed in either Georgia or Florida, nor was there any evidence presented that such offense(s) *would be* grounds for suspension or revocation of his driver's license had the offense(s) been committed in Washington. (RP 71-72, 127-133, 157; Pl.'s Ex. 11).

In summary, a rational trier of fact could not have found Mr. Arch guilty, beyond a reasonable doubt, of DWLS in the third degree. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). His conviction for DWLS in the third degree should be reversed and the charge dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (setting forth this remedy).

**Issue 2: Should this Court find the evidence sufficient to support Mr. Arch's conviction for attempting to elude a police vehicle, then the jury was not properly instructed on the required mental state for the crime.**

Should this court reject Mr. Arch's argument set forth in Issue 1(a) above and find sufficient evidence to support his conviction for attempting to elude a police vehicle, then the jury was not properly instructed on the required mental state for the crime and the case should be remanded for a new trial.

**a. The trial court erred in not providing defense counsel's requested jury instruction regarding the mental state for attempting to elude a police vehicle.**

In order to prove the crime of attempting to elude a police vehicle, the State must prove the defendant “willfully fails or refuses to immediately bring his or her vehicle to a stop.” RCW 46.61.024(1). Willfulness in the context of attempting to elude a police vehicle is identical with knowledge. *State v. Flora*, 160 Wn. App. 549, 553, 249 P.3d 188 (2011) (citing *State v. Mather*, 28 Wn. App. 700, 702, 626 P.2d 44 (1981)); *see also* RCW 9A.08.010(4) (“A requirement that an offense be committed wilfully [sic] is satisfied if a person acts knowingly with respect to the material elements of the offense. . . .”).

Where a defendant is charged with attempting to elude a police vehicle, the term willfulness should be defined for the jury when requested by a party. *Flora*, 160 Wn. App. at 553. “Without a definition, the jury is left to come up with its own understanding of a technical term for a culpable mental state.” *Id.* at 553-54 (citing *State v. Allen*, 101 Wn.2d 355, 362, 678 P.2d 798 (1984)).

Here, defense counsel requested a definitional instruction regarding the mental state for attempting to elude a police vehicle addressing the requirement of “knowledge that there is a pursuing police

vehicle.” (RP 186). The trial court declined to give the requested instruction. (RP 189-190).

The trial court erred in not providing defense counsel’s proposed jury instruction. (RP 186-190). As stated above, knowledge and willfulness are identical in the context of attempting to elude a police vehicle. *Flora*, 160 Wn. App. at 553 (citing *Mather*, 28 Wn. App. at 702). And, the term willfulness should be defined for the jury when requested by a party. *Flora*, 160 Wn. App. at 553.

In declining to give defense counsel’s proposed jury instruction, the trial court reasoned that the jury instructions allowed defense counsel to argue his theory of the case. (RP 189-190). In closing argument, defense counsel argued on the definition of willful. (RP 246). However, “[a] jury should not have to obtain its instruction on the law from arguments of counsel.” *Flora*, 160 Wn. App. at 556 (quoting *State v. Aumick*, 126 Wash.2d 422, 431, 894 P.2d 1325 (1995)).

A trial court's failure to define a technical term may be harmless error. *Id.* at 554 (citing *In re Detention of Pouncy*, 168 Wash.2d 382, 391, 229 P.3d 678 (2010)). “An instructional error is harmless only if it is trivial, or formal, or merely academic and in no way affected the final outcome of the case.” *State v. Woods*, 138 Wn. App. 191, 202, 156 P.3d

309, 314 (2007) (internal quotation marks omitted) (quoting *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997)).

The trial court's failure to give defense counsel's requested instruction was not harmless. There was evidence to support Mr. Arch's theory that he did not know Trooper Lindquist was pursuing his car until he was close to his residence, at which point he immediately slowed down. (RP 87, 104-107, 110-111, 147-149, 151, 164). There was evidence that Mr. Arch could not see Trooper Lindquist behind him: he testified he did not see him, that his driver's side mirror was defective and also that the mirror was difficult to see out of because of his tinted windows. (RP 143-147, 157-158, 161). In addition, Trooper Lindquist testified the closest he got to Mr. Arch's car before Mr. Arch slowed down was 10 car lengths away. (RP 87, 104-107, 110-111). Given this evidence, the failure to instruct the jury on the definition of knowing affected the final outcome of the case. *See Woods*, 138 Wash. App. at 202 (quoting *Walden*, 131 Wn.2d at 478) (defining harmless error).

Because the absence of a jury instruction regarding the mental state for attempting to elude a patrol vehicle may have affected the verdict, the case should be reversed and remanded for a new trial with a properly instructed jury. *See Flora*, 160 Wn. App. at 556 (setting forth this remedy).

**b. To the extent defense counsel was required to take exception to the trial court's jury instructions, defense counsel was ineffective for failing to do so.**

During the jury instruction conference, defense counsel requested a definitional instruction regarding the mental state for attempting to elude a police vehicle. (RP 186-190). At the close of the evidence, the trial court asked if there were exceptions to the jury instructions. (RP 220-221). However, defense counsel did not take exception to any of his proposed instructions that the trial court declined to give. (RP 221).

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, “strategy must be based on reasoned decision-making[.]” *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

To the extent defense counsel was required to take exception to the trial court’s jury instructions, defense counsel was ineffective for failing to do so. There was no tactical reason for failing to take exception to the trial court’s failure to give his earlier requested jury instruction regarding the mental state for attempting to a police vehicle. And, trial counsel’s omission was deficient performance that prejudiced Mr. Arch, because Mr. Arch was entitled to a jury instruction defining knowing, which is identical with the term willful, upon request. *See Flora*, 160 Wn. App. at 553-56.

**c. In the alternative, Mr. Arch was denied his constitutional right to effective assistance of counsel when defense counsel failed to request a jury instruction defining the term “willfully.”**

Defense counsel requested a definitional instruction regarding the mental state for attempting to elude a police vehicle addressing the requirement of “knowledge that there is a pursuing police vehicle.” (RP

186). Should this Court find that defense counsel's request using the term "knowledge" rather than "willful" was insufficient to establish a request for a willful definitional instruction as discussed in *Flora*, then defense counsel was ineffective for failing to specifically request a jury instruction defining the term "willful." See *McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225-26); *Flora*, 160 Wn. App. at 553-56.

There was no tactical reason for not requesting a definitional instruction Mr. Arch was entitled to and would have properly instructed the jury on the applicable law. See *Flora*, 160 Wn. App. at 553-56. And, trial counsel's omission was deficient performance that prejudiced Mr. Arch, because Mr. Arch was entitled to a jury instruction defining willfully upon request. See *Flora*, 160 Wn. App. at 553-56. In addition, because there was evidence presented at trial that Mr. Arch did not know Trooper Lindquist was pursuing his car, it was crucial for the jury to receive proper instructions on the applicable law so that the defendant could fairly argue his theory of the case. (RP 87, 104-107, 110-111, 147-149, 151, 164).

**Issue 3: Should this Court find the evidence sufficient to support Mr. Arch's conviction for DWLS in the third degree, then the trial court erred in instructing the jury on an alternate means of committing DWLS in the third degree not charged in the Information.**

Should this court reject Mr. Arch's argument set forth in Issue 1(b) above and find sufficient evidence to support his conviction for DWLS in the third degree, then the trial court erred in instructing the jury on an alternate means of committing DWLS in the third degree that was not charged in the Information, and the case should be remanded for a new trial.

Due process requires "that jury instructions list all of the elements of the crime, since failure to list all elements would permit the jury to convict without proof of the omitted element." *Smith*, 155 Wn.2d at 502. As acknowledged above, the reason for the suspension of a driver's license or driving privilege is an essential element of a DWLS charge. *Id.* at 504; *Johnson*, 179 Wn.2d at 543. "[I]t is error to instruct the jury on uncharged offenses or uncharged alternative theories." *State v. Morales*, 174 Wn. App. 370, 382, 298 P.3d 791 (2013). When a defendant is tried on an uncharged alternative theory, the remedy is a new trial. *Id.* at 384.

Here, the to-convict jury instruction for DWLS in the third degree contains a different essential element than the Information. (CP 41, 136).

The Information states, in relevant part:

[T]he above-named Defendant did drive a motor vehicle when his or her driver's license or driving privilege was suspended or revoked solely because the person has committed an offense in another state(s) that, if committed in this state, *would not be grounds* for the suspension or revocation of the person's driver's license. . . .

(CP 136) (emphasis added); *see also* RCW 46.20.342(1)(c)(v).

The to-convict instruction states, in relevant part:

That at the time of driving an order was in effect that suspended or revoked the defendant's driver's license or driving privileges in this or any other state because the defendant committed an offense in another state that if committed in this state *would be grounds* for the suspension or revocation of the defendant's driver's license[.]

(CP 41); *cf.* RCW 46.20.342(1)(c)(v).<sup>2</sup>

Because the to-convict jury instruction fails to list all of the elements alleged in the Information, the jury instructions permitted the jury to convict Mr. Arch of an uncharged crime and without proof of all of the charged elements. *See Smith*, 155 Wn.2d at 502. The trial court erred

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<sup>2</sup> This to-convict instruction mirrors the Washington Pattern Jury Instruction (WPIC). *See* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 93.07 (3d Ed 2008). However, this WPIC does not mirror the language in the statute, or the Information here. *See* RCW 46.20.342(1)(c)(v); CP 136. Because the to-convict instruction does not set forth one of the enumerated reasons set forth in RCW 46.20.342(1)(c), it actually permits the jury to find Mr. Arch guilty of the uncharged crime of DWLS in the second degree. *See* RCW 46.20.342(1)(b). Both the State and defense counsel were aware of this problem with the to-convict instruction. (RP 181-183).

in instructing the jury on an uncharged alternative theory. *See Morales*, 174 Wn. App. at 382. The DWLS in the third degree conviction should be reversed and remanded for a new trial before a properly instructed jury. *See Morales*, 174 Wn. App. at 384.

**F. CONCLUSION**

The evidence presented at trial was insufficient to find Mr. Arch guilty of attempting to elude a police vehicle and DWLS in the third degree. Both convictions should be reversed and the charges dismissed with prejudice. In the alternative, both convictions should be reversed and remanded for a new trial because of errors in the jury instructions or ineffective assistance of defense counsel.

Respectfully submitted this 10th day of February, 2015.

  
Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols  
Kristina M. Nichols, WSBA #35918  
Attorney for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 32697-7-III  
vs. )  
DAVID F. ARCH )  
Defendant/Appellant )  
PROOF OF SERVICE )  
\_\_\_\_\_ )

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC and Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 10, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

David F. Arch  
Brownstone Work Release  
223 S. Browne Street  
Spokane, WA 99201

Having obtained prior permission from the Okanogan County Prosecutor's Office, I also served Karl Sloan at ksloan@co.okanogan.wa.us and sfieldlarson@co.okanogan.wa.us using Division III's e-service feature.

Dated this 10th day of February, 2015.



Jill S. Reuter, Of Counsel, WSBA #38374  
Nichols Law Firm, PLLC  
PO Box 19203  
Spokane, WA 99219  
Phone: (509) 731-3279  
Wa.Appeals@gmail.com