NO. 32697-7

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON

RESPONDENT,

V.

DAVID F. ARCH

APPELLANT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 9

1. The evidence was sufficient to find the defendant guilty of attempting to elude 9

2. The evidence was sufficient to find the defendant guilty of driving while suspended or revoked in the third degree 12

3. There was no error in not providing a definitional instruction for "willfully" that was not requested; or denying a definitional instruction of "knowledge". 17

4. Counsel was not ineffective for not taking exception with, or proposing definitional instructions 20

E. CONCLUSION 23

TABLE OF AUTHORITIES

Cases

In re Hubert,
138 Wn. App. 924, 158 P.3d 1282 (2007) 21
In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 15
Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 10
Neder v. United States,
527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) 17
Schatz v. Heimbigner,
82 Wash. 589, 144 P. 901 (1914) 14
Smith v. Shannon,
100 Wn.2d 26, 666 P.2d 351 (1983) 18
State v. Barringer,
32 Wn. App. 882, 650 P.2d 1129 (1982) 13, 14
State v. Berube,
150 Wn.2d 498, 79 P.3d 1144 (2003) 17
State v. Boot,
40 Wn. App. 215, 697 P.2d 1034 (1985) 18
State v. Brown,
147 Wn.2d 330, 58 P.3d 889 (2002) 17
State v. Camarillo,
115 Wn.2d 60, 794 P.2d 850 (1990) 10
State v. Delmarter,
94 Wn.2d 634, 618 P.2d 99 (1980) 20
State v. Dent,
123 Wn.2d 467, 869 P.2d 392 (1994) 15
State v. Dugger,
75 Wn.2d 689, 453 P.2d 655 (1969) 10
State v. Flora,
160 Wn. App. 549, 249 P.3d 188 (2011) 17, 19
State v. Fussell,
84 Wn. App. 126, 925 P.2d 642 (1996) 10, 11
State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980) 10
State v. Hames,
74 Wn.2d 721, 446 P.2d 344 (1968) 13
State v. Hickman,
135 Wn.2d 97, 954 P.2d 900 (1998) 13, 14, 15
State v. Hoffman,
116 Wn.2d 51, 804 P.2d 577 (1991) 18
State v. Hudson,
85 Wn. App. 401, 932 P.2d 714 (1997) 10, 11

State v. Jeffries,
105 Wn.2d 398, 717 P.2d 722 (1986) 18
State v. Kirwin,
166 Wn. App. 659, 271 P.3d 310 (2012) 15
State v. Lee,
128 Wn.2d 151, 904 P.2d 1143 (1995) 13
State v. Leohner,
69 Wn.2d 131, 417 P.2d 368 (1966) 13
State v. McFarland,
127 Wn.2d 322, 899 P.2d 1251 (1995) 21
State v. Ng,
110 Wn.2d 32, 750 P.2d 632 (1988) 13
State v. O'Hara,
167 Wn.2d 91, 217 P.3d 756 (2009) 18
State v. Powell,
150 Wn. App. 139, 206 P.3d 703 (2009) 21
State v. Randecker,
79 Wn.2d 512, 487 P.2d 1295 (1971) 10
State v. Redmond,
150 Wn.2d 489, 78 P.3d 1001 (2003) 17
State v. Rempel,
114 Wn.2d 77, 785 P.2d 1134 (1990) 10
State v. Salas,
127 Wn.2d 173, 897 P.2d 1246 (1995) 13
State v. Smith,
104 Wn.2d 497, 707 P.2d 1306 (1985) 10
State v. Smith,
155 Wn.2d 496, 120 P.3d 559 (2005) 15
State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997) 21
State v. Stubsjoen,
48 Wn. App. 139, 738 P.2d 306 (1987) 18
State v. Teal,
152 Wn.2d 333, 96 P.3d 974 (2004) 15
State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987) 21
State v. Thompson,
169 Wn. App. 436, 290 P.3d 996 (2012) 21
State v. Wilson,
71 Wn. App. 880, 863 P.2d 116 (1993) 9
Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 21
Tonkovich v. Dep't of Labor & Indus. of State,
31 Wn.2d 220, 195 P.2d 638 (1948) 14
United States v. Williams,
998 F.2d 258 (5th Cir. 1993) 15

Williams v. United States,
510 U.S. 1099, 114 S.Ct. 940, 127 L.Ed.2d 230 (1994) 15

Statutes

RCW 46.20.342(1)(c) 7, 12
RCW 46.61.024 7
RCW 9.94A.834 7
U.S. Const. amend. XIV 15

Other Authorities

WPIC 10.02 22
WPIC 10.05 22
WPIC 93.06 8
WPIC 93.07 ..... 1, 8, 12
WPIC 94.02 8

A. ASSIGNMENTS OF ERROR

1. Whether evidence was sufficient for any rational trier of fact to find the defendant guilty of attempting to elude a uniformed police officer.

2. Whether evidence was sufficient for any rational trier of fact to find the defendant guilty of driving while suspended or revoked in the third degree; and whether the trial court erred in giving an agreed instruction based on WPIC 93.07.

3. Whether the trial court erred in not instructing the jury on the definition of "willfully".

4. Whether trial counsel was ineffective for failing to request the definitional instruction of "willfully".

B. ISSUES PERTAINING TO ASSIGMENT OF ERROR

1. Was there sufficient evidence for any rational trier of fact to find the defendant guilty of attempting to elude a uniformed police officer when he was stopped by a State Trooper conducing traffic enforcement?

2. Was there evidence sufficient for any rational trier of fact to find the defendant guilty of driving while suspended or revoked in the third degree finding the defendant was suspended in another state for an offense that *would* be grounds to suspend the driver in Washington; and did the trial court err in instructing the jury based on WPIC 93.07?

3. Did the trial court err by not instructing the jury on the definition of "willfully" that was not requested by either party; or by not giving an orally suggested "knowledge" instruction that defense did not take exception to?

4. Was trial counsel ineffective for failing to request the definitional instruction of "willfully", or not taking exception to the court's decision to not give a definitional instruction of "knowledge" where no predjudice resulted?

C. STATEMENT OF THE CASE

May 30, 2013, Sergeant Lex Lindquist of the Washington State Patrol (WSP) was a WSP Trooper assigned to the Okanogan detachment. RP 79. His duties at that time,

were traffic law enforcement, which included enforcing the motor vehicle code, criminal code, and investigating collisions. RP 79-80. While Trooper Lindquist was on traffic enforcement duty on the afternoon of May 30, 2013, he was patrolling Highway 97 in the area near Tonasket. RP 80, 84. While conducting traffic patrol that day, Trooper Lindquist was driving a fully marked white WSP Chevy Caprice, equipped with a light bar and door seals.

On that afternoon, Trooper Lindquist had made a traffic stop of a northbound vehicle near milepost 319. RP 80. The Trooper completed his paperwork related to that traffic stop, then cleared the stop by making a U-turn and traveling southbound on Highway 97. RP 80, 84.

Shortly after clearing the traffic stop, the Trooper first saw the defendant's vehicle approaching at a high rate of speed. RP 80-81. The vehicle, a Black Mercedes, was travelling northbound and was pulling away from the vehicles behind it. RP 80-81. Trooper Lindquist activated his moving radar unit and measured the defendant's vehicle traveling approximately 80 mph in a posted 60 mph speed zone. RP 80-82, 109. The three cars traveling northbound behind the defendant's vehicle were measured by radar at speeds slightly above 60 mph. RP 82, 109.

Trooper Lindquist had to wait for the three cars behind the defendant to pass before he could execute a U-turn and pursue the defendant. RP 82, 84. The Trooper was near milepost 318 when he began his pursuit. RP 84. By the time the Trooper had caught up to the rearmost vehicle, the defendant's vehicle had accelerated above the initial 80 mph measured on radar and was pulling away rapidly. RP 82, 95-96, 110. The defendant testified he accelerated another 67 mph (over the 80 mph he was

traveling) only after he passed the Trooper. RP 163. Trooper Lindquist activated his overhead lights on the light bar, his wigwag headlights, and siren to pursue the defendant. RP 83-84, 106. The three vehicles between the Trooper and the defendant immediately yielded to the right of the roadway. RP 84, 95.

Trooper Lindquist communicated to dispatch information about the pursuit, the vehicle description, license plate, roadway, traffic, and other information, according to policy, so the information could be transmitted to his supervisor. RP 87-88.

Trooper Lindquist was only able to catch up to the defendant after accelerating to 150 mph and because the defendant had to slow for other vehicles in the northbound lane and oncoming southbound lane that prevented the defendant from immediately passing. RP 84-85, 96. Once behind the defendant, The Trooper slowed his vehicle to 137 mph to keep pace with the defendant's vehicle. RP 85. Vehicles traveling northbound in front of the defendant's vehicle responded to the Troopers lights and sirens by yielding. Vehicles approaching the defendant and Trooper in the southbound lane also yielded. RP 85, 98.

The defendant did not yield; he continued northbound passing multiple vehicles. RP 85-86. The defendant would at times pass vehicles by driving his vehicle completely in the southbound lane, and at other times by straddling the centerline of the roadway. RP 97-98. At one point during the pursuit the defendant passed a line of approximately seven cars. RP 210. During the pursuit, the defendant's vehicle reached speeds of 147 mph. RP 86.

US Border Patrol Agent Louis Koler was on duty and travelling southbound on Highway 97 in his marked Border Patrol vehicle. RP 117-118. As Agent Koler was

entered into a right hand curve near the north O'Neil Road turn-off, he noticed the vehicle in front of him apply emergency braking and swerve off the right hand side of the road to the shoulder. RP 118-119. Agent Koler also braked and swerved to the shoulder, as he observed the defendant's vehicle headed northbound - driving in the south bound lane. RP 118, 120, 124, 126. Agent Koler pulled completely off the roadway, and the defendant's vehicle passed by him while still driving in the oncoming (southbound) lane. RP 120, 126. Had Agent Koler and the vehicle in front of him not taken evasive action, they would have collided with the defendant's vehicle that was travelling in their lane. RP 120. Agent Koler believed the defendant's vehicle was travelling at least 90 to 100 mph, and appeared to cut the corner into the southbound lane to maintain control. RP 121.

Within fractions of a second, Agent Koler observed the WSP vehicle pass by in pursuit. RP 121. Agent Koler did not use the same radio frequency as WSP, and until this time had no knowledge of the pursuit in progress. RP 122. The defendant testified that he passed the Agent and recognized that he was Border Patrol. RP 169-170. Agent Koler activated his emergency lights and turned northbound to assist in the pursuit. RP 121-122. Agent Koler drove at his vehicle's maximum speed of 96 mph, but could not keep up. RP 122.

The pursuit continued to approximately milepost 330. There were multiple locations along the highway where the defendant could have pulled safely pulled over. See RP 96, 97, 98, 99, 100.

At approximately milepost 329, the defendant slowed to approximately 20 to 25 mph. RP 88. The defendant extended his right hand out of the vehicles open sunroof

and waved it back and forth. RP 88, 108. Trooper Lindquist turned off his siren and issued commands over his vehicle's public address system to the defendant. RP 88, 100, 110. Despite the verbal commands to stop, the defendant continued to drive approximately ½ mile northbound, passing a wide turnout on the left hand side of the roadway. RP 89, 100, 101, 207-208. The defendant continued to a driveway on the left hand side of the highway, then crossed a set of railroad tracks without stopping, then turned and drove north, and then turned left to reach a residence. RP 89-90, 103.

Trooper Lindquist exited his patrol car, drew his pistol and gave verbal commands to the defendant for him to show his hands and exit the car. RP 90; RP 150. Agent Koler arrived on scene during this time and observed the "state trooper" (Trooper Lindquist) out of his vehicle and giving commands to the driver of the Mercedes. RP 92-93, 122-123. Agent Koler provided cover for the Trooper, who was conducting a high risk arrest. RP 123-124. The defendant was slow to comply with Trooper Lindquist's requests, but finally laid down on the ground as directed. RP 90. The Trooper holstered his gun and handcuffed the defendant. RP 90; RP 210-211.

The defendant was the sole occupant of the Mercedes and was identified as David Arch. RP 91. Deputy Holloway and two other deputy sheriffs arrived near this time. RP 93, 125, 214. Deputy Holloway identified a border patrol agent and state patrol trooper at the scene when he arrived. RP 216-217. The defendant also identified the officer's present during his stop. RP 150-151.

After being handcuffed, the Trooper searched the defendant, placed him in the Trooper's patrol car, and advised him of his *Miranda* warnings. The Trooper asked the defendant why he ran. The defendant stated that he did not want this car impounded,

wanted to get home, and that the last time he was stopped the officer told him if he was caught driving again he would be taken to jail. RP 91, 112, 216. The defendant told the Trooper that he was suspended out of Georgia and Florida. RP 91. The defendant also apologized for putting people in danger. RP 91, 211.

At no time did the defendant ever mention to any officer that he did not know Trooper Lindquist was trying to stop him or that he had any equipment defect that prevented him from seeing the pursuing officer. RP 92, 112, 216. On the contrary, his stated reason for not stopping was because he believed he would be arrested and did not want his car towed; so he continued driving until he reached his residence. RP 91, 112, 165, 216.

At trial the defendant alleged his driver's side mirror was defective; but he testified that it did not prevent him from seeing traffic, and stated that his rearview and passenger side mirrors were fine. RP 157-158, 160,162, 167. Additionally photographs the defendant took of his driver's side mirror some months after the incident (and before he disposed of the car) did not support the allegation that the mirror was defective and prevented the defendant from seeing detail in the driver's side mirror. RP 167-168, 201-206.

The defendant was provided notification by the Washington Department of Licensing that his license was cancelled on August 20, 2012 because he was suspended in another state. RP 132. The defendant knew he had no right to drive on May 30, 2013, and that his license was suspended. RP 156-157. The defendant stipulated to the admissibility of his out of state suspension at trial. RP 61 (7/29 Pretrial motions); RP 71. The stipulation stated:

> That on May 30, 2013, my license was suspended in the States of Florida and Georgia due to commission of offenses, that if committed in Washington State, would be grounds for suspension or revocation of my Washington State driver's license.

Exhibit 11 – Designated by Appellant 2/10/15.

The defendant was charged by information in Count 1 with Attempting to Elude Pursuing Police Vehicle, alleging the enhancement that the defendant endangered one or more persons; and in Count 2 with Driving While License Revoked or Suspended in the Third Degree. CP 135-136.

Regarding Count 1 - Attempting to Elude Pursuing Police Vehicle, the information stated in part:

> On or about May 30, 2013 in the County of Okanogan, State of Washington, the above-named Defendant, as a driver of a motor vehicle, did willfully fail or refuse to immediately bring his or her vehicle to a stop and did drive his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after having been given a visual or audible signal to bring the vehicle to a stop, said signal having been given by hand, voice, emergency light, or siren by a uniformed police officer whose vehicle was equipped with lights and sirens; contrary to RCW 46.61.024...; AND FURTHERMORE, the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer contrary to RCW 9.94A.834.

Regarding Count 2 - Driving While License Suspended or Revoked in the Third Degree, the information stated in part:

> 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; contrary to RCW 46.20.342(1)(c).

The defendant's case proceeded to a jury trial on July 29, 2014. RP 3. The jury was provided instruction #5, the elements instruction for Count 1:

> To convict the defendant of attempting to elude a police vehicle, each of the following elements of the crime must be proved 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 light, 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.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 36. Instruction #5 was based on WPIC § 94.02. CP 147. The jury was provided instruction #10, the elements instruction for Count 2:

To convict the defendant of driving while license suspended or revoked in the third degree, each of the following three elements of the crime must be proved 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.

If you find from the evidence that elements (1) (2) and (3), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

CP 40. Instruction #10 was based on WPIC § 93.07. CP 151.

Prior to opening statement, the State advised the court that the State's proposed jury instruction based on WPIC § 93.07 appeared incorrect based on the inclusion of the word "not" and provided a corrected copy consistent with the WPIC. RP 72.

In the jury instruction conference, the State advised the court of the discrepancy between the statute, the definition instruction (WPIC § 93.06), and the elements instruction (WPIC § 93.07). RP 181-183. The State pointed out that the instruction without the word "not" would still satisfy the elements of Driving While License Suspended in the Third Degree, and would likely meet the higher offense of Driving While License Suspended in the Second Degree. RP 182. Defense agreed that neither

the elements instruction, nor definition instruction, should contain the word "not". RP 183-184 The Court agreed with the parties and adopted the changes. RP 183-184.

The defense also orally suggested an instruction defining "knowledge", so the jury could consider whether the defendant had knowledge of a pursuing police vehicle. RP 186-187. The court found the inclusion of willfully in the elements of the crime provided both parties the ability to fully and fairly argue their theories of the case, and that it was unnecessary where the correct and sufficient mental state for the crime was set out in the elements instruction. RP 188-190. The defense did not request a definition instruction of the statutory mental state "willfully". RP 186-188, 221.

The defense did not object to the court's decision not to give the orally proposed "knowledge" instruction. RP 221. Defense also did not object to any instructions the court gave. RP 221.

The defendant was found guilty of both counts and the enhancement on July 30, 2014. RP 179; CP 27-28.

D. ARGUMENT

1. <u>The evidence was sufficient to find the defendant guilty of attempting to elude</u>.

Appellant argues that the State failed to present sufficient proof that Trooper Lindquist was in uniform when he gave the signal to stop. Appellant's claim of insufficient evidence admits the truth of the State's evidence and *all* inferences that can be reasonably drawn therefrom. *E.g., State v. Wilson*, 71 Wn. App. 880, 891, 863 P.2d 116 (1993) *rev'd in part,* 125 Wn.2d 212, 883 P.2d 320 (1994). In determining whether sufficient evidence supports a conviction, the standard of review is whether, after

viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990)(citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)(citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979))). Under this standard, the court must resolve all inferences in favor of the State. *State v. Smith*, 104 Wn.2d 497, 507, 707 P.2d 1306 (1985).

It is a general rule that the elements of a crime may be proved by circumstantial evidence. E.g., *State v. Dugger*, 75 Wn.2d 689, 690, 453 P.2d 655, 656 (1969). A court does not weigh the evidence to determine whether the necessary quantum has been produced to establish some proof of an element of the crime; it may only test or examine the sufficiency thereof. *See Dugger*, 75 Wn.2d at 690; *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295, 1298 (1971). The jury, as trier of fact, is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses. The court must concern itself only with the presence or absence of the required quantum. *Randecker*, 79 Wn.2d, 517. Reviewing courts must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

For authority, Appellant cites *State v. Hudson*, 85 Wn. App. 401, 932 P.2d 714 (1997) and *State v. Fussell*, 84 Wn. App. 126, 925 P.2d 642 (1996). In *Hudson*, 85 Wn. App. 401, the *only* evidence from which the trier of fact could infer that the officer was in uniform was that the officer was in a marked police car. The court held that such evidence, "...without more, is insufficient to permit a rational trier of fact to infer beyond

a reasonable doubt that the officers were in uniform." *Hudson*, 85 Wn. App. at 405. Similarly, in *Fussell*, 84 Wn. App. 126, Division Three held that the fact that the officers were "on duty" in a marked car, and the defendant realized the officers were law enforcement, without more, did not provide sufficient evidence from which to infer that either officer was in uniform. *Fussell*, 84 Wn. App. at 128–29.

Evidence in the present case was sufficient. Not only was Trooper Lindquist "on-duty" in a marked vehicle when he first signaled to the defendant, but Trooper Lindquist and Border Patrol Agent Koler testified that Trooper Lindquist used his gun and handcuffs when arresting the defendant, and then put his gun back in his holster. Agent Koler testified that he identified the officer as a "state trooper" who was engaged in a high risk arrest when Agent Koler arrived at the scene of the stop. Deputy Holloway identified both a "state trooper" and "border patrol agent" on scene at the time he arrived after the stop. The defendant also specifically identified the people as officers who were present at the scene of his stop.

Moreover, the Trooper testified that at the time of the incident, he was specifically working traffic enforcement, patrolling the area near Tonasket, and had just completed a traffic stop and the associated paper work when he first encountered the defendant. The Trooper was working traffic enforcement, not plain clothes, undercover, or a special detail; nor was he on his way to some non-uniformed duty.

Viewing the evidence in the light most favorable to the State, and resolving all inferences in favor of the State, a rational trier of fact could have found beyond a reasonable doubt that Trooper Lindquist (and Agent Koler) was in uniform when the defendant attempted to elude him and he was signaled to stop. Unlike *Hudson* and

Fussell, there was more than the bare facts that the officer was generally on duty and in a marked police vehicle and ultimately recognized by the defendant as law enforcement.

2. The evidence was sufficient to find the defendant guilty of driving while suspended or revoked in the third degree

Appellant argues there was insufficient evidence to find him guilty of Driving While License Suspended in the Third Degree, where the to convict instruction based on WPIC § 93.07 contained the phrase "...would be grounds for the suspension or revocation of the defendant's driver's license..." and the information contained the phrase "... would not be grounds for the suspension or revocation of the person's driver's license..."The Appellant is incorrect in his assertion that there was insufficient evidence for the jury to find the defendant guilty of Driving while Revoked or Suspended in the Third Degree. WPIC § 93.07 states in part:

> ...(2) That at the time of driving the defendant's driver's license or driving privileges was suspended or revoked because...(e) 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...

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC § 93.07 (3d Ed). RCW 46.20.342(1)(c) states in part:

> A person who violates this section when his or her driver's license or driving privilege is, at the time of the violation, suspended or revoked solely because...(v) the person has committed an offense in another state that, if committed in this state, *would not be grounds* for the suspension or revocation of the person's driver's license...

In the elements instruction the jury was instructed that 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. The instruction became the law of the case, and required to State to prove an additional and higher burden to find guilt for the crime charged.

The argument for reviewing the *sufficiency* of evidence with regard to the crime as instructed, finds support in cases holding that the instructions to the jury become the law of the case. The law of the case is an established doctrine with roots reaching back to the earliest days of statehood. *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900, 902-04 (1998). Under the doctrine jury instructions not objected to become the law of the case. *Id.* (citing *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968)("The foregoing instructions were not excepted to and therefore, became the law of the case. ") (quoting *State v. Leohner*, 69 Wn.2d 131, 134, 417 P.2d 368 (1966)); *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995)(" If no exception is taken to jury instructions, those instructions become the law of the case.")).

In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction. *Hickman*, 135 Wn.2d at 102(citing *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)("Added elements become the law of the case ... when they are included in instructions to the jury.")). See also *State v. Barringer*, 32 Wn. App. 882, 887-88, 650 P.2d 1129 (1982)("Although the charging statute ... did not require reference to [the added element], by including that reference in the information and in the instructions, it became the law of the case and the State had the burden of proving it.").

On appeal, a defendant may assign error to elements added under the law of the case doctrine. *Hickman*, 135 Wn.2d at 102(citing *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988)(because the State failed to object to the jury instructions they "are the law of the case and we will consider error predicated on them.")). Such assignment of

error may include a challenge to the sufficiency of evidence of the added element. *Hickman*, 135 Wn.2d at 102-103(citing *Barringer*, 32 Wn. App. at 887-88; *Schatz v. Heimbigner*, 82 Wash. 589, 590, 144 P. 901 (1914) (Alleged errors are not available to the appellants, when they are at cross-purposes with the instructions of the court to which no error has been assigned. There is but one question open to them; that is, is there sufficient evidence to sustain the verdict under the instructions of the court?); *Tonkovich v. Dep't of Labor & Indus. of State*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948)("It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions where, as here, the charge is approved by counsel for each party, no objections or exceptions thereto having been made at any stage. In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions....")).

As indicated above, when determining whether there is sufficient evidence to prove the added element, the reviewing court inquires whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Hickman*, 135 Wn.2d at 103. If the reviewing court finds insufficient evidence to prove the added element, reversal is required. *Id.*

In the present case there was explicit agreement by both parties for the court to give the elements instruction. The Appellant waived claims of error, except for sufficiency of the evidence. A defendant's failure to request the desired instruction or object to those actually given waived any objection on appeal as "it is elementary that timely exceptions [to proposed jury instructions], before the reading of the instructions to

the jury, are necessary...." *Hickman*, 135 Wn.2d at 104(quoting *State v. Dent*, 123 Wn.2d 467, 479, 869 P.2d 392 (1994)). Parties must object to jury instructions before they are given on penalty of forfeiture of such objection. *Id.*

The Appellant cites to *State v. Smith*, 155 Wn.2d 496, 120 P.3d 559, 562-63 (2005), for support, but his reliance is misplaced. In *Smith*, 155 Wn.2d 496, the court found there was insufficient evidence where evidence only showed the defendant's license had been revoked "in the first degree," without providing any evidence to of the reason he was revoked as a habitual traffic offender. *Smith*, 155 Wn.2d at 503-504.

In the present case, the defendant stipulated that his license was suspended in the States of Florida and Georgia due to commission of offenses that if committed in Washington State, would be grounds for suspension or revocation of his Washington State driver's license.

In *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974, 976 (2004) the Court indicated that in a criminal prosecution the State bears the burden of proving all of the elements of the crime charged. A reviewing court will reverse a conviction for insufficient evidence only if no rational trier of fact could find that the State met its burden.[1]

In the present case, by proving the defendant was suspended in the States of Florida and Georgia due to commission of offenses that if committed in Washington

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[1] Appellant also cites to *State v. Kirwin*, 166 Wn. App. 659, 672, 271 P.3d 310, 317 (2012). *Kirwin* quoted *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970): "T]he Due Process Clause [U.S. Const. amend. XIV] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

Kirwin, went on to say that although we have found no published decision directly addressing our issue, the federal cases consistently articulate the substantial evidence standard as focusing on the crime actually charged. *Kirwin*, 166 Wn. App. at 672(citing *United States v. Williams*, 998 F.2d 258, 262 (5th Cir. 1993)("If a rational jury could have found the defendant guilty beyond a reasonable doubt of the essential elements of the crimes charged, the conviction should be upheld.")), cert. denied, *Williams v. United States*, 510 U.S. 1099, 114 S.Ct. 940, 127 L.Ed.2d 230 (1994)).

State *would be* grounds for suspension or revocation in Washington , the State exceeded the proof necessary to prove the essential elements of Driving While Revoked or Suspended in the Third degree. If the defendant was shown to have been suspended in another state due to commission of a more serious offense that would be grounds for suspension in Washington; it would clearly encompass and satisfy the requirement that he was suspended for a lesser offense that would not necessarily rise to a suspension in Washington. Under either wording, the defendant's status as suspended or revoked in the third degree was met. There was sufficient evidence for any rational trier of fact to find that the defendant guilty.[2]

Similarly, Appellants argument that the element's instruction was an alternate means of committing the crime is without merit. The evidence proved, and jury found, the essential elements, and the instructed elements, where the defendant was driving while his license was suspended or revoked in Washington on May 20, 2013. The suspension was due to the defendant being suspended in other states due to offenses that would result in suspension in Washington.

Even if the Court found the elements instruction misstated an element, the wording of the instruction was harmless error. An erroneous jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has not relieved the State of its burden to prove each

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[2] Similarly, Appellant's argument of insufficiency would not lie in any number of offenses where the State charged a lower offense, but presented an instruction and evidence at trial sufficient for a higher offense. A few of many examples would be: Theft Third Degree, where the State provided sufficient evidence that the value exceeded $750, meeting the requirement for First or Second Degree; or Criminal Trespass Second Degree, where the State provided sufficient evidence of unlawful entry into a motor home, meeting the requirement for First Degree.

element of the case. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889, 896 (2002). An instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *State v. Berube*, 150 Wn.2d 498, 505, 79 P.3d 1144, 1148 (2003) quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. *Berube*, 150 Wn.2d at 505. In the present case the defendant stipulated to the facts. The evidence was uncontroverted.

3. <u>There was no error in not providing a definitional instruction of "willfully" that was not requested; or denying a definitional instruction of "knowledge".</u>

Appellant claims the court erred in not providing a definitional instruction of "knowledge" that was orally suggested by defense; and/or erred by not providing a definitional instruction of "willfully" that was not requested by either party. There was no error.

The offense of attempting to elude a police officer requires proof that the defendant acted "willfully." This term must be defined in jury instructions <u>*upon request*</u> (emphasis added). *State v. Flora*, 160 Wn. App. 549, 551, 249 P.3d 188, 190 (2011).

In the present case, there was no request for a definitional instruction for the term "willfully", nor any objection to the failure of the court to give the unrequested instruction. Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." *Flora*, 160 Wn. App. at 553(citing *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003)).

Appellant contends that the trial court erred by not giving the jury an instruction defining "willfully". Although, Appellant may have been entitled to such an instruction had he requested it, he failed to do so at trial. The usual rule is that a court will not review an issue where the proper objection was not made at trial. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, 734 (1986). The failure to give a particular instruction is not error when no request was made for such an instruction. *State v. Hoffman*, 116 Wn.2d 51, 111-12, 804 P.2d 577, 609 (1991). The failure to define a term is not constitutional error. *State v. Boot*, 40 Wn. App. 215, 217, 697 P.2d 1034, 1036 (1985).

An instruction defining a mental state is to be given when the requested, however, the trial court's omission of a mental state instruction cannot be raised before this court for the first time. See e.g., *State v. Stubsjoen*, 48 Wn. App. 139, 147-49, 738 P.2d 306, 310-11 (1987). As a general rule, the appellate court will not review any claim of error which was not raised in the trial court. *Id.* (citing *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983)). Although a party may raise on appeal for the first time a manifest error affecting a constitutional right, it does not mean that any error (constitutional or otherwise) that was not argued below will be reviewed. *Stubsjoen*, 48 Wn. App. at 147-149. There was no manifest error affecting a constitutional right in the present case.

The State Supreme Court has rejected a rule that courts are constitutionally obligated to define technical terms. *State v. O'Hara*, 167 Wn.2d 91, 106, 217 P.3d 756, 764 (2009), as corrected (Jan. 21, 2010), (Jan. 21, 2010). The Court reasoned that where a trial court had instructed the jury on all of the elements—the failure to further define an element is not constitutional error. *Id.*

In *Flora*, the court held that without giving the requested definitional instruction, the defendant lacked legal support for his legitimate theory that the vehicle he was accused of willfully eluding was not recognizable as a police vehicle. *Flora*, 160 Wn. App. at 551.

However, unlike *Flora*, there was no basis to argue that the defendant in this case did not know the vehicle chasing him was a police vehicle. There was no evidence or argument as to the defendant's lack of knowledge that it was a *police* vehicle pursing him. The defendant's entire argument at trial was that he didn't know he was being pursued until near the end of the pursuit, therefore he did not "willfully" fail or refuses to pull over "immediately".

Flora is inapplicable because it addressed the driver's knowledge that he was being pursued by a *police* vehicle, as opposed to a private vehicle, not the driver's knowledge that he was being pursued. See *Flora*, 160 Wn. App. at 555. Here the defendant did not claim a lack of knowledge that the vehicle pursuing him was a *police* vehicle. *Flora* is also inapplicable because, unlike Flora, the defendant in this case never requested a definitional instruction for the term "willfully".

Additionally, the defendant admitted knowing he had passed the oncoming WSP Trooper while travelling approximately 80 mph, and then accelerated after passing the Trooper. The defendant also admitted passing a Border Patrol Agent. Even at trial, the defendant admitted he saw the Trooper, and heard his commands to stop given over the public address system, but continued driving past a pull out, over a railroad crossing, and to his residence before stopping, in order to avoid having his car impounded.

Despite the defendant's argument that once he learned he was being pursued he pulled over in a reasonable manner, and therefore did not "willfully" fail to immediately stop; the willfulness of a defendant's conduct may be inferred by the jury "where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The State presented evidence that the defendant passed both Trooper Lindquist (and Agent Koler), in an unsafe manner and that immediately after passing Trooper Lindquist, the defendant substantially increased his speed. The logical inference from that behavior is that the defendant knew that the Trooper was beginning to pursue him. Moreover, even when the defendant admitted that he knew the officer was ordering him to stop later in the pursuit, he refused to do so. There was sufficient evidence the defendant knew he was being pursued by a police vehicle, and willfully attempted to elude it after having been given visual and audible signals to bring his vehicle to a stop. Even if it could be assumed that it was error to fail to define willfully, the error was harmless.

There was overwhelming evidence of guilt based on the defendant's acts, and admissions of intentionally continuing to drive to his residence even after he knew he was being directed to stop by a law enforcement. The lack of a definition instruction did not contribute to the verdict.

4. <u>Counsel was not ineffective for not taking exception with, or proposing definitional instructions</u>.

Appellant next contends that defense counsel was ineffective for failing to take exception with the trial court's decision not to give the defendant's orally suggested

definitional instruction of "knowledge"; and/or for not requesting a definitional instruction of "willfully".

A court's review of an ineffective assistance of counsel is de novo. *State v. Powell*, 150 Wn. App. 139, 152, 206 P.3d 703 (2009). To prove ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that this performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995), .

Counsel's performance is deficient if it falls below an objective standard of reasonableness, *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), but legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel. *In re Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." *Powell*, 150 Wn. App. at 153.

Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, *and* the failure to request the instruction caused prejudice (emphasis added). *State v. Thompson,* 169 Wn. App. 436, 495, 290 P.3d 996, 1028 (2012).

In the present case, counsel's performance was not deficient, and the failure to take exception to an instruction, or request an instruction, did not cause prejudice. The failure to request WPIC § 10.05– Willfully –defining willfully as knowingly, caused no

prejudice. The elements instruction required in part: "...*the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop.*" By substituting the word knowingly the passage would read: ..."*the defendant 'knowingly' failed or refused to immediately bring the vehicle to a stop after being signaled to stop*". This would not have changed the outcome where even the defendant testified he knew (and heard) the officer demanding he stop, but that he continued to drive anyway. The defendant's argument did not contest that he was being signaled by police, but focused on whether or not he acted "immediately" by stopping as soon as reasonably possible once he was signaled by the police officer.[3] CP 246-247.

Similarly, counsel was not ineffective for failing to object to, or take exception with, the courts failure to give his proposed "knowledge" instruction.[4] WPIC § 10.02 provides the jury the ability to infer the defendant acted with knowledge, using a reasonable person standard. This would have permitted the jury to infer knowledge, regardless of what the defendant testified to, or what defense argued in closing. There were legitimate trial strategy reasons not to pursue the knowledge instruction that was orally suggested.

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[3] Instruction 6 defined the term: "Immediately" means stopping as soon as reasonably possible once signaled by a police officer to halt. CP 37.

[4] WPIC § 10.02 defines "Knowledge – Knowingly", and states:

> A person knows or acts knowingly or with knowledge with respect to a fact][circumstance][or][result] when he or she is aware of that [fact][circumstance][or][result]. [It is not necessary that the person know that the [fact][circumstance][or][result] is defined by law as being unlawful or an element of a crime.]
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> [When acting knowingly [as to a particular fact] is required to establish an element of a crime, the element is also established if a person acts intentionally [as to that fact].]

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC § 10.02 (3d Ed)

E. CONCLUSION

The evidence was sufficient for a rational finder of fact to find the defendant guilty of attempting to elude, where the direct and circumstantial evidence established the defendant was signaled to stop by a uniformed Washington State Patrol Trooper.

The evidence was sufficient for a rational finder of fact to find the defendant guilty of driving while suspended or revoked in the third degree were the facts indicated the defendant was suspended out of state for an offense that would be a basis to suspend his license in Washington. Instructing the jury pursuant to the WPIC became the law of the case and held the State to a higher burden. Giving the WPIC was not error.

The trial court did not err by not providing a definitional instruction for "willfully" that was not requested by either party; nor for denying a definitional instruction of "knowledge" that was orally offered and that was not subsequently objected to by defense. The claimed instructional errors claimed by Appellant were not raised at trial and are waived on appeal.

Trial counsel was not ineffective for not taking exception with the court's denial of a "knowledge" instruction, nor for failing to request a definition instruction of "Willfully". It had no impact on the defendant's theory of the case, and no prejudice resulted from trial counsel's decisions.

Dated this 8 day of May 2015

Respectfully Submitted by:

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