

34528-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA FOWLER, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court provided an erroneous "to convict" instruction that relieved the prosecution of its burden to prove every element beyond a reasonable doubt.

2. The trial court impermissibly allowed police officer testimony on the ultimate issue of fact that invaded the province of the jury.

## **II. ISSUES PRESENTED**

1. Where the defendant did not object below to the allegedly erroneous "to convict" instruction for the crime of attempt to elude, may he now raise the issue for the first time on appeal where the alleged error is not "manifest"?
2. Where the defendant agreed to each of the State's proposed jury instructions, did he invite error by agreeing to the State's proffered "to convict" instruction?
3. Whether the "to convict" instruction given by the trial court accurately informed the jury of the law, was not misleading, and allowed the parties to argue their theories of the case?
4. Whether any alleged error in the "to convict" instruction on the one count of attempting to elude police was harmless, where the defendant's theory of the case conceded that he was attempting to elude?
5. Whether a law enforcement officer's testimony that the defendant was "attempting to elude" him and was driving "recklessly" constitutes an "explicit or nearly explicit" comment on defendant's guilt such that it constitutes manifest constitutional error that may be raised for the first time on appeal?
6. Whether any error in the officer's statements that the defendant was "attempting to elude" and was driving "recklessly" was harmless

and was cumulative with the defendant's own testimony and supported the defendant's theory of the case?

### **III. STATEMENT OF THE CASE**

The State charged Joshua Fowler by information filed on September 10, 2014, in the Spokane County Superior Court, with one count of attempt to elude a police vehicle, one count of second degree unlawful possession of a firearm and one count of possession of a stolen firearm. CP 10-11. The defendant's case proceeded to trial on May 9, 2016. RP 3.<sup>1</sup>

On September 5, 2014, Kurt Vigesaa, a sergeant with the Spokane Police Department, was working in his assigned 2009 Chevrolet Impala, a vehicle equipped with red and blue emergency lights and siren. RP 121-125. He was wearing the uniform of the day which included a police department badge and patch. RP 126. At approximately 3:20 p.m., at the intersection of Addison and Standard, in Spokane, Vigesaa observed the defendant's vehicle travelling southbound on Standard. RP 125-127. Familiar with the vehicle from past experience, having stopped Mr. Fowler recently for driving with a suspended license, and observing Mr. Fowler driving the vehicle, Vigesaa made eye contact with Mr. Fowler as he drove past him.

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<sup>1</sup> Unless otherwise indicated, all references to the Verbatim Report of Proceedings, "RP," specifically refer to the trial proceedings consecutively paginated in three volumes, from the trial dates of May 9 through May 11, 2016 and the sentencing date of May 12, 2016.

RP 127-128. Vigesaa made a U-turn within seconds of observing Fowler driving the vehicle, and the defendant “immediately began eluding” him.

RP 130. Fowler accelerated away from Vigesaa, RP 130, and Vigesaa activated his lights and siren and began to pursue him. RP 133. The pursuit lasted approximately four to five blocks through a 25 mile per hour zone.

RP 134. During the pursuit, Vigesaa observed Fowler to be driving at approximately 45 miles per hour, by the use of his calibrated speedometer.

RP 135. During the pursuit, the defendant crossed through four uncontrolled intersections in a residential area, and each time, the defendant failed to slow his vehicle to observe potential oncoming traffic. RP 137.

Fowler then turned into an apartment complex parking lot. RP 138. Because the incident occurred on a Friday afternoon, there were a number of people present in the apartment complex parking lot, to include children. RP 142. The defendant’s vehicle came to a screeching stop in the parking lot near the egress onto Lyons Street. RP 143. Both doors immediately opened; Fowler ran to the southeast, and his passenger, Haley Lloyd, ran to the west. RP 144. Vigesaa continued to pursue Fowler on foot. RP 146. While pursuing Fowler, Vigesaa observed the defendant reaching toward his waistband, while weaving in and out of shrubs and trees. RP 146. Once the defendant cleared the shrubs, and was running through a grassy area, he

decided to surrender. RP 147. Vigesaa then placed the defendant under arrest.

Based on the defendant's behavior during the foot pursuit, Vigesaa retraced the path of the pursuit, looking for any contraband Fowler may have discarded. RP 148-149. In one of the shrubs, Vigesaa located a handgun and a box of ammunition. RP 149. The firearm was a Smith and Wesson .45 caliber semi-automatic handgun.<sup>2</sup> RP 150.

Haley Lloyd, the passenger of the vehicle, was the stepdaughter of Scott Larson. RP 73-74. At the time of the incidents in question, Ms. Lloyd was dating Joshua Fowler, and Mr. Fowler was known to Mr. Larson. RP 74. Mr. Larson owned a Smith and Wesson semi-automatic pistol with rubber grips and a blue body; he had purchased it from his brother-in-law, and kept it in storage. RP 79. Mr. Larson discovered, however, that the gun was missing from his residence on September 5, 2014, the same day that Mr. Fowler was later discovered with it.<sup>3</sup> RP 81. Sergeant Vigesaa showed Mr. Larson the Smith and Wesson handgun located in the shrubs after the

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<sup>2</sup> Vigesaa described the firearm as a "semi-auto, .45 auto" RP 150.

<sup>3</sup> Mr. Larson testified he discovered the firearm was missing about 15 to 20 minutes before Mr. Fowler was discovered with it. RP 5/9/16 RP 81. Deputy Wang testified, however, that Mr. Larson reported the firearm stolen after Larson was advised that law enforcement had recovered it from Mr. Fowler. 5/9/16 RP 218. This dispute in the evidence is irrelevant to the questions presented here.

pursuit with Mr. Fowler, and Mr. Larson identified the gun as belonging to him. RP 151.

After the foregoing evidence was presented at trial, Mr. Fowler testified. He admitted to having fled from Sergeant Vigesaa; “[Haley Lloyd] indicated [Vigesaa] was flipping around. She told me to go. She has warrants. So immediately, I fled.” He admitted to hearing Vigesaa’s siren and seeing his emergency lights, and that he was trying to get away from him. RP 226, 236. He did not remember how fast he was travelling but conceded he was “speeding.” RP 226, 232, 236. On cross-examination, the defendant admitted he sped through “cross streets” while attempting to get away from Vigesaa. RP 237. Mr. Fowler claimed he wanted to “get away from” Vigesaa, not only to spare Ms. Lloyd from being arrested, but also because he “had no license, bad tabs at the time.” RP 238. The defendant conceded he had prior criminal convictions for crimes of dishonesty, but explained that he pled guilty to those charges, rather than proceeding to trial, because he “was guilty of those charges.” RP 244.

#### Procedural history.

After both the State and defense rested at trial, the court asked defense counsel if he had any objections or exceptions to the instructions proposed by the State. RP 254. Acknowledging that the defense had not prepared its own instructions, defense counsel indicated he had not yet

reviewed each of the State's instructions, but did not anticipate an objection. RP 254. In response, the court indicated that counsel would have time to review the instructions and voice any objections the following day. RP 255.

On May 11, 2016, court reconvened, and the parties again discussed the proposed jury instructions. RP 257. The court again asked defense counsel whether he had any "exceptions to the instructions as they're now presented" and defense counsel indicated he had none. RP 257.

Relevant to this case, the court instructed the jury both in writing and orally that, in order to convict the defendant of the crime of attempt to elude a police vehicle:

[E]ach of the following elements of the crime must be proved beyond a reasonable doubt: 1) that on or about September 5th, 2014, 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 vehicle in a manner indicating a reckless manner; and 6) that the acts occurred in the state of Washington.

CP 95; RP 266.<sup>4</sup>

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<sup>4</sup> Instruction number 7 instructed the jury that "A person commits the crime of attempting to elude a police vehicle when he willfully fails or refuses to bring his vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle he drives his vehicle in a reckless manner." CP 94.

In closing, the State argued that this instruction required the State to prove:

[T]hat while attempting to elude a police vehicle, the defendant drove his vehicle in a manner indicating a reckless manner. So we have to prove that he drove recklessly. We have done so through the testimony of Officer Vigesaa. He has a calibrated speedometer in his car, clocked him going 45 miles per hour in a 25-miles-per-hour zone going through three uncontrolled intersections, driving fast and speeding; by his own admission, speeding; and speeding in an apartment complex with people present.

The way the defendant was driving -- and he said he wasn't paying attention to speeding. That very well could be accurate. He was paying attention to get away. That's reckless, and it puts people in potential danger. And that element has been proven beyond any reasonable doubt.

RP 288.

As a matter of trial strategy, defendant did not contest the attempt to elude charge, but rather, contested the possession of a stolen firearm and unlawful possession of a firearm charge. In closing the defendant argued:

There are facts in this case that are just not in dispute. There are elements, as [the prosecutor] eloquently went through, that have been proven by the state beyond a reasonable doubt. Mr. Fowler, in his Yukon with his girlfriend, felony warrant next to him, at some point, one or both see Sergeant Vigesaa. They decide, Nope, warrant. Go, run. They do.

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Instruction number 11 defined "operate a motor vehicle in a reckless manner" as "to drive in a rash or heedless manner, indifferent to the consequences." CP 98.

They take off for a few blocks, go into a parking lot, stop. He was driving with a suspended license, but he didn't have a warrant, but he was clearly trying to get away. Yeah, he was eluding. He was attempting to, anyway; no question about that. It's not in dispute.

What else isn't in dispute? Well, he is a convicted felon. We know that. We've talked about it already. He's been convicted of three forgeries. You heard his testimony on the stand. He pled guilty to those. Why? He said he did it. He didn't take those to trial, but here he is in trial today. And again, it's not because of the elude.

He's already admitted to that on the stand. The state's right. He did that. But here's what's not clear, and here's what he didn't do. He didn't possess a firearm; and even if he did, he sure didn't know it was stolen.

RP 293-294.

There was some mention in the state's first closing about reckless driving. It is part of attempt to elude. I think there is some question as to how reckless the driving was, but again, Mr. Fowler said he was trying to get away, that he was traveling over the speed limit. I think there's some question of how many people were wherever.

You also heard Sergeant Vigasaa testify that, Yeah, sometimes we actually end pursuit if it's too dangerous. Well, he didn't do that here. But as I already said, Mr. Fowler admitted to eluding. That's something that's not in dispute. The elements are satisfied by the state there, but they're not satisfied with respect to possession of the firearm because he didn't have it.

RP 302.

The jury found the defendant guilty of attempting to elude a police vehicle as charged in count I and second degree unlawful possession of a

firearm as charged in count II. CP 110-111. The jury acquitted the defendant of knowingly possessing a stolen firearm as charged in count III. CP 112.

On May 12, 2016,<sup>5</sup> the court sentenced the defendant to standard range sentences on each count, imposing 13 months for the attempt to elude, and 26 months for the unlawful possession of a firearm conviction. CP 134. The court ordered the sentences to run concurrent to each other, CP 135, and imposed \$800 in mandatory legal financial obligations, CP 136-137.

The defendant timely appealed.

#### **IV. ARGUMENT**

Defendant makes two claims on appeal. First, he claims the “to convict” instruction for attempt to elude misstated an element of the offense and relieved the prosecution of proving beyond a reasonable doubt that the defendant drove in a reckless manner. Second, the defendant claims that Sergeant Vigesaa’s testimony impermissibly invaded the province of the jury. Both claims fail.

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<sup>5</sup> The judgment and sentence, notice of right to appeal, and warrant of commitment were all signed by the trial court on May 12, 2016, but were not marked as “filed” until May 23, 2016. CP 127-140.

**A. THE DEFENDANT FAILED TO OBJECT TO THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT IN HIS CASE; IT WAS NOT A MANIFEST CONSTITUTIONAL ERROR FOR THE COURT TO GIVE THIS INSTRUCTION; ANY ERROR WAS WAIVED; THE INSTRUCTION WAS INARTICULATE BUT NOT INCORRECT; AND ANY ERROR WAS HARMLESS.**

1. The defendant may not raise an alleged error in the “to convict” instruction because it is not a manifest constitutional error and was not objected to below.

A criminal defendant may not raise a challenge to a jury instruction for the first time on appeal, unless the alleged error is a manifest error affecting a constitutional right. RAP 2.5(a). It is a fundamental principle of appellate jurisprudence that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013).

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *State v. Strine*, 176 Wn.2d at 749. This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the

event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

*Strine*, 176 Wn.2d at 749-50. Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Thus, to establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.”

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclao*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

*State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

As this Court observed in *State v. Guzman Nuñez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012): “[T]he general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c),<sup>6</sup> requiring that timely and well stated objections be made to instructions given or refused ‘in order that the trial court may have the opportunity to correct any error.’”

In determining whether a claimed error is manifest, this court views the claimed error in the context of the record as a whole, rather than in isolation. *Scott*, 110 Wn.2d at 688. Manifest error is “unmistakable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008). Instructional error is not automatically constitutional error. *Guzman Nuñez*, 160 Wn. App. at 159.

There is nothing in defendant’s claim of error that is plain and indisputable, or so apparent on review that it amounts to a complete

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<sup>6</sup> CrR 6.15(c) states: “**Objection to Instructions.** Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have recognized that, in the absence of an objection to the instructions proposed by the State and prepared by the court, the “to convict” instruction was inadequate. To the contrary, the instruction was a correct statement of the law, although inarticulate, and instructed the jury as to every essential element of the crime of attempting to elude a police vehicle. Therefore, the defendant’s claims here are not manifest, and therefore, may not be raised for the first time on appeal.

2. The defendant invited error, if any, in the “to convict” instruction.

Furthermore, the defendant specifically agreed to the instructions proposed by the State and as ultimately prepared by the Court. Under the doctrine of invited error, even where constitutional rights are involved, this court will not review jury instructions when the defendant has proposed an instruction or agreed to its wording. *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). The doctrine of invited error precludes a criminal defendant from seeking review of an error he or she helped create. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Because the defendant agreed to the instructions, not having proposed his own, any error in this regard is not only waived by defendant’s failure to object, it is also invited. *But see*, *State v. Hood*, 196 Wn. App. 127, 133-134, 382 P.3d 710 (2016) (where

defendant did not propose his own instructions, invited error doctrine did not bar review of jury instruction, but alleged error was not a manifest constitutional error that could be raised on appeal absent objection below).

3. The “to convict” instruction correctly set forth the law, was not misleading, and allowed the parties to argue their theories of the case.

On appeal, challenges to jury instructions are reviewed de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). “Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

Both the Federal and State Constitution require that a jury be instructed on all essential elements of the crime charged. U.S. Const. amend. VI; Const. art. 1, § 22. A jury instruction which *omits* an *essential element* of a crime relieves the State of proving each element of the crime charged beyond a reasonable doubt and is a violation of due process. *State v. O’Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007). Therefore, “a ‘to convict’ [jury] instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (quoting *State v. Emmanuel*, 42 Wn.2d 799, 819,

259 P.2d 845 (1953)). The court does not look to other jury instructions to supply a missing element from a “to convict” jury instruction. *Id.* at 262-63, 930 P.2d 917. However, even if a jury instruction “omits an element of the charged offense or misstates the law,” it does not necessarily require reversal, and “is subject to harmless error analysis.” *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

RCW 46.61.024(1) provides the elements of attempting to elude a police vehicle. It states:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her 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, shall be guilty of a class C felony. 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.

The approved Washington Pattern Jury Instruction on the elements required to convict a defendant of attempting to elude a police vehicle provides:

To convict the defendant of the crime 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 (date), 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] [her] vehicle in a reckless manner;*  
and

(6) That the acts occurred in the State of Washington.

WPIC 94.02 (emphasis added).

In this case, the elements instruction given by the trial court provided:

To convict the defendant of the crime 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 September 5th, 2014, 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 vehicle in a manner indicating a reckless manner;<sup>7</sup> and*

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<sup>7</sup> The State surmises that the language of this instruction is a conglomeration of the current WPIC, and the former version of the WPIC

(6) That the acts occurred in the state of Washington.

CP 95 (emphasis added).

The “to convict” instruction that was given at trial did not comport with the recommended WPIC. However, mere nonconformity with a WPIC does not render an instruction defective. “The pattern instructions are not authoritative primary sources of the law; rather, they restate otherwise existing law for jurors. The pattern instructions do not receive advance approval from any court, although they are often treated as ‘persuasive.’” WPIC 0.10 (Introduction to Washington’s Pattern Jury Instructions for Criminal Cases). “The pattern instructions are not binding on trial courts; they are intended to guide trial courts in drafting appropriate instructions for individual cases.” *Id.*; see also *State v. Hayward*, 152 Wn. App. 632, 645-646, 217 P.3d 354 (2009) (“WPICs are not the law; they are merely persuasive authority”). Unlike WPIC 4.01, which our Supreme Court has instructed Washington trial courts to use in all criminal cases, *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), WPIC 94.02 is not the subject of such a mandate.

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which instructed the jury in a manner consistent with former RCW 46.61.024, which required proof that a defendant drove “his vehicle in a manner *indicating* a wanton or willful disregard for the lives or property of others.” RCW 46.61.024 (2002) (emphasis added). The statute was revised in 2003 to its current form.

Furthermore, only the total omission of an essential element of an offense requires automatic reversal. *See State v. Sibert*, 168 Wn.2d 306, 312, 230 P.3d 142 (2010). Thus, the question remains whether the language used by the trial court in instructing the jury on the recklessness required for the State to prove the crime of attempt to elude is a correct statement of the law. Although inarticulate and, to some extent, repetitive, it does not misstate the law. The words “in a reckless manner” and “in a manner indicating a reckless manner” convey the same meaning. There is no discernable difference between the use of either phrase, other than “in a reckless manner” is more succinct and clear.

Here, the trial court also instructed the jury that “a person commits the crime of attempting to elude a police vehicle when he willfully fails or refuses to bring his vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle *he drives his vehicle in a reckless manner.*” CP 94. Furthermore, Instruction number 11 defined “operate a motor vehicle in a reckless manner” as “to drive in a rash or heedless manner, indifferent to the consequences.” CP 98. Each of these instructions were accurate statements of the law. Although this Court does not look to other instructions to provide a missing element, the court may look to other instructions to determine whether the “to convict” instruction sufficiently

stated each element of the offense. Every term included in the “to convict” instruction was appropriately and accurately defined elsewhere in the definitional instructions.

Furthermore, the parties both argued that the State was required to demonstrate reckless driving. RP 288, 302.<sup>8</sup> And, as discussed below, the defendant agreed that this standard had been met. Therefore, there is no evidence that the irregularity in the instruction was inaccurate, misleading, or, in any way prevented either party from arguing its theory of the case. Finally, the defendant has also not established that the instruction omitted an essential element of the crime. No error occurred in this regard.

4. Any error in the “to convict” jury instruction was harmless.

As applied to omissions or misstatements of elements in jury instructions, “the error is harmless if that element is supported by uncontroverted evidence.” *Thomas*, 150 Wn.2d at 845; *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The defendant’s theory of the case was that he fled from Sergeant Vigesaa because his girlfriend had warrants and because he did not have a driver’s license or valid registration. Defendant agreed multiple times that he willfully fled from law

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<sup>8</sup> Defendant did not contest that he was attempting to elude Sergeant Vigesaa, although he argued that “some question as to how reckless the driving was.” RP 302.

enforcement, he sped through a residential neighborhood, and he failed to stop at cross-streets while speeding away from the officer.

In closing, the defense argued that Mr. Fowler acknowledged those crimes he had committed, and agreed that he was guilty of the crime of attempting to elude police. He pled guilty to prior acts of forgery because he was guilty of those acts. And, with respect to the attempt to elude, defense counsel strategically argued, “he was clearly trying to get away. Yeah, he was eluding. He was attempting to, anyway; no question about that. It’s not in dispute.”

He’s been convicted of three forgeries. You heard his testimony on the stand. He pled guilty to those. Why? He said he did it. He didn’t take those to trial, but here he is in trial today. And again, it’s not because of the elude. He’s already admitted to that on the stand. The state’s right. He did that. But here’s what’s not clear, and here’s what he didn’t do. He didn’t possess a firearm; and even if he did, he sure didn’t know it was stolen.

RP 293-294.

Defendant’s theory of the case was that he *did* attempt to elude police, but not for the reasons that the State theorized, i.e., that he was in possession of a stolen firearm. Based on his offender score at trial, a conviction for *only* the attempt to elude a police vehicle would have yielded a standard range sentence of 4 to 12 months. RCW 9.94A.510; RCW 9.94A.525. By the time the case proceeded to trial, the defendant had

already served a significant amount of that time.<sup>9</sup> However, if he had been convicted of possession of a stolen firearm, in addition to the attempt to elude, he would have faced a standard range sentence on that charge of 41 to 54 months.<sup>10</sup> RCW 9.94A.510; RCW 9.94A.525. The defense strategy in this case was to employ any reasonable tactic to secure an acquittal of the most serious offense, the possession of a stolen firearm, even though to do so would require admitting guilt on a less serious offense, but one that carried a significantly reduced potential for lengthy incarceration, and presented the potential for a credit-for-time-served sentence. This strategy was successful because the jury ultimately acquitted the defendant of possessing a stolen firearm.

Thus, any error in the instruction was harmless because the defendant openly admitted to the jury that he was attempting to elude a police vehicle on the date in question to gain credibility that he did not

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<sup>9</sup> The defendant was held on a \$5,000 bond from September 8, 2014 to September 10, 2014, and thereafter was held in custody on a \$10,000 bond. CP 6, 14, 18. The defendant remained in custody until he posted the required surety bond on January 5, 2015. CP 26-29. He was then remanded to custody on or about March 18, 2016 for a new charge, CP 41, was thereafter required to post a \$15,000 surety bond, CP 46, and remained in custody through the trial. Thus, by the time the sentence was entered, he had already served approximately 6 months on this charge.

<sup>10</sup> For the sake of clarity, these standard range sentence calculations do not take into account an increased offender score based upon a conviction for unlawful possession of a firearm.

possess the firearm. The uncontroverted evidence demonstrated that the defendant sped away from law enforcement, in order to avoid detention, and drove twice the speed limit while failing to stop, or even pause, for numerous uncontrolled intersections. While the defendant's admission of guilt does not relieve the State the burden of proving his guilt at trial beyond a reasonable doubt, it certainly enabled the jury to find him guilty of the crime beyond a reasonable doubt when combined with the other evidence presented at trial. Accordingly, any alleged error in the "to convict" instruction was harmless beyond a reasonable doubt. This claim therefore fails.

**B. SERGEANT VIGESAA'S TESTIMONY DID NOT INVADE THE PROVINCE OF THE JURY; THE ALLEGED ERROR WAS NOT PRESERVED; AND ANY ERROR WAS HARMLESS.**

"Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant 'because it "invad[es] the exclusive province of the [jury]."'” *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). However, improper opinion testimony on guilt or veracity is subject to RAP 2.5 analysis, discussed above. *King*, 167 Wn.2d at 332.

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. "Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost

explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

*State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007).

To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of a case, including, “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *Id.* at 928.

The defendant has failed to explain how Sergeant Vigessa’s testimony was an “explicit or almost explicit” comment on an ultimate issue of fact, such that he may raise the issue for the first time on appeal. Although the allegedly improper statements were made by a law enforcement officer, who may have portrayed some “aura of reliability,” *Kirkman*, 159 Wn.2d at 928, each of the other factors weighs heavily against Mr. Fowler’s argument. The specific nature of the testimony, which was the mere use of the commonly used words “attempt to elude” and “reckless,” does not indicate in any way that Sergeant Vigessaa was testifying that the defendant was “guilty.” The word “attempt” and the word “elude” are both words that any member of the jury would recognize and understand as conveying a particular idea – i.e., that the defendant was “trying” to “get away” from the

sergeant. The simple use of words included in the name of a crime does not amount to an explicit or almost explicit comment on the guilt of a defendant.

In *State v. Blake*, 172 Wn. App. 515, 523, 298 P.3d 769 (2012), *review denied*, 177 Wn.2d 1010 (2013), for example, several witnesses identified the defendant as the shooter during a murder. Both witnesses were in the vicinity of a shooting, but did not witness the defendant shoot the firearm. One witnesses testified:

I didn't see the person that pulled the trigger. I saw the flash, you understand. It came from my right side. [Blake] was on my right side. I didn't see the gun. I just saw the flash, and I heard it. Instantly, when I saw the flash and heard the sound, like I told you, I took off and ran. I was already trying to make my way out of the situation anyway.

*Blake*, 172 Wn. App. at 524.

The other witness' testimony identified the defendant as the shooter, based on his perceptions of the circumstances surrounding the shooting. *Id.* at 524. In rejecting the defendant's claim that the testimony was an improper opinion regarding his guilt, the court held that because the testimony stemmed from the witnesses' own sensory perceptions and did not contain "conclusory legal terms such as 'guilt' or 'intent,'" the jury was free to disregard the testimony. *Id.* at 525. Ultimately, the court remarked: "Significantly, case law does not support the contention that the challenged testimony included impermissible opinion on guilt, as opposed to allowable

testimony as to inferences or fact-based observations.” *Id.* at 526; *see also*, *State v. Haq*, 166 Wn. App. 221, 266, 268 P.3d 997 (2012) (statements made by law enforcement officers that the defendant was an “active shooter” “hunting for people to execute” was not an explicit or nearly explicit comment on defendant’s guilt and was not so prejudicial in context of entire trial to create practical and identifiable consequences). Vigesaa’s testimony likewise consisted of fact-based observations.

Assuming, for the sake of argument, that Vigesaa’s testimony was an improper opinion on guilty, Mr. Fowler has failed to demonstrate any actual prejudice. First, the judge instructed the jury that it was the sole judge of the credibility of the witnesses and what weight to give to the testimony, CP 87, and the jury is presumed to follow the court’s instructions. *See State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008) (“In *Kirkman*, this court concluded there was no prejudice in large part because, despite the allegedly improper opinion testimony on witness credibility, the jury was properly instructed that jurors ““are the sole judges of the credibility of witnesses,”” and that jurors ““are not bound”” by expert witness opinions. Virtually identical instructions were given in this case. There was no written jury inquiry or other evidence that the jury was unfairly influenced, and we should presume the jury followed the court’s instructions absent evidence to the contrary”); *State v. Curtiss*, 161 Wn. App. 673, 697-98, 250 P.3d 496,

*review denied*, 172 Wn.2d 1012 (2011) (improper opinion testimony was not reversible error where the trial court properly instructed the jury that it was the sole judge of witness credibility and no evidence indicated the jury was unfairly influenced, thus indicating no unfair prejudice resulted).

Here, there is no evidence that the jury was unfairly influenced by Vigesaa's testimony, especially where defendant and his counsel both agreed that he was "attempting to elude" police. Absent an objection raised below, which would have allowed the trial court an opportunity to address the alleged error, this issue simply does not qualify as a manifest error affecting a constitutional right such that review may now be taken.

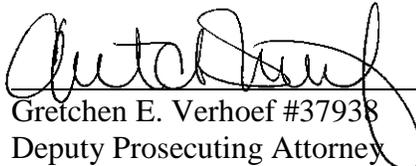
Additionally, any error in this regard was harmless. As discussed above, the defendant and his attorney repeatedly and purposefully conceded that Mr. Fowler was attempting to elude police. Thus, not only was Sergeant Vigesaa's testimony cumulative with the defendant's own testimony, but it also supported the defendant's theory of the case: he was guilty of attempting to elude police, but was not guilty of possessing a stolen firearm. This claim has no merit.

## V. CONCLUSION

The errors claimed by the defendant were not preserved for appeal and are not errors that allow review under RAP 2.5. Both errors involve the defendant's attempt to elude a police vehicle, a crime which the defendant conceded occurred. Thus, any error was harmless. The State respectfully requests that this Court affirm the trial court and jury verdicts.

Dated this 16 day of August, 2017.

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Prosecuting Attorney



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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FOWLER,

Appellant.

34528-9-III

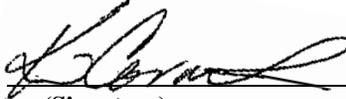
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 16, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kate Benward  
wapofficemail@washapp.org

8/16/2017  
(Date)

Spokane, WA  
(Place)

  
(Signature)

# SPOKANE COUNTY PROSECUTOR

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