

FILED

APR 05, 2017

Court of Appeals
Division III
State of Washington

NO. 34745-1-III

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

STATE OF WASHINGTON
v.
BENJAMIN SWOFFORD, JR.

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

The Honorable Harold D. Clarke III, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Swofford was denied his due process right to present a defense by the trial court prohibiting testimony regarding Swofford's state of mind to support the statutory defense to attempting to elude.

2. The state failed to prove beyond a reasonable doubt the essential elements of attempting to elude.

3. The state failed to prove beyond a reasonable doubt the essential elements of the sentencing enhancement threat of harm or injury to the public.

4. Swofford was prejudiced by counsel's ineffective assistance where counsel failed to request a jury instruction defining "willfully" in the attempting to elude statute.

5. The trial court erred by sentencing Swofford to community custody where that provision is not authorized under the attempting to elude statute.

Issues Presented on Appeal

1. Was Swofford denied his due process right to present a defense by the trial court prohibiting testimony regarding Swofford's state of mind which would have revealed that he was driving to his stepdaughter who had just overdosed, which would have supported the statutory

defense to the charge?

2. Did the state fail to prove beyond a reasonable doubt the essential elements of attempting to elude where the evidence indicated that the night conditions and the car condition made it difficult to see?

3. Did the state fail to prove beyond a reasonable doubt the enhancement that others were threatened with harm of injury where the only evidence in support of this enhancement consisted of an officer testifying that he saw 3 cars move off to the right to avoid Swofford?

4. Was Swofford prejudiced by counsel's ineffective assistance where counsel failed to request a jury instruction defining "willfully" in the attempting to elude statute, where the elements challenged required the jury to understand the meaning of willfully specifically in the context of Swofford's knowledge regarding being signaled to stop by a police officer?

5. Did the trial court err by including community custody on the judgment and sentence where there is no statutory authority for ordering community custody in an attempting to elude case?

B. STATEMENT OF THE CASE

a. Charge.

The state charged Swofford with attempting to elude with an

enhancement for causing a threat of injury or harm to another person. CP 6-7. Swofford was convicted as charged. CP 62-63; 127-147.

b. General Trial Facts

Late on a dark, foggy and rainy night, Officer Corrigan Mohondro was working patrol when he observed a car driving a maximum of 50-55 miles per hour in High Bridge Park. RP 126-29. The car caught Mohondro's attention because of the rate of speed on the small, washboard, dirt-gravel road. RP 125-128, 131. It was very difficult to see due to rain and glare on the road from the headlights reflected in the night fog. RP 131, 223.

Mohondro observed the car drive around a lone minivan that was stopped at a stop sign. RP 129. The car, later identified as being driven by Mr. Swofford, drove into the oncoming lane, and around the minivan without stopping at the stop sign. RP 129-30. There were no cars in the oncoming lane at that time. RP 226.

Mohondro was in a marked police car. He had his emergency lights flashing at all times and intermittently used his siren. RP 125, 228-29, 312. During the chase, there were no other cars on Government Way. RP 230-31. Later during the 3 to 4 minute pursuit when Swofford was travelling

about 40 miles per hour, there were three cars near Spokane Falls Community College that moved to the right and either slowed down or stopped to avoid Swofford in their lane of travel. RP 233-34, 242.

According to Mohondro, there was water on the road which could explain why Swofford slammed on his brakes at different times during the pursuit. RP 231. Mohondro guessed that Swofford drove as fast as 65 miles per hour and at other times much slower. RP 229. Mohondo also testified that generally in his experience, at times a driver will slow down to get the police to pass or to try to disable the police car. RP 231-32. When Swofford used his brakes, he was only travelling 25-30 miles per hour. RP 238.

Officer Hamilton, responded to the pursuit and set up “stop-sticks”, which are designed to deflate tires to cause a car to slow down and stop. RP 138-40. The “stop sticks” deflated 3-4 of Swofford’s tires causing Swofford to slow down on an uphill stretch of the road. RP 147, 204. When Swofford’s car slowed to 25-30 miles per hour, Mohondo executed a PIT maneuver. RP 238-39. The PIT maneuver involved the police car making contact with the rear end of Swofford’s car, and causing it to stop at a Quick Stop minimart. RP 210- 12, 217.

After Mohondro ordered Swofford out of his van he noticed that the van was full of furniture that partially obstructed the rear window. RP 240. According to Mohondro, Swofford said

“Is my girlfriend's fucking van, too.” Then he said, quote: Will you call my mom and tell her I fucked up?” And then, quote: “Can you call my girlfriend and tell her I fucked her car up?”

RP 220. Swofford was not under the influence. Id.

c. Defense Suppressed.

The state moved to suppress any reference to a necessity defense. CP 22-24. Swofford moved to permit a necessity defense and testimony that he was driving fast because he was under duress due to his step-daughter who had just overdosed on drugs. RP 161-185, 307. The court ruled that a common law necessity defense was not available because the statute provided a statutory defense. RP 175.

The court indicated that it would consider offering the statutory defense if the facts supported the defense. RP 175-76. The court prohibited testimony regarding Swofford’s state of mind because “intent is not a component. And that fits with the statute because the statute talks about a reasonable person, not this person, not a subjective person.” RP

178. Counsel argued that state of mind was relevant under the statutory defense that Swofford should have been able to offer to establish the facts necessary for the statutory defense instruction. RP 180.

The court prohibited any testimony regarding state of mind and necessity. RP 187-89. Swofford requested a jury instruction on necessity and on state of mind to explain the meaning of willful, which necessarily required an understanding of Swofford's state of mind. RP 161-189, 252. The court denied these motions. *Id.*

d. Sentencing.

The court imposed an exceptional sentence based on a jury finding that Swofford committed the following aggravating factor. CP 63.

Was any person, other than Benjamin G. Swofford Jr., or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Benjamin G. Swofford during his commission of the crime of attempting to elude a police vehicle?

CP 63.

The court indicated in the judgment and sentence that Swofford was on community placement when the current offense was committed. CP 127-142. The state did not include any information regarding Swofford being on community custody during the commission of the current offense.

RP 305-09; CP 143-45. The court also ordered 12 months of community custody after informing Swofford that community custody did not apply to his case. CP 127-42; RP 315.

The legal financials, we have the \$800 in mandatory nondiscretionary legal financials, which are the five-hundred-dollar victim fund assessment, the DNA, court costs. I will sign the order on restitution for \$695-and-some-odd cents. There is no community custody.

This timely appeal follows. CP 149-173; RP 315.

e. Enhancement.

Mohondo testified that several cars yielded to Swofford. RP 200. “They were getting far to the right side of roadway for them as they possibly could and coming down to either a complete stop or a near stop.” RP 200. The prosecutor argued that at least “three cars” pulled over. RP 272.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF ATTEMPTING TO ELUDE.

Swofford did not get to testify that he was racing home to his stepdaughter who had overdosed. RP 131, 233. Officer Mohondro

observed Swofford driving fast on a dirt road and at one point during the three-to-four minute pursuit, cross the line of traffic into the oncoming lane, causing three other cars to move aside. RP 125-31. Given, the dark, rainy, foggy night and the blinding glare from headlights, the state was unable to prove beyond a reasonable doubt that Swofford knew a police car was signaling for him to stop, or that he knowingly failed to stop. RP 126-31.

a. Due Process Proof Beyond a Reasonable Doubt.

As a part of the due process rights guaranteed under both the Washington Constitution, article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

As the United States Supreme Court explained in *Winship*: "[the] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *Winship*, 397 U.S. at 364.

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant's right under Washington Constitution, article 1, § 9 and United States Constitution, Sixth Amendment to be free from double jeopardy. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

Swofford was charged with attempting to elude a pursuing police

vehicle under RCW 46.61.024. That statute provides:

Any driver of a motor vehicle who [1] **willfully** fails or refuses to immediately bring his vehicle to a stop and who [2] drives his vehicle in a **reckless** manner [3] 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.

(Emphasis added) RCW 46.61.024 (numeration added).

To commit the offense of attempting to elude, the driver must act “willfully”. *State v. Flora*, 160 Wn. App. 549, 552, 249 P.3d 188 (2011). This means that “the driver must not only know that he is being signaled to stop but must also know that the pursuing vehicle is a police vehicle.” *Flora*, 160 Wn. App. at 555 (citing *State v. Slayton*, 39 Wn. App. 46, 49, 691 P.2d 596 (1984)).

b. Insufficient Evidence to Support
“Willfully” Element.

Swofford did not testify, but Mohondro explained that it was very difficult to see due to the rain, darkness, fog and glare. RP 131, 233. Swofford’s van was also full of furniture which blocked part of his rear view.

RP 240. Additionally, while Mohondro did use his emergency lights, he did not have his siren on at any time when communicating with dispatch during this 3-4 minute pursuit. RP 125, 228

To prove willfulness, the state had to establish that Swofford heard the intermittent siren and actually saw the police lights through the din of night fog, rain and glare, and then knowingly failed to stop. *Engel*, 166 Wn.2d at 576. While it is possible that Swofford knew a police car was signaling for him to stop, the evidence falls short of proof beyond a reasonable doubt because a rational juror would not find the essential element of willfulness in light of the stormy night conditions.

Subsequently, if Swofford did not know he was being signaled by a police officer, it would have been impossible to establish that he willfully failed to stop because he would have first needed the knowledge that Mohondro was a police officer.

The facts in this case do not permit an inference that Swofford actually heard and saw the police car, and willfully disregarded the signal to stop. In short, the state failed to prove that Swofford willfully failed to stop before attempting to elude. The failure to prove an essential element of the crime charged requires reversal with a remand for

dismissal with prejudice. *Hudson*, 450 U.S. 40; *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Anderson*, 96 Wn.2d at 742.

The Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.” *Burks*, 437 U.S. at 9. Accordingly, to avoid a double jeopardy violation, this Court must reverse the assault conviction and remand for dismissal with prejudice. *Id*; *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996).

2. SWOFFORD WAS DENIED HIS DUE
PROCESS RIGHT TO PRESENT A
DEFENSE.

The attempting to elude statute was amended in 2003 changing the driving element from “willful wanton” disregard for the safety of others to “reckless driving” RCW 46.61.024. The amendment also added a statutory defense to the charge:

(2) It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was

reasonable under the circumstances.

Id.

Swofford requested to produce evidence regarding his state of mind to establish the statutory defense. RP 161-171. The court suppressed all reference to state of mind which precluded the opportunity to present the statutory defense. RP 175, 185.

The Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington State Constitution guarantee a criminal defendant the right to present a defense to the crimes charged. A defendant has the right to present admissible evidence in his defense and must show the evidence is at least minimally relevant to the fact at issue in her case. *State v. Yoke*, 196 Wn. App. 424, 432, 383 P.3d 619 (2015). Further, a defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting it. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

a. Statutory Defense.

RCW 46.61.024(2) provides a statutory defense to the charge of attempting to elude. Under the statute, the person is evaluated based on what a reasonable person would do in the same circumstances. Id. To

understand what a reasonable person would do under the circumstances requires an understanding of the circumstances.

The term “willful” contains both subjective and objective components. *State v. Sherman*, 98 Wn.2d 53, 58-59, 653 P.2d 612 (1982); RCW 46.61.024. Based on the prior attempting to elude statute, our Courts have explained “that defendant’s objective conduct ‘may be rebutted by subjective evidence pertaining to defendant’s mental state’” in an attempting to elude case. *State v. Mitchell*, 56 Wn. App. 610, 616-17, 784 P.2d 1990) (quoting *State v. Thomas*, 109 Wn.2d 222, 227-28, 743 P.2d 816 (1987)). See also *Sherman*, 98 Wn.2d at 58-59 (*Sherman* instruction: the defendant’s objective conduct could be “rebutted by other evidence in the case whether objective or subjective.”).

State of mind is a core issue in the crime of attempting to elude because it contains the element of willfulness with respect to the element that the defendant must know that an officer is signaling for the driver to stop, and regarding the willful failure to stop. RCW 46.61.024; *Thomas*, 109 Wn.2d at 227-28; *Sherman*, 98 Wn.2d at 58-59; *Mitchell*, 56 Wn. App. at 616-17.

Even though the willful portion of the current attempting to elude

applies to the failure to stop rather than to the manner of driving, case law continues to find that willful is a subjective mental state. *Thomas*, 109 Wn.2d at 227-28; *Sherman*, 98 Wn.2d at 58-59; *Mitchell*, 56 Wn. App. at 616-17.

If our courts permit subjective evidence to rebut the willful portion of the driving element in the former attempting to elude statute, then it is logical to expect that subjective evidence similarly can be used to rebut the willful element regarding failure to stop in the current statute. Trial counsel made this argument quite clearly, but the trial court incorrectly insisted that Swofford's state of mind was not relevant to establish an element of the attempting to elude statute. RP 185.

The trial court effectively barred Swofford from presenting a defense by barring evidence of the circumstances for driving fast. Swofford was entitled to present facts for the jury to determine if a reasonable person under the circumstances would have acted consistently with Swofford, thus invoking the protections of the statutory defense.

In an offer of proof, Swofford provided the court with sufficient evidence regarding the overdose evidence which should have been

presented to the jury along with the statutory defense. The trial court's suppression of this evidence and refusal to give the statutory defense violated Swofford's constitutional right to present a defense.

Swofford was also entitled to present inconsistent defenses because the only criteria for allowing inconsistent defenses is some evidence in the record to support each defense. *State v. Frost*, 160 Wn.2d 765, 772, 16 P.3d 361 (2007); *Cf. State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010) (defendant charged with assault was entitled to argue accident and an instruction on defense of self-defense, since there were two versions of events and outcome would turn on what was believed).

Swofford argued that he did not see or hear the signal to stop and he also should have been allowed to argue his reasons for not stopping were not willful, due to his stepdaughter' crisis. *Id.*

3. SWOFFORD WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO REQUEST A JURY INSTRUCTION DEFINING THE ESSENTIAL ELEMENT "WILLFULLY" IN WITH RESPECT THE CHARGE OF ATTEMPTING TO ELUDE.

The trial court agreed that the term "willfully" in the attempting to

elude statute requires “knowledge”. RP 182. The defense argued for a both the common law necessity defense and the statutory defense, but did not explicitly requested a definition of the term “willfully”. RCW 9A.08.010(4) defines willfully as follows:

A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

Id.

The WPIC provides: “A person acts willfully [as to a particular fact] when he or she acts knowingly [as to that fact].” 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.05, at 214 (3d ed. 2008).

- a. Swofford Was Entitled To Jury Instruction Defining “Willfully”.

“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.” *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); *Flora*, 160 Wn. App. at 553.

In *Flora*, the court denied the instruction erroneously believing that “willingly” did not implicate “knowledge” in the attempting to elude statute. *Id.* On appeal the state conceded error on this point. *Id.* By contrast, in this case, the court agreed that the term “willfully” did implicate knowledge, but counsel did not request an instruction defining this term. RP 182.

The term “willfully” is an element in the attempting to elude statute that has the identical meaning as “knowledge”. *Flora*, 160 Wn. App. at 553. Because the term “willfully” has a specific, particular meaning in the context of the attempting to elude statute, it should be defined for the jury on request. *State v. Allen*, 101 Wn.2d 355, 358-62, 678 P.2d 798 (1984).

As a general principle of law, a “jury should not have to obtain its instruction on the law from arguments of counsel.” “*State v. Aumick*, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). Without a definition, the jury is impermissibly left to come up with its own understanding of a technical term for a culpable mental state. *Allen*, 101 Wn.2d at 358-62.

In this case as in *Flora*, counsel argued and here the court agreed that the term “willful” meant “knowing”. RP 180, 182. *Flora*, 160 Wn. App. at 554-55. The Court in *Flora* explained that the jury needed an instruction on “willfully” because the driver “has to know that there’s an officer giving

him a signal and know the officer is pursuing him.” *Id.* In *Flora*, the Court explained that the verdict was affected without an instruction defining “willfully” because it allowed the jury to find something less than proof beyond a reasonable doubt that the driver knew both that he was being signaled to stop and that the pursuing vehicle was a police vehicle. *Flora*, 160 Wn. App. at 555-56.

On this point of law, *Flora* is indistinguishable. Here as in *Flora*, counsel argued to the court that “willfully” meant “knowledge” and that the jury needed to understand the term “willfully”. Only here, counsel argued in the context of the necessity defense rather than simply requesting a specific instruction defining the term “willfully”. RP 180, 182. Counsel’s failure to request this definition was ineffective assistance of counsel because it allowed the state to obtain a conviction without requiring the state to prove beyond a reasonable doubt that Swofford knew he was being signaled to stop and that he knew the pursuing vehicle was a police car. *Id.*

In some circumstances not applicable in the instant case, a trial court’s failure to define a term may be harmless error. *State v. Pouncy*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010). Error is only harmless if the

error is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

b. Ineffective Assistance of Counsel.

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and article I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v.*

Hawkins, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33 (citing, *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999); *State v. Hamilton*, 179 Wn. App. 870, 879-80, 320 P.3d 142 (2014).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State*

v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel. *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Counsel's performance is not deficient if the defendant would not have received a proposed instruction. *Powell*, 150 Wn. App. at 154.

In *Hubert*, the defendant was charged with "second degree rape under that part of the statute criminalizing sex with a person who is incapable of consent by reason of being physically helpless." *Hubert*, 138 Wn. App. at 927. An affirmative defense to this charge is that the defendant reasonably believed that the person was capable of consent. *Hubert*, 138 Wn. App. at 929.

Hubert testified that he believed that the alleged victim was awake during the sexual encounter. *Id.* Despite this evidence, Hubert's attorney did not raise the affirmative defense. *Id.* Further, his attorney admitted that he "was not familiar' with the statutory defense until Hubert's appellate counsel brought it to his attention." *Id.* The Court concluded that "[c]ounsel's failure to discover and advance the defense was plainly

deficient performance.” *Hubert*, 138 Wn. App. at 930.

Hubert’s counsel failed to identify and present the sole available defense to the charged crime, despite the fact that there was evidence to support that defense. *Hubert*, 138 Wn. App. at 932. The Court concluded that Hubert was denied effective assistance of counsel as a result of this failure and the resulting prejudice. *Id.*

Hubert instructs that when counsel does not request a needed instruction, performance is deficient, and when there is evidence to support the instruction, the defendant is prejudiced. In *Flora*, the Court explained that in an attempting to elude case when the night is “dark and rainy”, that evidence is sufficient to require a jury instruction on the definition of “willfully” because a jury could have believed that under such circumstances, the driver did not act knowingly under the circumstances. *Flora*, 160 Wn. App. at 555-56.

Here in addition to a dark and rainy night in *Flora*, there was also fog and glare to support the need for a jury instruction on “willfully” because the jury here could have believed that Swofford did not act knowingly. Accordingly, as indicated in *Hubert* and *Flora*, the failure to counsel’s performance was deficient and prejudicial. *Flora*, 160 Wn. App.

at 549; *Hubert*, 138 Wn. App. at 930.

The remedy is to remand for a new trial. *Flora*, 160 Wn. App. at 556.

4. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE SENTENCING ENHANCEMENT THAT OTHERS WERE THREATENED WITH PHYSICAL INJURY OR HARM UNDER RCW 9.94A.834.

The state charged and the jury found that Swofford committed the enhancement endangering others during the attempting to elude. CP 6-7. To establish this enhancement the state must prove beyond a reasonable doubt “the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer.” *State v. Williams*, 178 Wn. App. 104, 107, 313 P.3d 470 (2013), *review denied*, 180 Wn.2d 1003, 321 P.3d 1207 (2014); RCW 9.94A.834.

In other words, that “that one or more persons other than the defendant or the pursuing law enforcement officer were *threatened with physical injury or harm* by the actions of the person committing the crime of attempting to elude a police vehicle.” *Id* (enhancement added). *State v. Chouap*, 170 Wn. App. 114, 125-26, 285 P.3d 138

(2012), *review denied*, 182 Wn.2d 1003 (2015) (citing *State v. Nunez*, 174 Wn.2d 707, 709, 712, 285 P.3d 21 (2012)); RCW 9.94A.537¹.

For example, in *State v. Freely*, 192 Wn. App. 751, 368 P.3d 514 (2016), *review denied*, 185 Wn.2d 1042(2016), in the context of a prosecutorial misconduct case, Division One held that the prosecutor could argue that endangering another – applied to an officer that was not pursuing the driver. *Freely*, 192 Wn. App. at 757, 761-62. In *Freely*, the driver slid his car directly towards an officer who set up spike strips, putting that officer in danger. *Id.*

Similarly, in *Chouap*, the evidence established that Chouap drove directly at a police officer other than the one pursuing, and came “[f]airly close’ to striking” the other officer. *Chouap*, 170 Wn. App.at 120. One car also had to pull over in front of Chouap to avoid being hit by Chouap, but the emphasis of the threatened by harm came from the officer who was targeted by Chouap and who feared for his safety. *Chouap*, 170 Wn. App. at 120.

¹RCW 9.94A.537(3) “The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.”

Here, by contrast, the allegation of danger to others applied to officer Mohondo testifying that three or four cars moved aside to the far right and either slowed down or stopped. RP 200. There was however no testimony that any of the drivers was threatened with injury or harm or were ever in danger, or had to act swiftly to avoid a collision. RP 200.

The simple allegation alone does not satisfy the state's burden of proof beyond a reasonable doubt. Accordingly, under *Nunez*, this Court must reverse the enhancement and remand for a sentence modification.

5. THE TRIAL COURT ERRED BY IMPOSING
COMMUNITY CUSTODY BECAUSE IT IS
NOT STATUTORILY AUTHORIZED.

During sentencing, the trial court informed Swofford that "community custody does not apply". RP 315. The court nonetheless, without statutory authority imposed 12 months of community custody under RCW 9.94A.701. CP 62-63; 127-147.

RCW 9.94A.701 does not apply to the crime of attempting to elude. RCW 9.94A.701(3) provides as follows:

(3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:

(a) Any crime against persons under RCW 9.94A.411(2);

(b) An offense involving the unlawful possession of a firearm under RCW 9.41.040, where the offender is a criminal street gang member or associate;

(c) A felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000; or

(d) A felony violation of RCW 9A.44.132(1) (failure to register) that is the offender's first violation for a felony failure to register.

Id.

Attempting to elude is not a crime against a person, an offense involving a firearm or street gang and is not related to failure to register. RCW 9.94A.411. The list of crimes against persons and violent crimes is exhaustive and does not include attempting to elude. *In re Post Conviction Review of Leach*, 161 Wn.2d 180, 185, 163 P.3d 782 (2007). When community custody is not authorized by statute, as in this case, it must be removed from the judgment and sentence. *Leach*, 161 Wn.2d at 188.

In *Leach*, the Court ordered removal of the term of community

custody for an attempt crime that was not authorized by statute. *Leach*, 161 Wn.2d at 188. In this case as well, the community custody is unauthorized by statute and accordingly must be removed from Swofford's judgment and sentence.

D. CONCLUSION

Swofford respectfully requests this Court remand for reversal of the charge and dismissal with prejudice. In the alternate, Swofford requests remand for a new trial and remand for resentencing to vacate the sentencing enhancement and the community custody.

DATED this 5th day of April 2017.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light blue rectangular background.

LISE ELLNER
WSBA No. 20955
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor at SCPAAppeals@spokanecounty.org and Benjamin Swofford, Jr./DOC#758521, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed, on April 5, 2017. Service was made electronically to the prosecutor and via U.S. Mail to Benjamin Swofford, Jr.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

ELLNER LAW OFFICE
April 05, 2017 - 1:07 PM
Transmittal Letter

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Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to SCPAappeals@spokanecounty.org.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net