

34745-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BENJAMIN SWOFFORD, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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.

II. ISSUES PRESENTED

1. Was there sufficient evidence to support the defendant's conviction for attempting to elude a pursuing police vehicle?

2. Whether the defendant was denied due process when the trial court found irrelevant a proffer of testimony in furtherance of a necessity defense?

3. Did the defendant meet his burden of production to establish *both* elements of the affirmative to eluding a pursuing police vehicle and to warrant giving an affirmative defense instruction?

4. Was the trial court required to sua sponte instruct the jury on the definition of “willfully”?

5. Was the defense attorney ineffective if he proposed a definition for “willfully,” but the record is silent as to why the trial court did not instruct on the definition?

6. Has the defendant established he was prejudiced because the jury was not instructed on the definition of “willfully”?

7. Was there sufficient evidence to support the aggravating circumstance beyond a reasonable doubt?

8. Should this Court remand this case to the trial court to strike the community custody provision if it is not authorized by statute?

III. STATEMENT OF THE CASE

Procedural history.

The defendant/appellant, Benjamin Swofford, Jr., was charged by information in the Spokane County Superior Court with one count of attempting to elude a pursuing police vehicle. CP 6-7. The State also alleged the aggravating circumstance of endangerment by eluding a pursuing police vehicle. CP 6-7. After a jury trial, Mr. Swofford was convicted as charged,

including the aggravating circumstance. CP 62, 63. With an offender score above a “9,” Mr. Swofford was sentenced within the standard range, with an additional 12 months plus one day for the enhancement. CP 132, 151.

The trial court also ordered 12 months of community custody. CP 133-34.

Substantive facts.

On December 6, 2015, Spokane Police Officer Corrigan Mohondro was on patrol and driving a fully marked patrol car. RP 125. The vehicle had “Spokane Police” in large lettering on both sides of the vehicle, a siren, and a full emergency light bar. RP 125. The officer was wearing a department-issued jumpsuit, which had a badge on the chest, and Spokane police patches on both shoulders. RP 125.

Officer Mohondro first noticed Mr. Swofford’s vehicle near High Bridge Park around 11:45 p.m., on a Sunday night.¹ RP 126, 223. During inclement weather, Mr. Swofford was driving on a small, gravel road, which was wash-boarded. RP 128, 131. Mr. Swofford’s vehicle was travelling at approximately 50 to 55 miles per hour, as it passed by the officer. RP 129, 225. The officer caught up with Mr. Swofford’s vehicle at

¹ The officer described the area as a dirt road leading toward a parking area inside of the High Bridge golf course. RP 128.

the intersection of “A” Street and High Bridge Park drive. RP 129. Mr. Swofford failed to stop and did not slow for a stop sign at the intersection. RP 129. A motorist, in a minivan, was stopped at the intersection in front of Mr. Swofford. RP 129. At this point, the officer was approximately one to two car lengths behind Mr. Swofford. RP 191. Mr. Swofford drove around the minivan, accelerated into the oncoming lane, and travelled westbound on Riverside. RP 129-30.

The officer activated his emergency lights, and intermittently² used the siren. RP 130, 132, 191. The officer noted it had been raining during his entire shift, there was standing water on the roadway (as the pursuit approached Fort Wright Institute), which created a glare making it difficult to see, and there was a light fog throughout most of the pursuit. RP 131, 223-24. At one point, Mr. Swofford accelerated away from the officer. RP 131. Several times, as the patrol vehicle neared Mr. Swofford’s vehicle to enable the officer to view his license plate, Mr. Swofford hit his brakes,

² The officer only occasionally used the siren because it was extremely loud, and when activated, it was difficult to hear other officers on the police radio who were responding to the area, and relaying information to the officer. RP 132. An officer in pursuit does not have to continuously activate the siren to constitute an attempt to elude. The signal given by the officer may be by hand, voice, emergency light, *or* siren. RCW 46.61.024 (emphasis added).

causing the officer to immediately slam on his brakes. RP 131. It appeared Mr. Swofford did this to cause a collision, which would allow the defendant to flee. RP 197.

Officer Mohondro described Mr. Swofford's driving on Government Way:

He was between both sides of the road, so crossing the oncoming lane, fog line, as well as the lane, the proper lane, back and forth across the road. He slammed on his brakes several times, and then would accelerate extremely rapidly, continue that erratic driving pretty much entirely down Government Way.

RP 196.³ During this time, Mr. Swofford's vehicle was traveling at approximately 60 to 65 miles per hour, based upon the officer's vehicle speedometer and visual observation. RP 229. The speed limit is posted at 30 or 35 miles per hour for that stretch of roadway. RP 248. Again, the officer was approximately two car lengths behind the suspect vehicle at this point. RP 232.

As the pursuit approached Fort Wright Institute and Spokane Falls Community College, Mr. Swofford continued to cross into the two

³ There were no street lights from Riverside to the Fort Wright Institute. RP 197. The area around Fort Wright Institute was residential, including several apartment complexes, which was densely populated. RP 199.

oncoming lanes, back and forth, into his own lane of travel. RP 200. There were approximately four other cars approaching the defendant and the officer in the oncoming lane of travel. RP 194-95, 199, 235. The suspect vehicle was travelling at approximately 40 miles per hour at this point. RP 230. The oncoming motorists were driving to the far right side of the roadway, slowing to a stop or a near stop as the pursuit approached. RP 200.

As the pursuit progressed toward T. J. Meenach Bridge, which was a downward grade, Mr. Swofford again drove into the far left of the oncoming lanes as he rounded the curve. RP 201. He was travelling at 60 miles per hour in a marked 30 miles per hour zone. RP 204.

During this time frame, other officers responded to the chase. RP 133. Eventually, spike strips were deployed in the area of T. J. Meenach Bridge, near Northwest Boulevard. RP 133, 139, 141. Officer Craig Hamilton observed the chase approach, with Officer Mohondro's patrol car's emergency lights and siren activated. RP 145. Mr. Swofford's vehicle drove past Officer Hamilton at such a fast rate, he was unable to recognize the vehicle afterward. RP 153. After Mr. Swofford's car drove over the spike strips, several of the vehicle tires eventually deflated. RP 141, 143, 145-46, 153, 208.

With three of the suspect vehicle tires flattened, the vehicle continued to travel at approximately 30 miles per hour. RP 211, 222. At

approximately 11:49 p.m., Officer Mohondro performed a pursuit intervention technique (PIT) to stop Mr. Swofford's vehicle. RP 210-11, 242. Mr. Swofford's vehicle finally came to rest at Northwest Boulevard and Cochran, in a business parking lot.⁴ RP 212.

When Mr. Swofford was taken into custody, he remarked to Officer Mohondro "I[t's] my girlfriend's fucking van, too." "Will you call my mom and tell her I fucked up?" "Can you call my girlfriend and tell her I fucked her car up?"⁵ RP 220.

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT'S CONVICTION FOR ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

Mr. Swofford claims there was insufficient evidence to establish that he acted "willfully" at the time of the event. *See* Appellant's Br. at 7-12.

Standard of review regarding sufficiency of the evidence.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068,

⁴ The suspect vehicle was equipped with both right and left side mirrors, and a rear view mirror. RP 221.

⁵ The trial court held a CrR 3.5 hearing, and determined the statements admissible at the time of trial. RP 9-31. No written findings of fact and conclusions of law were entered.

25 L.Ed.2d 368 (1970); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016); U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

A sufficiency of evidence challenge is reviewed de novo. *Rich*, 184 Wn.2d at 903. The standard of review for a sufficiency of the evidence assertion in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Rich*, 184 Wn.2d at 903. A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). "Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact." *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). In like manner, the credibility of witnesses and the weight of the evidence is the exclusive function of the

trier of fact, and is not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A jury may draw inferences from the evidence so long as those inferences are rationally related to the proven facts. *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989). A rational connection must exist between the initial fact proven and the further fact presumed. *Jackson*, 112 Wn.2d at 875. Moreover, a jury may infer from one fact the existence of another essential to guilt, if reason and experience support the inference. *Tot v. United States*, 319 U.S. 463, 467, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943).

Argument.

The attempt to elude a police vehicle statute provides:

(1) 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.

RCW 46.61.024.

“Willfulness” in the attempting to elude statute is identical to “knowledge”. *State v. Flora*, 160 Wn. App. 549, 553, 249 P.3d 188 (2011); *State v. Mather*, 28 Wn. App. 700, 702, 626 P.2d 44 (1981).

The trial court's instruction number seven, in relevant part, reads as follows:

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 December 6, 2015, 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 57.

The court's instruction number eight defining "reckless manner" stated:

To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.

CP 58.

Here, at the time of the incident, the officer was in uniform and driving a patrol vehicle equipped with emergency lights and siren. Mr. Swofford was signaled to stop by the officer's activation of the vehicle's emergency lights and occasional use of the siren. Furthermore, Mr. Swofford willfully failed to stop his vehicle as established by the following facts. The officer caught up with the suspect vehicle at "A" Street and High Bridge Park Drive. Contemporaneously, Mr. Swofford drove around a stopped minivan, accelerated into oncoming traffic, and travelled onto Riverside Avenue. The officer was approximately one to two car lengths behind the vehicle at this point. The officer activated his emergency lights and periodically used his siren. The siren was extremely loud. RP 195. Several times as the patrol car neared the suspect vehicle, Mr. Swofford slammed on his brakes.

From these several facts, it can be reasonably inferred Mr. Swofford attempted this very dangerous act as a strategic maneuver to stop the officer's pursuit, either by causing the officer to crash or making it too dangerous for the officer to continue the pursuit. These acts alone support the inference that Mr. Swofford "willfully" failed to stop and was aware of the officer's command to stop his vehicle. At that point in time, the defendant willfully failed to *immediately* bring his vehicle to a stop, and, as before and after, he continued to drive in a manner indicating a wanton and

willful disregard for the lives or property of others while attempting to elude police after being signaled to stop by a uniformed officer.

The chase continued on Government Way where the officer was approximately two car lengths behind Mr. Swofford's vehicle, as Mr. Swofford's van occupied all lanes of travel, accelerating rapidly at times, and maintaining a speed of at least 60 miles per hour, in a posted 30 to 35 miles per hour zone in that area.

Mr. Swofford progressed through the area of Fort Wright Institute and Spokane Falls Community College at approximately 40 miles per hour and continued to cross into the two oncoming lanes. It can again be inferred that Mr. Swofford's decision-making was an effort to cause the officer to terminate the pursuit.

As the pursuit advanced on a downward grade toward J. Meenach Bridge, Mr. Swofford again drove in the far left of the oncoming lane, speeding at 60 miles per hour in a posted 30 miles per hour zone.

Even after three of the four tires were punctured by a spike strip and the officer's failed attempt to stop Mr. Swofford's vehicle with a PIT maneuver, the defendant continued to drive the van until it succumbed to the flattened tires at a business parking lot. Certainly it can be inferred that after the failed PIT maneuver, Mr. Swofford had knowledge that an officer

wanted him to stop, and he willfully continued to drive despite that knowledge. He admitted as much when he told the officer he “f—d up.”

The evidence was sufficient to establish the elements of attempt to elude a pursuing police vehicle, including the fact that Mr. Swofford willfully failed to stop during the pursuit. The State presented substantial evidence that the defendant attempted to elude the officer.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DETERMINED THAT THE DEFENDANT’S PROFFERED EVIDENCE WAS NOT RELEVANT TO A CLAIM OF NECESSITY. MOREOVER, THE DEFENDANT DID NOT MEET HIS BURDEN TO HAVE THE JURY INSTRUCTED ON THE AFFIRMATIVE DEFENSE OF ENDANGERMENT BY ELUDING A PURSUING POLICE VEHICLE.

Mr. Swofford next alleges that he was denied his due process right to present a defense. Appellant’s Br. at 12-16.

Standard of review.

An appellate court reviews an alleged due process violation de novo. *State v. Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006); *State v. Statler*, 160 Wn. App. 622, 636-37, 248 P.3d 165 (2011), *review denied*, 172 Wn.2d 1002 (2011).

During trial, the defense attorney requested the court rule on whether the common law defense of necessity would legally be available at the time of the defendant’s case in chief in response to the State’s motion in limine to preclude a necessity defense, relying on *State v. Gallegos*,

73 Wn. App. 644, 871 P.2d 621 (1994). RP 161-69; CP 27 (defendant's additional proposed instructions).⁶ The defense made the following offer of proof:

The argument we would make, Judge, and the common law defense, necessity defense as I read it, is that it is more of a medical issue here. Here we would try to present evidence that basically Mr. Swofford's stepdaughter, so to speak, because he was engaged to the mother of the daughter, Mr. Swofford was aware that night that she had overdosed, essentially, taken too many drugs of some kind and was in a medical emergency.

He had at that point Miss Farr, who is the parent of the individual who overdosed, had her van. That has been established. She was the registered owner. They had no other vehicle, is my understanding at the time. She basically called him and says, you need to get home. The daughter's boyfriend at the time had called 911, but they hadn't received a medical response at that point. So he's in the van and he's rushing in that direction. So we would argue essentially that it is a medical issue, and that it is not at all having to do whether or not Mr. Swofford recognized that it is a police vehicle pursuing him, which is what the statute affirmative defense is completely different; they are not consistent.

So we would argue essentially that it is a medical issue, and that it is not at all having to do whether or not Mr. Swofford recognized that it is a police vehicle pursuing him, which is

⁶ The defense originally filed a general set of proposed instructions with the court clerk, which included WPIC 94.10 (attempting to elude a police vehicle-affirmative defense-reasonable belief that pursuer is not a police vehicle defense). CP 15. It subsequently filed a supplemental "necessity" instruction. CP 27. It is unknown whether a copy was delivered to the trial court.

what the statute affirmative defense is completely different; they are not consistent.

RP 163-64.

The defense attorney continued with his argument regarding the application of the common law defense of necessity to the present case.

RP 164-165. The defense then remarked:

The force of nature element is only one part of it. There is another clause there: "Or the pressure of circumstances caused the accused to take unlawful action." I would submit to the Court there is no point in that entire phrase if it is meant that the common law necessity defense only applies to those situations where there is a force of nature at play. So I do believe that necessity can be used in a medical situation.

RP 165.

The defense attorney then posited that whether a jury instruction could be given on the issue would be dependent on whether sufficient evidence had been presented to submit a jury instruction on necessity.

RP 165.

Thereafter, the court ruled:

So starting out with 46.61.020 -- I'm referring to the RCWs -- that is the attempt to elude statute, subsection (2) establishes affirmative defenses. There appear to be two defenses: One, that a reasonable person would not believe a signal to stop was given by a police officer; and two, the driving after the signal to stop was reasonable under the circumstances.

So then the question is raised today whether necessity remains a defense given the statute, which if I'm reading right, this was a 2010 statutory enactment. That was the second part that I just read was in 2010. But the statute was changed in 2010.

So, we look at WPIC 18.02 which talks about the defense of necessity, and there's a common law defense of necessity and that is, as counsel points out, set out in *State v. Diana*, and then clarified or the elements are set out in the instruction that we can use. As pointed out, the comments indicate that the instruction is to be used in cases where the common law defense is appropriate. And it must yield to a statutory defense for a particular crime.

So it has limited applicability.

...

Then the comment goes on to say the instruction does not apply to crimes that have a statutory necessity defense. And includes in that comment then the eluding statute and cites just exactly the statute that I read.

So two things come to pass here: First of all, if I accept Mr. Charbonneau's comments as, if you will, an offer of proof as to what occurred that evening with regard to Mr. Swofford, which I certainly would do in terms of how we frame this question, you know, then you get to the authority under the common law of the *State v. Gallegos*, the cases that we talked about, the 1994 case.

In that case -- that case does talk about the pressure that the defendant in that case felt. The court held as a matter of law that it wasn't available. Always an important thing for the court to do, rule things as a matter of law in or out, but that is what we're asked to do. It talked about the pressure that he felt that evening did not result from a physical force of nature. And then Counsel points out, you know, it says the pressure of circumstances. Then it lays out the test in that

case is from Diana. But the court went on to say that as a matter of law the defense of necessity was not available.

I agree the circumstances are different, but they are not materially different; in other words, it was an emergency, someone may have been experiencing an emergency here, probably a little more apparent given the offer of proof, but it was an emergency, it was a personal situation. And that the -- you know, the person being summoned, if you will, in this case the defendant, was -- the point would be, I'm hurrying to get home, or wherever I need to be. Fair enough. That may be the reason they started out driving quickly. Then the question is whether they have a necessity to continue to elude or move away from a police officer signaling. Two different questions.

Be that as it may, all that aside, State v. Gallegos would tell me under the situation I have been given, understanding it is sort of an offer of proof, if you will, it doesn't appear to meet the legal standard of necessity from the defense. That is the way I view it.

RP 172-75.

Ultimately, the trial court held that if the defense was asserting necessity, it had to be in the form of RCW 46.61.024(2) (statutory affirmative defense), and, when all of the evidence was presented, it would consider whether to permit an instruction. RP 175.

At the end of the State's case, the defense requested clarification on the court's prior ruling.

[DEFENSE COUNSEL]: I wanted to make a motion to clarify on one hand, and also to reconsider on the other as far as the Court's ruling this morning, specifically related to State v. Gallegos, Gallegos, however we pronounce it.

Judge, I reread the case since we had a break. In looking through some of the analysis, specifically looks like State v. Mitchell is cited to in the opinion, and I will read from that: "Once the state presents evidence supporting the inference that the defendant drove with" -- and again in this case because of the timing -- "with wanton and willful disregard, the defendant may rebut that with evidence pertaining to his mental state at the time of incident."

So I guess I wanted to point that out to the Court, because even though the statute as we know from this morning has changed, the state's own jury instructions define reckless as to operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner indifferent to the consequences. I feel like we get to bring in some information that shows where he was going and why he was going there.

Now, I may agree -- Let me rephrase that, Judge.

Part of the reason for the clarification portion is from this morning, I'm trying to figure out if the Court is allowing me to do that, because I may have misheard that, and then just not be able to argue anything with respect to not only necessity, not even getting there, to his mental state, or just not letting me present the evidence entirely.

I guess that is where I'm looking for the clarification, and at the same time asking the Court, I absolutely think this is relevant for the jury to know where he's going and why he's going there. Thanks.

RP 252-53.

The trial court subsequently stated, in part:

[COURT]: Again, that is the cite that I gave to you earlier; willful failure to do so implies knowledge that a signal has been given, so in derogation of the signal.

So again, as opposed to the mental state, I didn't intend to run or I intended to do something else, or you know, I was

in a hurry to go do this or in a hurry to go do that. I don't think that gets us to that mental state that you are talking about -- or that I am talking about, excuse me -- which is, again, did the person willfully fail to stop knowing what the situation is.

So I don't want to posit examples because then we get into all kinds of problems. But I think I posited one this morning where -- maybe a better example is, we have seen small trucks driving down the road -- small instead of a large semi -- but a smaller truck loaded up with hay. You don't even know how the person can see anything behind them to save their souls; the windows are blocked, the mirrors are blocked, probably not legal in the sense of equipment or anything else, but putting down the road, and there is no way they can see people behind them. So the officer may testify, it took me a half a mile to get this person pulled over because they just wouldn't pull over; the driver gets out, ultimately there is proof that he couldn't see. I think that is where it goes to. I was trying to posit that this morning.

That still may not be a good example, but I think that is far different than the kind of intent you are talking about.

This indicates willful failure to do so implies knowledge the signal has been given but fails to react to that signal. That is the way I believe it. I don't think it is relevant quite frankly where the defendant was going, what the defendant was doing, all those kinds of things.

And I think the cases talk to us about that. If the defendant is having a medical emergency, they have got somebody behind them that's got a radio and can get medical; pull over, call 911. That is not the issue, so I don't think any of that is relevant. I don't think it goes to what we're talking about here. That is just my sense of it.

So to answer your question -- and I apologize if I am not as clear as I need to be, but we keep talking about a little bit different elements of this thing -- as to the kinds of testimony

you proffered to me, I don't think that is relevant and I'm going to indicate that it is not.

RP 254-56.

Thereafter, the defense rested and did not have any exceptions or objections to the court's instructions, which did not include WPIC 94.10 (attempting to elude affirmative defense) or WPIC 18.02 (necessity defense). RP 257, 259.

The trial court did not prevent Mr. Swofford from testifying or limiting what evidence or testimony he could produce at the time of trial, including evidence of his state of mind or other circumstances of the event, other than he could not produce evidence regarding his claim of "medical necessity" as a basis for not stopping his vehicle during the pursuit. In that regard, Mr. Swofford fails to address whether his "medical necessity" proffer was admissible under RCW 46.61.024(2), if that defense also requires the additional element that there be evidence that a reasonable person would not have believed a signal to stop was given by the officer.

1. The trial court's evidentiary ruling does not constitute a due process violation.

Because Mr. Swofford challenges only the trial court's application of state evidence rules rather than the substance of the rules themselves, he has not sufficiently presented any issue of due process. *See* RAP 10.3(a)(6).

A constitutional due process concern arises where evidence is relevant but excluded by rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote.⁷ See *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (involved a state law that categorically barred an accomplice from testifying on behalf of a co-defendant, unless the co-defendant was acquitted - the law violated the Sixth Amendment); *Chambers v. Mississippi*, 410 U.S. 284, 289-90, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (a state court conviction was reversed when, on the basis of the state's hearsay rule, the state court refused to admit testimony that someone else had committed the crime, where the Court noted that the proffered testimony was trustworthy and admissible under a common exception to the hearsay rule not adopted in Mississippi); *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (a state law that excluded testimony at trial concerning the circumstances of a confession held unconstitutional); *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (a defendant's due process right to testify was violated by a state per se rule excluding all hypnotically

⁷ Article I, section 22 of the Washington Constitution guarantees criminal defendants a right to present testimony in their defense that is equivalent to the right guaranteed by the United States Constitution. See *Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *State v. Larson*, 160 Wn. App. 577, 590, 249 P.3d 669 (2011).

refreshed testimony). *United States v. Scheffer*, 523 U.S. 303, 315, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (Court upheld a blanket rule excluding all polygraph evidence in military courts because it did not eviscerate the defendant's defense); *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (held unconstitutional a per se bar that a defendant could not introduce proof of an alternative suspect if the prosecution had introduced "strong evidence" of the defendant's guilt).

In *Rock*, the Supreme Court held that a criminal defendant has the constitutional right to testify on his own behalf, but it qualified that holding by stating that "the right to present relevant testimony is not without limitation" and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." 483 U.S. at 55. The Court noted that "[n]umerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify." *Id.* at 55 n. 11. The Court, however, cautioned that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* at 55-56.

Accordingly, in the exercise of his right to present witnesses in his or her own defense, the defendant, like the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt or innocence. *Chambers*, 410 U.S. 284.

As an illustration, in *Clark v. Arizona*, 548 U.S. 735, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006), Arizona had a rule restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity; it thus eliminated the significance of this evidence for *mens rea*.

The Court noted that while the Constitution prohibits the exclusion of evidence under rules that serve no legitimate purpose or are disproportionate to legitimate ends, it does permit the exclusion of evidence if its probative value is outweighed by factors such as prejudice, confusion, or potential to mislead. *Id.* at 770. In so doing, the Court noted that evidence of mental disease and capacity “is not being excluded entirely”; rather, the rule restricted the use of evidence for a limited reason which satisfied “the standard of fundamental fairness that due process required.” *Id.* at 770-71.

Similarly, Chief Justice Rehnquist pointed out in *Gilmore v. Taylor*, 508 U.S. 333, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993), that the cases in which the *Chambers* principle has prevailed “dealt with the *exclusion* of

evidence ... or the testimony of defense witnesses, ... [not] a defendant's ability to present an affirmative defense." *Id.* at 343.

Accordingly, state courts have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. *Holmes*, 547 U.S. at 324; *State v. Donald*, 178 Wn. App. 250, 263, 316 P.3d 1081 (2013), *review denied*, 180 Wn.2d 1010 (2014). Evidentiary rules do not abridge a criminal defendant's right to present a defense as long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." *Scheffer*, 523 U.S. at 308. "While the Constitution ... prohibits the exclusion of evidence under rules that serve no legitimate purpose or are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Clark*, 548 U.S. at 770. Referring to rules of this type, the Supreme Court has stated that the Constitution permits judges "to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Holmes*, 547 U.S. at 326; *see also Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of

evidence”); *Nevada v. Jackson*, 133 S.Ct. 1990, 1992, 186 L.Ed.2d 62 (2013) (“Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence”).

Here, Mr. Swofford does not present one of those rare instances and he cannot establish the trial court’s reliance on ER 401 (relevance) and ER 402 (irrelevant evidence inadmissible) to exclude irrelevant evidence was disproportionate or arbitrary. Rather, he challenges only the application of our state’s evidence rules rather than the rule itself (whether it is disproportionate or arbitrary). Therefore, the present claim is simply an evidentiary one.

A defendant has no constitutional right to present irrelevant evidence. *Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). A decision to admit or exclude evidence will not be reversed on appeal absent abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court abuses its discretion only if no reasonable judge would adopt the view adopted by the trial court. *Id.* at 758. Alleging that a ruling violated the defendant’s right to present a defense does not alter the applicable standard of review. *State v. Franklin*, 180 Wn.2d 371, 377 n. 2, 325 P.3d 159 (2014) (reviewing a trial court’s decision to exclude evidence

for abuse of discretion, while considering whether an evidentiary ruling implicated constitutional rights to present a defense).

Here, the trial court did not abuse its discretion as discussed below.

2. Necessity defense.

In *Gallegos*, 73 Wn. App. 644, the defendant returned home from a bar and learned about people harassing his friend at that bar. The defendant, who had been drinking, drove his car toward the bar. Police engaged the defendant in a pursuit, with lights flashing and siren activated. *Id.* at 646. Police observed the defendant run six red lights and caused several cars to brake abruptly to avoid a collision. The pursuit was eventually called off by a supervisor. *Id.* at 646.

Gallegos argued his actions were justified under a “necessity” defense. *Id.* at 647. The State moved in limine to exclude evidence of a necessity defense. *Id.* at 647. The trial court held it would not permit questions or evidence regarding the defendant’s state of mind for lack of relevance. *Id.* at 647.

The court of appeals, interpreting former RCW 46.61.021(a), held that the pressure under which the defendant acted did not result from a physical force of nature and, therefore, as a matter of law, a necessity defense was not available to him. *Id.* at 651.

“[W]hen the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law. The defense is not applicable where the compelling circumstances have been brought about by the accused or where a legal alternative is available to the accused.”

Id. at 650 (quoting *State v. Diana*, 24 Wn. App. 908, 913-14, 604 P.2d 1312 (1979)). The court held that “[t]he ‘pressure’ must come from the physical forces of nature, not from other human beings.” *Id.* Furthermore, the court explained that a person eluding a pursuing police vehicle to help a friend in danger cannot assert the necessity defense when there is a legal alternative: seeking that police officer’s assistance. *Id.* at 651.

The court also reasoned that, even if the necessity defense was available to him, the defendant failed to present sufficient evidence to persuade a jury because he relied on his unreasonable subjective beliefs. The court noted that simply waiting a few minutes and informing the pursuing officer about the situation would have allowed the officer to take the necessary legal action to find the defendant’s friend at the bar and protect her.

Here, the defense proffered theory for offering the testimony and necessity instruction did not arise from the physical forces of nature. As in *Gallegos*, Mr. Swofford’s offer of proof was that his actions were justified because he was allegedly driving quickly to help a family friend. The trial

court did not err when it denied this defense because Mr. Swofford, as in *Gallegos*, had a legal alternative that would have averted harm to his friend - he could have stopped and explained the situation to the officer and asked for immediate help. There was no factual or legal basis for the testimony. There was no error.

3. RCW 46.61.024 - affirmative defense.

Mr. Swofford similarly claims that his lawyer requested to produce evidence regarding his state of mind to establish the affirmative defense under RCW 46.61.024(2).

The trial court did not prevent Mr. Swofford from testifying or limit what evidence or testimony he could produce at the time of trial, including evidence of his state of mind or other circumstances of the event, other than he could not produce evidence regarding his claim of “medical necessity” as the trial court found that evidence irrelevant as to whether there was a basis for not stopping his vehicle during the pursuit. Likewise, Mr. Swofford fails to address whether his “medical necessity” proffer was relevant and admissible under RCW 46.61.024(2), if that defense also required evidence that a reasonable person would not have believed a signal to stop was given by the officer.

In the present case, the trial court found the defendant’s proposed evidence, regarding the basis for his erratic driving, was not relevant under

the affirmative defense statute, or regarding a necessity defense, and excluded it.

In 2003, the legislature amended RCW 46.61.024, to remove the requirement that the patrol car be appropriately marked showing it to be police vehicle under subsection (1) of the statute, and contemporaneously added an affirmative defense, which reads:

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.

RCW 46.61.024(2) (emphasis added).⁸

There are two elements to this statutory affirmative defense which must be proved. Mr. Swofford failed to make an offer of proof or present any evidence that the first element — a reasonable person would not believe

⁸ It is apparent the legislature enacted the statutory affirmative defense because it no longer requires patrol vehicles to be marked. Unlike the situation here, the legislature could have envisioned situations where patrol vehicles are not readily identifiable (e.g., a garden variety van or pickup truck) and a motorist hearing an audible siren, believed it originated from a different direction and location, such as a metropolitan, downtown area where sirens echo or abate. The legislature could have also recognized situations posited by the trial court where the driver is unaware of a patrol car because of the vehicle type, such as a farm truck, being driven, in combination with the product being transported (i.e., overflowing hay), which, in turn, obstructs the view and possibly the direction of the siren of the patrol car.

a signal to stop was given – was met or what evidence was available to support it. Because Mr. Swofford did not present any evidence establishing the first element, let alone by a preponderance of the evidence, his proposed evidence regarding the second element – that the defendant’s driving after the signal to stop was reasonable under the circumstances – was irrelevant to establish the affirmative defense because he did not bore the burden of demonstrating *both* elements to have the jury instructed on the defense. In sum, asserted evidence of one element was not relevant without evidence of the other. The trial court had a proper basis in which to exclude the proffered evidence.⁹

Accordingly, Mr. Swofford fails to establish the trial court abused its discretion because he cannot show that the affirmative defense was factually available or that there was sufficient evidence to submit it to the jury. *See State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009) (“[a] defendant raising an affirmative defense must offer sufficient admissible evidence to justify giving an instruction on the defense”).

⁹ An appellate court may affirm an evidentiary ruling on any basis that is supported by the record and the law. *State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870 (2003).

In addition, although Mr. Swofford filed a proposed instruction on the affirmative defense outlined under RCW 46.61.024(2), he never argued for its application or use in the trial court. His focus was on asking the trial court to instruct on the defense of necessity. Indeed, after the jury instruction conference, Mr. Swofford did not take exception to the trial court not giving either his “necessity” defense instruction or his originally proposed affirmative defense. RP 257-59.

This due process claim has no merit as the defendant has not established an “arbitrary” or “disproportionate” application of any evidence rule. Likewise, Mr. Swofford has failed to establish the trial court abused its discretion by not permitting evidence of his “medical necessity” claim.

C. THE TRIAL COURT WAS NOT REQUIRED TO SUA SPONTE INSTRUCT THE JURY ON A DEFINITION OF “WILLFULLY.” MOREOVER, THE DEFENDANT’S LAWYER WAS NOT INEFFECTIVE FOR NOT PROPOSING A DEFINITION OF “WILLFULLY” AS THE DEFENSE ATTORNEY DID PROPOSE SUCH AN INSTRUCTION AND THE RECORD IS SILENT AS TO WHY THE TRIAL COURT DID NOT INSTRUCT. MOREOVER, THE DEFENDANT FAILS TO SHOW ANY PREJUDICE AS THE RECORD ESTABLISHES HE ACTED WILLFULLY WHEN THE OFFICER SIGNALLED HIM TO STOP AND THE TERM IS SELF-EXPLANATORY.

Mr. Swofford next claims the trial court erred by not defining “willfully” for the jury and his lawyer was ineffective for failing to request an instruction defining the term “willful.”

1. Alleged failure of the trial court to define “willful” in the jury instructions.

It is constitutional error to fail to properly instruct the jury on the elements of the crime. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988). Instructional errors are of constitutional magnitude only where the jury is not instructed on every element of the charged crime. *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). “As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.” *Id.* at 250.

In that regard, trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory. *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). Whether a word is technical in nature is a question within the discretion of the trial court. *State v. Guloy*, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985). However, simply because a word or phrase is included in a statute does not mean it is a “technical term.” *Scott*, 110 Wn.2d at 691-92. *Scott* involved the definition of “knowledge,” which the court found not to be a technical term requiring an instruction when the word is used to define a criminal offense. *Id.* at 692. The Court held that a definitional instruction for “knowledge” was not

required because “knowledge” is a commonly understood term, and although it is defined by statute, that “does not mean that it has acquired a technical meaning.” *Id.* at 691. “Willfulness” in the attempting to elude statute is identical to “knowledge.” *State v. Flora*, 160 Wn. App. 549, 553, 249 P.3d 188 (2011); *Mather*, 28 Wn. App. at 702.

“Willful” is not statutorily defined. In the absence of a statutory definition, the words used are given their ordinary and usual meaning. *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997); *State v. Haley*, 35 Wn. App. 96, 665 P.2d 1375 (1983). Our Supreme Court has defined “willful” in a lawyer discipline case as “done deliberately: not accidental or without purpose: intentional, self-determined.” *In re Disciplinary Proceeding Against Lopez*, 153 Wn.2d 570, 611, 106 P.3d 221 (2005) citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 2617 (2002).

Mr. Swofford has not provided any authority that “willful” is not a commonly understood term¹⁰ and he cannot establish any error. His argument runs squarely against the ruling in *Scott* similarly finding “knowledge” is not a technical term which requires a definition. *See also*

¹⁰ The attempt to elude statute no longer requires the “willful and wanton” standard after the 2003 amendment. *State v. Ratliff*, 140 Wn. App. 12, 16, 164 P.3d 516 (2007).

Hall v. State Farm Fire & Cas. Co., 109 Wn. App. 614, 621, 36 P.3d 582 (2001), *review denied*, 146 Wn.2d 1021 (2002) (“willful and malicious” are commonly understood terms not requiring definition as they are within the common understanding of an average juror).

Moreover, as required, the jury was advised that one of the elements of the crime was that Mr. Swofford “willfully” failed to stop after being given the command to do so. The jury was further instructed that “willfully” was one of the elements the prosecution had to prove beyond a reasonable doubt. The failure to further define “willfully” is *not* manifest constitutional error. *Scott*, 110 Wn.2d at 688-691. Because the defense did not request the jury be instructed on the “willfully” definitional instruction, the alleged error is not “manifest” and cannot be presented for the first time on appeal. *Scott*, 110 Wn.2d at 691; *see* RAP 2.5.

The record does not contain any ruling on why this instruction was not given or any challenge by the defense to the absence of the instruction. The failure to request an instruction, or to challenge the trial court’s failure to give a requested instruction, waives the issue on appeal. *Scott*, 110 Wn.2d at 686; RAP 2.5(a); CrR 6.15(c) (requires timely and well stated objections be made to instructions given or refused). There was no error.

2. Claim of ineffective assistance for failing to request the definitional instruction of “willful.”

Standard of review.

An appellate court reviews a claim of ineffective assistance of counsel as a mixed question of fact and law reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden of showing that (1) counsel’s performance was deficient and (2) counsel’s deficient performance prejudiced the defendant’s case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice, Mr. Swofford must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. The claim fails if the defendant does not establish either prong. *Id.* at 700. Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). An appellate court’s review of defense counsel’s performance is highly deferential, and it strongly presumes reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). In addition, there is a strong presumption that counsel provided effective assistance. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel. *See State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). “Where the claim of ineffective assistance [of counsel] 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.” *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012).

In that regard, an appellate court considers a challenge to the jury instructions in the context of the jury instructions as a whole. *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014). “Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” *Id.* at 306. Specifically, the “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.” *Id.* at 311.

Here, the defense took no exceptions or objections to the court’s instructions. The defense filed proposed instructions with clerk, including a definition of “willful,” but never requested the jury be instructed on that definition. CP 20. The record does not contain any ruling on why this

instruction was not given or any challenge by the defense to the absence of the instruction. A defense lawyer cannot be considered ineffective for not offering an instruction that he actually proposed.

Even if Mr. Swofford could establish deficient performance concerning a term which has common understanding, he cannot show how the alleged deficient performance prejudiced him. Mr. Swofford argues that because the event occurred at night, and it was rainy and foggy, the jury could have believed he did not act “knowingly.” Appellant’s Br. at 23. Despite his claim that it was “a dark and stormy night,” there is no evidence in the record that Mr. Swofford did not know the officer signaled him to stop and he cannot show the alleged deficient performance prejudiced him.

Despite his unsupported claim that the jury “could have believed Swofford did not act knowing” and, thus, he did not willfully fail to stop, the willfulness of his conduct may be inferred by the jury “where it is plainly indicated as a matter of logical probability.” *Delmarter*, 94 Wn.2d at 638. Mr. Swofford has not demonstrated how the outcome of the trial would have been different, nor does he offer *any* analysis of how he was prejudiced by the lack of instruction to the jury on the definitional term.

As discussed above, there was ample evidence presented that Mr. Swofford knew he was being pursued by a police vehicle. As the pursuit began, Mr. Swofford failed to stop at a controlled intersection, and

accelerated away from the patrol car, into the oncoming lane, as the officer is one to two car lengths behind, with emergency lights activated and an intermittent siren on Riverside Avenue. Mr. Swofford continued at a high rate of speed, on Government Way, crossed into oncoming traffic, slammed on his brakes several times, and he accelerated away from the officer at a high rate of speed, traveling at approximately 60 to 65 miles per hour in a posted 30 to 35 miles per hour zone. As the chase progressed through Spokane Falls Community College, Mr. Swofford continued to cross into oncoming lanes, and as he rounded the curve near the bridge, he again accelerated to 60 miles per hour in a 30 miles per hour zone. Remarkably, Mr. Swofford continued to drive his vehicle after driving over the “spike strip” until it came to rest in a parking lot with three deflated tires. At the end of this event, Mr. Swofford remarked “I f----d up.”¹¹

¹¹ Mr. Swofford’s reliance on *Flora*, 160 Wn. App. at 555, is factually inapplicable. In *Flora*, the officer followed a vehicle for a short distance on a rainy night, without activating the emergency lights. The suspect vehicle stopped within a short distance, and the patrol car stopped behind the suspect vehicle. The suspect exited the vehicle, shouted at the officer, and returned to his vehicle at the officer’s command. The suspect vehicle sped off at 70 miles per hour, in a posted 55 miles per hour zone. The officer turned on his emergency lights and siren and pursued the vehicle. Within a mile, the suspect vehicle turned into a parking lot, and fled. Division One of this Court found there was evidence to support the defendant’s theory that he did not know the vehicle chasing him was a police vehicle. *Id.* at 555. The court held that the absence of an instruction defining “willfully” may have affected the verdict. *Id.* at 556. In addition to being dark and rainy, the court remarked that the patrol car only had markings on the side, and a

Moreover, Mr. Swofford must also demonstrate prejudice by showing had the jury been instructed on a “willfully” definition instruction, there is a reasonable probability that the jury would not have found him guilty. Mr. Swofford fails to identify any prejudice from the failure to define “willfully,” and his ineffective assistance of counsel claim fails.

D. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

Mr. Swofford next alleges there was insufficient evidence to support the aggravating factor, endangerment by eluding a pursuing police vehicle, because the State failed to prove that his conduct threatened any other person with physical injury or harm. *See* Appellant’s Br. at 24-26. At the conclusion of trial, the jury found the State had proved the existence of this aggravating circumstance beyond a reasonable doubt. CP 63.

RCW 9.94A.834(1), endangerment by eluding a police vehicle, provides:

- (1) The prosecuting attorney may file a special allegation of endangerment by eluding under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical

female passenger participated in a ride-along program. *Id.* at 555. These facts are inapposite to the facts in this case and do not support Mr. Swofford’s ineffective assistance of counsel claim.

injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

This aggravating circumstance must be proved beyond a reasonable doubt. RCW 9.94A.834(2).

Standard of review.

When a defendant challenges the sufficiency of an aggravating circumstance, an appellate court uses the same standard applied to substantive crimes. *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010); *see also* RCW 9.94A.585(4) (stating that an appellate court may reverse a sentence outside of the standard range if “the reasons supplied by the sentencing court are not supported by the record”).

Under this standard, an appellate court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *See State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). When challenging the sufficiency of the evidence, a defendant admits the truth of the State’s evidence and all reasonable inferences that may be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Moreover, circumstantial and direct evidence are deemed equally reliable. *Yates*, 161 Wn.2d at 752. The court defers to the jury on issues of conflicting testimony, credibility of witnesses, and the

persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The clear language of the statute requires the factfinder to consider the circumstances in which Mr. Swofford “threatened” other motorists or pedestrians with his vehicle.

As discussed in previous sections, Mr. Swofford’s abnormally dangerous use and erratic operation of the van at high rates of speed caused a high risk of harm, not only to the several drivers in the oncoming lanes,¹² who had to drive off to the side of the road to immediately avert potential serious injury, but to pedestrians/students in areas of Fort Wright Institute and the Spokane County Community College. An automobile by its very nature is tremendously dangerous, in terms of the seriousness of both the physical injuries and property damage it can cause, if used improperly. The facts here would allow a rational trier of fact to conclude that Mr. Swofford threatened other drivers and potential pedestrians with harm or injury. Sufficient evidence supported the jury’s finding and Mr. Swofford’s claim fails.

¹² RP 200.

**E. THE TRIAL COURT DID NOT HAVE STATUTORY
AUTHORITY TO ORDER COMMUNITY CUSTODY
CONDITIONS FOR THE ATTEMPT TO ELUDE CONVICTION.**

The State concedes that the community custody conditions were outside the scope of the trial court's authority. *See* RCW 9.94A.701. The State respectfully requests this Court remand this matter to the trial court to strike the community custody conditions ordered by the trial court.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the judgment and sentence.

Dated this 31 day of May, 2017.

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN SWAFFORD, JR.,

Appellant.

NO. 34745-1-III

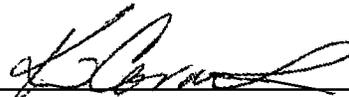
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 31, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Lise Ellner
liseellnerlaw@comcast.net

5/31/2017
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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