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No. 35457-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

SHAUN PAUL DAVIS,

Appellant.

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

The Honorable Judge Timothy B. Fennessy

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APPELLANT'S OPENING BRIEF

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### **A. SUMMARY OF ARGUMENT**

Following a jury trial, Shaun Paul Davis was charged with and convicted of attempt to elude a police vehicle and first degree driving while license suspended or revoked. The jury also returned a special verdict for a sentencing enhancement on the attempt to elude conviction, which permitted the addition of 12 months plus one day confinement to Mr. Davis' standard sentencing range. Mr. Davis now appeals, challenging the sufficiency of the evidence to prove the attempt to elude sentencing enhancement, or, in the alternative, that the jury instruction for the attempt to elude sentencing enhancement was defective because it did not instruct the jury the State must prove the sentencing enhancement beyond a reasonable doubt. Mr. Davis also requests correction of a scrivener's error in the judgment and sentence for first degree driving while license suspended or revoked, and preemptively objects to the imposition of appellate costs.

### **B. ASSIGNMENTS OF ERROR**

1. The trial court erred in sentencing Mr. Davis on the attempt to elude sentencing enhancement, where the evidence was insufficient to prove this sentencing enhancement.
2. The jury instruction for the attempt to elude sentencing enhancement was defective because it did not instruct the jury the State must prove the sentencing enhancement beyond a reasonable doubt.
3. The judgment and sentence for first degree driving while license suspended or revoked contains an error that should be corrected, where it indicates Mr. Davis was found guilty on June 20, 2017, rather than on May 10, 2017.

4. An award of costs on appeal against Mr. Davis would be improper in the event that the State is the substantially prevailing party.

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

Issue 1: Whether the trial court erred in sentencing Mr. Davis on the attempt to elude sentencing enhancement, where the evidence was insufficient to prove this sentencing enhancement.

Issue 2: In the alternative, whether the jury instruction for the attempt to elude sentencing enhancement was defective because it did not instruct the jury the State must prove the sentencing enhancement beyond a reasonable doubt.

Issue 3: Whether the judgment and sentence for first degree driving while license suspended or revoked contains an error that should be corrected, where it indicates Mr. Davis was found guilty on June 20, 2017, rather than on May 10, 2017.

Issue 4: Whether this Court should deny costs against Mr. Davis on appeal in the event the State is the substantially prevailing party.

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

On September 2, 2015, Washington State Patrol Trooper Douglas W. Power was on duty in Spokane, and he observed a motorcycle with no mirrors go by him on the road. (RP<sup>1</sup> 76, 78-79, 82). Trooper Power immediately followed the motorcycle in his patrol car. (RP 79, 82-83). He activated his emergency lights, and the motorcycle continued driving. (RP 79, 83). Trooper Power then

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<sup>1</sup> The Report of Proceedings consists of a single volume containing a pre-trial hearing, reported by Tammey McMaster, and two consecutively paginated volumes containing the jury trial and sentencing, reported by Amy Wilkins. References to “RP” herein refer to the two volumes reported by Ms. Wilkins.

activated his vehicle's siren, and the motorcycle did not stop, but instead, accelerated. (RP 80, 83).

The motorcycle continued driving, taking a right-hand turn around some cars, cutting through traffic and then driving through a gas station parking lot. (RP 83; Pl.'s Ex. 3). The motorcycle ran a red light and four stop signs. (RP 83-84; Pl.'s Ex. 3). The motorcycle also passed vehicles in a no-passing zone. (RP 85-87; Pl.'s Ex. 3). Trooper Power pursued the motorcycle until it drove the wrong way down a one-lane, one-way street with no shoulder. (RP 85-88; Pl.'s Ex. 3). Trooper Power then terminated his pursuit of the motorcycle because it was dangerous for him to drive down this one-way street. (RP 85-88).

Spokane County Sheriff's Office Deputy James Wang heard about the pursuit over the radio, located the suspect as he drove down the one-way street, and began to pursue him. (RP 88-90, 118-121). According to Deputy Wang, the motorcycle had to pull off onto the shoulder of the one-way in order to avoid hitting some cars. (RP 121). Deputy Wang eventually terminated his pursuit. (RP 121-122).

Two mechanics working in a garage located in the area of the pursuit observed the suspect motorcycle drive into a lot on the back side of the business. (RP 124-133, 140-146). The mechanics later saw a barefoot man walking through the garage, and out of the front door of the business. (RP 132, 136-137, 146-148, 153, 156-158).

Spokane Police Department Officer Jeremy Howe also heard about the pursuit of the motorcycle over the radio, and he drove to the area. (RP 160-161). He located the suspect running, and pursued the suspect on foot. (RP 162-164).

Trooper Power observed Officer Howe chasing a suspect on foot, and he followed in his vehicle. (RP 93-94, 96, 113). Officer Howe placed the suspect under arrest, with the assistance of Deputy Wang. (RP 96, 122, 163). The suspect was identified as Shaun Paul Davis. (RP 98, 123, 139, 154, 163). He was barefoot at the time of his arrest. (RP 98, 106; Pl.'s Ex. 3).

Trooper Power's pursuit of the motorcycle was recorded on a camera located on his vehicle's dashboard. (RP 80-85, 94-96; Pl.'s Ex. 3).

The State charged Mr. Davis with possession of a stolen motor vehicle, attempt to elude a police vehicle, and first degree driving while license suspended or revoked. (CP 140-141). Th attempt to elude a police vehicle count alleged:

That the defendant, SHAUN PAUL DAVIS, in the State of Washington, on or about September 02, 2015, did willfully fail and refuse to immediately bring his vehicle to a stop and did drive his vehicle in a reckless manner while attempting to elude a pursuing police vehicle after being given a visual or audible signal to bring the vehicle to a stop by a uniformed law enforcement officer with the Washington State Patrol, whose vehicle was equipped with lights and sirens[.]

(CP 140).

The attempt to elude a police vehicle count also alleged the following sentencing enhancement:

[D]uring commission of said crime, 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 defendant under the provisions of RCW 9.94A.834[.]

(CP 140).

The case proceeded to a jury trial. (RP 39-241). Witnesses testified consisted with the facts stated above. (RP 53-191).

In addition, Trooper Power testified he first estimated the motorcycle's speed at 45 miles per hour. (RP 83). He testified when the motorcycle was driving on a long straightaway, he estimated its speed at approximately 80 miles per hour in a 30 mile per hour zone. (RP 84). He testified "cars are pulling off to the shoulder on the side. Very little traffic at this point." (RP 84).

Trooper Power testified that at one point, the motorcycle drove in the oncoming lane. (RP 84). He testified "[h]e's [also] slowing much more for the corners than an experience[d] rider would, so I'm able to easily keep up with him." (RP 84). Trooper Power described how the motorcycle passed vehicles in a no-passing zone:

The motorcycle, we come into some double yellow, where the road has some hills. We have to go up and down some hills, and so there's a limited sight distance. The motorcycle starts passing traffic when - - but he seems to wait for opportunity when traffic isn't coming at him, and he doesn't get way over the - - the double yellow line. He goes over just far enough to get around the car. So I'm advising state patrol communications that he's passing in a no passing zone, but he's doing it in a safe manner, not really endangering too many people at this time.

(RP 85).

Trooper Power further testified:

[The State:] Now, you mentioned that when he was crossing several cars in the no-passing zone of the double yellow line - -

[Trooper Power:] Right.

[The State:] - - that there weren't too many people. During this pursuit, before you were forced to terminate, did his actions endanger anybody else aside from you and him?

[Trooper Power:] The - - when he was passing in the double yellow line, I didn't see him come close enough that I considered terminating at this point.

[The State:] Right. But - -

[Trooper Power:] So . . .

[The State:] But did he with the other people out on the road?

[Trooper Power:] But he was out there traveling at an excessive rate of speed in a no-passing zone, passing cars that aren't expecting, you know, to be passed at that location. And with cars coming, and some places limited sight distance because of the hills, you can't see over the hill, and when you're coming up the hill, you can't see what's coming at you.

[The State:] So with this pursuit at approximately 6:04 p.m., there were other cars out there aside from just you and him, correct?

[Trooper Power:] Yes, ma'am.

(RP 86-87).

Trooper Power testified it was dangerous for the motorcycle to go down the one-lane, one-way street, where he terminated his pursuit of the motorcycle, stating "[t]here's no shoulder, there's no second lanes, no place to go for an oncoming car." (RP 87).

The video of the pursuit of the motorcycle from Trooper Power's dashboard camera was admitted as an exhibit at trial. (RP 80-82; Pl.'s Ex. 3). The video shows the motorcycle slowing down when it took a right-hand turn around some cars, cut through traffic, and then drove through a gas station

parking lot. (Pl.'s Ex. 3). The video shows the motorcycle drive in an oncoming lane, but there were no cars in the oncoming lane. (Pl.'s Ex. 3). The video also shows the motorcycle pass vehicles in a no-passing zone, but shows the motorcycle staying close to the center line as it passes vehicles. (Pl.'s Ex. 3). The video does not show the motorcycle close to a collision with any motor vehicles or pedestrians. (Pl.'s Ex. 3). The video also does not follow the motorcycle driving down the one-lane, one-way street where Trooper Power terminated his pursuit of the motorcycle, but rather, only depicts the motorcycle driving away with no vehicles in sight on the roadway. (Pl.'s Ex. 3).

Mr. Davis' defense was that he was not driving the motorcycle on the day in question. (RP 180-191, 214-223). Natalie Stafford, a friend of Mr. Davis, testified on his behalf. (RP 180-191). She testified she ran into Mr. Davis on the day in question, in the area of the pursuit, and he was on foot. (RP 180-183, 185). She testified Mr. Davis was not wearing any shoes. (RP 182, 185).

The trial court instructed the jury as follows regarding the State's burden of proof:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

(CP 152; RP 195-196).

The trial court gave the following to-convict jury instruction for the charge of attempt to elude a police vehicle:

To convict the defendant of the crime of attempting to elude a police vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 2, 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.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 165; RP 198-199).

The trial court gave the jury the following special verdict form for the attempt to elude sentencing enhancement:

(This special verdict is to be answered only if the jury finds the defendant guilty of ATTEMPT TO ELUDE A POLICE VEHICLE as charged in count II.

We, the jury, return a special verdict by answering as follows:

QUESTION: Was any person, other than SHAUN DAVIS or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of SHAUN DAVIS during his commission of the crime of attempting to elude a police vehicle?

ANSWER: \_\_\_\_\_

(Write "yes" or "no")

DATE: \_\_\_\_\_

Presiding Juror

(CP 171, 175).

The jury found Mr. Davis not guilty of possession of a stolen motor vehicle. (CP 173; RP 231). The jury found Mr. Davis guilty of attempt to elude a police vehicle and first degree driving while license suspended or revoked. (CP 174, 176; RP 231). The jury answered "yes" to the special verdict form for the attempt to elude sentencing enhancement. (CP 175; RP 231). The jury returned these verdicts on May 10, 2017. (CP 173-176; RP 231).

At the sentencing hearing, the trial court imposed a term of confinement on the attempt to elude conviction of 37.5 months and one day, which included 12 months and one day confinement for the attempt to elude sentencing enhancement. (CP 191, 196, 200-201; RP 251). The trial court imposed only mandatory costs. (CP 202-203; RP 251-252).

The felony judgment and sentence contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 204).

The judgment and sentence for the first degree driving while license suspended or revoked conviction states that Mr. Davis was found guilty on June 20, 2017. (CP 210).

Mr. Davis timely appealed. (CP 221-222). The trial court entered an Order of Indigency, granting Mr. Davis a right to review at public expense. (CP 223-229).

#### **E. ARGUMENT**

**Issue 1: Whether the trial court erred in sentencing Mr. Davis on the attempt to elude sentencing enhancement, where the evidence was insufficient to prove this sentencing enhancement.**

There was insufficient evidence to prove the attempt to elude sentencing enhancement, because the evidence presented at trial did not establish that Mr. Davis threatened any person, other than himself or a pursuing law enforcement officer, with physical injury or harm while committing the crime of attempt to elude a police vehicle. A rational jury could not have found the attempt to elude sentencing enhancement was proven beyond a reasonable doubt. Therefore, the evidence is insufficient to prove the attempt to elude sentencing enhancement.

“A jury's finding by special interrogatory is reviewed under the sufficiency of the evidence standard.” *State v. Stubbs*, 170 Wn.2d 117, 123, 240

P.3d 143 (2010). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

“Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence “is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt.” *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*,

162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating “a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . .”). “A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is ‘manifest.’” *Id.*

When insufficient evidence exists to support a sentencing enhancement, the remedy is to reverse the sentencing enhancement and remand for resentencing. *See State v. Williams*, 167 Wn.2d 889, 902, 225 P.3d 913 (2010); *see also State v. Villanueva*, No. 33821-5-III, 2017 WL 118213, at \*2 (Wash. Ct. App. Jan. 12, 2017); GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

When a defendant is charged with attempt to elude a police vehicle, the State may allege a sentencing enhancement as follows:

The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle 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 injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

RCW 9.94A.834(1).

When this sentencing enhancement is alleged, “the state shall prove beyond a reasonable doubt that the accused committed the crime [of attempting to elude a police vehicle] while endangering one or more persons other than the defendant or the pursuing law enforcement officer.” RCW 9.94A.834(2). In addition, “if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.” RCW 9.94A.834(2).

Here, the attempt to elude a police vehicle count alleged the following sentencing enhancement:

[D]uring commission of said crime, 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 defendant under the provisions of RCW 9.94A.834[.]

(CP 140).

The trial court gave the jury the following special verdict form for the attempt to elude sentencing enhancement:

(This special verdict is to be answered only if the jury finds the defendant guilty of ATTEMPT TO ELUDE A POLICE VEHICLE as charged in count II.

We, the jury, return a special verdict by answering as follows:

QUESTION: Was any person, other than SHAUN DAVIS or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of SHAUN DAVIS during his commission of the crime of attempting to elude a police vehicle?

ANSWER: \_\_\_\_\_  
(Write “yes” or “no”)

DATE: \_\_\_\_\_  
Presiding Juror

(CP 171, 175); *see also State v. Williams*, 178 Wn. App. 104, 109, 313 P.3d 470 (2013) (upholding a special verdict form with similar language).

Here, the evidence presented at trial was insufficient to prove the attempt to elude sentencing enhancement. *See RCW 9.94A.834; see also CP 140, 171, 175.* Specifically, the evidence presented at trial was insufficient for the jury to find, beyond a reasonable doubt, that Mr. Davis threatened any person, other than himself or a pursuing law enforcement officer, with physical injury or harm while committing the crime of attempt to elude a police vehicle. *See RCW 9.94A.834; see also CP 140, 171, 175.*

The State alleged Mr. Davis committed the crime of attempt to elude as follows:

That the defendant, SHAUN PAUL DAVIS, in the State of Washington, on or about September 02, 2015, did willfully fail and refuse to immediately bring his vehicle to a stop and did drive his vehicle in a reckless manner while attempting to elude a pursuing police vehicle after being given a visual or audible signal to bring the vehicle to a stop *by a uniformed law enforcement officer with the Washington State Patrol*, whose vehicle was equipped with lights and sirens[.]

(CP 140) (emphasis added).

Thus, the State alleged Mr. Davis attempted to elude a police vehicle by failing to stop for a Washington State Patrol officer. (CP 140). The State did not allege that Mr. Davis attempted to elude a police vehicle by failing to stop for a deputy

with the Spokane County Sheriff's Office, or any other law enforcement agency. (CP 140). Therefore, it would be improper to consider evidence of Mr. Davis' driving while being pursued by officers other than Trooper Power, specifically, Deputy Wang, where only an officer with the Washington State Patrol was alleged in the charging document. *See State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 381 (1997) (stating "a defendant has the right to be informed of charges against him and to be tried only for offenses charged.").

When considering the evidence of Mr. Davis' driving while being pursued by Trooper Power, there was insufficient for the jury to find, beyond a reasonable doubt, that Mr. Davis threatened any person, other than himself or a pursuing law enforcement officer, with physical injury or harm. *See* RCW 9.94A.834; *see also* CP 140, 171, 175. The video of the pursuit from Trooper Power's dashboard camera, and Trooper Power's testimony at trial, does not show that a person inside another vehicle or a pedestrian was threatened with physical injury or harm by Mr. Davis. (RP 75-114; Pl.'s Ex. 3). The threat must be to an actual person. *See, e.g., State v. Tolman*, No. 46632-5-II, 2016 WL 6995552, at \*3-4 (Wash. Ct. App. Nov. 29, 2016) (sufficient evidence supported the sentencing enhancement, based upon the defendant swerving around another car, which the jury could conclude contained another person); *State v. Oya*, No. 47136-1-II, 2016 WL 5922655, at \*6-7 (Wash. Ct. App. Oct. 11, 2016) (sufficient evidence supported the sentencing enhancement, where the defendant's refusal to stop for the

pursuing police vehicle jeopardized the safety of a passenger in the defendant's vehicle); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Here, the evidence at trial was insufficient for the jury to find that Mr. Davis' driving while being pursued by Trooper Power threatened an actual person. (RP 75-114; Pl.'s Ex. 3). Mr. Davis slowed down as he took a right-hand turn around some cars, cut through traffic, and then drive through a gas station parking lot. (Pl.'s Ex. 3). He did not encounter any other cars when he drove in the oncoming lane of traffic. (Pl.'s Ex. 3). Although Mr. Davis drove the wrong way down a one-way street while being pursued by Trooper Power, there was no evidence presented that he encountered another vehicle on that road while being pursued by Trooper Power. (RP 85-88; Pl.'s Ex. 3).

Furthermore, as Mr. Davis passed vehicles in a no-passing zone, he stayed close to the center line, and did not veer into the oncoming lane of traffic. (Pl.'s Ex. 3). Trooper Power described Mr. Davis' driving at this time as follows: "he's passing in a no passing zone, but he's doing it in a safe manner, not really endangering too many people at this time." (RP 85). While Trooper Power discussed the fact that "some places [had] limited sight distance because of the hills, you can't see over the hill, and when you're coming up the hill, you can't see what's coming at you[,]" he did not identify a specific vehicle that was threatened by Mr. Davis' driving on this stretch of road. (RP 86-87).

Neither the video of the pursuit of Mr. Davis from Trooper Power's dashboard camera, nor the testimony of Trooper Power, show that Mr. Davis' driving while being pursued by Trooper Power threatened an actual person, other than himself and Trooper Power. (RP 75-114; Pl.'s Ex. 3). Although Mr. Davis ran a red light and four stop signs, neither the video nor the testimony of Trooper Power identified a specific vehicle threatened by this driving. (RP 75-114; Pl.'s Ex. 3). The video does not show the motorcycle close to a collision with any motor vehicles or pedestrians. (Pl.'s Ex. 3).

Because the evidence is insufficient to prove the attempt to elude sentencing enhancement, Mr. Davis' case should be reversed and remanded for resentencing without the attempt to elude sentencing enhancement. *See Williams*, 167 Wn.2d at 902 (specifying the procedure following a finding that the court erred in enhancing a sentence); *Villanueva*, 2017 WL 118213, at \*2 (setting forth this remedy); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

**Issue 2: In the alternative, whether the jury instruction for the attempt to elude sentencing enhancement was defective because it did not instruct the jury the State must prove the sentencing enhancement beyond a reasonable doubt.**

Mr. Davis requests this Court consider this argument, made in the alternative, if it rejects his sufficiency of the evidence argument presented in Issue 1 above. Mr. Davis' case should be reversed and remanded for a new trial on the attempt to elude sentencing enhancement, because the jury instruction for the

attempt to elude sentencing enhancement was defective because it did not instruct the jury the State must prove the sentencing enhancement beyond a reasonable doubt.

When a defendant is charged with attempt to elude a police vehicle, the State may allege a sentencing enhancement under RCW 9.94A.834. *See* RCW 9.94A.834(1). When this sentencing enhancement is alleged, “the state shall prove *beyond a reasonable doubt* that the accused committed the crime [of attempting to elude a police vehicle] while endangering one or more persons other than the defendant or the pursuing law enforcement officer.” RCW 9.94A.834(2) (emphasis added). If this sentencing enhancement is found, additional punishment is authorized as follows:

An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

RCW 9.94A.533(11).

“The Sixth Amendment to the United States Constitution requires that a jury must unanimously find beyond a reasonable doubt any aggravating circumstances that increase a defendant's sentence.” *State v. Nunez*, 174 Wn.2d 707, 709, 285 P.3d 21 (2012). “[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

When the jury has not been correctly instructed on the requirement of proof beyond a reasonable doubt, the resulting error is a structural error. *Id.* at 279-81; *see also Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (acknowledging a “defective reasonable-doubt instruction” is structural error); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (acknowledging the same). “Structural error is not subject to harmless error analysis; prejudice is necessarily presumed.” *State v. Smith*, 174 Wn. App. 359, 368, 298 P.3d 785 (2013).

Here, Mr. Davis challenges the jury instruction for the attempt to elude sentencing enhancement for the first time on appeal. Because it is a manifest error affecting a constitutional right, it may be raised for the first time in appeal. *See* RAP 2.5(a)(3). The failure of the attempt to elude sentencing enhancement jury instruction to inform the jury that the State had to prove the aggravating circumstance beyond a reasonable doubt violated the Sixth Amendment to the United States Constitution. *See Nunez*, 174 Wn.2d at 709. This error was manifest, because it is unclear what level of proof the jury applied to their “yes” answer to the special verdict form. *See State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (stating “[m]anifest” in RAP 2.5(a)(3) requires a showing of actual prejudice.”).

The trial court gave the jury a special verdict form for the attempt to elude sentencing enhancement. (CP 171, 175). This was the only jury instruction given

for the sentencing enhancement; the trial court did not give the jury any accompanying instruction about the special verdict form. (CP 147-172; RP 191-201); *see also* 11A *Washington Practice: Washington Pattern Jury Instructions: Criminal* 160.00 (4th ed. 2016) (pattern concluding instruction for a special verdict form, not given here, instructing the jury it must be satisfied beyond a reasonable doubt in order to answer the special verdict form “yes”). The special verdict form for the attempt to elude sentencing enhancement did not instruct the jury the State must prove the sentencing enhancement beyond a reasonable doubt. (CP 171, 175).

No other jury instruction instructed the jury the State must prove the sentencing enhancement beyond a reasonable doubt. (CP 147-172; RP 191-201). The trial court gave the jury an instruction regarding the State’s burden of proof. (CP 152; RP 195-196). This instruction informed the jury “[t]he State is the plaintiff and has the burden of proving *each element of each crime* beyond a reasonable doubt.” (CP 152; RP 195) (emphasis added). The attempt to elude sentencing enhancement was not an element of a crime. *See* RCW 46.61.024(1) (elements of attempt to elude a police vehicle); *see also* RCW 9.94A.834 (attempt to elude sentencing enhancement, in a separate statutory provision from the substantive offense of attempt to elude). The attempt to elude sentencing enhancement was not listed as an element in the to-convict instruction, that the

State had to prove beyond a reasonable doubt in order to find Mr. Davis guilty. (CP 165; RP 198-199).

The jury was not informed that in order to answer “yes” to the attempt to elude sentencing enhancement, the State had to prove the enhancement beyond a reasonable doubt. (CP 147-172, 175; RP 191-201). Mr. Davis’ case should be reversed and remanded for a new trial on the attempt to elude sentencing enhancement. *See Nunez*, 174 Wn.2d at 717 (except in the death penalty context, double jeopardy does not preclude a retrial of sentence enhancements).

**Issue 3: Whether the judgment and sentence for first degree driving while license suspended or revoked contains an error that should be corrected, where it indicates Mr. Davis was found guilty on June 20, 2017, rather than on May 10, 2017.**

The judgment and sentence for the first degree driving while license suspended or revoked conviction states that Mr. Davis was found guilty on June 20, 2017. (CP 210). However, Mr. Davis was found guilty of first degree driving while license suspended or revoked on May 10, 2017. (CP 176; RP 231).

Therefore, this court should remand this case to the trial court for correction of the judgment and sentence for the first degree driving while license suspended or revoked conviction to reflect that Mr. Davis was found guilty on May 10, 2017, rather than on June 20, 2017. *See, e.g., State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, incorrectly stating the terms of confinement imposed); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010)

(remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence).

**Issue 4: Whether this Court should deny costs against Mr. Davis on appeal in the event the State is the substantially prevailing party.**

Mr. Davis preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

The trial court imposed only mandatory costs. (CP 202-203; RP 251-252). An order finding Mr. Davis indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 223-229). To the contrary, Mr. Davis' report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Davis remains indigent. His report as to continued indigency shows that he has no income other than basic food (SNAP) public benefits. The report also shows that Mr. Davis has outstanding debts.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835, 44 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems,

the Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Id.* at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, the trial court imposed only mandatory costs and entered an Order of Indigency, and Mr.

Davis' Report as to Continued Indigency demonstrates a continued inability to pay costs. (CP 202-203, 223-229; RP 251-252).

In addition, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Davis would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State's collection efforts. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." *Blazina*, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The *Blazina* court said, "if someone does meet the GR 34[(a)(3)] standard for indigency,

courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Mr. Davis met this standard for indigency. (CP 223-229).

In addition, Mr. Davis' report as to continued indigency states that he receives basic food (SNAP) public benefits. In *Blazina*, our Supreme Court stated:

[W]hen determining a defendant's ability to pay . . . Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, *such as Social Security or food stamps* . . . Although the ways to establish indigent status remain nonexhaustive . . . *if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.*

*Blazina*, 182 Wn.2d at 838-39 (internal citations omitted) (emphasis added).

Because Mr. Davis currently receives food stamps, the record demonstrates he is indigent and does not have the ability to pay costs on appeal. *See id.*

This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e); CP 170-173. "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to "seriously

question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Davis to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Davis’ report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Davis remains indigent.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the “supreme court . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State’s requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender’s financial

circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Davis' current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Davis remains indigent.

Appellate costs should not be imposed in this case.

#### **F. CONCLUSION**

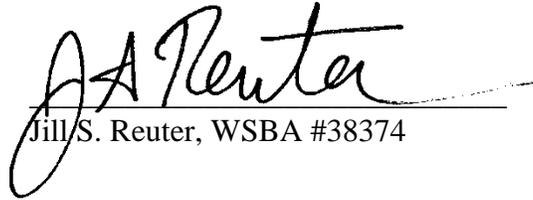
The evidence presented at trial was insufficient to prove the attempt to elude sentencing enhancement. Therefore, Mr. Davis' case should be reversed and remanded for resentencing without the attempt to elude sentencing enhancement.

In the alternative, Mr. Davis' case should be reversed and remanded for a new trial on the attempt to elude sentencing enhancement, because the jury instruction for the attempt to elude sentencing enhancement was defective because it did not instruct the jury the State must prove the sentencing enhancement beyond a reasonable doubt.

At a minimum, this matter should be remanded to the trial court for correction of the judgment and sentence for the first degree driving while license suspended or revoked conviction to reflect that Mr. Davis was found guilty on May 10, 2017, rather than on June 20, 2017.

Mr. Davis also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 5th day of February, 2018.

  
Jill S. Reuter, WSBA #38374