

FILED  
Court of Appeals  
Division III  
State of Washington  
4/5/2018 2:08 PM  
No. 35457-1-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, RESPONDENT  
v.

SHAUN PAUL DAVIS, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

---

LAWRENCE H. HASKELL  
Prosecuting Attorney

Anastasiya E. Krotoff  
Deputy Prosecuting Attorney  
Attorney for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**INDEX**

**I. APPELLANT’S ASSIGNMENTS OF ERROR ..... 1**

**II. ISSUES PRESENTED ..... 1**

**III. STATEMENT OF THE CASE ..... 2**

    Substantive facts. .... 3

**IV. ARGUMENT ..... 6**

    A. THERE WAS SUFFICIENT EVIDENCE AT TRIAL TO ESTABLISH THE AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT..... 6

    B. MR. DAVIS FAILED TO OBJECT TO THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT; IT WAS NOT A MANIFEST CONSTITUTIONAL ERROR FOR THE COURT TO OMIT THE INSTRUCTION; AND ANY ERROR WAS WAIVED..... 12

        1. The defendant may not raise an alleged error in the instructions because it is not a manifest constitutional error and was not objected to below. .... 12

        2. Assuming a manifest constitutional error occurred, it was invited error. .... 16

    C. THE AGGRAVATING CIRCUMSTANCE IS ANALOGOUS TO AN ELEMENT IN THE “TO CONVICT” INSTRUCTION; JURORS WERE INSTRUCTED THAT EACH ELEMENT MUST BE PROVED BEYOND A REASONABLE DOUBT; AND ANY ERROR IS HARMLESS..... 18

        1. No error occurred because the State’s burden was conveyed throughout trial. .... 18

        2. Any error was harmless and not per se reversible structural error..... 24

D.	THIS CASE SHOULD BE REMANDED TO CORRECT A SCRIVENER’S ERROR ON THE JUDGMENT AND SENTENCE.....	29
E.	UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.....	30
V.	CONCLUSION .....	31

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>City of Seattle v. Patu</i> , 147 Wn.2d 717, 58 P.3d 273 (2002).....	16, 17
<i>Hue v. Farmboy Spray Co.</i> , 127 Wn.2d 67, 896 P.2d 682 (1995).....	22
<i>Pasco v. Mace</i> , 98 Wn.2d 87, 653 P.2d 618 (1982) .....	18
<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	27
<i>State v. Berlin</i> , 167 Wn. App. 113, 271 P.3d 400 (2012) .....	28
<i>State v. Braithwaite</i> , 34 Wn. App. 71 5, 667 P.2d 82 (1983) .....	26
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	14
<i>State v. Cook</i> , 31 Wn. App. 165, 639 P.2d 863, <i>review denied</i> , 97 Wn.2d 1018 (1982).....	26
<i>State v. Cox</i> , 94 Wn.2d 170, 174, 615 P.2d 465 (1980).....	21
<i>State v. Fowler</i> , 114 Wn.2d 59, 785 P.2d 808 (1990).....	26, 27
<i>State v. Guzman Nuñez</i> , 160 Wn. App. 150, 248 P.3d 103 (2011), <i>aff'd</i> , 174 Wn.2d 707, 285 P.3d 21 (2012).....	14, 15
<i>State v. Hayward</i> , 152 Wn. App. 632, 217 P.3d 354 (2009) .....	27
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	16
<i>State v. Hood</i> , 196 Wn. App. 127, 382 P.3d 710 (2016) .....	17
<i>State v. Nunez</i> , 174 Wn.2d 707, 285 P.3d 21 (2012) .....	20, 25
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), <i>as corrected</i> (Jan. 21, 2010).....	14
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	21

<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	8
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988) .....	13, 14
<i>State v. Smith</i> , 174 Wn. App. 359, 298 P.3d 785 (2013) .....	21
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	12, 13
<i>State v. Stubbs</i> , 170 Wn.2d 117, 240 P.3d 143 (2010) .....	7
<i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	16
<i>State v. Summers</i> , 107 Wn. App. 373, 28 P.3d 780 (2001).....	16
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004) .....	8
<i>State v. Williams-Walker</i> , 167 Wn.2d 889, 225 P.3d 913 (2010).....	20
<i>State v. Willouahby</i> , 29 Wn. App. 828, 630 P.2d 1387, <i>review denied</i> , 96 Wn.2d 1018 (1981).....	26
<i>State v. Winings</i> , 126 Wn. App. 75, 107 P.3d 141 (2005) .....	16
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007) .....	7, 8

#### **FEDERAL CASES**

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) .....	19
<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 494 (1991) .....	24
<i>Brulay v. United States</i> , 383 F.2d 345 (9th Cir. 1967) .....	10
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	19
<i>McKaskle v. Wiggins</i> , 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) .....	24
<i>Neder v. United States</i> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) .....	19, 24, 25

<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) .....	22, 25
<i>Tumey v. Ohio</i> , 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) .....	24
<i>United States v. Gil</i> , 58 F.3d 1414 (9th Cir. 1995) .....	10
<i>Vasquez v. Hillery</i> , 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) .....	24
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) .....	25
<i>Washington v. Recuenco</i> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) .....	19

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. VI .....	19
-----------------------------	----

**STATUTES**

RCW 9.94A.585 .....	7
RCW 9.94A.834 .....	7, 8

**RULES**

CrR 6.15 .....	14
RAP 14.2 .....	30, 31
RAP 2.5 .....	12

**OTHER**

11 Washington Pattern Jury Instructions: Criminal 0.10 .....	27
11A Washington Pattern Jury Instructions: Criminal 160.00 (3d ed. 2008) .....	27

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

1. There was insufficient evidence to prove the sentencing enhancement on the charge of attempt to elude.
2. The jury instruction was erroneous for the attempt to elude sentencing enhancement because it did not instruct that the State must prove the enhancement beyond a reasonable doubt.
3. The court erred by entering the incorrect date of conviction for first degree driving suspended on the judgement and sentence.
4. The Court of Appeals should decline to impose appellate costs should respondent substantially prevail and request such costs.

## **II. ISSUES PRESENTED**

1. Was there sufficient evidence to support the aggravating circumstance beyond a reasonable doubt?
2. Where the defendant did not object to the allegedly erroneous instruction for the aggravating circumstance on the crime of attempt to elude, may he now raise the issue for the first time on appeal, where the alleged error is not "manifest"?
3. Whether the allegedly erroneous instruction for the sentencing enhancement was harmless error?

4. Should this Court remand to correct the scrivener's error with respect to the first degree driving suspended conviction date, where the judgement and sentence shows a conviction date of June 20, 2017, instead of May 10, 2017?

5. Whether this Court should impose appellate costs if the State is the substantially prevailing party on appeal?

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

The State of Washington charged the defendant, Shaun P. Davis, in the Spokane County Superior Court with possession of a stolen motor vehicle, attempt to elude a police vehicle with an enhancement for endangering other drivers or pedestrians other than himself or the pursuing officers, and first degree driving while license suspended for events occurring on September 2, 2015. CP 140-42.

Following trial, the defendant was acquitted of possession of a stolen motor vehicle, but was convicted of attempt to elude a police vehicle, as well as the enhancement, and first degree driving while license suspended. RP 231;<sup>1</sup> CP 174-76. This timely appeal followed.

---

<sup>1</sup> The Report of Proceedings is comprised of two consecutively paginated volumes.

Substantive facts.

On September 2, 2015, at approximately 6:04 p.m., Washington State Patrol Trooper Douglas Power was finishing up paperwork from a traffic stop. RP 76. He was parked on Third Avenue and Lee Street. RP 76. Third Avenue is akin to a “thoroughfare,” paralleling the freeway. RP 78.

A motorcycle driving east on Third Avenue caught Trooper Power’s attention because it did not have mirrors, as required by law. RP 76. The driver of the motorcycle was later identified as Shaun Davis. RP 22, 98, 163. Trooper Power immediately pulled out and followed the motorcycle. RP 79. He activated his overhead emergency lights, but Mr. Davis continued driving. RP 80. Trooper Power then activated his siren. RP 80. Mr. Davis looked back at the Trooper, lowered his head, and accelerated. RP 80. At that point, Trooper Power advised communications that a motorcycle was running from him. RP 83.

Mr. Davis turned right onto Thor Street, going around cars and cutting through traffic, then drove into a gas station parking lot at the corner of the intersection. RP 83. He drove through an alley next to the gas station and returned to Third Avenue, failing to stop at the stop sign when making a right-hand turn. RP 83.

When he reached Freya Street, Mr. Davis drove through a red light. RP 83. Trooper Power paused for a moment, his lights and siren on, to make

sure traffic was clear before proceeding. RP 83. Trooper Power continued following Mr. Davis as the defendant drove through a stop sign, without yielding or stopping, at Havana Street. RP 83.

Third Avenue then curves and turns into Fourth Avenue, continuing to parallel the freeway. RP 83. Trooper Power estimated Mr. Davis' speed to be 80 mph on this stretch of the road – 50 miles over the posted speed limit of 30 mph. RP 84. Cars pulled off the road onto the shoulder, as Mr. Davis sped through this area. RP 84.

As he approached Thierman Road, Mr. Davis drove into the oncoming lane and looked back at Trooper Power. RP 84. Mr. Davis moved back into the correct lane of travel and then turned right on Thierman Road, failing to stop at the stop sign. RP 84. Trooper Power noticed that Mr. Davis was “wobbling the turn,” which gave him the distinct impression Mr. Davis was an inexperienced rider. RP 84.

Mr. Davis continued until Eighth Avenue, where he turned right, again failing to stop at the stop sign. RP 84. Traffic was slightly heavier on Eighth Avenue. RP 84-85. Eighth Avenue also has hills, creating limited visibility in places. RP 85. Mr. Davis passed traffic by crossing over the double-yellow divider and driving in the oncoming lane. RP 85. Trooper Power advised communications that Mr. Davis was passing in a no-passing zone but was doing so in a safe manner, “not endangering too

many people at this time.” RP 85. Trooper Power testified that when Mr. Davis passed the double yellow divider, the defendant did come close enough to other vehicles, such that it would require terminating the pursuit. RP 86. However, Trooper Power indicated to the jury that Mr. Davis’ speeds were excessive, and that passing in a no-passing zone in an area with hills and limited visibility meant unsuspecting motorists in that area would not see what was coming at them. RP 86.

Mr. Davis then turned onto a residential street, with a speed limit of 25 mph, and accelerated quickly. RP 85. At the end of the street, Mr. Davis circled back onto Fourth Avenue, once again driving parallel to the freeway. RP 85. Fourth Avenue subsequently turned into a one-way street traveling eastbound, which forced Trooper Power to terminate the pursuit. RP 85. Travelling down the one-way street endangered the Trooper, the defendant, as well as other cars and motorists on the street because Fourth Avenue is a “one-lane, one-way street,” with “no shoulder ... no second lanes, [and] no place to go for an oncoming car.” RP 87.

Spokane County Sheriff’s Deputy James Wang picked up the pursuit at about 6:12 p.m. – roughly eight minutes after the start of the chase. RP 118. Deputy Wang observed Mr. Davis driving east on Third Avenue, a one-way, westbound street. RP 119. Deputy Wang activated his lights and sirens and attempted to stop Mr. Davis. RP 120. Mr. Davis looked back at

Deputy Wang and accelerated at a high rate of speed. RP 120. Multiple westbound cars approached Mr. Davis and Deputy Wang. RP 121. Mr. Davis drove onto the shoulder to avoid them, and, due to safety concerns, Deputy Wang terminated the pursuit. RP 121.

Then, Spokane Police Officer Jeremy Howe intercepted Mr. Davis near Fancher Road and Third Avenue, giving chase on foot after two employees of a business located on the right-hand side of Third Avenue waved him down. RP 162. Trooper Power arrived to see Officer Howe chasing Mr. Davis. RP 93. Trooper Power accelerated down the road and cut Mr. Davis off in a parking lot, after which Mr. Davis was arrested. RP 93, 122, 162-63. The total pursuit lasted 6.1 miles and occurred during rush hour on a weeknight, after six o'clock in the evening. RP 86, 88, 118, 121, 160, 184.

#### **IV. ARGUMENT**

##### **A. THERE WAS SUFFICIENT EVIDENCE AT TRIAL TO ESTABLISH THE AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT.**

Mr. Davis claims 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 10. Contrary to this argument, consideration of the facts presented at trial demonstrate that

a rational trier of fact would conclude Mr. Davis threatened other motorists with harm or injury. Sufficient evidence supported the jury's finding, and Mr. Davis' claim fails.

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

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 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).

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) (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 plain language of RCW 9.94A.834(1) requires the factfinder to consider the circumstances in which Mr. Davis "threatened" other motorists or pedestrians with his vehicle.

Automobiles, including motorcycles, by their nature are greatly dangerous, in terms of the seriousness of both the physical injuries and property damage they can cause, if used improperly. Mr. Davis' dangerous use and operation of the motorcycle at high rates of speed caused a high risk of harm to multiple drivers, some of whom had to drive off to the side of the road to avoid potential serious bodily injury. RP 84, 121. The pursuit occurred on a weeknight during rush hour, just shortly after six o'clock in the evening. RP 86, 118, 121, 160. Mr. Davis cut through traffic and drove across multiple lanes of travel on Thor Street to get access to the gas station parking lot. RP 83. He also failed to stop at a red light at the intersection on

Third Avenue and Freya. RP 83. In fact, Trooper Power paused – his lights and siren on – before entering the intersection, to ensure the safety of others as well as himself. RP 83.

At one point, Trooper Power estimated Mr. Davis' speed to be 80 mph in a 30 mph zone. RP 84. Cars pulled off the road to the shoulder, as Mr. Davis barreled through this area. RP 84. During Trooper Power's pursuit, Mr. Davis drove in the wrong direction into oncoming lanes of traffic on multiple occasions, including on Fourth Avenue, across a double-yellow divider, and on Eighth Avenue, travelling at excessive speeds to pass traffic. RP 84.

Trooper Power believed Mr. Davis was passing cars in a safe manner on Eighth Avenue. RP 85. However, he also indicated that Mr. Davis travelled at excessive speeds in a no-passing zone, going around unsuspecting motorists in an area with hills and limited visibility. RP 85-86. Moreover, Trooper Power never stated Mr. Davis was not endangering *any* motorists. His testimony at trial was that Mr. Davis was “not endangering too many people,” such that would force Trooper Power to terminate the pursuit at that point. RP 85-86.

Mr. Davis sped through a residential street with a speed limit of 25 mph. RP 85. Afterward, he entered Fourth Avenue in a section where it is a one-way street, forcing Trooper Power to terminate the pursuit. RP 85.

Going down a one-way street endangered other cars because Fourth Avenue is a “one-lane, one-way street,” with “no shoulder . . . no second lanes, [and] no place to go for an oncoming car.” RP 87.

Deputy Wang observed Mr. Davis driving east on Third Avenue, travelling in the wrong direction. RP 120. Mr. Davis drove on the shoulder to avoid cars, at which point, due to safety concerns, Deputy Wang terminated his pursuit. RP 121.

Mr. Davis claims that Deputy Wang’s observations should not be considered because the State alleged that Mr. Davis failed to stop for “a uniformed law enforcement officer with the *Washington State Patrol*.” See Appellant’s Br. at 14-15 (emphasis added). However, that claim is based upon the information, *see* CP 165, and not on the jury instructions, which do not mention Washington State Patrol. *See* CP 163-65. What defendant is conflating here is an issue relating to variance between the information and the proof.<sup>2</sup>

---

<sup>2</sup> If this is a variance, there is no harm. Variance claims not raised at trial are reviewed for plain error. *United States v. Gil*, 58 F.3d 1414, 1423 (9th Cir. 1995). “A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.” *Id.* at 1422 (quoting *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984) (internal quotation omitted)). A variance will not require a reversal unless it affected the defendant’s substantial rights at trial. *Brulay v. United States*, 383 F.2d 345, 350-51 (9th Cir. 1967).

Although police officers employed by agencies other than the Washington State Patrol were engaged in the pursuit, that testimony only enhances the testimony establishing that Mr. Davis fled from Trooper Power. Indeed, the initial stop was attempted by Trooper Power with the Washington State Patrol. Trooper Power relayed to communications the events as Mr. Davis attempted to elude. RP 88. As a result of the information provided by Trooper Power, Deputy Wang recognized the motorcycle as relayed by dispatch. RP 119-20. Officer Howe learned the same information through communications. RP 160. Trooper Power arrived on the scene as Officer Howe chased Mr. Davis on foot and was able to assist Officer Howe in ending the pursuit by blocking Mr. Davis' path with his patrol vehicle. RP 93-94, 96, 122, 162-63.

This chain of events does not create three separate attempt to elude incidents, but is consistent with a single course of conduct. The initial attempt to stop Mr. Davis by Trooper Power was the charge in question at trial; the chase that followed resulted from Trooper Power's observations and the information he relayed to communications.

Even assuming, *arguendo*, that the observations by Deputy Wang were not taken into consideration, the conduct observed by Trooper Power is nonetheless sufficient to prove the aggravating circumstance beyond a reasonable doubt. Mr. Davis endangered multiple vehicles by driving

through a red light and numerous stop signs, going around vehicles in the oncoming lane, and driving the wrong way down a one-way road with no shoulder and no way out for oncoming vehicles. RP 83-87, 118-21.

**B. MR. DAVIS FAILED TO OBJECT TO THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT; IT WAS NOT A MANIFEST CONSTITUTIONAL ERROR FOR THE COURT TO OMIT THE INSTRUCTION; AND ANY ERROR WAS WAIVED.**

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

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

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

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete

record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

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

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

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

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

given what the trial court knew at that time, the court could have corrected the error.

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

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

In determining whether a claimed error is manifest, this Court views the claimed error in the context of the record as a whole, rather than in isolation. *Scott*, 110 Wn.2d at 688. Manifest error is “unmistakable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008).

---

<sup>3</sup> CrR 6.15(c) states: “**Objection to Instructions.** Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.”

Instructional error is not automatically a constitutional error. *Guzman Nuñez*, 160 Wn. App. at 159.

There is nothing in defendant's claim of error that is plain and indisputable, or so apparent on review that it rises to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have recognized that, in the absence of an objection to the instructions prepared by the court, the instructions were inadequate. To the contrary, the instructions were a correct statement of the law, instructed the jury as to every essential element of the crime of attempting to elude a police vehicle, including the aggravator, and the jury was instructed that all elements must be proved beyond a reasonable doubt.<sup>4</sup>

---

<sup>4</sup> Jury Instruction No. 3 stated:

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,

Therefore, the defendant's claims here are not manifest, and therefore, may not be raised for the first time on appeal.

2. Assuming a manifest constitutional error occurred, it was invited error.

Because Mr. Davis specifically agreed to the instructions prepared by the trial court, any error was invited. The doctrine of invited error precludes a party from creating error in the trial court and then attempting to benefit from the created error on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002). This doctrine is applicable to errors of constitutional significance. *Id.*

Under the doctrine of invited error, even where constitutional rights are involved, this Court will not review jury instructions when the defendant has proposed an instruction or agreed to its wording. *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). The doctrine of invited error precludes a criminal defendant from seeking review of an error he or she helped create. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (improper instruction on self-defense); *State v. Henderson*, 114 Wn.2d 867, 869-71, 792 P.2d 514 (1990) (failure to identify the defendant's intended crime in attempted burglary case); *see also State v. Summers*,

---

fairly, and carefully considering all of the evidence or lack of evidence.

CP 152.

107 Wn. App. 373, 380-82, 28 P.3d 780 (2001) (omission of the knowledge element of unlawful possession of a firearm); *but see*, *State v. Hood*, 196 Wn. App. 127, 133-34, 382 P.3d 710 (2016) (where defendant did not propose his own instructions, invited error doctrine did not bar review of jury instruction, but alleged error was not a manifest constitutional error that could be raised on appeal absent objection below).

In *City of Seattle v. Patu*, for instance, an element in the “to convict” instruction was omitted where defendant was charged with obstructing a police officer. The court declined to consider the defendant’s challenge to the faulty instruction on appeal because the proposed instruction was accepted at trial. *Patu*, 147 Wn.2d at 720-21.

Here, the defendant specifically agreed to the instructions proposed by the State and as ultimately prepared by the court. The trial court prepared its own jury instruction packet and submitted it to both sides. CP 147-72; RP 167. The defense did not object or note any exceptions to the instructions provided:

THE COURT: Please be seated. Mr. Shaw has provided, I think at counsel table the jury instructions that I plan to give. That includes Jury Instruction No. 5, Mr. Zeller, for our discussion in the event that Mr. Davis decides not to testify. We have the supplemental one, if he decides to testify. We’ll just make that call as we go. But I do want to give everyone an opportunity to put on the record any objections and/or exceptions to the instruction packet as given or as supplied...

MS. STERETT: No objections.

THE COURT: Or exceptions?

MS. STERETT: No, Your Honor.

THE COURT: All right. Mr. Zeller.

MR. ZELLER: Likewise, no objections or exceptions.

RP 167.

The invited error doctrine applies to Mr. Davis' claim. Mr. Davis expressly acquiesced in giving the instructions provided by the trial court. RP 167. Any error in this regard is not only waived by Mr. Davis' failure to object, it is also invited.

**C. THE AGGRAVATING CIRCUMSTANCE IS ANALOGOUS TO AN ELEMENT IN THE "TO CONVICT" INSTRUCTION; JURORS WERE INSTRUCTED THAT EACH ELEMENT MUST BE PROVED BEYOND A REASONABLE DOUBT; AND ANY ERROR IS HARMLESS.**

Mr. Davis argues that the error of omitting the instruction advising jurors that the aggravating circumstance must be proved beyond a reasonable doubt is a structural error, such that it violates the Sixth Amendment of the United States Constitution and requires reversal of the judgment. *See* Appellant's Br. at 19. This argument should be rejected.

1. No error occurred because the State's burden was conveyed throughout trial.

Article I, sections 21 and 22, of the state constitution unequivocally establish the right to a jury trial in criminal cases. *Pasco v. Mace*,

98 Wn.2d 87, 653 P.2d 618 (1982). This right encompasses the right of a criminal defendant to have each element of the charged offense presented to the jury for deliberation. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The federal constitution provides for the same right. U.S. Const. amend. VI; *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

Aggravating circumstances are analogous to elements of the crime charged:

Any possible distinction between an “element” of a felony offense and a “sentencing factor” was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing “all the facts and circumstances which constitute the offence ... stated with such certainty and precision, that the defendant ... may be enabled to determine the species of offence they constitute, in order that he may prepare his defense accordingly ... and *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted.”

*Apprendi v. New Jersey*, 530 U.S. 466, 478-79, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (citations omitted) (emphasis in original); *see also* *Washington v. Recuenco*, 548 U.S. 212, 221, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (elements of the crime and sentencing factors treated the same under the Sixth Amendment). The right to a trial by jury compels a sentence to be permitted by a jury’s verdict.

*State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). Where a particular factor enhances the punishment beyond that which “would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose harsher penalty.” *Id.* at 897 (citing *State v. Frazier*, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972)). Failing to submit a sentencing enhancement to a jury thereby violates a criminal defendant’s right to a jury trial under both state and federal constitutions. *Id.*; *State v. Nunez*, 174 Wn.2d 707, 709, 285 P.3d 21 (2012).

The two fundamental purposes to be accomplished by jury instructions, as expounded by the Washington Supreme Court in *State v. Cox*, include:

(1) To declare that each element of the crime must be proven beyond a reasonable doubt, and define the standard of reasonable doubt; and (2) To state that the burden is upon the “State to prove each element of the crime by that standard.” The function of informing the jury of the reasonable doubt standard can only be achieved by a specific instruction. Therefore when ... the jury instructions fail to include a specific instruction on reasonable doubt, the omission is per se reversible error. In contrast to the reasonable doubt function, the function of informing the jury that the burden of proof is upon the State and not the defendant could conceivably be achieved by either of two means an instruction specifically identifying the State as the party bearing the burden of proof or the presumption of innocence

instruction which declares the defendant innocent until proven guilty.

94 Wn.2d 170, 174, 615 P.2d 465 (1980). The Court went on to say:

When ... the jury instructions lack both a specific identification of the State as the party with the burden and a presumption of innocence instruction, the instructions unconstitutionally fail to perform the function of informing the jury of the allocation of burden of proof. However, if the trial judge gives the presumption of innocence instruction even though failing to give a specific instruction on the State as the party with the burden of proof, there is still a possibility that the instructions as a whole were sufficient to adequately inform the jury that the burden of proof is upon the State and not the defendant. Thus ... we must determine on the basis of the totality of circumstances test and not the per se test whether the jury was adequately informed of the allocation of burden of proof.

*Id.* at 175 (citations omitted).

In short, the ultimate determination rests on whether the totality of circumstances were such as to adequately inform the jury regarding the State's burden of proof. *Id.* at 175. The instructions must, as a whole, state the law correctly. *State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785 (2013).

On appeal, challenges to jury instructions are reviewed de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury

of the law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

Here, the State’s burden of proof was explicitly underscored during trial such that any instructional deficit was harmless error considering the context of the entire record. The trial court read Instruction No. 3 to the jury, which informs the jury that the State has the burden of proof on all elements of the crime charged. Instruction No. 3 states the following:

*The defendant has entered pleas of not guilty. That 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 (emphasis added). There was no defect in the trial court’s reasonable doubt instruction.<sup>5</sup>

---

<sup>5</sup> A defective reasonable doubt instruction is per se reversible error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

The State's burden of proof was reiterated, at a minimum, of three times: (1) in the physical instructions given to the jury; (2) in the reading of the introductory reasonable doubt instruction<sup>6</sup>; and (3) in the "to convict" instruction regarding the crime of attempting to elude a police vehicle. *See* CP 147-68; RP 195, 198-99.

Further, Mr. Davis had a meaningful opportunity to present and argue his theory of the case that he was not the driver of the motorcycle involved in the elude. RP 180-91, 214-23. In arguing this theory during closing, defense counsel reiterated the State's burden of proof, stating:

The state has the burden of proof to prove all the elements beyond a reasonable doubt... I think obviously for the state to prove all three counts, they've got to prove that it was Mr. Davis who was on that motorcycle that day beyond a reasonable doubt. All three counts hinge on you believing beyond a reasonable doubt he's the driver of that motorcycle.

RP 214.

---

<sup>6</sup> The reading of the instructions by the judge mirror Instruction No. 3:

The defendant has entered pleas of not guilty. That 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.

RP 195.

As shown, the burden of proof which the jury was instructed to apply was clearly beyond a reasonable doubt. In accordance with this burden of proof and the evidence presented at the trial, the jury unanimously decided, as polling confirmed, that the State had proved the facts supporting the aggravating circumstance beyond a reasonable doubt. *See* RP 231-41.

Therefore, no error occurred. The State's burden was explicitly conveyed to the jury multiple times throughout trial, and the evidence at trial supports the jury's unanimous finding in the special verdict.

2. Any error was harmless and not per se reversible structural error.

If the court finds that an error occurred, it is not reversible error – contrary to Mr. Davis's assertion – but is subject to harmless error review.

A structural error is a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 494 (1991). Given the extraordinary remedy, structural errors have been found in very few cases. *See, e.g., Neder*, 527 U.S. at 8 (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)) (total denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of juror); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)

(right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial right); *Sullivan*, 508 U.S. (erroneous definition of reasonable doubt instruction to the jury).

Mr. Davis cites to no Washington case holding that the omission of the additional instruction accompanying the special verdict form is automatically, per se reversible as structural error, or that such omission is not subject to harmless error analysis. *Neder*, 527 U.S. at 8.

Rather, to support his argument that it is unclear what standard the jury applied in answering the special verdict, Mr. Davis relies on *Nunez*, 174 Wn.2d 707.

In *Nunez*, the instruction addressing the special verdict form stated, “If you unanimously have a reasonable doubt as to this question, you must answer, ‘no.’” *Id.* at 710. The jury answered the special verdict form “yes,” and at sentencing, the sentence enhancement was imposed by the court. *Id.* at 710. At issue was whether the nonunanimity instruction was confusing to the jury because it conflicted with the general instruction requiring unanimity. *Id.* at 716. The court held that making a “jury give a definitive ‘no’ answer when its members cannot agree frustrates this purpose.” *Id.* at 718.

This case is inapposite because there is no unanimity issue here, and the jury was unanimous in their verdict. RP 231-41. The issue at hand is

whether failing to instruct the jury that the special verdict must be proved by the State beyond a reasonable doubt is per se reversible error.

Case law establishes that it is not. Instead, failing to instruct the jury that the special verdict must be found beyond a reasonable doubt is subject to harmless error analysis. *State v. Willouahby*, 29 Wn. App. 828, 832, 630 P.2d 1387, *review denied*, 96 Wn.2d 1018 (1981) (failing to instruct the jury it needed to find the firearm enhancement beyond a reasonable doubt was harmless given uncontroverted evidence that firearm was used); *State v. Cook*, 31 Wn. App. 165, 175-76, 639 P.2d 863, *review denied*, 97 Wn.2d 1018 (1982) (same); *State v. Braithwaite*, 34 Wn. App. 715, 725-26, 667 P.2d 82 (1983) (same).

In *State v. Fowler*, the trial court failed to instruct the jury that the State's burden to prove the defendant was armed with a deadly weapon was proof beyond a reasonable doubt. 114 Wn.2d 59, 62, 785 P.2d 808 (1990), *disapproved of on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). On review, the Washington Supreme Court determined that, because the jury was instructed once, at a minimum, regarding the heightened burden carried by the State in criminal cases, any omission of further instruction would be evaluated by examining whether the error of omission was harmless beyond a reasonable doubt. *Id.* at 64.

Given the uncontroverted evidence and testimony, “the instruction error was harmless.” *Id.* at 65.

Here, it is uncontroverted that the “to convict” instruction regarding the charge of attempt to elude was properly given to the jury. The only nonconformity at issue is the lack of an additional reasonable doubt instruction, specifically WPIC 160.00. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00 (3d ed. 2008) (WPIC).

However, mere nonconformity with a WPIC does not render an instruction defective. “The pattern instructions are not authoritative primary sources of the law; rather, they restate otherwise existing law for jurors. The pattern instructions do not receive advance approval from any court, although they are often treated as ‘persuasive.’” WPIC 0.10 (Introduction to Washington’s Pattern Jury Instructions for Criminal Cases). “The pattern instructions are not binding on trial courts; they are intended to guide trial courts in drafting appropriate instructions for individual cases.” *Id.*; *see also State v. Hayward*, 152 Wn. App. 632, 645-46, 217 P.3d 354 (2009) (“WPICs are not the law; they are merely persuasive authority”). Unlike WPIC 4.01, which our Supreme Court has instructed Washington trial courts to use in all criminal cases, *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), WPIC 160.00 is not the subject of such a mandate.

In *State v. Berlin*, the defendant was charged with attempted second degree murder and first degree assault, as well as an enhancement on each count. 167 Wn. App. 113, 116, 271 P.3d 400 (2012). The trial court gave the following instruction: “Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.” *Id.* at 122. The jury unanimously found the defendant guilty and returned affirmative special verdict findings. *Id.* at 124. Polling supported the jury’s unanimous findings, affirming that the State proved beyond a reasonable doubt the factual basis for the sentencing enhancements. *Id.* at 124.

This type of error was held not constitutional in nature, nor manifest; the court nevertheless engaged in a harmless error analysis in light of *Nunez*, 174 Wn.2d 707. The question rested on whether it could be concluded beyond a reasonable doubt that the instructional error did not influence the jury’s special verdict finding. *Berlin*, 167 Wn. App. at 125. The court noted:

[W]e cannot divorce the focus on the “flawed deliberative process” in our analysis of these instructional errors from the context of the entire record, including the State’s evidence. If we focused only on the “flawed deliberative process,” then this error would automatically require reversal in every case in which the jury receives the flawed special verdict instruction... Thus ... under harmless error analysis, we must consider the effect of the ‘flawed deliberative process’ in the context of the entire record, including the State’s evidence.

*Id.* at 126.

Therefore, the lack of an additional reasonable doubt instruction with respect to the aggravator was harmless error given the context of the entire record and evidence presented during trial. The jury was instructed as to the State's burden to prove each element beyond a reasonable doubt, and unanimously found the aggravating circumstance to support Mr. Davis' sentencing enhancement.

Further, the defendant's *whole* defense was that the State could not prove that he was the driver of the motorcycle, RP 214-20, and, that the State failed to prove that the operator of the motorcycle would know it was stolen. RP 220-23.

**D. THIS CASE SHOULD BE REMANDED TO CORRECT A SCRIVENER'S ERROR ON THE JUDGMENT AND SENTENCE.**

The State concedes that the date of conviction, as stated on the felony judgement and sentence, is incorrect. *See* CP 210. Mr. Davis was found guilty of first degree driving while license suspended on May 10, 2017. CP 176; RP 231. This Court should remand the case to the trial court to correct the scrivener's error in the judgement and sentence.

**E. UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.**

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual’s current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis added.)

The trial court determined the defendant to be indigent for purposes of his appeal on June 9, 2017, based on a declaration provided by the defendant. CP 51-56. The State is unaware of any change in the defendant’s circumstances. Should the defendant’s appeal be unsuccessful, this Court

should only impose appellate costs in conformity with RAP 14.2 as amended.

**V. CONCLUSION**

Given the foregoing reasons, the State respectfully requests this Court to affirm the defendant's conviction.

Dated this 5 day of April, 2018.

LAWRENCE H. HASKELL  
Prosecuting Attorney



---

Anastasiya E. Krotoff #51411  
Deputy Prosecuting Attorney  
Attorney for Respondent