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Division III
State of Washington
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BENJAMIN CHARLES FISHER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

Respondent has one assignment of error, claiming that insufficient evidence supports the special verdict for endangering others while eluding a police officer.

II. ISSUE PRESENTED

Whether, under the facts of this case, the defendant's high-speed, nighttime driving, without headlights, constituted a threat of physical injury or harm to either or both of the confined passengers in his vehicle?

III. STATEMENT OF THE CASE

On the night of April 29, 2017, Spokane County Sheriff's Office deputy Michael Keys was on patrol in a marked law enforcement vehicle when he observed a vehicle make a turn without using its signal. RP 63-64, 71, 72, 74, 75. He also did not see a license plate on the vehicle. RP 76.

Deputy Keys stopped the vehicle and saw three people inside. RP 77, 78. Unknown to Deputy Keys was the fact that the driver, Benjamin Fisher, had an extraditable warrant out of Idaho and was not of the mind of returning to do 49 months in that state for a probation violation. RP 95, 141. When Deputy Keys asked for identification, Benjamin Fisher prevaricated and gave his brother's name and date of birth, verbally identifying himself as Phillip A. Fisher. RP 179, 40.

Deputy Keys was able to locate a photograph based upon the information provided, and realized that the defendant had provided false information. RP 79, 80. Deputy Keys re-approached the defendant's vehicle, and asked the defendant to step out; the defendant declined and squealed his tires while driving off at a high rate of speed. RP 80.

Deputy Keys pursued. The defendant turned off his head lights and then made a "very, very fast" left turn, with wheels spinning and squealing, cutting the corner. RP 81, 86, 87. Keys estimated the car was going about 45 miles per hour in a 25 mile per hour zone, but acknowledged he could have been about 10 miles per hour off. RP 85, 86. Continuing with its headlights off, the car made another high-speed left turn onto a street where vehicles were parked and could have been struck. RP 88.

About nine blocks from the initial stop, the vehicle stopped in a private driveway and all occupants fled on foot. RP 90, 92, 96.

A K9 team responded and located Mr. Fisher hiding under a deck in a homeowner's backyard. RP 113-14, 118, 120, 125-27. The State charged Mr. Fisher with attempting to elude a police officer and added

an enhancement¹ alleging that one or more persons other than the defendant and pursuing law enforcement officers were threatened with physical injury or harm during the pursuit. CP 4.

IV. ARGUMENT

THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THAT ONE OR BOTH OF DEFENDANT’S CONFINED PASSENGERS WERE THREATENED WITH PHYSICAL INJURY OR HARM BY THE DEFENDANT’S NIGHTTIME, HIGHSPEED DRIVING WITHOUT HEADLIGHTS.

On appeal, Fisher contends that insufficient evidence supports the unanimous jury finding that his conduct threatened one or more persons with physical harm. Br. of Appellant at 4. In his argument, Fisher attempts to place upon the definition of “threatened with physical injury or harm” a different and heightened requirement greater than the statutory requirement² that there be a threat of physical injury or

¹ See RCW 9.94A.834, *infra*.

² RCW 9.94A.834. Special allegation--Endangerment by eluding a police vehicle--Procedures

1) 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.

harm.³ A fair construction of the statute does not support the defendant's position.

The objective of statutory interpretation is to give effect to the legislature's intent. *State v. Tracy*, 128 Wn. App. 388, 395, 115 P.3d 831 (2005), *affirmed*, 158 Wn.2d 683, 147 P.3d 559 (2006). If a statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *In re Det. of Herrick*, 190 Wn.2d 236, 243, 412 P.3d 293 (2018).

The plain meaning of the statute is derived from the wording of the statute itself, as well as from related statutes disclosing legislative intent

(2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or 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.

³ The jury instruction phrased the special verdict as follows: "Was any person, other than BENJAMIN CHARLES FISHER or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of BENJAMIN CHARLES FISHER during his commission of the crime of attempting to elude a police vehicle?" CP 65.

about the particular statute in question. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). Terms which are not defined by statute are given their plain and ordinary meaning unless a contrary legislative intent is indicated. *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). If, after reviewing the statute under these principles, it may be susceptible to more than one reasonable interpretation then it is ambiguous. *Id.* Under those circumstances the court may resort to “statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Id.* (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)).

The statutory enhancement for eluding was established by Chapter 219, Laws of 2008. RCW 9.94A.533(11). The statute applies to offenses occurring after June 12, 2008. It sets forth a sentence enhancement for the offense of attempting to elude a police vehicle if the conviction includes a finding by special allegation that the defendant endangered one or more persons during the incident. RCW 9.94A.533(11) states:

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.

All of appellant's cases attempting to interpret the legislative intent of the sentencing enhancement,⁴ except *State v. Williams*, 178 Wn. App. 104, 313 P.3d 470 (2013), *predate* the adoption of that enhancement and, therefore, are of little assistance. And *Williams* provides no relief for the appellant. In *Williams*, the appellant argued that the special verdict instruction relieved the State of its burden to prove the sentencing enhancement beyond a reasonable doubt because it used the WPIC terms "threatened with physical injury or harm" instead of "endangered." 178 Wn. App. at 109. Importantly, the appellate court noted that no additional definitional language was necessary because "threatened with physical injury or harm" provided the definition of "endangerment" and, therefore, the jury was properly instructed on the law. *Id.* at 109. The court concluded that the instructions were sufficient and did not relieve the State of its burden to prove the sentencing enhancement beyond a reasonable doubt. *Id.* It is of note that the WPIC approved in *Williams* is the same as used in the instant case.⁵ The *Williams* decision is contrary to appellant's current

⁴ *State v. Malone*, 106 Wn.2d 607, 612, 724 P.2d 364 (1986), Br. of Appellant at 7; *State v. Roggenkamp*, 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005), Br. of Appellant at 7.

⁵ See *Williams*, 178 Wn. App. at 107 ("We note that the instruction used by the State is the pattern instruction. See 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL § 190.12, at 664

position that the “threatened with physical harm” requirement of the enhancement has some additional or heightened meaning.

Additionally, and more recently, in *State v. Feely*, 192 Wn. App. 751, 368 P.3d 514, *review denied*, 185 Wn.2d 1042 (2016), the appellate court examined the eluding enhancement statute and found its terms unambiguous. There, the appellate court held that officers not involved in the pursuit of the defendant, but involved in the deployment of spike strips in an attempt to disable the defendant’s vehicle as it drove by were properly considered as persons threatened with physical harm and were not exempted by the pursuing-officer-exclusion in the statute. In doing so, the court considered the legislative history of that enhancement and noted that the enhancement statute logically increases punishment if there is danger to others than the defendant and the pursuing officer. If officers who are not following the defendant are endangered, then the statute increases punishment based upon that risk that is not inherent in the mandatory elements of the crime.

Contrary to Feely’s arguments, this construction of the statute is logical. The crime necessarily requires an officer in a police vehicle pursuing a defendant trying to elude that officer. The enhancement logically imposes a greater

(3d ed. 2008).” This WPIC instruction was also used in the instant case. CP 68.

punishment if there is danger to others than the defendant and the pursuing officer. If officers who are not following are endangered, then the statute increases punishment based upon that risk that is not inherent in the mandatory elements of the crime.

Feely, 192 Wn. App. at 762.

The court also noted that the legislative history supported a conclusion that the enhancement compelled this result because the “bill report⁶ gives examples of the risk to children and bystanders created by eluding defenders, but still returns to the general risk to ‘society as a whole.’” *Id.* at fn. 20. Therefore, as to appellant’s sufficiency of the evidence claim regarding the enhancement, the question becomes whether there was sufficient evidence presented to support an enhancement finding under the facts of the present case – whether there was a threat of harm to either of the two passengers that found themselves confined within defendant’s eluding vehicle.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). The same is true of any sentencing enhancements. *State v. Tongate*, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). In a sufficiency challenge,

⁶ H.B. Rep. on Engrossed Substitute H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008).

“all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

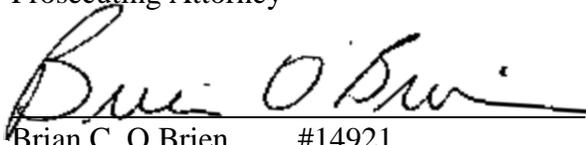
Here, the defendant fled from capture because he had a pending warrant and faced 49 months of additional incarceration in Idaho for a probation violation; he sped nine blocks down unlit roads at night, in the dark, with his lights off, cutting corners “very, very fast,” with his wheels spinning and squealing, onto streets where vehicles were parked and could have been struck, finally ending up in someone’s private driveway. From these facts, a jury could determine that driving blind – headlights off – on dark public streets at night is worse than driving with your eyes closed; at least when you drive with your eyes closed other people can see you. The mixture of lightless high-speed driving and lightless high-speed cornering while losing traction in an area where vehicles were parked and could have been struck, combined with defendant’s determination not to be caught, constituted a threat of physical injury or harm to either or both of the passengers confined within his vehicle.

V. CONCLUSION

The defendant's unlit, high-speed driving under the facts of this case constituted a threat of physical injury or harm to either or both of the confined passengers in the defendant's vehicle.

Dated this 31 day of May, 2018.

LAWRENCE H. HASKELL
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A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

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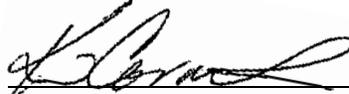
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I certify under penalty of perjury under the laws of the State of Washington, that on May 31, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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5/31/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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