

FILED
Court of Appeals
Division III
State of Washington
11/26/2018 11:04 AM
No. 35719-8-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEREK WAYNE SCHILLING, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

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

INDEX

I. ISSUES PRESENTED 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 7

 A. THE LANGUAGE “DRIVING IN A RECKLESS MANNER” WHILE WILLFULLY ELUDING A POLICE OFFICER IS NOT UNCONSTITUTIONALLY VAGUE. 7

 Standard of Review..... 10

 B. THE UNITED STATES SUPREME COURT DECISION IN JOHNSON DID NOT ALTER THE “AS APPLIED” ANALYSIS GENERALLY UTILIZED IN VAGUENESS CHALLENGES NOT IMPLICATING FIRST AMENDMENT SPEECH..... 15

 C. THE STATE DID NOT OFFER IMPROPER OPINION TESTIMONY REGARDING MR. SCHILLING’S GUILT, AND, IN ANY EVENT, ANY SUCH TESTIMONY WAS HARMLESS. 20

 1. Fear Scent..... 20

 2. Driving Recklessly..... 23

IV. CONCLUSION 27

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Am. Dog Owners Ass'n v. City of Yakima</i> , 113 Wn.2d 213, 777 P.2d 1046 (1989).....	11
<i>City of Seattle v. Eze</i> , 111 Wn.2d 22, 759 P.2d 366 (1988).....	10
<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993).....	24, 25
<i>City of Seattle v. Morrow</i> , 45 Wn.2d 27, 273 P.2d 238 (1954).....	14
<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 795 P.2d 693 (1990).....	11, 12, 15, 20
<i>Haley v. Med. Disciplinary Bd.</i> , 117 Wn.2d 720, 818 P.2d 1062 (1991).....	10
<i>In re Danforth</i> , 173 Wn.2d 59, 264 P.3d 783 (2011).....	11, 12
<i>State v. Coria</i> , 120 Wn.2d 156, 839 P.2d 890 (1992).....	10, 11, 15
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	8
<i>State v. Fateley</i> , 18 Wn. App. 99, 566 P.2d 959 (1977)	13
<i>State v. Halstien</i> , 122 Wn.2d 109, 857 P.2d 270 (1993).....	11
<i>State v. Harrington</i> , 181 Wn. App. 805, 333 P.3d 410 (2014).....	10
<i>State v. Hill</i> , 48 Wn. App. 344, 739 P.2d 707 (1987).....	9, 12, 13
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	26
<i>State v. Maciolek</i> , 101 Wn.2d 259, 676 P.2d 996 (1984)	11
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	21, 22
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1998)	9

<i>State v. Stoddard</i> , 192 Wn. App. 222, 366 P.3d 474 (2016).....	8, 22
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	8, 9, 22
<i>State v. Watson</i> , 160 Wn.2d 1, 154 P.3d 909 (2007)	10
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	8

FEDERAL CASES

<i>Dimaya v. Lynch</i> , 803 F.3d 1110 (9th Cir. 2015)	20
<i>Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).....	15
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010)	15
<i>Johnson v. United States</i> , 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015)	15, 16, 17, 18
<i>Kolender v. Lawson</i> , 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)	10
<i>Maynard v. Cartwright</i> , 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)	15
<i>Sessions v. Dimaya</i> , 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018)	18, 19
<i>Shuti v. Lynch</i> , 828 F.3d 440 (6th Cir. 2016).....	19
<i>Taylor v. United States</i> , 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)	18
<i>United States v. Gasperini</i> , 894 F.3d 482 (2d Cir. 2018)	9
<i>United States v. Harden</i> , 866 F.3d 768 (7th Cir. 2017)	19
<i>United States v. Henderson</i> , 121 F.2d 75, 73 App. D.C. 369 (D.C. Cir. 1941)	14
<i>United States v. Nastri</i> , 647 F. App'x 51 (2d Cir. 2016)	19

<i>United States v. Olano</i> , 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).....	8
<i>United States v. Prickett</i> , 839 F.3d 697 (8th Cir. 2016).....	19
<i>United States v. Schofield</i> , 802 F.3d 722 (5th Cir. 2015) (per curiam).....	20
<i>United States v. Sheffey</i> , 57 F.3d 1419 (6th Cir. 1995).....	26
<i>United States v. Williams</i> , 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).....	15
<i>Yakus v. United States</i> , 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944).....	8

OTHER STATE CASES

<i>State v Andrews</i> , 108 Conn. 209, 142 A. 840 (1928).....	14
<i>State v. Henry</i> , 83 Idaho 167, 359 P.2d 514 (1961).....	14
<i>State v. Tulley</i> , 428 P.3d 1005, 870 Utah Adv. Rep. 29 (2018).....	19
<i>Wilson v. State</i> , 245 Ga. 49, 262 S.E.2d 810 (1980).....	14

STATUTES

18 U.S.C. § 924.....	17
RCW 46.61.024	7

RULES

ER 704	25
RAP 2.5.....	passim

OTHER

MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11 th Ed. 2003)	22
---	----

I. ISSUES PRESENTED

1. Is the language “driving in a reckless manner” while in the process of attempting to elude a police vehicle unconstitutionally vague?
2. Did the State offer improper opinion testimony regarding Mr. Schilling’s guilt and, if so, was this testimony harmless?

II. STATEMENT OF THE CASE

On May 4, 2017, at 4:14 a.m., Spokane County Sheriff’s Deputy Spencer Rassier was on patrol, in uniform, in a well-marked Spokane Valley Ford Crown Victoria police cruiser. RP 12-14.¹ While on patrol, he observed a maroon Mercury Cougar traveling southbound across the intersection of Farr Road and Sprague Avenue in Spokane Valley. RP 14. The Cougar appeared to be travelling at a high rate of speed through the intersection. *Id.* Deputy Rassier followed the Cougar and observed it fail to signal as it turned into the Winco parking lot. RP 15. The vehicle did not have license plates or a temporary tag in the rear window. RP 15. The Winco Grocery Outlet was open at the time. RP 28. Deputy Rassier turned on his car’s lights and siren to effectuate a traffic stop; immediately, the

¹ The RP’s used reference the McMaster transcript of trial and sentencing, totaling 122 pages in length.

Cougar sped onto Sprague Avenue from the parking lot and proceeded westbound, reaching speeds ranging from 80 to 100 m.p.h. in a posted 35 m.p.h. zone. RP 15. With lights on and siren blazing, Deputy Rassier pursued the cheetah-like speeding Cougar as it continued westbound on Sprague, striking a guard rail as it attempted to enter the on-ramp to I-90. RP 16. The Cougar recovered from the guardrail collision and then continued westbound on I-90 at speeds reaching 100 m.p.h., until it exited at Hamilton Street. RP 16.

The chase continued northbound on Hamilton Street until it intersected with Boone Street. RP 17. At Boone, the Cougar sped eastbound, then south on Superior, and then made a U-turn to travel northbound on Superior to Mission Avenue. RP 17-19. Deputy Rassier was able to observe the defendant, Derek Schilling, driving the Cougar as the vehicle passed by him after it had made the U-turn on Superior. RP 18.

Mr. Schilling then drove through a red light at Mission and Perry Street and continued northbound on Perry to Bridgeport, where the chase proceeded east on Bridgeport and then northbound on Napa to Glass. RP 20. The pursuit persisted until Deputy Rassier decided to terminate the chase because the risks of continuing were too dangerous due to the residential nature of the area, and the fact that they were approaching a hospital. RP 20.

After discontinuing the chase, but before he had fully stopped his cruiser, Deputy Rassier heard, via radio, Deputy Randy Watts indicate he observed the Cougar crash near Market and Garland. RP 21.² Deputy Rassier proceeded to the crash site, and observed Mr. Schilling's maroon Cougar crashed over some train tracks, with extensive frontend damage. RP 25. The Cougar had crashed in an industrial-type area by the railroad tracks; it was not an area where an individual would normally be walking around, especially at that time of the morning. RP 38. The Cougar was unoccupied. RP 25. Out of caution, Deputy Rassier waited for the arrival of a K-9 officer. *Id.*

K-9 Deputy Tyler Kullman and his dog, Kahn, arrived soon after the collision. RP 60. As Deputy Kullman observed the crash site, it was obvious the collision had just occurred. *Id.* Deputy Kullman and Kahn began tracking from the open driver's door of the Cougar. RP 61.

² As to the crash, Deputy Watts testified:

So I see this car come flying through the intersection and I could have predicted that it was going to crash and as soon as I saw it land start to lose control, I called it out over the radio: Hey, I've got the car, what I think is the car and it looks like it's going to wreck out. And of course it did wreck out.

RP 35.

Deputy Kullman had worked in the K-9 unit since 2013. RP 49. He explained how a dog's nose and olfactory system far exceeds a human's nose, but that there was no way to truly quantify the differences. RP 52. He explained how a dog can take a very specific scent, among hundreds of scents in a room, and concentrate on that one, specific scent. RP 52, 53.

Deputy Kullman explained how humans all produce rafts, or skin cells, and that these rafts are shed by the millions and are traceable by their scent to a specific individual. RP 58.³ He also explained that the second scent usually involved in tracking comes from “the ground scent, the ground picture. So every time we take a step, regardless of what it is, we create ground disturbance which creates bacteria. That bacteria produces that scent.” RP 58. He related that when this ground scent and the human rafts meet, they create the strongest or optimal scent. *Id.* Deputy Kullman also described how, when a person runs from the police or tries to hide, that person produces what he described as a stronger “fear scent” because these runners are sweating from the armpits and pumping adrenaline through their body. RP 61.

³ The scent a dog picks up from these rafts is special to that person; it is based off diet, the brand of shampoo used, and the soap used to wash clothes, and all of those things that are specific to a particular person. RP 58.

Deputy Kullman began tracking the defendant from the open door of the car. RP 61. He knew that whoever left the car was the only person who had recently been around it. RP 61. Kahn immediately picked up a good track and soon located the defendant on the ridgeline, twenty feet down from the top of the hill. RP 63-65.

The defendant testified that he was only a passenger in the car, that an unnamed friend was driving the car and panicked when Deputy Rassier attempted to stop the vehicle at the Winco parking lot:

Yeah, we came to the stoplight. He's tripping on a police officer right there on Sprague that got behind us and we turned into Winco, it activated his lights and he just took off and there was nothing I could do. I was stuck in the car.

RP 75.

Mr. Schilling described how he knew the officer was trying to initiate a stop, that he could hear the siren and see the emergency lights as the police car pursued the Cougar; however, his unnamed friend continued driving, and the eluding continued a very long way, his unnamed friend disregarding his exhortations to stop the car.

A: He just kept driving down Sprague and protesting, telling – I was calling him nuts, what are you doing, dude, and he wouldn't let me out of the car or nothing. He just gunned it.

RP 76.

During the eluding, Mr. Schilling was afraid and nervous. RP 76. His fear that began at the start of the eluding caused him to latch on his seatbelt, which ultimately saved him from injury when the car crashed.

Q: Okay. When the car went over the train tracks, were you injured at all?

A: No, not that I can say. I was wearing my seat belt, of course. As soon as he started going I put on my seat belt. I was pretty scared honestly.

RP 76.

Mr. Schilling stated that the only ingress and egress to the car was through the driver's door because previous damage to the passenger's side door had rendered that door inoperable. RP 73-74; Ex. P-3. Mr. Schilling claimed that the reason Deputy Rassier believed he was the driver was because his unnamed friend looked like him. RP 78. Shilling claimed they both had the same color of hair, they both wore a goatee, and both had the same type of build. RP 78.

During closing argument, Shilling admitted he agreed with the facts as presented at trial,⁴ other than the identification of him as the driver:

This case comes to essentially the one issue: Who is driving the car. You have two components the State is asking you to rely on to prove that Mr. Schilling is driving the car. You've got obviously Mr. Schilling is apprehended by Officer Kahn, I don't how far away from the scene but at the scene of the

⁴ "There was this long pursuit that starts over here and ends over here and Mr. Schilling and I are not disputing that this took place." RP 100.

crash. That's the one thing he's asking you to rely upon. We're not disputing that he's in the car. We're not disputing that his scent is all over that car. In fact, the pictures that you'll have a chance to take another look at will show you that Mr. Schilling couldn't get out of the passenger side door. You'll see it's completely caved in. That's not from this accident. Look at how this car comes to rest. Nothing hits the side. That's from a crash a couple days prior. So he gets out on the driver's side door. I have no doubt that Officer Kahn and Kullman up the scent of Mr. Schilling right there out of that door. He went out of that door.

RP 100.

III. ARGUMENT

A. THE LANGUAGE “DRIVING IN A RECKLESS MANNER” WHILE WILLFULLY ELUDING A POLICE OFFICER IS NOT UNCONSTITUTIONALLY VAGUE.⁵

Prior to examination of the vagueness claim regarding the wording “reckless manner” as contained in the eluding statute, it must be noted that the defendant did not preserve this issue for appeal as required by RAP 2.5(a)(3).

⁵ RCW 46.61.024, as relevant, provides:

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who *drives his or her vehicle in a reckless manner* while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

(Emphasis added.)

RAP 2.5(a) formalizes a fundamental principle of appellate review. The first sentence of the rule reads: “Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5. No procedural principle is more familiar than that a right of any sort may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944). RAP 2.5(a) affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013); *State v. Stoddard*, 192 Wn. App. 222, 228, 366 P.3d 474 (2016). There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006); *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

The theory of preservation by timely objection also addresses several other concerns. The rule 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, 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. *Strine*, 176 Wn.2d at 749-50; *State v. Scott*, 110 Wn.2d 682, 685-88, 757 P.2d 492 (1998).

Here, the only highway to review is through RAP 2.5(a)(3), via a claim of manifest error. How can the defendant's claim that the term "reckless manner" is vague be "manifest," when, under current law, as set forth below, the many judicial decisions already addressing this very concern have decided the issue against the very argument raised here? *See, e.g., State v. Hill*, 48 Wn. App. 344, 739 P.2d 707 (1987). Was the trial court required to *sua sponte* decide the current law was of no consequence? *Cf. United States v. Gasperini*, 894 F.3d 482, 487 (2d Cir. 2018) (examining belated claim that computer intrusion misdemeanor statute was unconstitutionally vague because it did not define the terms "access," "authorization," and "information"; deciding appellate court could not conclude that the district court plainly erred by not *sua sponte* dismissing the indictment because "[a]t a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law," citing *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

Shilling’s vagueness claim is not preserved for appeal. Additionally, the vagueness claim has no merit.

Standard of Review.

The vagueness doctrine “is limited in two significant ways.” *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). First, “[a] statute is presumed to be constitutional, and the person challenging a statute on vagueness grounds has the heavy burden of proving vagueness beyond a reasonable doubt.” *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). Second, because “[s]ome measure of vagueness is inherent in the use of language’, *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991), courts do not require ‘absolute agreement’ or ‘impossible standards of specificity.’” *State v. Watson*, 160 Wn.2d 1, 7, 154 P.3d 909 (2007) (quoting *Coria*, 120 Wn.2d at 163).

Thus, “[a] statute is not void for vagueness merely because some terms are not defined.” *State v. Harrington*, 181 Wn. App. 805, 824, 333 P.3d 410 (2014). Likewise, a statute is not unconstitutionally vague “merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” *Haley*, 117 Wn.2d at 740 (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)); and see *Kolender v. Lawson*, 461 U.S. 352, 361, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). “[I]f [people] of ordinary

intelligence can understand a penal statute, notwithstanding some possible areas of disagreement, it is not wanting in certainty.” *State v. Maciolek*, 101 Wn.2d 259, 265, 676 P.2d 996 (1984).

Moreover, Washington courts *limit* facial challenges to statutes that implicate free speech rights.⁶ *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993). Here, Mr. Schilling does not assert, nor could he, that his challenge implicates First Amendment rights. Therefore, the vagueness challenge is evaluated by examining the statute as applied under the particular facts of the case. *Coria*, 120 Wn.2d at 163; *City of Spokane v. Douglass*, 115 Wn.2d 171, 182, 795 P.2d 693 (1990).

Utilizing this “as applied” test, the challenged law is examined for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the statute and not by examining hypothetical situations at the periphery of the ordinance’s scope. *In re Danforth*, 173 Wn.2d 59, 72, 264 P.3d 783 (2011). Additionally, the mere fact that a statute may require some degree of subjective evaluation by a police officer to determine whether the statute applies does not mean the statute is unconstitutionally vague. *Id.* at 74; *Am. Dog Owners Ass’n v. City of Yakima*, 113 Wn.2d 213,

⁶ The defendant’s claim that recent Federal cases dealing with the residual clause of the Armed Career Criminal Act has changed the “as applied” analysis is addressed below.

216, 777 P.2d 1046 (1989). “Under the due process clause, the enactment is unconstitutional only if it invites an inordinate amount of police discretion.” *In re Danforth*, 173 Wn.2d at 74; *Douglass*, 115 Wn.2d at 181.

The courts of our state have held the term “driving in a reckless manner,” as used in our driving statutes, does not offend the due process requirement that a criminal statute must be sufficiently definite as to what acts are prohibited. Dispositive of this issue is this Court’s decision in *Hill*, 48 Wn. App. 344, which held the vehicular assault statute was not unconstitutionally vague for failing to define the words “reckless manner”:

Third, Ms. Hill contends the vehicular assault statute is unconstitutionally vague because it fails to define the word “reckless” and there are no statutory standards for distinguishing “reckless” from “ordinary negligence.” *State v. Jacobsen*, 78 Wn.2d 491, 477 P.2d 1 (1970) is dispositive of this issue. In that case the defendant argued the language “in a reckless manner” as used in the vehicular homicide statute, RCW 46.61.520(1), was so vague that an accused could not understand the nature of the crime charged so as to intelligently admit or deny guilt. The court held at page 498:

Criminal statutes need not spell out with absolute certainty every act or omission which is prohibited if the general terms of the act convey an understandable meaning to the average person. This is especially true where the subject matter, as here, does not admit of precision. We think the terms “disregard for the safety of others” and “reckless manner” adequately convey such meaning.

(Citation omitted.) Thus, the court in *Jacobsen* upheld the statute and found the language “in a reckless manner” fairly

apprised, in words of common understanding, the acts or omission proscribed.

Hill, 48 Wn. App. 348-49 (alteration in original).

This Court in *Hill* also determined that case law defines the phrase “to operate a vehicle in a reckless manner’ as meaning a heedless, careless or rash manner or in a manner showing indifference to the consequences.” *Id.* at 348 (citing *State v. Partridge*, 47 Wn.2d 640, 645-46, 289 P.2d 702 (1955)); *State v. Fateley*, 18 Wn. App. 99, 105-06, 566 P.2d 959 (1977). Moreover, the trial court in the instant case gave the same definition of “driving in a reckless manner” that was approved of in *Hill*: “To operate a vehicle in a reckless manner means driving in a rash or heedless manner, indifferent to the consequences.” *See* CP 33 (Instruction no. 9); *Hill*, 48 Wn. App. at 348.

As applied, the defendant’s driving fully meets the reckless standard. Mr. Schilling raced down city streets and down I-90 at 100 m.p.h.; he completed a high-speed U-turn without any evidence of slowing down. He ultimately crashed his vehicle after losing control and “flying” through the intersection at Market and Garland. Here, Mr. Schilling testified that he could see the officer behind with the lights activated, attempting to stop the careening Cougar he was occupying. He testified that even he was frightened and scared by the driving as soon as it began. RP 76. In fact, his

fear of the consequences caused him to put on his seatbelt, an act which ultimately saved him from injury when the car crashed into the train tracks. Importantly, as confessed by Mr. Schilling during his testimony and his counsel during closing, the case was not about *whether* the driving was reckless during the eluding, it was about *who* was driving. RP 100.

Appellant has failed to cite or distinguish the dispositive cases of *Hill* and *Jacobsen*.⁷ The term “driving in a reckless manner” is not unconstitutionally vague.

⁷ One older Washington State case also supports the State’s position. *See City of Seattle v. Morrow*, 45 Wn.2d 27, 33, 273 P.2d 238 (1954) (operation of a motor vehicle in a “reckless” manner was not vague such that a person of common understanding could not comprehend how to defend against allegation). Other courts concur. *See State v Andrews*, 108 Conn. 209, 142 A. 840 (1928) (“reckless disregard” as used in statutes prohibiting reckless driving were sufficiently definite and certain to define an offense); *United States v. Henderson*, 121 F.2d 75, 77, 73 App. D.C. 369 (D.C. Cir. 1941) (“The words and phrases used in the presently applicable statute, *i.e.*, immoderate rate of speed, careless, reckless, negligent, manner, willfully, wantonly, and cause, are all well known, both in common speech and in the terminology of the law” (citing cases)); *Wilson v. State*, 245 Ga. 49, 53, 262 S.E.2d 810 (1980) (noting “prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision and many statutes have some inherent vagueness for “(i)n most English words and phrases there lurk uncertainties.” ... All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden” (alterations in original; citations omitted)); *State v. Henry*, 83 Idaho 167, 172, 359 P.2d 514 (1961) (“reckless driving” not vague).

B. THE UNITED STATES SUPREME COURT DECISION IN *JOHNSON*⁸ DID NOT ALTER THE “AS APPLIED” ANALYSIS GENERALLY UTILIZED IN VAGUENESS CHALLENGES NOT IMPLICATING FIRST AMENDMENT SPEECH.

A vagueness challenge not implicating First Amendment rights is evaluated by examining the statute as applied under the particular facts of the case. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010); *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008); *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, and n. 7, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (collecting cases); *Coria*, 120 Wn.2d at 163; *Douglass*, 115 Wn.2d at 182.

Mr. Schilling contends that *Johnson v. United States*, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), altered that general framework. Specifically, he argues that post-*Johnson*, a court is required to analyze the facial challenge first and, in fact, strike the statute as unconstitutionally vague, even if the statute might not be vague when applied to the case at hand. Br. of Appellant at 8-11. However, a review of the *Johnson* decision establishes that that case cannot bear the weight Mr. Schilling ascribes to it.

⁸ *Johnson v. United States*, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).

Johnson examined the federal Armed Career Criminal Act of 1984 (the ACCA). 135 S.Ct. at 2555. The ACCA *enhances* the sentences of restricted individuals who “ship, possess, and receive firearms” and who also have “three or more earlier convictions for a ‘serious drug offense’ or a ‘violent felony.’” *Id.* (citation omitted). The ACCA defines “violent felony,” in part, as “any crime punishable by imprisonment for a term exceeding one year ... that ... is burglary, arson, or extortion, involves the use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*” *Id.* at 2555-56 (first omission in original) (quoting 18 U.S.C. § 924(e)(2)(B)). The Supreme Court held that the “indeterminacy of the wide-ranging inquiry required by” the italicized language, known as the statute’s residual clause, “denies fair notice to defendants and invites arbitrary enforcement by judges.” *Id.* at 2557.⁹

⁹ The Court summed up its experience with its prior attempts of saving the residual clause in *Johnson* at 135 S.Ct. 2560:

It has been said that the life of the law is experience. Nine years’ experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise. Each of the uncertainties in the residual clause may be tolerable in isolation, but “their sum makes a task for us which at best could be only guesswork.” *United States v. Evans*, 333 U.S. 483, 495, 68 S.Ct. 634, 92 L.Ed. 823 (1948). Invoking so shapeless a provision to condemn someone to

In its examination of the residual clause, the *Johnson* Court pointed out two features that worked together to make the federal statute unconstitutionally vague. First, the residual clause left “grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” 135 S.Ct. at 2557. In applying the statute’s language, a court was required to assess “whether a crime qualifies as a violent felony ‘in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.’” *Id.* Second, the language left “uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.” *Id.* at 2558.

The holding in *Johnson* turned on the manner in which that specific *sentencing enhancement* provision operated. Whether the residual clause applied depended on whether the given offense – and not the facts of the actual offense – created a sufficiently high risk of injury to others. *See* 18 U.S.C. § 924(e)(2)(B)(ii). This was the required analysis because the Supreme Court had previously held that the language of the relevant ACCA

prison for 15 years to life does not comport with the Constitution’s guarantee of due process.

provision, 18 U.S.C. § 924(e)(2)(B)(ii), required a “categorical approach,” rather than the traditional as-applied analysis. *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).¹⁰

While the Supreme Court bypassed the traditional as-applied inquiry in *Johnson*, it also clarified that it “d[id] not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct; ‘the law is full of instances where a man’s fate depends on his estimating rightly ... some matter of degree.’” 135 S.Ct. at 2561 (omission in original) (citation omitted). In other words, the Court limited *Johnson* to statutes that require courts to employ the categorical approach. This point was emphasized further in Justice Thomas’s dissent¹¹ in *Dimaya*:

This Court’s precedents likewise recognize that, outside the First Amendment context, a challenger must prove that the

¹⁰ In *Sessions v. Dimaya*, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018) (extending the holding of *Johnson* to civil deportation cases), the Court held the residual clause of the federal criminal code’s definition of “crime of violence,” as incorporated into the Immigration and Nationality Act’s (INA) definition of aggravated felony, was impermissibly vague in violation of due process. In applying a categorical approach, the Court noted that under the residual clause, “a court focused on neither the ‘real-world facts’ nor the bare ‘statutory elements’ of an offense. *Ibid.* Instead, a court was supposed to ‘imagine’ an ‘idealized ordinary case of the crime’—or otherwise put, the court had to identify the “kind of conduct the ‘ordinary case’ of a crime involves.”” *Dimaya*, 138 S.Ct. at 1213-14.

¹¹ Justice Thomas was joined in this portion of his dissent by Justice Kennedy and Justice Alito.

statute is vague as applied to him. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010); *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008); *Maynard*, 486 U.S., at 361, 108 S.Ct. 1853; *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, and n. 7, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (collecting cases). *Johnson* did not overrule these precedents. While *Johnson* weakened the principle that a facial challenge requires a statute to be vague “in all applications,” 576 U.S., at —, 135 S.Ct., at 2561 (emphasis added), it did not address whether a statute must be vague as applied to the person challenging it. That question did not arise because the Court concluded that ACCA’s residual clause was vague as applied to the crime at issue there: unlawful possession of a short-barreled shotgun. See *id.*, at —, 135 S.Ct., at 2560.

Sessions v. Dimaya, 138 S.Ct. 1204, 1250, 200 L.Ed.2d 549 (2018); see also *State v. Tulley*, 428 P.3d 1005, 870 Utah Adv. Rep. 29 (2018) (noting this interpretation limiting *Johnson*’s categorical approach to residual clause cases has been adopted by each federal circuit court to address the issue).¹²

¹² See *United States v. Harden*, 866 F.3d 768, 773 (7th Cir. 2017) (“[T]he *Johnson* Court’s concerns extended only to categorical determinations under that standard rather than determinations based on the actual individual circumstances”); *United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016) (“[T]he Supreme Court was clear [in *Johnson*] in limiting its holding to the particular set of circumstances applying to the ACCA residual clause...” (citation omitted)); *Shuti v. Lynch*, 828 F.3d 440, 449 (6th Cir. 2016) (acknowledging that *Johnson* does not apply to cases that “call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct,” but nonetheless striking down the challenged statute because it “mandate[d] a categorical mode of analysis that deal[t] with ‘an imaginary condition other than the facts’” (citations omitted)); *United States v. Nastri*, 647 F. App’x 51, 55 (2d Cir. 2016) (In *Johnson* “the Supreme Court specifically noted that it did ‘not doubt the constitutionality

Therefore, *Johnson* does not invalidate the “as applied” analytical framework set forth in *Douglass*, 115 Wn.2d 171; indeed, it reaffirms the constitutionality of statutes like the ones at issue there and in the current case. The defendant’s argument to the contrary is without support.

C. THE STATE DID NOT OFFER IMPROPER OPINION TESTIMONY REGARDING MR. SCHILLING’S GUILT, AND, IN ANY EVENT, ANY SUCH TESTIMONY WAS HARMLESS.

1. Fear Scent.

The defendant complains that Deputy Kullman’s testimony that his K9 unit tracked Mr. Schilling by his “fear” scent constituted improper opinion testimony.

of laws that call for the application of a qualitative standard such as “substantial risk” to real-world conduct.’ Whether a defendant’s actual two-year drug-distribution conspiracy falls within the scope of ‘a substantial period of time’ is precisely this kind of qualitative standard” (quoting *Johnson*, 135 S.Ct. at 2561)); *Dimaya v. Lynch*, 803 F.3d 1110, 1116 (9th Cir. 2015) (“In many circumstances, of course, statutes require judges to apply standards that measure various degrees of risk. The vast majority of those statutes pose no vagueness problems because they ‘call for the application of a qualitative standard such as “substantial risk” to real world conduct.’ The statute at issue in *Johnson* was not one of those statutes, however. Nor is the provision at issue here” (footnote omitted) (citations omitted)); *United States v. Schofield*, 802 F.3d 722, 731 (5th Cir. 2015) (per curiam) (“The Court in *Johnson* noted that ‘laws [which] require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion,’ like the SORNA residual clause, were distinguishable from the law it declared unconstitutionally vague” (alteration in original) (quoting *Johnson*, 135 S.Ct. at 2561)).

First, it is debatable whether this statement even constitutes an opinion on the defendant's guilt. Deputy Kullman explained how when someone is running from the police or trying to hide, they produce what he described as a "fear scent" because the runners are sweating from the armpits and pumping adrenaline through their body. RP 61. This is more akin to a simple factual statement regarding commonly understood physical bodily functions, than an opinion on the defendant's guilt. None of the elements of the crime of eluding involve "fear" or "scent."

Second, the defendant never objected to this evidence, and did not object for tactical reasons. His *own testimony* was that he was afraid and fearful, and that he ran from the car that he was *not* driving because he had a warrant and was afraid of being arrested. This evidence *supported* his alibi defense.

Third, the lack of objection is fatal to his newly raised claims. *See* RAP 2.5(a)(3). Citing *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), the defendant now argues he may challenge this "opinion" testimony for the first time on appeal because it was manifest error affecting a constitutional right. This reasoning ignores the punch line of that decision:

Montgomery argues he may challenge this opinion testimony for the first time on appeal because it was manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). This exception is a narrow one, and we have found constitutional error to be manifest only when the error

caused actual prejudice or practical and identifiable consequences. *Kirkman*, 159 Wn.2d at 934-35, 155 P.3d 125.

Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. *See id.* at 937, 155 P.3d 125. In *Kirkman*, this court concluded there was no prejudice in large part because, despite the allegedly improper opinion testimony on witness credibility, the jury was properly instructed that jurors ““are the sole judges of the credibility of witnesses,”” and that jurors ““are not bound”” by expert witness opinions. *Id.* (quoting clerk’s papers). Virtually identical instructions were given in this case. RP at 224, 226. There was no written jury inquiry or other evidence that the jury was unfairly influenced, and we should presume the jury followed the court’s instructions absent evidence to the contrary. *See Kirkman*, 159 Wn.2d at 928, 155 P.3d 125.

Montgomery, 163 Wn.2d at 595-96. Here, the jury was instructed that they were the sole judges of the value and weight to be given to the testimony of each witness, and the factors, including bias, that they could consider in making those evaluations. CP 24. There were no written jury inquiries, and the jury presumptively followed the trial court’s instructions.

By not raising an objection below, the defendant has waived any claim of error regarding the evidence of “fear” scent. *Strine*, 176 Wn.2d at 749; *Stoddard*, 192 Wn. App. at 228. The assertion that “fear scent” is an opinion on the defendant’s guilt is debatable, and not obvious.¹³ Moreover,

¹³ Manifest means “obvious” or “evident.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 775 (11th Ed. 2003).

any error is harmless because, as the defendant conceded after testifying, and during closing argument, he was fearful, and the only issue in the case was whether he was the driver of the eluding vehicle. RP 100. The defendant's claim that he was prejudiced by the testimony regarding "fear scent" is without support.

2. Driving Recklessly.

The defendant complains that Deputy Rassier's statement that the defendant continued at the same speeds, "driving recklessly" constituted an improper opinion on his guilt. The colloquy giving rise to this statement was as follows:

[Prosecutor:] Why did you terminate your pursuit at that point?

[Deputy Rassier:] Risks were getting too dangerous. The speeds in this area, it's a residential area. He continued at the same speeds, driving recklessly. The crime was an infraction originally was not -- it was too low a crime to continue the dangerous pursuit.

RP 20.

The defendant offered no objection to either the question or the response. Yet, the defendant claims this response may be raised on appeal because the error is manifest. Br. of Appellant at 18-19. The defendant claims that the deputy's response is troubling because "it contains conclusory terms within the relevant legal standard. *See City of Seattle v.*

Heatley, 70 Wn. App. 573, 581, 854 P.2d 658 (1993).” Br. of Appellant at 19.

However, the *Heatley* decision supports the State’s position that the failure to object under these circumstances does not automatically qualify as manifest error:

Citing *State v. Carlin*, 40 Wn. App. 698, 700 P.2d 323 (1985), *Heatley* contends that the admission of an opinion on a criminal defendant’s guilt is a “manifest error affecting a constitutional right” under RAP 2.5(a)(3) that may be raised for the first time on appeal. We have determined that the challenged testimony here did not constitute an opinion on guilt and need not resolve this contention. However, because this is a frequently recurring issue, we take this opportunity to reject *Carlin* to the extent it can be interpreted as holding that the admission of testimony alleged to constitute an opinion on guilt is an error of constitutional magnitude that may automatically be raised for the first time on appeal under RAP 2.5(a)(3).

...

However, *Carlin* provides no analysis and cites no relevant authority for the proposition that this is the type of “manifest error” contemplated by RAP 2.5(a)(3).

Heatley, 70 Wn. App. at 583. In a footnote, the court also noted that claims of “jury invasion” are often “empty rhetoric.”¹⁴ Therefore, RAP 2.5 should bar review of this claim.

¹⁴ See *Heatley*, 70 Wn. App. at 583 fn. 5:

The assertion that a witness’s testimony “invades the province of the trier of fact” is of little assistance in assessing the effect of an alleged evidentiary error. *Cf.* 3 J. Weinstein

Moreover, as noted in *Heatley*, under the modern rules of evidence, an opinion is not improper *merely* because it involves ultimate factual issues. 70 Wn. App. at 579-80. ER 704 provides that “[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Thus, opinion testimony may not be excluded under ER 704 solely on the basis that it encompasses ultimate issues of fact. Whether such testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an “ultimate issue” depends on the specific circumstances of each case. These circumstances include the including the type of witness involved, the specific nature of the testimony, the nature of the charges, the

& M. Berger, *supra* at 704-3, Advisory Committee’s Note on Fed.R.Evid. 704 (“The basis usually assigned for the [ultimate issue] rule, to prevent the witness from ‘usurping the province of the jury,’ is aptly characterized as ‘empty rhetoric.’” quoting 7 J. Wigmore, *Evidence* § 1920, at 17 (1978)). Jurors always remain free to draw their own conclusions. 3 J. Weinstein & M. Berger, *supra* at 704-7. Rather, the effect of erroneously admitted evidence must be judged in the specific context in which it is offered. Thus, where an expert’s testimony is admitted without proper foundation, the “aura of special reliability” may create the danger of unfair prejudice. *Black*, 109 Wn.2d at 349, 745 P.2d 12.

type of defense, and the other evidence before the trier of fact.¹⁵ *Cf. United States v. Sheffey*, 57 F.3d 1419, 1426 (6th Cir. 1995):

[I]f an opinion question posed to a lay witness does not involve terms with a separate, distinct and specialized meaning in the law different from that present in the vernacular, then the witness may answer it over the objection that it calls for a legal conclusion. Applying that standard to the facts of this case, we do not see any specialized legal terms in the question “Did Mr. Sheffey, at the time of the accident, drive recklessly and in extreme disregard of human life?” Simply because this question embraced the terms of the jury instruction on malice aforethought does not dictate a ruling that it called for a legal conclusion as defined by *Torres*. [*v. County of Oakland*, 758 F.2d 147, 149 & n. 1 (6th Cir. 1985)].

Here, the statement to the effect that the defendant continued driving recklessly does not involve specialized meaning and is stated in the vernacular of a lay witness – in fact, it may require some sort of special sophistry involving less or more descriptive synonyms to change the language without changing nature of the observed conduct – driving recklessly.

¹⁵ Interestingly, this five-part test was adopted by our State Supreme Court: “the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (quoting *Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)) (internal quotation marks omitted).

In any event, under the specific circumstances of this case using the five factors identified in *Kirkman, supra*, to decide whether testimony is improper opinion testimony, it is clear that the second and fourth factors are dispositive here. The second factor is the nature of the testimony. Deputy Rassier's testimony regarding the reason for stopping the pursuit was a brief and indirect comment describing his own state of mind for ending the chase. As to the fourth factor, the type of defense – the defendant asserted the defense that he was not the driver of the car, and he conceded that the driver drove recklessly; in fact, he was frightened by the driving and saved by his seat belt. There was no improper opinion given, and any error in this regard was both waived and harmless.

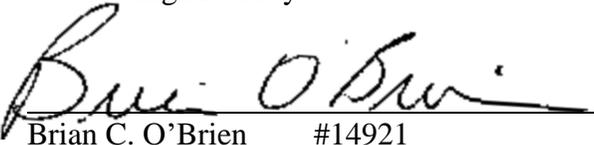
IV. CONCLUSION

This Court should affirm the judgment and sentence of the lower court. A vagueness challenge not implicating First Amendment rights is evaluated by examining the statute as applied under the particular facts of the case. The language “driving in a reckless manner” while in the process of attempting to elude a police vehicle is not unconstitutionally vague.

The State did not offer improper opinion testimony regarding Mr. Schilling's guilt and any error in this regard was not preserved and was harmless.

Dated this 26 day of November, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney

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

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

DEREK SCHILLING,

Appellant.

NO. 35719-8-III

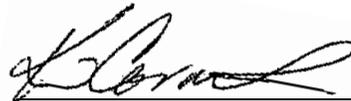
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on November 26, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Colin Patrick and Lila Silverstein
wapofficemail@wasapp.org

11/26/2018
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

November 26, 2018 - 11:04 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35719-8
Appellate Court Case Title: State of Washington v. Derek Wayne Schilling
Superior Court Case Number: 17-1-01742-7

The following documents have been uploaded:

- 357198_Briefs_20181126110342D3181786_3188.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Schilling Derek - 357198 - Resp Br - BCO.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- lila@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Brian Clayton O'Brien - Email: bobrien@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20181126110342D3181786