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**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW SIMON GAROUTTE, APPELLANT

ON APPEAL FROM THE SUPERIOR COURT
OF GRANT COUNTY

Superior Court Cause No. 17-1-00572-2

The Honorable John M. Antosz

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR

- A. GAROUTTE EXPRESSED SATISFACTION WITH THE COURT’S RULING STRIKING GUINN FROM THE STATE’S TRIAL WITNESS LIST AS A REMEDY FOR TARDY PRODUCTION OF MCMILLAN’S WRITTEN REPORT AND THE ELEVENTH-HOUR ADDITION OF GUINN AS A WITNESS. ALTHOUGH THE COURT GAVE HIM EVERY OPPORTUNITY TO DO SO AFTER IT CRAFTED AN ALTERNATIVE PREJUDICE ARGUMENT ON HIS BEHALF, GAROUTTE DID NOT ASK TO “UNWAIVE” HIS JURY TRIAL WAIVER AND CONTINUE HIS CASE LONG ENOUGH TO EMPANEL A JURY. DID THE TRIAL COURT HAVE A DUTY TO IMPOSE A REMEDY GAROUTTE NEGLECTED TO REQUEST? (Assignment of Error No. 1)
- B. SUBSTANTIAL EVIDENCE SUPPORTED EACH OF THE COURT’S CONTESTED FINDINGS OF FACT AND THESE FINDINGS WERE NOT ERRONEOUS. DID THE COURT’S GUILTY VERDICT DENY GAROUTTE DUE PROCESS? (Assignments of Error Nos. 2 through 16).

II. STATEMENT OF THE CASE¹

- A. THE AUGUST 30, 2017 ELUDING INCIDENT²

Sergeant John McMillan was a nine-year veteran of the Grant County Sheriff’s Office when, on August 30, 2017, he attempted to stop a vehicle driven by appellant Matthew Simon Garoutte. BartunekVRP 63. Before McMillan started his employment with Grant County, he had been a trooper with the Washington State Patrol for 15 years. BartunekVRP 63.

¹ The record in this case consists of clerks papers, cited here as CP at ____, a verified report of pretrial and post-trial proceedings prepared by Charlene Beck, cited here as BeckVRP ____, and the verified report of trial proceedings prepared by Tom Bartunek, cited here as BartunekVRP ____.

² The State’s gleans its facts concerning the eluding incident from trial testimony.

The State Patrol had trained McMillan in emergency vehicle operations. BartunekVRP 64. While with the State Patrol, McMillan had been involved in more than ten eluding cases. BartunekVRP 64–65. At the time of the incident with Garoutte, he was the lead emergency vehicle operations instructor for the Grant County Sheriff's Department. BartunekVRP 65.

On August 30, 2017, around 7:50 p.m., McMillan received a dispatch call concerning an erratic driver on Thomas Drive in rural Grant County, less than five minutes from McMillan's location. BartunekVRP 67–68. He was familiar with the reported address. BartunekVRP 68. As McMillan turned onto Thomas Drive, dispatch relayed that the suspect car was backing out of the caller's property. BartunekVRP 68.

Simultaneously, McMillan saw a white, two-door Honda backing out of a driveway. BartunekVRP 68, 73–74. McMillan backed into the first driveway on Thomas Drive and waited for the Honda to drive by. BartunekVRP 68, 73. As the Honda passed at approximately ten miles per hour, McMillan saw only one person, the driver, through the unobstructed passenger window. BartunekVRP 74. McMillan could not tell whether the driver was male or female. BartunekVRP 74.

McMillan began following the Honda, about a car length behind. BartunekVRP 74–75. While behind the Honda, McMillan saw only one

occupant. BartunekVRP 75. As McMillan followed, the Honda veered off the traveled portion of the roadway several times and turned without signaling. BartunekVRP 75-76. When the Honda again swerved lane travel, McMillan turned on his emergency lights, intending to stop the car. BartunekVRP 78. Instead of stopping, the car accelerated. BartunekVRP 78. McMillan notified dispatch he was pursuing and activated his siren. BartunekVRP 78.

The Honda ran a stop sign at State Route 28, a busy county road, without any apparent attempt to slow down. BartunekVRP 81. McMillan saw only one person in the Honda as he continued to pursue the car with his lights and siren activated at speeds reaching 80 miles per hour. BartunekVRP 83. By the time the Honda made a right turn onto a paved road, McMillan was six to eight car lengths behind. BartunekVRP 84. At this point, the vehicles were traveling about 70 miles per hour. BartunekVRP 85. The road turned to gravel and McMillan was blinded by dust from the Honda. BartunekVRP 86. McMillan could see scuff marks in the gravel and surmised the driver was losing control. BartunekVRP 86-87. McMillan slowed to get his bearings but could still follow the car's dust trail. BartunekVRP 87. McMillan estimated he was 15 to 30 seconds behind the Honda. BartunekVRP 114. At no time did McMillan see a place where the car could have pulled over to allow someone to jump out.

BartunekVRP 114. During the chase, he did not see anyone walking or jogging in the vicinity. BartunekVRP 115.

McMillan eventually came upon the Honda crashed in a ditch. BartunekVRP 89. The engine was running but nobody was inside. BartunekVRP 93. McMillan could not recall at trial whether the driver's door was open but was certain the passenger door was closed. BartunekVRP 93.

A green hayfield lay to the west of the crash site. BartunekVRP 92. The alfalfa was about knee high. BartunekVRP 96. McMillan saw a man running diagonally across the field about 75 yards from the car. BartunekVRP 94. McMillan saw only one person. BartunekVRP 94.

Two other deputies responded to McMillan's request for assistance, one with a canine tracking unit. BartunekVRP 95. Aware the tracking canine was on its way and not wanting to contaminate the subject's flight path through the alfalfa, McMillan waited by the crashed Honda for the other officers to arrive. BartunekVRP 95. He lost sight of the running man in an area overgrown with trees and bushes. BartunekVRP 95-96.

While heading to McMillan's location, one of the responding deputies, Alex Bushy, learned the car had crashed and the subject was fleeing in a northwest direction from the crash. BartunekVRP 121. Bushy

drove to the edge of an adjacent field to provide containment.

BartunekVRP 120–122.

It was now dusk, after 8:00 p.m. BartunekVRP 111. It was too dark for Bushy to see McMillan all the way across the hayfield. BartunekVRP 129. He did, however, have an unobstructed view of McMillan's activated vehicle lights. BartunekVRP 123. Bushy pointed his flashlight toward some noise and saw a man running up the tree line, directly toward him. BartunekVRP 123. When Bushy told the man to stop, the man turned and ran in a different direction. BartunekVRP 123. Bushy ran along the road, parallel to the running suspect. BartunekVRP 124. When the suspect tripped and fell, Bushy apprehended and handcuffed him. BartunekVRP 124. Garoutte was the man Bushy apprehended. BartunekVRP 125. Like McMillan, Bushy had looked for other persons in the field but saw nobody else. BartunekVRP 128.

Deputy Tyson Voss arrived at McMillan's location with his tracking canine less than ten minutes after receiving the assistance call and had heard McMillan's radio traffic during the pursuit. BartunekVRP 133–34. Voss deployed the dog, who immediately lifted his leg and relieved himself. BartunekVRP 137. Voss testified this was common behavior: "He's a dog." BartunekVRP 137. As the dog finished its business, Bushy radioed he was in foot pursuit of the suspect. BartunekVRP 137.

Although it was dark, Voss could see “distinctly” a little way down a path from the crash site through the alfalfa where someone had gone in a northwest direction. BartunekVRP 137–38. He used his flashlight to scan the field. BartunekVRP 145. Voss saw no other paths in the field. BartunekVRP 138.

Bushy had Garoutte in custody before Voss and his dog got to Bushy’s location. BartunekVRP 140. Bushy transferred custody of Garoutte to Voss. BartunekVRP 140–41.

B. ADDITIONAL TRIAL TESTIMONY

Mary Cobb was the person who called 9-1-1 to report the reckless driver on Thomas Drive. BartunekVRP 154. She did not know what the driver looked like because all information she reported was being relayed to her by another person while she was on the telephone. BartunekVRP 149–50. Cobb never saw the driver of the erratically-driven car. BartunekVRP 155. In the past, Cobb had seen a number of different people drive the same white Honda, but testified she had never before seen Garoutte anywhere. BartunekVRP 157–58.

Garoutte testified he was in the Honda the evening of August 30, 2017, but claimed he was lying down in the back seat because he had a Department of Corrections warrant and did not want to get arrested. BartunekVRP 159. On cross examination, he admitted having run from

law enforcement in the past, but only when he saw officers and not because they were chasing him. BartunekVRP 161. He admitted he sometimes gave a false name to law enforcement. BartunekVRP 162.

Garoutte denied ever having driven the Honda, but said his uncle was the father of the Honda's owner. BartunekVRP 163. He said his uncle gave permission to have one of Garoutte's friends drive Garoutte somewhere in the Honda because Garoutte did not have a driver's license. BartunekVRP 163. Garoutte testified the driver of the Honda on August 30, 2017 was his uncle's friend, Jesse. BartunekVRP 162. Garoutte did not know Jesse's last name. BartunekVRP 162.

C. WAIVER OF JURY TRIAL AND MOTION FOR DISMISSAL FOR GOVERNMENTAL MISMANAGEMENT

On October 27, 2017, seventeen days before Garoutte waived jury trial, the State produced a body camera video of McMillan's October 26 interview with Amanda Guinn. CP at 29. On the video, McMillan stated he could not identify the driver of the white Honda. BartunekVRP 7. That information was not in the supplemental report McMillan wrote about his interview with Guinn. BartunekVRP 8-9.

At the November 13, 2017 readiness hearing, Garoutte signed and filed a written waiver of jury trial, CP at 27, and engaged in a colloquy with the trial court to determine voluntariness. BeckVRP 26-28. The trial

court told Garoutte that in a jury trial, 12 people would have to make a unanimous decision, that Garoutte could eliminate people from the jury for “no reason at all,” and emphasized that “by waiving this jury trial, it’ll be one judge that will decide the case. Do you understand that?” BeckVRP 27. Garoutte answered “Yes.” BeckVRP 27.

Garoutte filed a Motion to Dismiss for Governmental Mismanagement the morning of trial, November 15, 2017. CP at 28. He asserted the State had failed to disclose the exculpatory fact that McMillan could not identify the driver of the car he had been chasing, a fact that first came to light during McMillan’s October 26, 2017 interview with Guinn. CP at 31. In the procedural facts portion of the motion, Garoutte acknowledged his attorney’s office received the body camera video of the interview on October 27, seventeen days before Garoutte’s November 13 jury trial waiver and 19 days before trial. CP at 29. Garoutte asserted two facts from the interview—McMillan’s inability to identify the driver and that Garoutte had permission to drive the vehicle—were exculpatory and should have been disclosed earlier to the defense. CP at 29. He asserted this was grounds for dismissal. CP at 29.

Garoutte also argued for dismissal because the State failed to provide the deputy’s written October 26 report until November 14, the day before trial. CP at 31. The court confirmed McMillan’s inability to

identify the driver was disclosed on October 27 in the video.

BartunekVRP 9. When Garoutte complained he did not get the written report for another two and a half weeks, the court replied: "But you just said in the report its silent on that issue." BartunekVRP 10.

Garoutte also objected to the State adding Guinn to its witness list the day before trial. BartunekVRP 12. Guinn's statement was written the day of the interview and read into the body camera video. BartunekVRP 14. In the interview, Guinn stated she saw Garoutte driving her sister's car the day of the incident and that, as far as she knew, he had permission. BartunekVRP 25. McMillan asked whether Guinn would be willing write a statement and the recording shows Guinn say, "Yes." BartunekVRP 25. Guinn is then seen writing something, and, shortly afterwards, reading a statement into the recording. BartunekVRP 25.

Garoutte also asserted he was prejudiced by production of the written report the day after he waived jury trial. CP at 31. His written argument consisted of a single sentence: "The Defendant has been prejudiced!" CP at 31. He did not identify how he was prejudiced by this lapse, nor did he ask for any remedy other than dismissal. CP at 31. The only legitimate prejudice³ Garoutte identified was that Guinn could put

³ Garoutte also argued prejudice from late production of various facts concerning ownership of the Honda and Garoutte's permission to drive it. BartunekVRP 13. The court closely questioned those assertions, ruling the identity of the car's owner and the

him behind the wheel of the Honda on the day of the incident.

BartunekVRP 13, 19, and that he had not been provided Guinn's criminal history. BartunekVRP 20.

During oral argument on the dismissal motion, Garoutte confirmed he received the video October 27, but again complained about not receiving the written report of the interview until "after we had waived our constitutional right to a jury trial." BartunekVRP 6. Defense counsel was on vacation from October 27 through November 6, 2017. CP at 32. Garoutte argued he was "prejudiced by waiving [his] constitutional rights based on the reports that we had received [through November 13]." BartunekVRP 12. In oral argument, Garoutte did not elaborate on the nature of the prejudice.

The only prejudice Garoutte identified during oral argument was that Guinn could put Garoutte behind the wheel of the Honda on the day of the incident. BartunekVRP 13, 19. He argued additional prejudice came from not having been provided Guinn's criminal history. BartunekVRP 20. When counsel finished, the court summarized the "major point" of Garoutte's argument: that listing Guinn as a new witness "is prejudicial because she saw Mr. Garoutte, she said she saw Mr. Garoutte driving the

fact Garoutte had permission to drive were irrelevant to the eluding charge. BartunekVRP 16-18.

car.” Counsel responded: “Yeah.” Bartunek VRP 20. The court then recalled counsel mentioning an additional source of prejudice, but it took some time and discussion before the court and counsel could recollect what it was. Bartunek VRP 20. Eventually, the court remembered the jury trial waiver issue and engaged counsel in the following dialogue.

COURT: I think you said something about being prejudiced about waiving the right to a jury trial.

COUNSEL: Oh, yeah. We’re clearly prejudiced, judge.

COURT: I thought what you were trying to say is if we had known X, then we might have made a different decision - -

COUNSEL: Correct. And especially knowing [Guinn’s] criminal history or having handled her criminal cases, I think welfare fraud, drugs, plus she looks like heck on the videotape.

COURT: Okay. You went into this, you’re saying, if I can, you went into this saying you’re ready for trial because you didn’t believe Amanda Guinn would be testifying that she saw Mr. Garoutte driving.

COUNSEL: Yeah.

COURT: And that changes your preparation, maybe even the decision to waive the jury trial, because if it was in front of a jury, you might want to present the video of her saying that.

COUNSEL: Oh, yes.

COURT: Because of how she looks, and/or because of her criminal history.

COUNSEL: Yes.

COURT: Okay. All right. Anything else?

COUNSEL: No, judge. We're just moving that this be dismissed.

BartunekVRP 21–23. Garoutte did not ask for an alternative remedy.

BartunekVRP 23.

The State told the court it had been unable to serve a subpoena on Guinn and did not intend to call her as a witness after learning she had an active warrant for her arrest and was “somewhere in the Ellensburg area”. BartunekVRP 28–29. The court, McMillan, and counsel for both sides then engaged in a lengthy, informal discussion to suss out what happened to the written report after McMillan timely prepared and submitted it on October 26, concluding it “got stuck at the records department [in the sheriff’s office].” BartunekVRP 37–38. The court found misconduct from “the state in general, which would normally include law enforcement.”

BartunekVRP 46.

The court declined to find prejudice because there was no reason to have to continue the trial beyond its outside date, still 30 days away.

BartunekVRP 48. The court stated if, under these circumstances, a case needed to be continued it would be continued. BartunekVRP 48. The court

confirmed it correctly understood Garoutte's complaint to be that Guinn was listed at the last minute when the defense had been under the impression she was not going to be called and that counsel prepared the case with that belief. BartunekVRP 50. The judge struck Guinn as a witness. BartunekVRP 51.

The court also stated its understanding that "the primary basis for the argument that the waiver of the jury trial was made was because of [Guinn] as a witness." BartunekVRP 52. Defense counsel did not contradict the court's statement. BartunekVRP 52. The court then said it could also have allowed Garoutte to "unwaive" his right to a jury trial, but concluded the order striking Guinn as a witness satisfied Garoutte's "primary argument made [on] the basis that this choice to waive the jury was maybe now a decision that would put the defendant's rights in peril." BartunekVRP 52. Garoutte did not contradict the court's assessment. BartunekVRP 52-53. Garoutte asked only that the court also strike any information law enforcement obtained from Guinn. BartunekVRP 52. Everyone agreed such evidence would not be offered or admitted. BartunekVRP 52-53.

Garoutte then commented prejudice could also come from his having given up a constitutional right before learning Guinn would be called as a witness. BartunekVRP 53. The court agreed, responding this

was a “great point” and that the court’s focus had been on speedy trial. BartunekVRP 53. The court asked if there was anything else and defense counsel answered, “No, sir.” BartunekVRP 54. At no point did Garoutte ask to rescind his speedy trial waiver or continue trial to obtain Guinn’s presence in front of a jury. BartunekVRP 12–54.

III. ARGUMENT

A. GAROUTTE EXPRESSED SATISFACTION WITH THE COURT’S RULING STRIKING GUINN FROM THE STATE’S TRIAL WITNESS LIST AS A REMEDY FOR TARDY PRODUCTION OF McMILLAN’S WRITTEN REPORT AND THE ELEVENTH-HOUR ADDITION OF GUINN AS A WITNESS. ALTHOUGH THE COURT GAVE HIM EVERY OPPORTUNITY TO DO SO AFTER IT CRAFTED AN ALTERNATIVE PREJUDICE ARGUMENT ON HIS BEHALF, GAROUTTE DID NOT ASK TO “UNWAIVE” HIS JURY TRIAL WAIVER AND CONTINUE HIS CASE LONG ENOUGH TO EMPANEL A JURY. THE TRIAL COURT HAD NO DUTY TO IMPOSE A REMEDY GAROUTTE NEGLECTED TO REQUEST.

1. *Garoutte failed to raise in the trial court the prejudice argument he asserts on appeal, then neglected to request the remedy he now argues the court should have imposed. RAP 2.5(a) precludes entertainment of this issue.*

A defendant is not entitled to demand on appeal what he failed to request before trial. “RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

Garoutte’s claim of prejudice has transformed itself. Instead of claiming prejudice from Guinn’s late disclosure as he did below, Garoutte now claims prejudice from waiving his right to a jury before learning “that

the State would be presenting its sole eyewitness claim of Garoutte driving the car through Amanda Guinn, a highly impeachable witness that a lay jury would find so noncredible that it would acquit the defendant.” Br. of Appellant at 9. He argues the court should have, *sua sponte*, vacated Garoutte’s jury trial waiver and required Guinn to testify, contrary to Garoutte’s pre-trial argument and representations.

The trial court did everything it could to assist Garoutte in crafting a prejudice argument around having waived his right to jury trial before the State disclosed Guinn as a witness. Other than mentioning Guinn’s criminal history and that “she looks like heck on the videotape”, BartunekVRP 22, Garoutte did not propose a single example of prejudice, nor did he pick up the ball when the court hinted he might have wanted a jury to see Guinn’s video performance. He simply agreed with the court’s proposed theories and accepted the court’s remedy.

This record contradicts Garoutte’s claim on appeal that he “lost” his right to demand a jury trial or that the court failed to give him the remedy he asked for. Br. of Appellant at 22. The court volunteered it could “unwaive” Garoutte’s waiver. BartunekVRP 52. Garoutte did not ask to do that. Thirty days remained before the trial’s outside date—another fact offered by the court—and the court told Garoutte if trial needed to be continued, it would be. BartunekVRP 48. Garoutte did not ask. Had

Garoutte asked, there is no question the court would have allowed him to rescind his waiver, continue trial, and put Guinn to the test of twelve jurors. The court developed the prejudice argument for Garoutte, reminded him he still had 30 days on the time-for-trial clock, and asked twice whether he wanted to bring up anything else. BartunekVRP 12–54.

Garoutte did not propose the remedy he now claims was denied him and he did not contradict the court’s summary of the factual basis for his dismissal motion. The exchange between the court and counsel demonstrates Garoutte never seriously considered the prejudice he raises now, prejudice he now asserts based on a speculative notion that jurors would have been so disgusted by Guinn they would have ignored substantial evidence that Garoutte was the driver McMillan pursued on August 30, 2017 and acquitted him.

This Court should find Garoutte did not raise or develop this new theory before trial and preclude him from doing so now.

2. *Regardless of whether Garoutte’s jury trial waiver was knowing, intelligent, and voluntary in light of late-disclosed information, Garoutte gave up argument on that issue when he declined to ask the court to allow him to rescind his waiver and continue trial long enough to empanel a jury.*

Garoutte claims the record shows he would not have waived his right to a jury on November 13 had he known all of the State’s evidence. Br. of Appellant at 28. By November 13, the only missing evidence was

McMillan's written report and the written statement Guinn prepared on camera and read aloud on the video. CP at 31. When asked whether anything in the written report related to Garoutte's preparation of the case, Garoutte said it was the State's intent to call Guinn to put him behind the wheel. BartunekVRP 13. The court confirmed at least three times that the critical piece of missing information was the State's intent to call Guinn. BartunekVRP 16, 19, 20.

Asserting now that Guinn was a sure-fire ticket to acquittal, Garoutte does not explain why he did not object when the court struck Guinn from the State's witness list, why he failed to ask the court to allow him to rescind his waiver, and why he failed to ask to continue the case to empanel a jury.

Garoutte cannot now complain that his jury trial waiver was unknowing and involuntary when he declined to ask the trial court to allow him to rescind that waiver after the court brought up the idea. Although he moved for outright dismissal and did not propose alternative resolution, Garoutte did not express dissatisfaction when the court resolved his stated concerns by striking Guinn. The court's final comment, that it had focused on speedy trial issues instead of Garoutte's constitutional rights waiver, persuasively implies Garoutte would have

been allowed to rescind his waiver and try the case to a jury had he told the court that is what he wanted to do.

This Court should find Garoutte is precluded from arguing voluntariness of his waiver on appeal because he failed to ask to rescind his waiver before trial when given an opportunity to do so.

B. SUBSTANTIAL EVIDENCE SUPPORTED EACH OF THE COURT’S CONTESTED FINDINGS OF FACT AND THESE FINDINGS WERE NOT ERRONEOUS. THE COURT’S GUILTY VERDICT DID NOT DENY GAROUTTE DUE PROCESS.

1. *Standard of review*

“Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014) (citing *State v. Stevenson*, 128 Wn.App. 179, 193, 114 P.3d 699 (2005)). “ ‘Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *Id.* at 106. An appellant challenging sufficiency of the evidence “necessarily admits the truth of the State’s evidence and all reasonable inferences drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The test for evidentiary sufficiency under the federal constitution is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This is also the standard in Washington. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

2. *The State’s evidence, when viewed in the light most favorable to the prosecution and accepted as true, is sufficient to persuade a fair-minded person substantial evidence supports each of the trial court’s findings of fact.*

Garoutte argues ten assignments of error to a number of the trial court’s findings of fact, some individually and some in conjunction with related findings. The State heads discussion of each by quoting the contested finding(s).

- a. “Officer McMillan, in following the car, saw only one occupant of the vehicle that he was following, and that was the driver.” CP at 54. (Assignment of Error 7)

Garoutte asserts McMillan’s statement that he could not tell whether the driver was male or female indicates there could have been more than one person in the Honda. Br. of Appellant at 32. Garoutte overlooks substantial, unambiguous evidence to the contrary.

McMillan testified that when he first saw a white Honda matching the description of the reported vehicle, he backed into a driveway and waited for the Honda to drive by. BartunekVRP 68, 73. As the Honda passed his location at approximately ten miles per hour, McMillan “just saw a driver” through the unobstructed passenger window. BartunekVRP 74. He could not tell whether the driver was male or female. BartunekVRP 74. He later testified: “I could just see one occupant.” BartunekVRP 75. The occupant was in the driver’s seat. BartunekVRP 75. Garoutte’s testimony that he was lying down in the back seat, even if believed, does not render the court’s finding erroneous or unsubstantiated. No evidence supports the notion McMillan might have seen both a man and a woman in the car. Substantial, unrefuted evidence supports the court’s finding that McMillan saw only one person.

- b. “It was approximately sundown, so it was dusk. There was only about an hour of light after sundown. So there was still some light on August 30th at about 8:00 p.m.” CP at 54–55 (Assignment of Error 8)

Garoutte apparently believes that as soon as the sun slips under the horizon, all light leaves the sky. McMillan testified that when he reached the point where the Honda slid into the ditch, he could see a man running diagonally across an alfalfa field about 75 yards from the car. BartunekVRP 94. Garoutte must accept the truth of this statement and all

reasonable inferences that can be drawn from it. *Salinas*, 119 Wn.2d at 201. One reasonable inference is that there was sufficient light for McMillan to see someone 75 yards away.

Bushy, while still on his way to the scene, heard McMillan report the Honda had crashed and a subject was running in a northwest direction from the crash. BartunekVRP 121. This establishes Bushy arrived after McMillan. By the time Bushy reached the scene, it was too dark for him to see McMillan across the hayfield. BartunekVRP 129. This evidence does not contradict McMillan's testimony that he could see a single figure 75 yards from the car when he first came upon the Honda. Deputy Voss arrived after Bushy, about 10 minutes after receiving McMillan's call for assistance. BartunekVRP 133–34. Voss testified that although it was dark, he could still see a little way down the path of trodden alfalfa heading in a northwesterly direction from the Honda. BartunekVRP 137–38.

Substantial evidence supports the court's finding that there was still "some light at about 8:00 p.m."

- c. "The person [McMillan saw] running, by way of time and distance, was the same person that Deputy Bushy arrested on the other side of the field, which was the Defendant, Mr. Garoutte." CP at 55 (Assignment of Error 9)

Garoutte asserts this finding is unsubstantiated because McMillan lost sight of the fleeing figure before Bushy arrested Garoutte. Br. of

Appellant at 33. McMillan radioed that he saw a single person fleeing in a northwest direction across an alfalfa field. BartunekVRP 94. Based on McMillan's report, Bushy positioned himself at the edge of an adjacent field to provide "containment". BartunekVRP 120–122. Bushy could see McMillan's vehicle lights across the alfalfa field, BartunekVRP 123, leading to a reasonable inference he could calculate approximately where the fleeing person was headed when he fled the Honda. Bushy actively looked for other people in the field but saw nobody else. BartunekVRP 128. Voss scanned the field with his flashlight and saw only one path through the alfalfa. BartunekVRP 145, 138. McMillan lost sight of the running man in an area overgrown with trees and bushes. BartunekVRP 95–96. Bushy's flashlight first illuminated Garoutte at the edge of the tree line, running directly toward Bushy. BartunekVRP 123. When Bushy first told Garoutte to stop, Garoutte turned and ran in a different direction. BartunekVRP 123. These facts lead to the reasonable inference that the single person fleeing McMillan on one edge of the hayfield, the person who disappeared into trees and bushes, was the same person running along a tree line who Bushy intercepted at the location Bushy expected the fleeing subject to be. Substantial evidence supports this finding.

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- d. “There was no reasonable doubt that the person who was in the field running was also in the car that had just slid into the ditch.” CP at 55. (Assignment of Error 10)

“That person who ran from the car would appear to be also the person who drove the car [a]s Sergeant McMillan said he saw no one else in the car when following it and when he came upon the car, seconds after it had been ditched, no one else was in that open area.” CP at 55. (Assignment of Error 11)

Garoutte asserts these findings are unsubstantiated because McMillan could not have seen someone hiding in the back seat of the Honda and because the fact McMillan did not see anyone else is irrelevant. Br. of Appellant at 34. He also asserts no evidence supports that McMillan arrived “seconds” after the car was—quite literally—ditched.

The court’s first finding is supported by Garoutte’s own testimony. Garoutte, the person Bushy arrested on the far side of the hayfield, testified he was in the Honda during McMillan’s pursuit. BartunekVRP 115. It cannot be contested he was running from the car.

The second finding, that Garoutte was the driver, is inescapable. The Honda had two doors, not four. BartunekVRP 74. A person in the back seat would have had to climb around or over the front seats to get out. McMillan was certain the passenger door was closed when he got to the Honda, its motor still running. BartunekVRP 93. It is unlikely that anyone who would leave the motor running would pause to close the

passenger door, indicating a person in the back seat under Garoutte's scenario would have exited from the driver side after the driver had cleared the car. Garoutte discounts the import of McMillan's testimony that he did not see anyone else in the area and ignores that McMillan said he was 15 to 30 seconds behind Garoutte during the chase. BartunekVRP 114. It is unlikely McMillan, arriving when he did, could have missed seeing a second person had there been one.

As argued above, none of the three officers saw anybody else near the Honda, nor did they see more than one beaten track through the alfalfa field. During the car chase, McMillan did not see anybody walking or jogging in the vicinity. BartunekVRP 114. It would be unreasonable to infer from these facts that Garoutte magically materialized from nowhere, just in time to locate himself in the same general position as the person fleeing the Honda, such that the person McMillan saw managed to escape detection. It is also unreasonable to infer three officers would have missed a second person running through down a single track through an open field when all three were actively looking for such a person, one from a different vantage point. Substantial evidence supports the court's challenged findings.

- e. "And there was no evidence or testimony offered for why this cousin would feel a need to elude Sergeant McMillan." CP at 56. . . . "There was no

reason offered that Jesse would flee on foot after being stopped, other than I suppose to avoid being arrested for the felony eluding he would have just committed.” CP at 56. (Assignment of Error 12)

Garoutte testified his uncle gave permission to have someone drive him somewhere in the Honda, and that his uncle’s friend, Jesse, was the driver. BartunekVRP 163. Garoutte asserts the reason Jesse fled on foot was that he had just attempted to elude McMillan in the Honda. Br. of Appellant at 34. But the court correctly observed there was no evidence of why Jesse would have tried to *elude* McMillan in the first place. Use of the word “elude” indicates the court was considering the vehicle chase, not the flight across the alfalfa field.

f. “There was no evidence of another person running from the vehicle or in the field or in that area.” CP at 56. (Assignment of Error 13)

Garoutte asserts this finding is refuted by his own testimony that he was one of two occupants of the car. That is not the standard for assessing a challenge to evidentiary sufficiency. First, Garoutte must accept as true all of the State’s evidence. *Salinas*, 119 Wn.2d at 201. In this context, he cannot contradict the State’s evidence with his own testimony. More significant is that Garoutte, having admitted he was in the car, did not offer testimony about where Jesse might have gone. BartunekVRP 159–65. He said nothing about how the car slid into the

ditch or how he and Jesse got out. The court's finding is supported by substantial, unrefuted evidence.

- g. "Three different officers were on the scene at different locations and didn't see a second person in this remote and open rural area." CP at 56. (Assignment of Error 14)

Garoutte's challenge to this unrefuted finding is that the officers could not have seen another person because McMillan lost the person he saw at the tree line and that two people could have run along the beaten track, one behind the other. Br. of Appellant at 34–35. That does nothing to degrade each officers' testimony that he did not see a second person in a remote and open rural area. The two-on-one-track hypothesis is entirely unsupported by any evidence, and is refuted by the reasonable inference that if McMillan could see one person 75 yards away, he could also have seen two. Alternatively, even if a second person on the alfalfa trail was so far ahead that McMillan and Voss missed him, Bushy would have encountered that person before hearing Garoutte run along the tree line. The court's finding is supported by substantial evidence.

- h. "The intensity and the desperation that Mr. Garoutte displayed in running from Deputy Bushy on the other side of the field, wherein he was running north, and then east on the canal bank, trying to jump a ditch and landing on his face, matched the intensity and desperation of the person driving the vehicle trying to elude Sergeant McMillan." CP at 56. (Assignment of Error 15)

Garoutte asserts his testimony that he ran because he did not want to be arrested on a warrant is sufficient to defeat the court's assessment of unrefuted evidence. The person driving the Honda blew a stop sign on a busy intersection, BartunekVRP 81, reached speeds of 80 miles an hour on 50-mile-an-hour roads, BartunekVRP 84, and drove fast enough to lose control of the car several times before finally crashing it. BartunekVRP 86-87, 89. As the court pointed out, Garoutte ran, jumped, and fell flat on his face in his attempt to flee Bushy. BartunekVRP 123-25. Someone less desperate might have realized he was unlikely to outrun McMillan and Voss on one side of the hayfield and Bushy on the other. Substantial evidence supports the court's "intensity and desperation" comparison.

- i. "[Garoutte's testimony that he was lying down in the back seat before McMillan started following the Honda because he had seen a different police vehicle earlier] is difficult to believe, because it was a rural area where contact with law enforcement prior to this would be rare and not likely to occur, and if it did occur, it would very likely have been quite some time before Sergeant McMillan - - because there's not officers running through that area on a regular basis, it would have been quite some time in the past such that the person would likely sit back up. You wouldn't just lay in the back of a car for hours." CP at 57. (Assignment of Error 16)

Garoutte argues the fact that three officers were able to converge on the same scene within minutes of one another belies the court's

conclusion that there would have been “quite some time” between seeing the first law enforcement vehicle and the encounter with McMillan. Br. of Appellant at 35. But it defies belief that any person, having ducked to avoid a law enforcement vehicle, would remain lying down in the back seat of a two-door car even five minutes once the driver gave an “all-clear.” Under the facts of this case, that means Garoutte would have remained lying down in the Honda’s back seat as someone else drove erratically enough on Thomas Drive to cause Cobb to call 9-1-1.

If Garoutte was that nervous about law enforcement, it is unlikely his father’s friend, Jesse, would drive in a way likely to attract the deputies Garoutte wanted to avoid. McMillan was apparently closest to Cobb’s location. Whomever Garoutte supposedly saw beforehand was farther away. Garoutte’s argument requires accepting that he continued lying down throughout erratic driving, the backing out of Cobb’s driveway, and up Thomas Drive past McMillan. Garoutte did not say he or Jesse saw McMillan before McMillan started following the Honda. The court’s finding, that it was difficult to believe Garoutte would remain lying down for “quite some time” during these events, is supported by substantial evidence.

When concluding the State had proved beyond a reasonable doubt Garoutte drove the Honda, the trial court mentioned Garoutte’s prior

felony convictions of dishonesty and said: “Mr. Garoutte’s testimony does not diminish from that proof.” CP at 57. The trial court clearly did not believe Garoutte, yet throughout these challenges, Garoutte urges this court to accept his version of events when it contradicts the testimony of the deputies. That it cannot do. This Court must defer to trial court in resolving conflicting evidence and credibility determinations. *Camarillo*, 115 Wn.2d at 71.

This Court should conclude substantial evidence supports each of the trial court’s contested findings and that those findings are sufficient to support the conclusion Garoutte drove the Honda as it fled McMillan on August 30, 2017. Reversal is not required.

IV. CONCLUSION

This Court should find Garoutte failed to preserve the prejudice argument he now asserts and decline to consider it. This Court should further find Garoutte waived any challenge to the voluntariness of his jury trial waiver when he declined to ask the trial court to rescind that waiver. Finally, this Court should find each of the trial court’s challenged findings of fact were supported by substantial evidence.

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This Court should affirm Garoutte's conviction.

DATED this 13th day of November, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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