43159-9-II

89342-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington
Respondent

v.

ROBERT C. KINNAMAN
Appellant

43159-9-II

On Appeal from Grays Harbor County Superior Court
Cause number 12-1-7-0

The Honorable F. Mark McCauley

REPLY BRIEF

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II. STATEMENT OF THE CASE

Robert C. Kinnaman pleaded guilty to driving recklessly while attempting to elude a pursuing police vehicle and to a special sentencing enhancement for endangering one or more persons. CP 1, 4,13; RP 6, 7. He pleaded to the special sentencing enhancement allegation in the erroneous belief (a) that reckless driving constituted endangerment and (b) that the State possessed admissible evidence that he had endangered one or more Department of Transportation (DOT) workers who may have been present when the pursuit passed through a highway construction zone. RP 6, 7.

Kinnaman later sought to withdraw his plea to the enhancement while leaving his plea to the eluding intact. RP 21. He disputed the existence of any evidence of endangerment beyond the mere fact of eluding. Kinnaman informed the court he had pleaded guilty to endangerment based solely on the erroneous belief that the prosecutor had statements from one or more DOT workers asserting that they had perceived themselves to have been in danger or that they actually were endangered. RP 7, 21-22. He had since learned that this was false. RP 21. Rather, the DOT workers had stated merely that they witnessed his failure to stop while being pursued. RP 21.

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The court refused to permit a change of plea on the special allegation. RP 22. The court stated that the prosecutor was not required to produce any evidence unless the matter went to trial. Since Kinnaman had pleaded guilty, the court believed the absence of evidence supporting a factual basis for endangerment was immaterial. RP 22-23. Accordingly, the court entered a finding that Kinnaman had endangered people's lives. RP 23.

For the first time on appeal, Kinnaman claims that his plea to the sentencing enhancement was involuntary because he was erroneously informed that the recklessness element of attempting to elude constitutes actual endangerment, as well as that he was misinformed as to the existence of evidence that a person was actually endangered. He challenges his convictions on the special allegation on double jeopardy grounds because both convictions were based on no more than reckless driving, which supported only one conviction — for attempting to elude. Accordingly, the guilty plea to the sentence enhancement lacks a factual basis.

Finally, Kinnaman contends, and the State concedes, that the sentence imposed pursuant to the special allegation differs by one day from that authorized by the Sentencing Reform Act (SRA), and this

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requires reversal of the endangerment conviction and remand with instructions to permit Mr. Kinnaman to withdraw the plea.

Mr. Kinnaman does not challenge his guilty plea to the underlying charge of attempting to elude. He seeks solely to withdraw the invalid plea to the sentencing enhancement.

III. ARGUMENTS IN REPLY

1. THE COURT SHOULD STRIKE THE FIRST THREE PARAGRAPHS OF THE RESPONDENT'S BRIEF.

As a preliminary matter, the State argues facts based on evidence that was not before the trial court at the plea hearing. Brief of Respondent (BR) 1-2. The State has supplemented the appellate record with an arrest warrant affidavit prepared and signed by the prosecutor that recites hearsay contained in an alleged police report. CP 38-41. The Respondent now cites liberally to this affidavit as substantive evidence supporting a factual basis of guilt. BR 1-2. Mr. Kinnaman has moved to strike this affidavit from the appellate record. Motion to Strike, filed October 6, 2012.

This court does not accept evidence on appeal that was not before the trial court. RAP 9.11; *State v. Curtiss*, 161 Wn. App 673, 703 250

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P.3d 496, *review denied*, 172 Wn.2d 1012 (2011); *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005).

The State did not introduce the warrant affidavit at the plea hearing, so it was not before the court. It is therefore deemed additional evidence. The submission of additional evidence on review is governed by RAP 9.11. *State v. Madsen*, 153 Wn. App. 471, 485, 228 P.3d 24 (2009), *review denied*, 168 Wn.2d 1034 (2010), *overruled on other grounds by In re Flint*, 174 Wn.2d 539, 277 P.3d 657 (2012).

The respondent's arguments before this Court must be supported by the record. *State v. Lough*, 70 Wn. App. 302, 335, 853 P.2d 920 (1993), *aff'd*, 125 Wn.2d 847 (1995). That means the record of the proceeding that is the subject of the appeal. Washington courts have consistently held that cases on appeal must be decided on the record made in the trial court. *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1968) (citing cases).

A probable cause affidavit is not admissible as substantive evidence in the trial court on the issue of guilt, because its sole purpose is to permit a magistrate or judge to make a preliminary determination that the prosecution may go forward. 12 Wash. Prac., Criminal Practice & Procedure § 3006 (3d ed.), citing *State v. Patterson*, 83 Wn.2d 49, 52, 515 P.2d 496 (1973); *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982),

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cert. denied, 457 U.S. 1137, 102 S. Ct. 2967, 73 L. Ed. 2d 1355 (1982). The facts set forth need be sufficient merely to elevate the allegations beyond bald suspicion of criminal activity. *State v. Hauser*, 19 Wn. App. 506, 576 P.2d 420 (1978), *cert. denied* 440 U.S. 960, 99 S. Ct. 1503, 59 L. Ed. 2d 773 (1979); *State v. McAlpin*, 36 Wn. App. 707, 677 P.2d 185 (1984).

It is well-established that a probable cause affidavit may contain factual inaccuracies, innocuous facts, mere conclusions, and illegally obtained information. *Franks v. Delaware*, 438 U.S. 154, 164-65, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). A probable cause affidavit is not subject to the rules of evidence and thus may consist entirely of hearsay. ER 1101(c)(1); 12 Wash. Prac., Criminal Practice & Procedure § 3006 (3d ed.). That is the case here.

This affidavit purports to contain statements by Grays Harbor Sheriff's Deputy Schrader, but it was not prepared and signed by Deputy Schrader. It is Prosecutor Fuller's understanding of what Deputy Schrader said in his report. CP 39, 41.

Moreover, this warrant affidavit does not conform to the requirements of CrR 2.2(a). That rule requires a probable cause affidavit to be prepared and certified as provided in RCW 9A.72.085. CrR 2.2(a)(2). RCW 9A.72.085 provides that an unsworn statement must be

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certified in substantially the following form: "I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct." RCW 9A.72.085. The certification in this affidavit does not say that. It includes "weasel" words that render it illusory. Instead of certifying that the information above his signature is true and correct, which the prosecutor cannot possibly do so because he has no personal knowledge, he instead certifies that the information "is true and correct to the best of my knowledge and belief." CP 41. In other words, he certifies merely that the foregoing is unmitigated hearsay.

Even the declarant's report itself was not admissible on the issue of guilt. A police report is merely a subjective summary of the officer's investigation and is inadmissible. *In re Det. of Coe*, 2012 WL 4458411, Slip Op. 85965-5 at 25, citing *State v. Hines*, 87 Wn. App. 98, 101-02, 941 P.2d 9 (1997). Accordingly, a warrant affidavit merely shows probability and cannot be offered or admitted for the purpose of establishing a prima facie case of criminal conduct.

At the guilty plea hearing, the trial court must establish a factual basis for the plea as a matter of court rule and constitutional necessity. CrR 4.2(d); 13 Washington Practice § 3713. The preferred procedure is for the prosecutor to recite the facts the State intends to prove, and for the

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court then to ask the defendant to affirm those facts. 13 Wash. Prac. § 3713.

All material relied upon by the trial court for the factual basis must be made a part of the record. *In re Teems*, 28 Wn. App. 631, 626 P.2d 13 (1981), citing *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976), citing *Irizarry v. United States*, 508 F.2d 960, 967 (2d Cir. 1974). That means the record of the guilty plea hearing, not the record of the warrant application proceeding.

The State did not introduce the probable cause affidavit at Kinnaman's plea hearing, nor could it have done so. In general, the State may not introduce information contained in police reports to establish a factual basis for a guilty plea without the defendant's written consent. CrR 4.2(g) (check-box in § 11 of the plea form: "Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.") In particular, RCW 9.94A.834 requires the State to produce admissible evidence supporting the special allegation. RCW 9.94A.834(1).

Mr. Kinnaman did not check this box. Instead, he made a statement. He did not agree that the sentencing court could consider any additional facts whatsoever. CP 14, para. 1.6.

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In reviewing the factual basis for the guilty plea to the special allegation, this Court should consider solely the admissible evidence that was made part of the record of the plea hearing.

2. THE PLEA OF GUILTY TO ENDANGERMENT WAS INVOLUNTARY BECAUSE KINNAMAN WAS NOT INFORMED OF THE TRUE NATURE OF THE CHARGE.

For a guilty plea to be voluntary, it must be based on a correct statement of the elements of the offense and the defendant must understand how his conduct satisfies those elements. *State v. R.L.D.*, 132 Wn. App. 699, 705, 133 P.3d 505 (2006); *see also Keene*, 95 Wn.2d at 209. The defendant must understand the law in relation to the facts. *State v. Berry*, 129 Wn. App. 59, 65, 117 P.3d 1162 (2005), quoting *McCarthy v. U.S.*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). An inadequate factual basis negates this understanding. *In re Pers. Restraint of Clements*, 125 Wn. App. 634, 645, 106 P.3d 244 (2005).

Regardless of how much evidence the State had available and could have produced (but did not), a guilty plea must pass constitutional muster. *Henderson v. Morgan*, 426 U.S. 637, 644-645, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976), is illustrative. The *Henderson* Court assumed the prosecutor had overwhelming evidence of guilt but still reversed the conviction for failure of the plea to support a judgment of guilt because it

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was not voluntary in a constitutional sense. *Id.* at 645. "And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Henderson*, 426 U.S. at 645, quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S. Ct. 572, 574, 85 L. Ed. 859 (1941).

Here, Kinnaman's plea of guilty to the sentencing enhancement was not voluntary in the constitutional sense for lack of sufficient notice of the nature of the charge. By conflating the elements of the two offenses, the Statement on Plea of Guilty led Mr. Kinnaman into the false belief that, by pleading guilty to the reckless driving element of attempt to elude, he necessarily admitted physically endangering one or more persons as charged in the special allegation of endangerment. This is false.

The trial court failed to distinguish between actual endangerment — which is the essential element of a sentencing enhancement for endangerment by eluding — and the reckless driving element of the underlying charge of attempting to elude. The Statement on Plea of Guilty for example, incorporates actual endangerment into the elements of reckless driving: "An individual driving a motor vehicle drives recklessly while having a police motor vehicle properly marked chasing that

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individual — where the individual threatens physical harm to third persons."[1] CP 4. This misrepresented the nature of the charge and rendered Kinnaman's plea to the enhancement involuntary.

The Respondent finds it difficult to discern whether Mr. Kinnaman is appealing the underlying eluding conviction. BR 3. But Kinnaman states clearly in the introduction to the opening brief: "While maintaining his guilty plea to eluding, Mr. Kinnaman challenges the sentencing enhancement[.]" Again, the Statement of the Case concludes: "Mr. Kinnaman maintains his guilty plea to eluding, but appeals the sentencing enhancement." Appellant's Brief (AB) 1, 2. Finally, the Conclusion states: The Court should vacate the sentencing enhancement and dismiss the special allegation. AB 23. The prosecutor's difficulty in reading this is not because he is illiterate. His confusion reflects the State's failure, even now, to grasp that there is a distinction between the reckless driving element of eluding and the endangerment element of endangerment.

That difference is that reckless driving involves merely potential endangerment, for which the Legislature has established the punishment in the eluding statute. RCW 41.61.024. By contrast, a sentencing enhancement for endangerment requires the State to produce additional

[1] Best effort to render handwritten notation.

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admissible[2] evidence that people actually were endangered. RCW 9.94A.834(1) and RCW 9.94A.533(11).[3]

If a mere showing of reckless driving were sufficient to establish the sentencing enhancement for endangerment, RCW 9.94A.834(1) is superfluous in its entirety. It is not sufficient. The prosecutor must make a showing that sufficient admissible evidence exists, not only that the defendant drove recklessly, but that, in so doing, he actually endangered a person or several persons.

By analogy, this Court has construed reckless driving in the context of vehicular assault. The statutory language punishing conduct that causes "substantial bodily harm to another" requires proof of harm to a particular person, not merely risk of harm in general. *State v. Ramos*, 152 Wn. App. 684, 695, 217 P.3d 384 (2009).

Proof of Conduct is Not Sufficient: The State concedes that a guilty plea is not knowing, intelligent, and voluntary unless the State correctly informs the defendant of the nature of the charge. BR 4, citing *State v. Osborne*, 102 Wn.2d 87, 92-93, 684 P.2d 683 (1984). But the State claims that due process is satisfied so long as the defendant is

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[2] That is admissible evidence. RCW 9.94A.834(1).

[3] "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."

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apprised of the acts allegedly constituting the offense. BR 4. This overgeneralization misrepresents the law in this case.

"A plea of guilty is more than a confession which admits that the accused did various acts[.]" *Boykin v. Alabama*, 395 U.S. at 242.[4] Because most criminal convictions are obtained by guilty pleas, the trial court must make a record that shows the defendant was informed both of the nature of the charges and the acts constituting the offense. *Boykin*, 395 U.S. at 244, n. 7.

The State relies on *State v. Holsworth*, 93 Wn.2d 148, 607 P.2d 845 (1980). BR 4. That case is distinguishable, however. The sole question presented there was whether the State was barred from using a pre-*Boykin* guilty plea in subsequent persistent offender proceedings merely because the plea predated *Boykin*. *Holsworth*, 93 Wn.2d at 150-51. The answer was that it was possible for the State to establish the validity of a pre-*Boykin* plea by showing that the defendant was apprised of the specific conduct that necessarily constituted the offense. *Holsworth*, 93 Wn.2d at 150-52. *Holsworth* does not reject the due process criteria of *Boykin*, and no impediment existed here to conducting Mr. Kinnaman's proceedings in accordance with due process. *Holsworth* affirms the rule that a defendant facing imprisonment "must be apprised of

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[4] 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

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the nature of the offense and the consequences of pleading guilty, in order for the plea to be accepted as knowing, intelligent and voluntary." *Holsworth*, 93 Wn.2d at 153, quoting Justice Douglas speaking for the Court in *Boykin* at 243-44.

Washington's rules of criminal procedure reflect this fundamental principle. The criminal rule ensuring the voluntariness of a guilty plea is more protective than the federal rule. The federal rule says:

> **Ensuring a Plea is Voluntary**: Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

Federal Rules of Criminal Procedure, Rule 11(b)(2). Washington's rule, by contrast, includes the underlined language as follows:

> **Voluntariness**: The court shall not accept a plea of guilty without first determining that it is made voluntarily, competently <u>and with an understanding of the nature of the charge</u> and the consequences of the plea.

CrR 4.2(d) (emphasis added).

Apprising the defendant of the charged conduct is sufficient only if proof of the conduct necessarily proves the omitted element. In *Osborne*, for example, the State failed to advise felony murder defendants of the knowledge element of the crime. *Osborne*, 102 Wn.2d at 93. This did not render the pleas involuntary because the evidence — including written

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statements from witnesses — described brutal acts that could not possibly be regarded as anything but knowing. *Osborne*, 102 Wn.2d at 94.

Here, by contrast, the distinction between driving with reckless disregard for potential danger to others and actually endangering people is such that due process required the State to inform Mr. Kinnaman as a matter of law precisely what elevates reckless driving to endangerment. Otherwise, his plea could not be knowing, intelligent and voluntary.

Notice of the true nature of the charge is "the first and most universally recognized requirement of due process." *Osborne*, 102 Wn.2d at 93. Real notice of the nature of the charge is "the first and most universally recognized requirement of due process." *Henderson*, 426 U.S. at 645, quoting *Smith*, 312 U.S. at 334; *In re Keene*, 95 Wn.2d 203, 622 P.2d 360 (1980). "Probably the most important requirement of *Boykin* is that the defendant receive "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process". *State v. Chervenell*, 99 Wn.2d 309, 317-318, 662 P.2d 836 (1983), citing *Holsworth*, *Smith*, *Henderson*.

In *Chervenell*, the pleading defendant was not informed that the amount of marijuana was a fact the State would have to prove at trial. The prosecutor did not describe the amount possessed as an element of the

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offense, but merely stated it as one of the facts surrounding the offense. *Chervenell*, 99 Wn.2d at 318.

Likewise, here, Kinnaman was not informed that the State would have to produce admissible evidence that he actually endangered somebody, not merely a hearsay report that he drove without regard to the safety of others. Instead, he was erroneously led to believe that endangerment was implied in the recklessness element of eluding.

Where, as here, the defendant states that he would not have agreed to plead guilty if he had been fully informed, the plea cannot stand. *State v. Rawson*, 94 Wn. App. 293, 296-97, 971 P.2d 578 (1999); *State v. Acevedo*, 137 Wn.2d 179, 202, 970 P.2d 299 (1999) (failure to include community placement condition).

Mr. Kinnaman's plea to the endangerment allegation was not knowing, intelligent and voluntary. The Court should vacate the sentencing enhancement for endangerment by eluding.

3. THE RECORD DOES NOT ESTABLISH A FACTUAL BASIS FOR ENDANGERMENT BY ELUDING.

The State misrepresents the record regarding Mr. Kinnaman's plea to the enhancement. The State claims that Kinnaman admitted to facts

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sufficient to support the sentence enhancement. BR 2. This misrepresents the record.

As discussed, Kinnaman was laboring under the false impression that the evidence that he drove recklessly was sufficient to support the enhancement. He admitted speeding through a construction zone. BR 7. But this established no more than reckless driving, absent admissible evidence that one or more construction workers were endangered. RCW 9.94A.834(1). Kinnaman's statement that the workers were afraid was based solely on the prosecutor's claim to have received admissible statements to that effect. RP 14. Likewise, Kinnaman's statement that he thought he ran over the foot of a passenger who suddenly leaped from his moving vehicle when he saw the police, RP 12, is not evidence of criminal conduct. The court's ruling that Kinnaman knowingly and intelligently waived his rights is erroneous. RP 11-12; BR 2-3.

A factual basis sufficient to support a guilty plea requires sufficient evidence for a jury to conclude that the defendant is guilty. *State v. Amos*, 147 Wn. App. 217, 228, 195 P.3d 564 (2008). Moreover, the court must find the evidence in the record. *Osborne*, 102 Wn.2d at 95. The facts need not be established by the defendant's admissions; any reliable source may be used, provided, however, that the material the trial court relies on is made part of the record. *Id.* As discussed above and in the Appellant's

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motion to strike the warrant affidavit from the appellate record, the material must be in the record that was before the judge who was conducting the challenged proceeding.

The purpose behind the factual basis requirement is to protect defendants who, like Mr. Kinnaman, are otherwise likely to plead guilty without realizing that their conduct "does not actually fall within the charge." *Berry*, 129 Wn. App. at 65, quoting 13 Royce A. Ferguson, Jr., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 3713, 91-92 (3rd ed.2004). That is precisely what happened here. Kinnaman pleaded guilty to endangerment without understanding that driving heedlessly of the consequences does fall within the charge of endangerment unless one or more persons was in fact endangered.

RCW 9.94A.834(1) requires the existence of admissible evidence because of the mandatory provision that "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[.]" RCW 9.94A.834(1). In finding a factual basis for a guilty plea, the court must find the evidence in the record. *Osborne*, 102 Wn.2d at 95. But the court cannot make findings of fact without considering the evidence. That requires the State to produce admissible evidence at the hearing.

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The legislature included in RCW 9.94A.834(1) the express requirement that the State produce "admissible evidence." This is a clear indication that the legislature intended to distinguish an endangerment inquiry from sentencing proceedings that can be conducted outside the Rules of Evidence under ER 1101(c),

That did not happen here. The record contains some mention about some sort of involvement of DOT workers. RP 7, 14. The record does not show the nature of this evidence or whether it was admissible. No such evidence was offered or admitted. Mr. Kinnaman denied this allegation at sentencing, asserting that the statements said merely that the workers had witnessed a chase through the construction zone. RP 21. Witnessing a chase does not constitute actual endangerment. Therefore, the evidence was insufficient to establish a factual basis that "a person or persons" was endangered.

In addition to fatally compromising the voluntariness of Kinnaman's plea, conflating the elements of eluding and the special allegation relieved the State of its burden to establish endangerment with proof that one or more persons was in fact endangered.

Mr. Kinnaman wishes to withdraw his plea to the enhancement.

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4. THE SENTENCING ERROR ENTITLES KINNAMAN TO WITHDRAW HIS PLEA.

The State concedes that the sentence enhancement imposed here is contrary to law. The State also correctly concedes that this error renders the guilty plea to the enhancement involuntary. BR 10.

This comports with the holding of *State v. Barber*, 170 Wn.2d 854, 870, 248 P.3d 494 (2011), that the sentence imposed pursuant to a guilty plea must be statutorily authorized. *Barber* further holds that, just as "a plea agreement cannot bind the court to impose greater punishment than is statutorily authorized, it follows that the court lacks authority to impose lesser punishment as well." *Barber*, 170 Wn.2d at 870.

When a sentence is unlawful, the plea is invalid. *Barber*, 170 Wn.2d at 857. This includes a mutual mistake that results in an agreement to a sentence that is contrary to law. *Barber*, 170 Wn.2d at 859. Where the parties have agreed to a sentence that is contrary to law, the remedy is to permit the defendant to withdraw his plea. "Where the parties have agreed to a sentence that is contrary to law, the defendant may elect to withdraw his plea." *Barber*, 170 Wn.2d at 873.

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The SRA authorizes an enhancement of one year and one day, not 12 months as was imposed here. RCW 9.94A.533(11). Permitting the defendant to withdraw his plea is the only remedy the court has authority to impose. *Barber*, 170 Wn.2d at 873. The prosecutor may not correct the error simply by inserting the lawful sentence in the Judgment and Sentence, as was done here. CP 27. In *Barber*, neither the State nor the Department of Corrections could correct an erroneous sentence. *Barber*, 170 Wn.2d at 857.

Likewise, here, the remedy for a sentence in excess of the court's statutory authority is to permit withdrawal of the plea.

5. THE PLEA TO THE SPECIAL SENTENCING ALLEGATION IS SEVERABLE FROM THE PLEA TO THE PREDICATE OFFENSE.

Kinnaman challenges solely the special allegation conviction and maintains his plea of guilty to attempting to elude. The State claims that the guilty pleas are not severable, relying on *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). BR 11. This reliance is misplaced because *Miller* is distinguishable on its facts and does not support the proposition for which the State cites it.

The defendant in *Miller* did not seek to withdraw his plea but demanded specific performance of an irregular sentence. The State, not

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the defendant, wished to nullify the guilty plea on its own motion. This was unlawful. *Miller*, at 536, citing *State v. Tourtellotte*, 88 Wn.2d 579, 584, 564 P.2d 799 (1977). The opening brief distinguishes other Washington cases holding that multiple pleas made in the same proceeding are not severable. AB 17, discussing *State v. Bisson*, 156 Wn.2d 507, 130 P.3d 820 (2006), and *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003).

It is well established that a defendant may challenge one conviction of a multi-conviction plea agreement on double jeopardy grounds and maintain his guilty plea to the other. *In re Francis*, 170 Wn.2d 517, 532, 242 P.3d 866 (2010), discussing *State v. Knight*, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008). The State suggests no reason why a defendant may not challenge one conviction of a multi-conviction plea agreement on other constitutional grounds as well.

6. THE SENTENCE ENHANCEMENT VIOLATES DOUBLE JEOPARDY.

Mr. Kinnaman contends that double jeopardy precludes punishing him for both attempt to elude and endangerment by eluding absent facts establishing more than mere recklessness. The State claims that Kinnaman was not punished twice for the same offense because the underlying offense and the enhancement have different elements. BR 7.

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But the State did convict Kinnaman of different elements. He was convicted of both charges based on a factual basis that was sufficient to prove only one.

Whether the same conduct comprises separate offenses hinges upon whether the legislature intended them to be separate. *Francis*, 170 Wn.2d at 52, citing *State v. Freeman*, 153 Wn.2d 765, 771-72, 108 P.3d 753 (2005). In *Francis*, double jeopardy was violated where a defendant pleaded guilty to first degree robbery based on second degree assault and also to second degree assault based on the same conduct. *Francis*, 170 Wn.2d at 523. Here, Mr. Kinnaman pleaded guilty to attempting to elude, of which an essential element is reckless driving, and also to endangerment by eluding, based on the same conduct.

As discussed in the opening brief, by the plain language of the statute, endangerment by eluding requires more than mere recklessness, because the offense of attempt to elude already includes the element of driving recklessly. RCW 46.61.024(1). To prevail on a special allegation of endangerment by eluding, the state must prove beyond a reasonable doubt that the accused endangered one or more persons other than himself or the pursuing law enforcement officer. RCW 9.94A.834(2); RCW 9.94A.533(11).

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Reckless driving cannot be inferred from excessive speed. *State v. Randhawa*, 133 Wn.2d 67, 77, 941 P.2d 661 (1997). Likewise, here, actual endangerment of one or more persons cannot be inferred from driving with reckless disregard of potential danger. The State needed admissible evidence that one or more persons were threatened with physical injury. RCW 9.94A.834(1).

By requiring the proof that a person was endangered, the legislature signaled its intent that not every attempt to elude constitutes endangerment. Enhancing the sentence without proving additional facts violated double jeopardy.

IV. CONCLUSION

A court must allow the defendant to withdraw a guilty plea if necessary to correct a manifest injustice. CrR 4.2(f); *State v. A.N.J.*, 168 Wn.2d 91, 106-107, 225 P.3d 956 (2010); *State v. Taylor*, 83 Wn.2d 594, 595, 521 P.2d 699 (1974. That means the defendant must possess sufficient information to be able to understand the law in relation to the facts and appreciate the nature of the charge. *In re Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987); *Clements*, 125 Wn. App. at 645.

Here, the misrepresentation of the nature of the charge combined with the State's failure to include in the record any evidence that any

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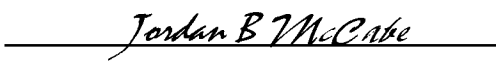
person was actually endangered plus Mr. Kinnaman's repudiation of the existence of any such evidence rendered the plea involuntary.

The Court should reverse and remand with instructions to allow Mr. Kinnaman to withdraw his plea to the enhancement.

Respectfully submitted this October 6, 2012.



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CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served with this Appellant's Brief electronically via the Division II upload portal: gfuller@co.grays-harbor.wa.us.

A hard copy was also mailed this day, first class postage prepaid, to:

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