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NO. 69022-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LAVELLE JOHNSON,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly exercised its discretion in denying Johnson's motion for a new trial based on juror misconduct where a juror searched Johnson's name on the internet, learned of information that was not prejudicial to Johnson in light of the evidence produced at trial, and did not share the information with the other jurors.

2. Whether the trial court properly instructed the jury on the sentencing enhancement of endangering the public while committing attempting to elude, where the instruction asked the jury whether the State had proved beyond a reasonable doubt that any member of the public was "threatened with physical injury or harm" during the commission of the crime.

3. Whether the charging document gave sufficient notice of the sentencing enhancement of endangering the public where the charging language alleged that the public was "threatened with physical injury or harm" during the commission of the crime of attempting to elude, "which is a special allegation of endangerment by eluding[.]"

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Lavelle Johnson, with attempting to elude a pursuing police vehicle and driving while license suspended or revoked in the first degree for conduct that occurred on October 20, 2010. CP 140-47. In addition, the State alleged the sentencing enhancement of endangering the public in accordance with RCW 9.94A.834 for the crime of attempting to elude. CP 146. The charging language for the enhancement reads as follows:

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do allege that during the commission of [attempting to elude], one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the defendant, which is a special allegation of endangerment by eluding under the authority of Chapter 219, Laws of 2008.

CP 146.

A jury trial on these charges occurred in December 2011 before the Honorable Michael Hayden.¹ At the conclusion of the

¹ A previous jury trial before a different judge ended in a mistrial when a witness violated a motion in limine. CP 163.

evidence, the trial court instructed the jury regarding the sentencing enhancement in the special verdict form as follows:

This special verdict is to be answered only if the jury finds the defendant guilty of Attempting to Elude a Pursuing Police Vehicle as Charged in Count I.

We, the jury, return a special verdict by answering as follows:

QUESTION: Was any person, other than Lavelle Johnson or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Lavelle Johnson during his commission of the crime of attempting to elude a police vehicle?

ANSWER: _____ (Write "yes" or "no")

CP 199. Johnson did not object to this instruction.

The jury convicted Johnson of both counts as charged; in addition, the jury answered "yes" to the sentencing enhancement.

CP 197-99; RP (12/23/11) 237.

After trial, it came to light that Juror 12 had conducted an internet search of the name "Lavelle Johnson" at the end of the first day of the jury's deliberations. CP 244. As a result of that search, the juror read part of a news article reporting that someone named "Lavelle Johnson" had had a sexual relationship with a juvenile corrections officer. CP 245. The juror did not read the entire article, nor did he share the information with any of the other jurors

until after the verdict had been read in open court. CP 245. The juror stated that he did not know whether the person referenced in the article was, in fact, the defendant, and he further stated that the information did not “change [his] feelings about the case or affect [his] decision about the verdict.” CP 245.

Johnson made a motion for a new trial based on Juror 12’s misconduct. CP 223-28, 233-36. The State responded that the misconduct was not prejudicial, primarily because evidence of Johnson’s prior convictions for three adult felony crimes of dishonesty (theft in the second degree, attempted witness tampering, and taking motor vehicle without permission) had been properly admitted during the trial. CP 238-42; RP (12/22/11) 172. The trial court denied Johnson’s motion for a new trial, finding that the juror’s misconduct was not prejudicial in light of the evidence introduced at trial, and given the fact that the juror had not shared the extrinsic information with any of the other jurors. CP 261-63; RP (3/30/12) 42-45.

The trial court imposed a prison-based DOSA sentence for the felony eluding charge and 6 months on the driving with license suspended charge. CP 249-60. Johnson now appeals. CP 266-79.

2. SUBSTANTIVE FACTS

In the early morning hours of October 20, 2010, Seattle Police Detective Edward Chan and Officer Jason Diamond were conducting surveillance on the Best Damn Sports Bar on Martin Luther King Way South. They were looking for the defendant, Lavelle Johnson. RP (12/20/11) 52-54; RP (12/21/11) 37. Eventually, they saw Johnson leave the bar with a male companion; Johnson got into the driver's seat of a black Mercedes-Benz, and his companion got into the passenger's seat. RP (12/20/11) 54. Johnson pulled out of the parking lot and went the wrong way on Martin Luther King Way without his lights on. RP (12/21/11) 40. Chan and Diamond notified other officers of Johnson's location and attempted to follow him. RP (12/21/11) 41.

Officer Aaron Sausman and Detective Benjamin Hughey pulled in behind the Mercedes in a marked patrol car and signaled Johnson to stop by activating their lights and siren. RP (12/20/11) 101, 104-06. Johnson did not stop. Instead, he went through a stop sign and accelerated to a high rate of speed. RP (12/20/11) 106.

Johnson ran a red light at Pacific Highway South, continued on Highway 599 at increasing rates of speed, and eventually

entered I-5 southbound. At this point, Johnson again turned off his lights. RP (12/21/11) 107-08. Johnson accelerated to “really high speeds, weaving in and out of traffic[.]” RP (12/21/11) 108. As the pursuit continued on southbound I-5, Johnson’s speed reached 120 miles per hour. RP (12/21/11) 108.

Johnson took the exit at 320th, drove over the overpass, and re-entered I-5 northbound. RP (12/21/11) 80-81. At this point, State Patrol Trooper Raymond Seaburg took the lead position in the pursuit. RP (12/21/11) 81; RP (12/21/11) 107-09. During this portion of the pursuit, Johnson reached speeds up to 130 miles per hour. RP (12/21/11) 117.

The pursuit continued onto Highway 599, International Boulevard, and other surface streets. RP (12/21/11) 118-20. Eventually, Johnson drove into the parking lot of an apartment complex, where he and the passenger got out of the Mercedes, which rolled into a parked car. RP (12/21/11) 120-21. Johnson fled on foot. RP (12/20/11) 75.

Officer Chris Hairston and his K-9 partner Orka responded to the scene to perform a track. RP (12/21/11) 17. During the K-9 track, Officer Christopher Myers and his partner were helping to set up containment in their patrol car and ended up driving right up

behind Johnson. RP (12/20/11) 75-79. Myers and his partner got out of their car, pointed their rifles at Johnson, and ordered him to put his hands up and walk backwards in their direction. Johnson did not initially comply; instead, he asked, "What is the situation?" RP (12/20/11) 80. Myers repeated his commands more forcefully, and Johnson finally complied. RP (12/20/11) 80.

Other officers arrived to assist, and Johnson was taken into custody. As the officers were arresting Johnson, the K-9 dog tracked directly to Johnson. RP (12/20/11) 81-82. Detective Thomas Mooney put Johnson in his patrol car for transport. RP (12/20/11) 90. Johnson told Mooney that "he wasn't in the vehicle and that he had never been in the vehicle." RP (12/20/11) 90-91.

At trial, Johnson's defense to the charges was that his male companion was driving the Mercedes and that Johnson was the passenger. RP (12/22/11) 164-68. Accordingly, Johnson admitted during his testimony that his license was suspended, and he agreed that the Mercedes was driven in a manner that put other motorists at risk of injury.² RP (12/22/11) 177-79. Johnson also conceded that he had been previously convicted of theft in the

² Johnson's trial counsel also stated at one point during the State's case, "I'm agreeing, I'm stipulating that the car was driving way too fast and it should have stopped and it's dangerous and all that." RP (12/21/11) 79.

second degree, attempted witness tampering, and taking a motor vehicle without permission.³ RP (12/22/11) 172.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING JOHNSON'S MOTION FOR A NEW TRIAL.

Johnson first argues that the trial court abused its discretion in denying his motion for a new trial based on juror misconduct. More specifically, Johnson claims that the trial court applied an incorrect legal standard in denying the motion for a new trial, and that the State did not show beyond a reasonable doubt that the juror misconduct was harmless. Appellant's Opening Brief, at 11-24. This claim should be rejected. The record demonstrates that the trial court applied the law correctly in considering Johnson's motion for a new trial, and that the trial court properly concluded beyond a reasonable doubt that the juror's misconduct did not contribute to the verdict, and thus, that it was not prejudicial.

The consideration of extrinsic evidence constitutes jury misconduct that may require granting a new trial. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 301 (1994). Extrinsic evidence is

³ These convictions were admitted in accordance with ER 609 on the issue of Johnson's credibility as a witness. See CP 209.

information that is outside the evidence introduced at trial. Id.
“Such evidence is improper because it is not subject to objection,
cross-examination, explanation or rebuttal.” Id. A new trial should
be granted if the trial court concludes that the extrinsic evidence
could have influenced the verdict; however, a new trial should not
be granted if the trial court is satisfied beyond a reasonable doubt
that the extrinsic evidence did not contribute to the verdict. State v.
Fry, 153 Wn. App. 235, 239, 220 P.3d 1245 (2009), rev. denied,
168 Wn.2d 1025 (2010).

Once it has been established that jury misconduct has
occurred, prejudice to the defendant is presumed. State v. Boling,
131 Wn. App. 329, 333, 127 P.3d 740, rev. denied, 158 Wn.2d
1011 (2006). “To overcome this presumption, the State must
satisfy the trial court that, viewed objectively, it is unreasonable to
believe the misconduct could have affected the verdict.” Id. (citing
State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)). In
making this determination, the trial court “need not delve into the
actual effect of the evidence.” Boling, 131 Wn. App. at 332.
Rather, the trial court objectively evaluates the potential effect of
the evidence:

This is an objective inquiry into whether the extraneous evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence, and includes consideration of the purpose for which the extraneous evidence was interjected into deliberations.

State v. Johnson, 137 Wn. App. 862, 870, 155 P.3d 183 (2007).

A trial court's ruling on a motion for a new trial due to jury misconduct is reviewed for manifest abuse of discretion. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). An abuse of discretion occurs only when no reasonable judge would have ruled as the trial court did. Id.

In this case, it is undisputed that one of the jurors committed misconduct by seeking out extrinsic evidence. Juror 12 signed an affidavit admitting that he "conducted an internet search for the defendant's name" at the conclusion of the first day of the jury's deliberations. CP 244. The juror further admitted that he read part of a news article "about a person named Lavelle Johnson having a sexual relationship with a corrections officer at a juvenile facility." CP 245. However, the juror also stated in the affidavit: 1) that he did not read the entire article; 2) that he did not know if the person referenced in the article was, in fact, the defendant; 3) that the article did not affect his decision in this case; and 4) that he did not

tell any other jurors about what he had read until after the jury's verdict had been filed. CP 245.

During preliminary discussions regarding Johnson's motion for a new trial based on the juror's misconduct, the trial court correctly observed that it had to find beyond a reasonable doubt that the misconduct was not prejudicial in order to deny the motion. RP (3/16/12) 15-16. In its oral ruling on the motion for a new trial, the trial court noted that evidence had been properly introduced at trial that Johnson had previously been convicted of three felony crimes of dishonesty as an adult. RP (3/30/12) 43. The trial court then ruled that in light of the felony convictions that were introduced at trial in accordance with ER 609, the juror's discovery that Johnson had been in juvenile custody at some point was not prejudicial. Furthermore, the court noted that the article that the juror found identified Johnson as the victim of the juvenile corrections officer's misconduct, and that the extrinsic information was not prejudicial for this reason as well. RP (3/30/12) 43-44. As the trial court stated in its written findings and conclusions:

Information about a potential juvenile criminal conviction, in light of three adult felonies admitted at trial, made no difference to the way the jury deliberated, especially since it was known by only one juror and not shared with the rest of the jury.

CP 262. Accordingly, the court ruled that the juror's misconduct did not prejudice Johnson's right to a fair trial because it did not affect the verdict. CP 262.

In light of the record, the trial court's ruling constitutes a proper exercise of discretion. The trial court correctly stated that the juror misconduct had to be harmless beyond a reasonable doubt in order to deny the motion for a new trial, and the trial court correctly ruled that the misconduct was indeed harmless in light of the evidence of Johnson's criminal history that had been properly admitted at trial. Given the lack of prejudice, and the fact that the extrinsic evidence was seen by only one juror, the trial court exercised its discretion on tenable grounds in ruling that the extrinsic evidence did not affect the verdict. This ruling is supported by both the record and the applicable law, and thus, it should be affirmed.

Nonetheless, Johnson argues that the trial court erred because it did not "hold the State to the constitutional error standard in either its oral ruling or its written findings." Appellant's Opening Brief, at 18. Although Johnson is correct that the trial court did not expressly state this legal standard in its oral ruling or its written findings of fact and conclusions of law, the record as a

whole demonstrates that the trial court was well aware of the applicable legal standard, and thus, that the trial court applied that standard in making its ruling.

As noted above, the trial court stated on the record that it would have to find “beyond a reasonable doubt” that the misconduct was not prejudicial in order to deny Johnson’s motion for a new trial. RP (3/16/12) 15-16. In addition, both Johnson and the State briefed the issue for the trial court in accordance with the correct legal standard. CP 224-26, 239-40. Therefore, Johnson’s argument is one of form rather than substance. While it would have been preferable for the trial court to have expressly stated the applicable legal standard in its findings and conclusions, the record as a whole demonstrates that the trial court was well aware of the legal standard and followed it.

Johnson also argues that the trial court erred in applying a “subjective” standard rather than an “objective” standard in considering the potential effect of the extrinsic evidence on the jury’s deliberations. More specifically, Johnson argues that the trial court should not have considered the juror’s statement in the affidavit that reading part of the news article did not affect his

feelings about the defendant or his verdict in this case.⁴ Appellant's Opening Brief, at 19-20. This argument should also be rejected. Although the trial court considered the juror's statement that the extrinsic information did not affect his deliberations, the record shows that the trial court considered the issue under an objective standard as well.

The primary basis for the trial court's ruling is the fact that evidence of Johnson's criminal history was properly admitted during the trial. In other words, the fact that three adult felony convictions were introduced into evidence is the primary reason that the trial court found that the juror's misconduct was not prejudicial. See RP (3/16/12) 16-17; RP (3/30/12) 43; CP 261-62. This is an objective fact; therefore, even disregarding the juror's statement that the extrinsic evidence had no effect on his deliberations, the trial court's ruling is amply supported under a purely objective standard.

Lastly, Johnson claims that the State did not show beyond a reasonable doubt that the juror's misconduct did not affect the verdict. In support of this argument, Johnson suggests that the jury

⁴ Johnson also suggests that the juror's affidavit may be false in this regard, stating that "an affidavit solicited and prepared by the party prosecutor, is unlikely to state that the extrinsic evidence did affect [the juror's] deliberations." Appellant's Opening Brief, at 18. This specious allegation has no support in the record. Moreover, as the trial court observed, Johnson's trial attorney had ample opportunity to contact the juror, yet did not. RP (3/30/12) 28-29.

was in “demonstrated equipoise” during deliberations and that the extrinsic evidence prejudiced the jury against him. Appellant’s Opening Brief, at 22-24. But the length of deliberations (just over one full day), and the fact that the jury wanted to review certain evidence during deliberations, does not demonstrate that the jury was in “equipoise,” or that the extrinsic evidence had an effect on deliberations. Moreover, Juror 12 did not share the extrinsic evidence that he discovered with any other jurors until after the verdicts were filed. CP 245. Johnson’s argument is without merit.

In sum, the trial court exercised its discretion properly in denying Johnson’s motion for a new trial by concluding beyond a reasonable doubt that the juror’s misconduct did not affect the verdict in light of the evidence that was properly admitted during the trial. This Court should reject Johnson’s claim, and affirm.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE SENTENCING ENHANCEMENT FOR ENDANGERING THE PUBLIC.

Johnson next argues that the jury was improperly instructed on the sentencing enhancement for endangering the public in the commission of attempting to elude a pursuing police vehicle. More specifically, Johnson claims that because the jury instruction did not

include the word “endangered,” the sentencing enhancement should be reversed. Appellant’s Opening Brief, at 24-32. This claim should be rejected. The jury was correctly instructed that it had to find beyond a reasonable doubt that any person other than Johnson or the pursuing police officers was “threatened with physical injury or harm by the actions of Lavelle Johnson” in order to answer “yes” to the special verdict. CP 199. This is what the applicable statute requires, and thus, this Court should affirm.

Jury instructions are proper when they are sufficient to allow the parties to argue their theories of the case, they do not mislead the jury, and they correctly inform the jury of the applicable law.

State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

Sentencing enhancements, like substantive crimes, must be proved to the jury beyond a reasonable doubt. However, jury instructions regarding sentencing enhancements need not be worded in a particular way, so long as the jury is required to find all of the facts necessary to support the enhancement beyond a reasonable doubt.

Id. at 372-74. Put another way, if the jury instructions regarding an enhancement can be “[f]airly read” to contain the necessary factual elements, the instructions and the resulting verdict are proper. Id. at 374. The facts of Willis are instructive here.

In Willis, the defendant was found guilty of several crimes, and the jury returned special verdicts that the defendant was armed with a firearm during the commission of those crimes. Willis, 153 Wn.2d at 369. For the first time on appeal, the defendant challenged the instructions regarding the firearm enhancements, and argued that they were deficient because they did not state that the jury must find “a nexus between the defendant, the crime, and the firearm.” Id. at 370. Rather, the instruction stated that the jury must find that “[a firearm was] readily available for offensive or defensive purposes.” Id. at 371 (alteration in original). After analyzing the cases discussing the “nexus” requirement for deadly weapon enhancements, the Court concluded:

Fairly read, instruction 29 includes language requiring the jury to find a relationship between the defendant, the weapon, and the crime. Specifically, the defendant must have a deadly weapon, including a firearm, and the weapon must be readily available for offensive or defensive purposes at the time of the commission of the crime. Although the term “nexus” is not used, the language of the instruction informs the jury that it must find a relationship between the defendant, the crime, and the deadly weapon. Accordingly, we hold that the jury instruction here was proper. Express “nexus” language is not required.

Id. at 374.

In this case, the sentencing enhancement at issue was alleged in accordance with RCW 9.94A.834, which provides:

(1) The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

(2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.

RCW 9.94A.835. A common-sense reading of this statute demonstrates that “endangerment” for purposes of the sentencing enhancement *means* “threatened with physical injury or harm.” This is consistent with the ordinary definitions of “endanger” as found in the dictionary, which include “to bring into danger or peril of probable harm or loss,” and “to create a dangerous situation.”

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 748 (1993).

In sum, "endangered" and "threatened with physical injury or harm" are synonymous for purposes of the statute.

The jurors in this case were correctly instructed that they had to unanimously agree beyond a reasonable doubt in order to answer "yes" to the special verdict. CP 218. The special verdict form for the sentencing enhancement then instructed the jury in relevant part as follows:

We, the jury, return a special verdict by answering as follows:

QUESTION: Was any person, other than Lavelle Johnson or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Lavelle Johnson during his commission of the crime of attempting to elude a police vehicle?

CP 199. In answering "yes" to the special verdict in this case, the jury found the necessary facts to support the enhancement beyond a reasonable doubt. As in Willis, the absence of the word "endangered" should not nullify the special verdict, because the jury found the necessary factual elements beyond a reasonable doubt.

Nonetheless, Johnson argues that the instruction as contained in the special verdict form relieved the State of its burden of proving the essential elements of the sentencing enhancement.

Appellant's Opening Brief, at 30-31. But given that "endangered" and "threatened with physical injury or harm" mean the same thing, this argument is without merit. The jury instructions were sufficient to apprise the jury of the necessary factual elements of the sentencing enhancement, and the jury unanimously found those necessary factual elements beyond a reasonable doubt.

Lastly, even if this Court were to conclude that it was error not to include the word "endangered" or "endangerment" in the instruction, any such error is harmless beyond a reasonable doubt. The failure to instruct a jury on all essential elements of a crime is harmless beyond a reasonable doubt if the element in question is uncontested and supported by overwhelming evidence. Neder v. United States, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Johnson conceded that the driving in this case was dangerous and that it put other motorists at risk of harm. RP (12/21/11) 79; RP (12/22/11) 178-79. Therefore, the sentencing enhancement was uncontested. Moreover, the enhancement was supported by overwhelming evidence. The driving in this case included speeding up to 130 miles per hour on I-5 without any lights on while weaving in and out of traffic, and running red lights and stop signs.

RP (12/20/11) 106-08; RP (12/21/11) 43, 77, 79-80; 113-19.

Therefore, any possible error in the jury instruction contained in the special verdict form is harmless beyond a reasonable doubt.

In sum, there is no basis to reverse the sentencing enhancement for endangering the public while committing attempting to elude. This Court should affirm.

3. THE CHARGING DOCUMENT CONTAINED LANGUAGE THAT WAS SUFFICIENT TO APPRISE JOHNSON OF THE SENTENCING ENHANCEMENT.

In a related claim, Johnson claims that the charging document was insufficient to provide notice of the sentencing enhancement of endangering the public in the commission of attempting to elude. Johnson argues that because the charging document did not contain some form of the word “endangered,” the State provided insufficient notice of the enhancement and it should be dismissed. Appellant’s Opening Brief, at 32-34. This claim should be rejected for two reasons. First, the information *does* contain the words “endangerment by eluding.” CP 146. Accordingly, Johnson is simply mistaken. Second, the language of the charging document is plainly sufficient to apprise Johnson that

he endangered the public by driving in a manner such that members of the public “were threatened with physical injury or harm” while committing the crime of attempting to elude. CP 146. Accordingly, this Court should affirm.

All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him or her. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Both the federal and state constitutions require that such notice be provided. See U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10). In addition, CrR 2.1(a)(1) provides that “the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”

Charging documents that “fail to set forth the essential elements of a crime in such a way that the defendant is notified of both the illegal conduct and the crime with which he is charged are constitutionally defective, and require dismissal.” State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). However, technical defects in the charging document, such as an error in the statutory citation, the date of the crime, or the specification of a different manner of committing the charged crime, do not generally require

reversal. State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995).

In a charging document for a statutory offense, it is sufficient to charge in the language of the statute if the statute sufficiently defines the crime to apprise an accused person with reasonable certainty of the nature of the accusation. State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989). It is not necessary to use the exact words of the statute, if other words are used that equivalently or more extensively signify the words in the statute. Id.

When a charging document is challenged for the first time on appeal, it will be liberally construed in favor of validity. Kjorsvik, 117 Wn.2d at 102. The reviewing court should examine the document to determine if there is any fair construction by which the elements are contained in the document. Id. at 105. In order to successfully challenge the information's sufficiency for the first time on appeal, a defendant must establish: 1) that the necessary elements of the offense are not in the information in any form; or 2) that actual prejudice resulted. Id. at 105-06. In employing the two-prong Kjorsvik test, "the primary question is whether the necessary facts appear in any form, or by fair construction can be found, in the charging document however inartfully it may be

worded.” State v. Nonog, 145 Wn. App. 802, 806, 187 P.3d 335 (2008). If so, the information will be held to be sufficient unless the defendant suffered actual prejudice as a result of the inartful charging language. Id. (citing Kjorsvik, 117 Wn.2d at 105-06).

Under the liberal construction rule that applies when the charging document is first challenged on appeal, “if the information contains allegations expressing the crime that was meant to be charged, it is sufficient even though it does not contain the statutory language.” Hopper, 118 Wn.2d at 156. A reviewing court should be “guided by common sense and practicality” in determining the sufficiency of the language. Id. Even missing elements may be implied if the language supports such a result. Id.

In this case, Johnson’s contention that the information does not contain some form of the word “endangered” is incorrect. The information plainly alleges “a special allegation of endangerment by eluding[.]” CP 146. Moreover, as discussed above, the word “endangered” and the phrase “threatened with physical injury or harm” are synonymous, because the latter is a definition of the former. Therefore, the language in the charging document is more than sufficient under the first prong of the Kjorsvik test, because the charging language (which is taken directly from RCW 9.94A.834)

was sufficient to apprise Johnson of the conduct that formed the basis for the sentencing enhancement. Furthermore, the sentencing enhancement was not a contested issue at trial, because Johnson conceded that the driving in this case put other drivers at risk of injury. See RP (12/21/11) 79; RP (12/22/11) 178-79. Therefore, Johnson suffered no prejudice, and he cannot meet the second prong of the Kjorsvik test, either.

In sum, the language of the information was plainly sufficient to give notice as to the nature and cause of the sentencing enhancement, and Johnson demonstrates no prejudice; thus, his claim fails.

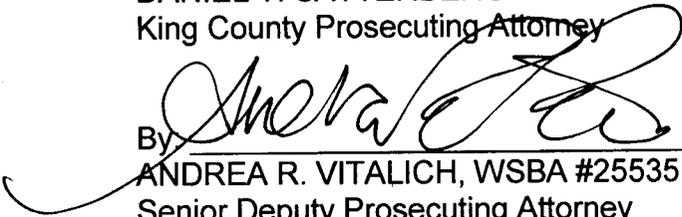
D. CONCLUSION

For the reasons set forth above, this Court should affirm.

DATED this 12th day of June, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
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By 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. LAVELLE JOHNSON, Cause No. 69022-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

6/12/13

Date