NO. 44652-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LELDON PITTMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 12-1-00263-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the open-court exchange of the parties' peremptory challenge list accord with defendant's public trial right when the challenges were exercised in open court and reduced to a written document filed in the public record?

2. Should defendant's conviction for attempting to elude a police vehicle be affirmed when the charging document challenged for the first time on appeal as insufficient was constitutionally adequate as it included the essential elements of that crime?

B. STATEMENT OF THE CASE.

1. Procedure

Appellant, LELDON PITTMAN ("defendant") was charged by Amended Information on July 11, 2012, with: attempting to elude a police vehicle, which included a sentencing enhancement for endangering someone other than himself and pursuing law enforcement (Count I); driving while under the influence of intoxicants (Count II); failure to remain at injury accident (Count III), and obstructing a law enforcement officer (Count IV). CP 12-14.[1] He received additional pretrial notice of

[1] Counts III and IV were not alleged in the original information. CP 1-2.

the facts at issue in his charges through the declaration of probable cause and supplemental declaration respectively filed on January 23, 2012, and July 11, 2012. CP 3-4, 15-16. The sufficiency of the charging documents was not challenged below. *See e.g.*, Def. Br. at 10.

The case was called for trial on February 5, 2013. 1RP 4. Jury selection was conducted in open court and the parties' openly exchanged peremptory challenge list was subsequently filed as a public record. *See e.g.*, RP (2/6/13) 3-6, 78-80; CP 132, 168, 169.[2] Defendant testified at trial. 4RP 354. The jury found him guilty for attempting to elude a police vehicle with the enhancement and for driving under the influence of intoxicants. CP 54-56. The misdemeanors in Counts III and IV did not result in convictions. CP 57-58. Defendant was sentenced to 20 months in the Department of Corrections on March 18, 2013. CP 106; 5RP 499. A notice of appeal was timely filed that day. CP 116.

2. Facts

Sometime around 5:00 a.m., on Sunday, January 22, 2012, defendant arrived at his parents home in Milton, Washington, with his girlfriend (Adriana Lujan) and another female (Brittany).[3] 2RP 224-225;

[2] CP 133-71 represents the State's estimate of how the State's Supplemental Clerk's Papers will be numbered.

[3] Brittany only appears to have been referenced by her first name in the record; no disrespect is intended.

3RP 251-52. They drove to the house after drinking together at a nightclub; defendant's admitted consumption included beer, mixed drinks and a shot of vodka. 3RP 254-55; 4RP 355, 357, 360, 366-67. He was approximately 32 years old at the time. 4RP 354. His mother (Susan Pittman) observed "[t]hey were all stumbling," and "[t]hey were all obviously drunk" when they entered the house. 2RP 225.

An argument ensued when defendant's mother would not let defendant take both women into a bedroom. 2RP 227. Defendant pushed his mother several times as their argument escalated. 2RP 228. She asked the women to leave when they became "rude" and "disrespectful." 2RP 228. Defendant decided to leave with them. 2RP 228. His mother was deeply troubled by that decision because "he was ... very drunk...drunker than the rest of them ... belligerent ... [a]nd ... had "a very fast car [Audi A6]" she "purchased for him." 2RP 228, 236.

Defendant's mother and stepfather (Michael Pittman) tried to prevent defendant from leaving because of defendant's level of inebriation and state of agitation. 2RP 224, 229-32; 3RP 253, 258. His stepfather eventually broke several windows out of defendant's car so defendant would not drive it away. 2RP 231-32, 233; 3RP 258-59; 4RP 371. Defendant responded by repeatedly reversing the car into his stepfather. 2RP 232-34; 3RP 259. His stepfather's foot became pinned between the

car and the garage; the resulting injury required two surgeries to correct. 2RP 232, 235. Defendant also repeatedly slammed his car forward into his stepfather's truck. 2RP 234; 3RP 259. Defendant's mother called 911 at approximately 5:47 a.m. as defendant drove away with Lujan in the passenger seat. 2RP 150, 235; 3RP 261.

Police dispatch reported the incident as a vehicular assault. 2RP 150. Officer Johnson responded in a marked police vehicle equipped with operational "LED lights" on the front and top, "wag" lights on the front and rear, white strobe lights, and audible siren. 2RP 150-152. The LED is a "diode" emitting system that is "significantly brighter" than rotating lights. 3RP 328. Johnson intercepted defendant by positioning the marked police vehicle in front of defendant's car. 2RP 155. Both vehicles stopped "face-to-face," approximately 75 feet apart. 2RP 155. Johnson's lights were activated at the time. 2RP 155. Johnson repositioned the police vehicle by pulling in behind defendant's car as defendant accelerated forward. 2RP 156-57. Defendant told Lujan he "was going to jail" or "I don't want to go to jail" when Johnson turned behind them. 2RP 156-57; 3RP 260, 296.

Defendant accelerated away from Johnson. 2RP 157. Johnson activated his siren after following defendant for roughly two blocks with activated emergency lights. 2RP 158-59. Johnson's lights and siren

remained activated as he pursued defendant through several streets. 2RP 161. Defendant repeatedly swerved over the center line while bypassing opportunities to pull over as he fled. 2RP 159, 181.

Officer Stringfellow observed Officer Johnson as he pursued defendant with activated lights and sirens. 3RP 330. Stringfellow directed his spotlight at defendant as defendant drove by his position. 3RP 331. Stringfellow joined the pursuit in another marked police vehicle equipped with activated "LED lights" and a "multi-tone siren." 3RP 328-31. Defendant and Lujan observed the police sirens as they continued to drive away. 3RP 260. The sound could travel unimpeded through the rear window of their vehicle as its glass shield was missing. 2RP 159; 3RP 330-31.

Officer Johnson advised other units he intended to execute a "PIT maneuver"[4] to disable defendant's vehicle as it approached the Fife city limit. 2RP 161-62; 3RP 332. Defendant defeated the maneuver by rapidly accelerating from approximately 25 to between 70 and 80 mph. 2RP 163; 3RP 332. Their vehicles momentarily slid together down the road. 2RP 163. Defendant then accelerated away from police through a series of

[4] A "PIT maneuver" or "pursuit intervention technique" is performed by using the front of the police vehicle to contact the fleeing vehicle's front fender at a moment when the two vehicles are traveling at a similar speed; the impact can disable the fleeing vehicle's engine by forcing its wheels to reverse against the direction of travel. 2RP 148-50, 163.

curves at speeds ranging from 30 to 80 mph. 2RP 164; 3RP 333. Defendant eventually entered a two lane "90-degree" corner while traveling between 75 and 80 mph. 3RP 333. The corner could not be successfully negotiated at those speeds when the road is dry. 3RP 333. Defendant entered the corner in the dark when the road was damp from snow and ice. 2RP 154; 3RP 331. His front windshield was also "smashed" in a visible "spider we[b]" pattern. 3RP 330-31.

A "collision event" began as defendant's car crossed into the oncoming lane of traffic. 2RP 164; 3RP 333. His car exited the roadway in a cloud of dust. 2RP 183. It traveled across the shoulder, severed a metal utility wire, and went "airborne" out of a ditch before impacting a tree and chain-link fence three or four feet above the underlying embankment. 3RP 287, 334. The "impact momentum caused the rear of the vehicle to spin around almost 180 degrees...." 2RP 166; 3RP 334-35. The car came to rest "45 degrees" up the embankment. 3RP 287. It appeared poised to roll over or slide down into the roadway. 3RP 287. The front end was "smashed" against the fence. 3RP 287. Fire personnel responded when it appeared the then smoking car might ignite. 2RP 172; 3RP 287, 298.

Officers Johnson and Stringfellow approached defendant's car on foot. 3RP 336. Defendant exited the driver-side door, "looked directly at"

them and "began sprinting westbound." 3RP 336. Johnson and Stringfellow yelled: "Stop, Police." 2RP 183; 3RP 337. Defendant disregarded their commands. 3RP 337. Johnson managed to grab defendant by the waist as he ran. 2RP 183; 3RP 338. Defendant dragged Johnson for a couple of feet in a continued effort to flee before he tripped over Johnson and fell to the ground. 2RP 185; 3RP 338. Defendant then "balled his fists" and attempted to strike Johnson. 2RP 185; 3RP 338. Stringfellow drew his taser, yelled "taser" several times, and deployed taser darts into defendant's back. 3RP 338-39. Defendant surrendered to arrest when the taser's voltage cycled. 2RP 185-90; 3RP 338-39.

Injured, and in a "state of shock," Lujan "crawled" out from the driver-side door defendant left open when he ran away. 2RP 186; 3RP 262-63, 339-40. She cried out in pain. 3RP 340. Medical personnel transported her to the hospital immobilized on a backboard. 3RP 263, 307. She was "very irritated;" there was a "strong odor of alcohol... on her person." 2RP 189. Her injuries included a "cervical strain," "various "abrasions and contusions." 3RP 264, 318. Lujan told police she asked defendant to pull over when she observed the police lights and sirens behind them. 3RP 260, 293-96.

Defendant was transported to the hospital on a stretcher. 2RP 189. An "overwhelming odor of alcohol" emanated from his person. 2RP 190.

His speech was slurred, his eyes were bloodshot and watery, and his face was pale. 2RP 190. He exhibited mood swings that swayed between cooperative and argumentative. 2RP 191. A sample of his blood was lawfully collected over his refusal to consent to a blood draw. 2RP 191-93, 195-97; 4RP 131. A subsequent analysis of the sample established defendant's blood alcohol concentration to be .17, plus or minus .015 grams per 100 milliliters; .08 is the concentration at which everyone is too affected to safely operate a motor vehicle. 2RP 106, 110-11.

At trial defendant claimed he had no memory of the incident between the time his stepfather attempted to disable his vehicle and when the police deployed the taser to facilitate his arrest. 4RP 363.

C. ARGUMENT.

1. THE OPEN-COURT EXCHANGE OF A PEREMPTORY CHALLENGE LIST ACCORDED WITH DEFENDANT'S PUBLIC TRIAL RIGHT BECAUSE THE CHALLENGES WERE EXERCISED IN OPEN COURT AND MADE A PART OF THE PUBLIC RECORD.

"The public trial right is not absolute ...." ***State v. Sublett***, 176 Wn.2d 58, 71, 292 P.3d70, 292 P.3d 715 (2012) (*citing* ***Waller v. Georgia***, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). "[I]t is [nevertheless] strictly guarded to ensure that proceedings occur outside the public courtroom in only the most unusual circumstances." ***State v.***

Leyerle, 158 Wn. App. 474, 478, 242 P.3d 921 (2010) (*citing* ***State v. Easterling***, 157 Wn.2d 167, 182, 137 P.3d 825 (2006)). The right "is found in article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution, both of which provide a criminal defendant with a public trial by an impartial jury." ***Sublett***, 176 Wn.2d 58 at 71.[5] "These provisions ensure a fair trial, foster public understanding and trust in the judicial system, and give [participants] the check of public scrutiny." ***Leyerle***, 158 Wn. App. at 479 (*citing* ***State v. Brightman***, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); ***Dreiling v. Jain***, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004)).

Alleged public trial right violations are reviewed de novo. *Id.* (*citing* ***State v. Momah***, 167 Wn.2d 140, 147-48, 217 P.3d 321 (2009); ***State v. Bone-Club***, 128 Wn.2d 254, 256, 906 P.2d 325 (1995)). Reversal and remand for new trial is the remedy when a defendant's public trial right is violated. ***State v. Leyerle***, 158 Wn. App. 474, 478, 242 P.3d 921

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[5] Article I, section 10 of Washington's Constitution also provides justice in all cases shall be administered openly, granting both the defendant and the public an interest in open, accessible proceedings. This right is mirrored federally by the First Amendment. Washington's Supreme Court historically analyzed court-closure allegations under either, article I, section 10 or article 1, section 22, analogously, although each is subject to different relief depending upon who asserts the violation. ***Sublett***, 176 Wn.2d 70, n.6 (*citing* ***Press-Enter. Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (transcript will remedy violation of public trial right asserted by member of the public); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***State v. Easterling***, 157 Wn.2d 167, 182, 137 P.3d 825 (2006) (remanding for new trial when right asserted by defendant excluded from proceeding).

(2010) (***In re Personal Restraint of Orange***, 152 Wn.2d 795, 814, 100 P.3d 291 (2004)). Whereas courtroom management decisions that do not amount to a public trial right infringing closure are reviewed for an abuse of discretion and will not be reversed unless they are manifestly unreasonable or based on untenable grounds for untenable reasons. ***State v. Lormor***, 172 Wn.2d 85, 93, 95, 257 P.3d 624 (2011); ***In re Marriage of Littlefield***, 133 Wn.2d 39, 46-7, 940 P.2d 1362 (1997); *see also* RCW 2.28.010.

a. RAP 2.5(a)(3) should be applied to right to public trial cases as it is to other constitutional rights.

Ordinarily an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is manifest and truly of constitutional dimension. ***State v. McFarland***, 127 Wn.2d 322, 332-33, 899 P.2s 1251 (1995); ***State v. Davis***, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3).[6] Such a restriction is necessary because the failure to raise an objection in the trial court "deprives the trial court of [its] opportunity to prevent or cure the error" thereby undermining the primacy of the trial court. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); ***State v. Scott***, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (the constitutional

[6] Which states: "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.

error exception in RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below). A defendant attempting to raise a claim for the first time on appeal must show both a constitutional error and prejudice to his rights. *Id.* at 926-27. A defendant can demonstrate actual prejudice on appeal by making a "plausible showing...that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* at 935.

Prior to the adoption of RAP 2.5 the Washington Supreme Court held that a closed courtroom claim could be raised on appeal even if there was no objection on this ground in the trial court. ***State v. Marsh***, 126 Wn. 142, 145-46, 217 P. 705 (1923). At common law, constitutional issues not raised in the trial court were not considered on appeal, with just two exceptions. If a defendant's constitutional rights in a criminal trial were violated, such issue could be raised for the first time on appeal. Secondly, where a party raised a constitutional challenge affecting the jurisdiction of the trial court, an appellate court could also reach the issue. ***State v. WWJ Corp.***, 138 Wn.2d 595, 601, 980 P.2d 1257 (1999) (citations omitted). These common law rules were replaced in 1976 by the adoption of the Rules of Appellate procedure, and specifically RAP 2.5(a). *Id.* at 601. As noted in ***State v. Beskurt***, 176 Wn.2d 441, 449-50, 293 P.3d 1159

(2013) (Madsen, J. concurring), when the Supreme Court decided ***Bone-Club*** in 1995, it cited to the ***Marsh*** rule without taking the impact of RAP 2.5(a)(3) into consideration. The failure to consider the impact of RAP 2.5(a)(3) has persisted in other decisions. *See e.g.,* ***Brightman***, 155 Wn.2d at 514-15. Respect for stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. ***State v. Devin***, 158 Wn.2d 157, 168, 142 P.3d 599 (2006).

Application of the *Marsh* rule is incorrect in this instance because it contradicts the Rules of Appellate Procedure. It is harmful in at least three respects: (1) the trial court is denied the opportunity to correct any error when no objection is required to preserve the issue for review; (2) it allows a defendant to participate in courtroom procedures that adhere to his or her benefit, yet claim those procedures are the basis for error in the appellate court; and (3) it diminishes public respect for the court and wastes finite judicial resources when retrial is allowed in the absence of demonstrated prejudice as the ***Marsh*** rule does not require a showing of manifest error or actual prejudice.

These harms can be seen in the case now before the Court. The trial court articulated how peremptory challenges would be exercised without objection from the defense. RP (2/6/13) 5-6, 78. The trial court then implemented that procedure in open court without objection. RP

(2/6/13) 78-69; CP 120, 168-169. Defendant exercised his peremptory challenges without the risk of offending potential jurors. *Id.* The resulting jury was seated in open court. RP (2/6/13) 78-79. There was nothing prejudicial about the peremptory challenge process. And a timely objection addressing open-court concerns might have prompted the trial court to avoid this claim by adopting an alternative procedure. RAP 2.5(a)(3) governs this issue due to defendant's failure to object to the peremptory challenge procedure observed. His failure to show an issue of constitutional magnitude that caused actual prejudice should prove an insurmountable bar to review.

b. Defendant's public trial right was observed through the open court exchange of a list of alternately exercised peremptory challenges.

The rules governing the constitutionality of an alleged courtroom closure only "come into play when" "the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." ***Sublett***, 176 Wn.2d at 71; ***State v. Lormor***, 172 Wn.2d 85, 92, 257 P.3d 624 (2011) (*citing* ***Bone-Club***, 128 Wn.2d at 257 (no spectators allowed in courtroom during suppression hearing); ***Easterling***, 157 Wn.2d at 172 (all spectators excluded during plea-bargaining). A courtroom closure implicating the public trial right must meet the standards

announced in ***Waller***,[7] or Washington's equivalent ***Bone-Club*** analysis.[8] Courtroom management decisions are reviewed for an abuse of discretion when the courtroom remains open because"[i]n addition to its inherent authority, the trial court, under RCW 2.28.010, has the power to ... provide for the orderly conduct of its proceedings." ***Lormor***, 172 Wn.2d at 93, 95.

"Neither the number of peremptory challenges nor the manner of their exercise is constitutionally secured." ***United States v. Turner***, 558 F.2d 535, 538 (1977) (*citing* ***Stilson v. United States***, 250 U.S. 583, 40 S. Ct. 28, 63 L. Ed. 1154(1919)). "[W]ide discretion is committed to the [trial] courts in setting the procedure for the exercise of peremptory challenges...[yet] [t]he method chosen ... must not unduly restrict the defendant's use of his challenges, ... and ... the defendant must be given adequate notice of the system to be used." *Id.* Washington's trial courts must also exercise their discretion in accordance with CrR 6.4(e). A defendant bears the burden of proving prejudice where the challenged

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[7] ***Waller*** provides: (1) the party seeking the closure must advance an overriding interest likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) the trial court must make findings adequate to support the closure ***Lormor***, 172 Wn.2d at 92, n.2 (*citing* ***Waller***, 467 U.S. at 48).

[8] ***Bone-Club*** requires: (1) The proponent of closure must show a compelling interest, and if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given an opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests of the proponent of the closure and the public; and (5) the order must be no broader in application or duration than necessary." ***Sublett***, 176 Wn.2d at 73, n. 8 (*citing* ***Bone-Club***, 128 Wn.2d at 285-59).

procedure substantially complies with the rules governing jury selection. *See e.g.*, ***State v. Tingdale***, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

The public trial right was not implicated by the open court exchange of the peremptory challenge list in this case.[9] Spectators had an opportunity to learn how peremptory challenges would be exercised when the process was described in open court before the strike list was exchanged. RP (2/6/13) 5-6, 78. The list was then alternately passed between the parties in the presence of the venire followed by an open-court announcement of stricken and seated jurors. RP (2/6/13) 78-79; CP 120, 168-169. The challenges could have been publicly scrutinized for any disconcerting patterns, either in court when announced, or when they were made part of the public record.

There is no showing public attendance was prohibited when the list was exchanged. The doors were not closed to all spectators as they were

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[9] The peremptory challenge list in this case was exchanged in open court so the trial court can be affirmed as properly exercising its discretion without this Court needing to draw a finer analytical line as to when a preemptory challenge is actually exercised, *i.e.*, when a party enters a selection on the alternately exchanged strike list or when the trial court announces the strike and seats the remaining jurors after giving the opponent an opportunity to object. The latter interpretation would be consistent with the fact that a party's peremptory challenge is not given effect until the challenged juror is stricken by the court. *See e.g.*, CrR 6.4(e); ***State v. Vreen***, 143 Wn.2d 923, 926, 26 P.3d 236 (2001) (privilege to strike individual jurors through peremptory challenges may be properly denied by the trial court when the challenge is based on purposeful discrimination); *See e.g.*, ***Batson v. Kentucky***, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (unconstitutional challenges based on race); ***State v. Saintacalle***, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 3946038 at 21 (Slip Op. filed Aug. 1, 2013) (Gonzalez, J., concurring)).

in ***Brightman***, 155 Wn.2d at 511, 122 P.3d 150. Defendant was not excluded from attending like the defendant in ***Easterling***, 157 Wn.2d at 172, 137 P.3d 825. None of the proceeding was conducted in an inaccessible location such as the judge's chambers as happened in ***Momah***, 167 Wn.2d at 146, 217 P.3d 321 and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009), or a hallway like the one at issue ***Leyerly***, 158 Wn. App. 482. The claimed public trial right violation could not have occurred as defendant's courtroom was not closed when peremptory challenges were exercised.

The argument defendant advances to urge reversal of his convictions in this case would require courts to find courtroom closures whenever spectators are incapable of perceiving every aspect of a trial court's publicly-conducted business with their full array of senses. *See e.g.* App. Br. at 7. That requirement was rejected by the Ninth Circuit in ***D'Aquino v. United States***, 192 F.2d 338, 365 (1951). In that case the government introduced five audio records inaudible without the earphones provided to select participants and attendees such as court, counsel, and the media. *Id.* D'Aquino argued the procedure denied her a public trial because public spectators could not hear the exhibits. *Id.* The Ninth Circuit found that claim "wholly without merit" analogizing the argument to a claim that the public trial right was violated "because certain exhibits

such as photographs, samples of handwriting, etc., although examined by the parties and by the jury were not passed around to the spectators in the courtroom." *Id.* (*Citing* ***Gilliars v. United States***, 87 U.S.App.D.C. 16, 182 F.2d 962, 972-73 (1950)).

Similar courtroom practices are common in Washington. Exhibits may be properly admitted, yet never published in a way that permits public inspection before the verdict is entered. *See e.g.*, ER 611(a);[10] ER 901(a).[11] They may even be properly withheld from the jury when used for limited purposes such impeachment under ER 608(b)[12] or refreshing witness recollection under ER 612.[13] *See also* WPIC 1.02 ("[e]xhibits may have been marked ... but they do not go ... to the jury room...."). The public quality of the proceeding is nevertheless preserved through the inclusion of those exhibits in a public record capable of subsequent review. *See e.g.*, ***Ishikawa***, 97 Wn.2d at 37. The public's right to open

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[10] ER 611(a) "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

[11] ER 901(a) "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent says."

[12] ER 608(b) "Specific instances of the conduct of a witness, for the purpose of attacking or supporting a witness credibility, other than conviction of a crime as provided by ER 609, may not be proved by extrinsic evidence ...."

[13] ER 612 "Writing Used to Refresh Memory."

criminal trials does not impose upon trial courts a duty to tailor publicly conducted proceedings to the viewing preferences of its audience.

c. Neither experience nor logic requires an open-court exchange of peremptory challenges.

"Before determining whether there was a [public trial right] violation, [reviewing courts] first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all." ***Sublett***, 176 Wn.2d at 71. "Existing case law does not hold that a defendant's public trial right applies to every component of the broad jury selection process.... Rather, [it] addresses application of the public trial right related only to a specific component of jury selection—*i.e.*, the voir dire of prospective jurors who form the venire...." ***State v. Wilson***, 174 Wn. App. 328, 338, 298 P.3d 148 (2013);[14] ***Orange***, 152 Wn.2d at 807-08 (entire voir dire closed to all spectators); ***Brightman***, 155 Wn.2d at 511 (entire voir dire closed to all spectators). ***Paumier***, ***Wise***, and the cases these opinions cite for support all involved courtroom closures during ... the voir dire component of jury selection ... The[y] did not... address or

[14] In ***State v. Paumier***, 176 Wn.2d 29, 34, 228 P.3d 1126 (2012) *and* ***State v. Wise***, 176 Wn.2d 1, 10, 228 P.3d 1113 (2012) "our Supreme court appears to have used the terms 'jury selection' and 'voir dire' interchangeably in the ***Bone-Club*** context. But [this Court] view[s] this interchangeable usage as inadvertent and not as evincing the Court's intent to treat these two terms as synonymous for precedential purposes...." ***Wilson***, 174 Wn. App. at 339-40.

purport to characterize as "courtroom closures" the entire jury selection spectrum (from initial summons to jury empanelment)...." ***Wilson***, 174 Wn. App. at 339-40; ***Lormor***, 172 Wn.2d at 93 (*citing* ***Momah***, 167 Wn.2d at 146; ***Strode***, 167 Wn.2d at 224.

The exercise of peremptory challenges[15] is a component of Washington's jury selection process that has yet to be specifically addressed in our Supreme Court's recent expansion of public trial right jurisprudence. ***Wilson***, 174 Wn. App. at 338. A determination of whether peremptory challenges must be exercised in public must come from application of the "experience and logic test." ***Sublett***, 176 Wn.2d at 141.[16]

That test requires courts to assess a closure by consideration of both history (experience) and the purposes of the open trial provision (logic). *Id.* at 73. The experience prong asks whether the practice in question has been historically open to the public, while the logic prong asks whether public access is significant to the functioning of the right. *Id.* The ***Bone-Club*** analysis must be applied before the court can close the courtroom if both prongs are answered affirmatively. *Id.*

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[15] CrR 6.4(e)(1) Peremptory Challenges Defined. A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror...."

[16] Although no opinion gathered more than four votes, eight of the nine justices sitting in ***Sublett*** approved the "experience and logic" test."

A historical review of peremptory challenges in this state reveals they do not need to be exercised in public. ***State v. Love***, ___ Wn. App. ____, 309 P.3d 1209, 1214 (No. 30809-0-III Pub. Sept., 2013). "[I]n over 140 years ... there is little evidence of public exercise of such challenges, and some evidence that they were conducted privately." *Id.* The ***Love*** court only discovered one case in which defense challenged the "use of secret—written—peremptory jury challenges" as defendant does in the instant case. 309 P.3d at 1213-14 (*quoting* ***State v. Thomas***, 16 Wn. App. 1, 13, 553 P.2d 1357 (Div. 2, 1976)). Thomas, like defendant, argued "Kitsap County's use of secret—written—peremptory jury challenges denie[d] both a fair and public trial." This Court held that claim "ha[d] no merit" due in part to the Court's" fail[ure] to see how th[at] practice, which is utilized in several counties in this state, could in any way prejudice the defendant." 16 Wn. App. at 13. This Court concluded the "manner of exercise ... rests exclusively with the legislature and the courts, subject only to the requirement of a fair and impartial jury." *Id.* (*citing* ***State v. Persinger***, 62 Wn.2d 362, 383 P.2d 497 (1963)). ***Love*** found ***Thomas*** to

be "strong evidence that preemptory challenges can be conducted in private." 309 P.3d at 1213-14.[17]

Love's analysis of the logic prong similarly revealed that public exercise of peremptory challenges is not necessary. *Id.* at 1214. The purposes of the public trial right are: to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. ***Brightman***, 155 Wn.2d at 514. "Those purposes are not furthered by a party's actions in exercising a peremptory challenge ... as [it] presents no question of public oversight." ***Love***, 309 P.3d at 1214.

Any risk that privately exercised peremptory challenges might conceal a litigant's attempt to strike potential jurors for impermissible reasons, such as race,[18] is negated when objections to challenges and the identity of stricken jurors are either disclosed in open court at trial or committed to the public record as public scrutiny could follow either form of disclosure. *See e.g.,* ***Cohen v. Senkowski***, 290 F.3d 485, 490 (2nd Cir. 2002) (*citing* ***United States v. Fontenot***, 14 F.3d 1364, 1370 (9th

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[17] fn.6: "The current statutes governing ... preemptory challenges in civil cases are found in RCW 4.44.130-.250. All of these statutes trace back to at least 1869; some are earlier. *See* Laws of 1869 §§ 212-223. CrR 6.4(e) supersedes the former statutes that provided for peremptory challenges in criminal cases. Those statutes, former RCW 10.49.030-.060 were repealed by Laws of 1984, ch. 76, § 30, and had their genesis in the Laws of 1854 §§ 102-06.

[18] *See e.g.,* ***Batson***, 476 U.S. at 86; ***Saintacalle***, *supra.*

Cir.1994)).[19] "The written record of [the peremptory challenge process consequently] satisfies the public's interest in the case and assures that all activities were conducted aboveboard, even if not within public earshot." ***Love***, 309 P.3d at 1214.

Love found further support for its reasoning through analogy to ***Sublett*** since a written record of the peremptory challenge process had been committed to public record in ***Love*** as the written jury question and response had been, pursuant CrR 6.15(f)(1),[20] in ***Sublett***. ***Love***, 309 P.3d at 1214. The ***Sublett*** Court found that rule's directive to "put the questions, answer and objections in the record" sufficiently advanced and protected the interests underlying the constitutional requirements of open courts to include the appearance of fairness...." 176 Wn.2d at 77. The

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[19] "Many ... circuits have held that if a defendant is given an opportunity to register his opinions with counsel after juror questioning and is present when the exercise of strikes is given formal effect, then his constitutional right to be present is satisfied. ***United States v. Fontenot***, 14 F.3d 1364, 1370 (9th Cir.1994); ***United States v. Gayles***, 1 F.3d 735, 738 (8th Cir.1993); ***United States v. Bascaro***, 742 F.2d 1335, 1349–50 (11th Cir.1984); cf. ***United States v. Washington***, 705 F.2d 489, 497 (D.C.Cir.1983) (finding that defendant has right to be present for juror questioning). [Some] [D]istrict courts ... have consistently held that a defendant's absence during the exercise of challenges does not violate his constitutional rights provided he is present for juror questioning and the formal reading of challenges in open court. *See, e.g.*, ***Evans v. Artuz***, 68 F.Supp.2d 188, 195 (E.D.N.Y.1999); ***Benitez v. Senkowski***, 1998 WL 668079, at 8 (S.D.N.Y. Sept.17, (1998)."

[20] CrR 6.15(f)(1) "The jury shall be instructed that any questions it wishes to ask the court ... Written questions from the jury, the court's response, and any objections thereto shall be made a part of the record...." (Emphasis added).

public filing of the peremptory challenge list in defendant's case ensured commensurate protection of the public trial right. *See* CP 120, 168-169.

Allowing parties to privately exchange a peremptory challenge list also logically serves legitimate interests in facilitating confidential communications on how peremptory challenges should be exercised. Such communications often involve the expression of protected mental impressions about the perceived merit of particular jurors or insights into the opponent's strategy, which in turn influences the way peremptory challenges are exercised. The doctrines of work product and attorney client privilege as applied to an adversarial trial proceeding warrant giving parties the ability to freely discuss and exercise peremptory challenges beyond the observation of opponents and spectators. *See e.g.*, ER 201; ER 502 (disclosures made in a proceeding waive attorney-client privilege or work product protection); CR 26(b)(4) (absolute protection from disclosure of mental impressions). Similar concern for protecting confidential information parties beneficially use to facilitate publicly conducted voir dire contributed to the Supreme Court's decision that the sealing of juror questionnaires did not constitute a courtroom closure in ***Beskurt***, 176 Wn.2d at 447.

Neither experience nor logic require peremptory challenges to be publicly exercised, at least where auxiliary safeguards of the public trial right are present to the degree observed in this case.

2. DEFENDANT'S CONVICTION FOR ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE SHOULD BE AFFIRMED BECAUSE THE CHARGING DOCUMENT CHALLENGED AS INSUFFICIENT CONTAINED THE ESSENTIAL ELEMENTS OF THAT CRIME.

Charging documents are "constitutionally adequate" when they include "all essential elements of the crime...." ***State v. Tandecki***, 153 Wn.2d 842, 846, 109 P.3d 398 (2005)(*citing* ***State v. Kjorsvik***, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991)). "[I]t has never been necessary to use the exact words of a statute in a charging document; it is sufficient if words conveying the same meaning and import are used." ***State v. Areseneau***, 75 Wn. App. 747, 753, 879 P.2d 1003 (1994); ***Kjorsvik***, 117 Wn.2d at 101-02; ***State v. Leach***, 113 Wn.2d 679, 686, 782 P.2d 552 (1989). "The primary goal of the essential elements rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." *Id.*

Where, as here, "a defendant challenges the sufficiency of the information for the first time on appeal, [reviewing courts] construe the

document liberally in favor of validity." ***State v. Williams***, __ Wn. App.___, 313 P.3d. 470 (2013) (*citing* ***Kjorsvik***, 117 Wn.2d at 97). The charging document is reviewed as a whole and in a common sense manner, first looking to determine "if ... the allegedly missing elements appear or can be implied from the words conveying the same meaning and import." ***State v. Naillieux***, 158 Wn. App. 630, 643, 241 P.3d 1280 (2010) (*citing* ***Kjorsvik***, 117 Wn.2d at 108, 111; ***State v. McCarty***, 140 Wn.2d 420, 425, 998 P.2d 296 (2000)). If the reviewing court finds an implied element, it then considers whether the Information used vague or inartful language that actually prejudiced the defendant. ***Kjorsvik***, 117 Wn.2d at 104; ***Naillieux***, 158 Wn. App. at 643.

a. The essential elements of the eluding statute were expressly included in the challenged Amended Information.

Essential elements are generally found in the statute itself. *See* ***McCarty***, 140 Wn.2d at 425; ***State v. Lorenz***, 152 Wn.2d 22, 34, 93 P.3d 133 (2004). Appellate courts interpret statutes to give effect to the legislature's intent. ***Dep't of Labor and Indus. v. Slaugh***, __ Wn.App. ___, 312 P.3d 676, 678-79 (2013) (*citing* ***City of Spokane v. Spokane County***, 158 Wn.2d 661, 672-73, 146 P.3d 893 (2006)). "If the statute's meaning is plain on its face, then the court will give effect to that plain

meaning as an expression of legislative intent." *Id.* (*citing* ***State ex rel. Citizens Against Tolls v. Murphy***, 151 Wn.2d 226, 224, 88 P.3d 375 (2004)). "Plain meaning is discerned not only from the provision in question but also from closely related statutes and the underlying legislative purpose." *Id.* If a statute is ambiguous then ... court[s] may resort to additional cannons of statutory construction or legislative history." *Id.* at 679 (*citing* ***Dep't of Ecology v. Cambell & Gwinn***, LLC, 146 Wn.2d 1, 12, 43 P.3d 4 (2004)). Courts must avoid needlessly reading statutes in a way that leads to absurd or strained consequences. *See* ***State v. Chhom***, 162 Wn.2d 451, 464, 173 P.3d 234 (2007).

RCW 46.61.024—Attempting to elude police vehicle, provides:

> "(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, **after being given a visual or audible signal to bring the vehicle to a stop**, shall be guilty of a class C felony. **The signal given by the police officer may be by hand, voice, emergency light, or siren**. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens."[21]

The challenged Amended Information charged defendant in Count I with "ATTEMPTING TO ELUDE A PURSUING POLICE VEHICE," as follows:

[21] Emphasis added to the statutory language at issue in defendant's appeal.

> "That LELDON ROY PITTMAN, in the State of Washington, on or about the 22nd day of January, 2012, did unlawfully, feloniously, and wilfully fail or refuse to immediately bring his vehicle to a stop and drive his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, **after being given a visual or audible signal to bring his vehicle to a stop** by a uniformed officer in a vehicle equipped with lights and sirens, contrary to RCW 46.61.024(1) ...."

CP 12.[22]

Defendant claims the Information is insufficient because it did not include RCW 46.61.024(1)'s second sentence, which reads:

> "The signal given by the police officer may be by hand, voice, emergency light, or siren."

Defendant is mistaken. The second sentence does not contain an essential element of attempting to elude a police vehicle, nor has an essential element *ever* been read into it by courts charged with determining that crime's elements.[23] *See* ***State v. Tandecki***, 153 Wn.2d 842, 848, 109 P.3d 398 (2005) (*citing* ***State v. Sherman***, 98 Wn.2d 53, 57, 653 P.2d 612 (1982). The ***Tandecki*** Court held: "[b]ased on clear statutory language ... to be guilty of attempting to elude, "[a] suspect must (1) willfully fail (2) to immediately bring his vehicle to a stop, (3) and drive in a manner indicating a wanton and willful disregard for the lives or property of others

[22] Emphasis added to charging language at issue in defendant's appeal.
[23] The relevant revisions of RCW 46.61.024 are: 2010 c 8 § 9065; 2003 c 101 § 1; 1983 c 80 § 1; 1982 1st ex.s. c 47 § 25.

(4) while attempting to elude police **after being signaled to stop** by a uniformed officer." *Id.*[24] The version of the statute analyzed in ***Tandecki*** only differs from the 2010 version at issue in defendant's case with respect to element (3), which replaces "wanton and willful disregard" with "reckless manner." *See Id.*; RCW 46.61.024(1)(2010 c 8 § 9065). The statute's second sentence has remained unchanged and unrecognized as an element of the crime. *See* ***Sherman***, 98 Wn.2d 53, 57; ***Naillieux***, 158 Wn. App. 644; ***State v. Duffy***, 86 Wn. App. 334, 340, 936 P.2d 444 (1997); ***State v. Stayton***, 39 Wn. App. 46, 47-48, 691 P.2d 596 (1984).

For example, "[t]he statute, RCW 46.61.024, in effect on June 9, 1982, provided:

> "Any driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton and wilful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, **after being given a visual or audible signal to bring the vehicle to a stop**, shall be guilty of a class C felony. **The signal given by the police officer may be hand, voice, emergency light, or siren**. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle."[25]

Stayton, 39 Wn. App. at 47-48 (fn. 1 "Effective June 10, 1982, the statute was amended to change "wanton and wilful" to "wanton or wilful."

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[24] Emphasis added to the statutory language at issue in defendant's appeal.
[25] Emphasis added to the language at issue in defendant's appeal.

Otherwise, the statute remained the same."). The ***Stayton*** Court, also relying on ***Sherman***, appropriately counted "a visual or audible signal" as an element while it correctly excluded the second sentence as an element. 39 Wn. App. at 49; *see also* ***State v. Treat***, 109 Wn. App. 419, 426, 35 P.3d 1192 (2001) ("The elements of eluding are: (1) a uniformed officer ... **gives a signal to stop**, (2) a driver wilfully fails to stop, and (3) the driver exhibits a wilful or wanton disregard for others in attempting to elude ....")(emphasis added); ***Naillieux*** 158 Wn. App. 644.

There are no substantive changes in the 2010 version of RCW 46.61.024(1) that elevate the second sentence to the status of an essential element. *See* ***Naillieux***, 158 Wn. App. at 644-45. Reading a new element into the statute would directly conflict with RCW 46.98.010, which provides: "[t]he provisions of this title insofar as they are substantially the same as statutory provisions repealed by this chapter, and relating to the same subject matter, shall be construed as restatements and continuations, and not as new enactments." *See also* ***Bragdon v. Abbott***, 524 U.S. 624, 645, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998)(when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretation as well). The challenged

Information was not rendered constitutionally inadequate by the omission of 46.61.024(1)'s second sentence.

Defendant's challenge to the Amended Information erroneously conflates essential language RCW 46.61.024(1) uses to denote the "visual or audible signal" element with descriptive language the statute employs to illustrate the means by which the "visual or audible signal" may, but need not, be given, *e.g.*, "by hand, voice, emergency light, or siren." *See* RCW 46.61.024(1); ***Lorenz***, 152 Wn.2d at 34-35; ***State v. Puong***, 174 Wn. App. 494, 544-45, 299 P.3d 37 (2013); ***State v. Peterson***, 174 Wn. App. 828, 849, 301 P.3d 1060 (2013) (*citing* ***State v. Smith***, 159 Wn.2d 778, 787, 154 P.3d 873 (2007)). Under the most expansive reading of the omitted second sentence's operative effect it does *no more than* define and limit the scope of "visual or audible signal" element, so it does not need to be included in the charging document. *See e.g.*, ***State v. Allen***, 176 Wn.2d 611, 630, 294 P.3d 679 (2013) (*citing* ***State v. Tellez***, 141 Wn. App. 479, 484, 170 P.3d 75 (2007)).

Defendant indirectly concedes the second sentence has the subordinate function of limiting the scope of the "signal" element. *See* Def. Br. at 11 ("nothing about the information informed Pittman of that limitation.") (Emphasis added). He nevertheless fails to acknowledge that the subordinate function of clarifying the scope of an element

categorically excludes the second sentence from classification as an essential element since elements are essential because of their primary function of demarcating crime, not elements of crime. *See e.g.* ***Lorenz***, 152 Wn.2d at 34-35; ***State v. Smith***, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (rejecting defendant's claim subalternatives of statutory alternatives need to be independently alleged).

Although the second sentence could be read as limiting the scope of the "signal" element, there are sound reasons to view it as merely illustrating sufficient means of satisfying that element. The sentence's illustrative quality is textually denoted through its use of the permissive qualifier "may" to introduce the listed delivery methods. Had the legislature intended to *require* those methods to the exclusion of others it would have logically introduced them with the directive "shall," which was added to sentences where essential elements appear. *See* RCW 46.61.024(1); ***Conway v. Washington State Dep't. of Social Services***, 131 Wn. App. 406, 416, 120 P.3d 130 (2005) ("when 'may' and 'shall' are both used in a provision, 'may' indicates a permissive action and 'shall' indicates a mandatory action ...."). The statute's plain language therefore instructs readers that the second sentence illustrates the kind of delivery methods that would satisfy the signal element.

Reading the second sentence as illustrative is also consistent with the statute's clear "purpose ... to prevent unreasonable conduct in resisting law enforcement activities" by pragmatically leaving it to the pursuing officer to select a means of giving a "visual or audible signal" best suited to the exigencies of the moment. *See* ***Treat***, 109 Wn. App. at 426 (*citing* ***State v. Hudson***, 85 Wn. App. 401, 403, 932 P.2d 714 (1997); ***Stayton***, 39 Wn. App. at 49; ***Duffy***, 86 Wn. App. at 341 ("All of the courts addressing this issue were concerned with the safety of police officers and the public if individuals were permitted to flee from ... stops... with reckless disregard.")).

Whereas, reading the statute as defendant proposes would absurdly limit the scope of acceptable "visual" and "audible" signals without any off-setting furtherance of the statute's purpose. For example, defendant's interpretation would allow a reckless driver to knowingly disregard an audible signal to stop given by a standard-traffic whistle, computerized public address system, or other similar method of delivery. *See* Def. Br. at 11. By the same reasoning a visual signal to stop given by a large red sign unambiguously projecting the word "STOP" in white letters could be just as freely disregarded by the reckless driver despite an obvious risk to police or the community. ***Chhom***, 162 Wn.2d at 464 (courts must avoid

needlessly reading statutes in a way that leads to absurd or strained consequences).

A comprehensive consideration of the statute's text and purpose reveals the generally expressed "visual or audible signal" element is not absurdly restricted by the methods of delivery listed in the statute's second sentence. The signal element could therefore be satisfied where an officer gives the statutorily required signal by any means similar to the ones listed in that sentence. *See* RCW 46.61.024(1); AMJUR Statutes § 127 (Effect of Association of Words, Phrases, and Sentences)(2013) (*citing* ***Gooch v. United States***, 297 U.S. 124, 128, 56 S. Ct. 395, 80 L. Ed. 522 (1936); ***State v. Carter***, 138 Wn. App. 350, 361, 157 P.3d 420 (2007) ("The doctrine of ejusdem generis requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest items similar to those designated by the specific terms.") (*citing* ***City of Seattle v. State***, 136 Wn.2d 693, 699, 965 P.2d 619 (1998)).

Definitional or illustrative, the second sentence does not contain an essential element. Defendant's challenge to the legal sufficiency of the charging language underlying his conviction for attempting to elude should fail.

b. The omitted methods of delivering the statutorily required audible or visual signal were at least implied in the charging document.

Under the rule of liberal construction applicable in this case: "even if there is an apparently missing element, it may be fairly implied from language within the charging document ... [so] if the necessary facts appear in any form, or by a fair construction can be found within the terms of the charge, then the charging document will be upheld on appeal." ***Kjorsvik***, 117 Wn.2d at 104. "Applying a more liberal construction on appeal discourages ... 'sandbagging' ... A potential defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before the trial when a successful objection would usually result only in an amendment of the pleading." *Id.* at 103.

The challenged Information's inclusion of the "visual or audible signal" element necessarily implied an officer could give the signal by any means capable of producing it, which included signals given "by hand, voice, emergency light, or siren." CP 12; *see* ***Williams***, 313 P.3d at 470; ***Areseneau***, 75 Wn. App. at 753-54; *see also e.g.*, ***State ex. rel. Johnson v. Lally***, 59 Wn.2d 849, 855, 370 P.2d 971 (1962) (express grants of authority conferred by statute carry with them all powers incidental or necessary to their exercise).

The sufficiency of a "signal" given by "hand, voice, emergency light, or siren, is also implied by other language included in the Information. Consistent with RCW 46.61.024(1), the Information provided that an "officer" give the statutorily required "visual or audible signal." CP 12. Officers, like all people, generally communicate by "voice" or assertive physical conduct such as "hand" gestures. *See* ER 201.[26] The Information's specific reference to "a pursuing police vehicle" "equipped with lights and sirens" easily implied the officer's "visual or audible signal" could be given by "emergency light, or siren" otherwise the presence of that equipment would prove a superfluous requirement. CP 12; RCW 46.61.024(1); ER 201; ***Tandecki***, 153 Wn.2d at 847 ("No part [of a statute] should be deemed ... superfluous unless the result of an obvious mistake or error").

Defendant appropriately does not argue the delivery methods listed in RCW 46.61.024(1)'s second sentence are incapable of being inferred from Information's inclusion of the more generally stated "visual or audible signal" element. Def. Br. at 11. Instead, he claims the omission of the second sentence rendered the charging document vague as to whether

[26] ER 201 "(b) ... A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned ... (f) Judicial notice may be taken at any stage in the proceeding."

some other delivery method, *neither listed in the second sentence nor at issue in his case* (such as "blowing a whistle") would also satisfy the "signal" element. Def. Br. at 11. That type of vagueness, if it exists, would not support the requested reversal as defendant makes no showing it prejudiced his defense in any way. *See* ***Kjorsvik***, 117 Wn.2d at 104; ***Naillieux***, 158 Wn. App. at 643.[27] His conviction for attempting to elude should be affirmed.

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[27] "The first prong of the test—the liberal construction of the charging document's language—looks to the face of the charging document itself. The second or "prejudice" prong of the test, however, may look beyond the face of the charging document to determine if the accused actually received notice of the charges he or she must have been prepared to defend against. It is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges."

A claim of prejudice would fail if it was made. The charging documents, which included two statements on probable cause, unmistakably notified defendant the visual and audible signals he failed to obey were given by the lights and sirens of pursuing police vehicles. CP 3-4, 12, 15-16; ***Tandecki***, 153 Wn.2d at 849-50(*citing* ***Kjorsvik***, 117 Wn.2d at 105-06)). The State's proposed instructions, which were filed before any testimony was presented at trial, further advised defendant of the type of signals at issue in his case as it included the descriptive statutory language defendant claims was improperly omitted from the Amended Information. CP 142 (Instruction No. 6), 143 (Instruction No. 7). Defendant consequently received express notice of the second sentence's illustrative list of legally sufficient methods of giving the statutorily required visual and audible signal at a time when the State would have been free to amend the charging document to include them. *See* CrR 2.1(d); ***State v. Ziegler***, 138 Wn. App. 804, 158 P.3d 647 (State may amend the criminal charge against a defendant during its case in chief when it does not prejudice the defense) *review denied*, 165 Wn.2d 1033, 203 P.3d (2009). Defendant is consequently incapable of plausibly claiming any prejudice grounded in an alleged inability to defend against the charge.

D. CONCLUSION.

A jury selected in open court convicted defendant of attempting to elude a police vehicle after that crime was properly alleged in the Amended Information. The jury's verdicts should be affirmed.

DATED: DECEMBER 24, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/24/13
Date Signature

PIERCE COUNTY PROSECUTOR

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