No. 91769-8

(Court of Appeals No. 71291-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA CARGILL,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Joshua Cargill, defendant and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Cargill seeks review of the Court of Appeals decision affirming his Snohomish County Superior Court conviction for eluding a pursuing police vehicle. State v. Joshua O'Hara Cargill, No. 71291-8-I. A copy of the Court of Appeals decision, dated May 4, 2015, is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amend. VI, XIV. Mr. Cargill was convicted of attempting to elude a pursing police vehicle even though the State did not prove beyond a reasonable doubt that he drove "in a reckless manner while attempting to elude a pursuing police vehicle" as required by RCW 46.61.024. Should Mr. Cargill's conviction for attempting to elude a pursuing police vehicle be reversed and dismissed in the absence of proof of an essential element of the crime?

2. The accused has the constitutional right to a fair trial, and a prosecutor's improper arguments may violate that right. U.S. Const. amend. XIV; Const. art. I, § 22. In closing argument, the prosecutor argued facts not in evidence and misrepresented the facts by using words that appealed to the juror's passions and prejudices. Did the prosecutor commit flagrant and ill-intentioned misconduct requiring reversal of Mr. Cargill's conviction?

3. The accused's Sixth Amendment right to counsel includes the right to effective assistance of counsel. Mr. Cargill's trial attorney did not object when a police officer testified that Mr. Cargill was driving recklessly in violation of the trial court's order, failed to object when the officer estimated how many cars pulled to the side of the road, and failed to object when the prosecutor offered his opinion that Mr. Cargill's driving was "absolutely reckless." Was Mr. Cargill's constitutional right to effective assistance of counsel was violated?

D. STATEMENT OF THE CASE

Arlington Police Officer Michael Sargent was alerted by an off-duty detective that Joshua Cargill, who had outstanding warrants for his arrest, was driving a green Honda on 172nd Street. 1RP 31-33, 36, 38-

41.[1] Officer Sargent found the Honda and signaled the driver to pull over using the emergency lights on his marked SUV. 1RP 37-38, 40-41. Mr. Cargill promptly stopped the Honda on the shoulder of 51st Street. 1RP 42-43, 50-51. It was the afternoon, and traffic was congested. 1RP 40, 41-42.

Officer Sargent saw Mr. Cargill at the wheel and a woman in the passenger seat, and he approached the Honda with his gun drawn. 1RP 39, 44-45. The uniformed officer told Mr. Cargill that he was under arrest and ordered him to turn the engine off and put his hands out the window. 1RP 38, 45-46. When Mr. Cargill pointed out that there was a child in the backseat, Officer Sargent holstered his weapon. 1RP 46. Mr. Cargill then drove away northbound. 1RP 46. According to the officer, Mr. Cargill was driving fast and was using the southbound lane. 1RP 46-47.

Officer Sargent's supervisor told him to "terminate" any pursuit of the Honda. 1RP 48-49. The officer slowly followed Mr. Cargill for about 20 blocks in order to observe his driving and direction of travel.

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[1] The verbatim report of proceedings contains five volumes. The verbatim report of the trial referred to by the volume number provided by the court reporter:
1RP = November 25, 2013 (marked Vol. I)
2RP = November-26, 2013 (marked Vol. II)
Other volumes are not cited.

1RP 49-50. Officer Sargent opined that Mr. Cargill was driving at a "high rate of speed" and "was weaving in and out of lanes" on the two-lane road. 1RP 43, 50. The officer stopped and checked with motorists who had pulled to the side of the road to make sure there had not been any accidents. 1RP 50. No one reported any injury or accidents. 1RP 53.

A jury convicted Mr. Cargill of attempting to elude a pursuing police vehicle with the aggravating factor that one or more people, other than the defendant or the officer, were threatened with physical injury or harm by the defendant's actions. CP 164; RCW 46.61.024(1); RCW 9.94A.834.

On appeal, Mr. Cargill argued that the State did not prove beyond a reasonable doubt that he refused or failed to immediately stop after the officer signaled him to stop, an essential element of attempting to elude a pursuing police vehicle. Brief of Appellant at 5-11 (hereafter BOA); Reply Brief of Appellant at 1-4 (hereafter Reply). The Court of Appeals rejected this argument, concluding that Mr. Cargill was guilty because he left after stopping his truck, even though the officer did not pursue Mr. Cargill. Slip Op. at 3-5.

Mr. Cargill also argued that the prosecutor committed misconduct in closing argument by arguing facts not in evidence and exaggerating the evidence in a prejudicial manner. BOA at 12-19; Reply Brief at 4-8; Statement of Additional Grounds for Review at 1-2 (hereafter SAG). The Court of Appeals, however, concluded that the prosecutor's statements were reasonable inferences from the evidence. Slip Op. at 5-7.

In his Statement of Additional Grounds for Review, Mr. Cargill argued that his attorney did not provide effective assistance of counsel. SAG at 2-3. The Court of Appeals concluded that Mr. Cargill did not show that his attorney's performance was deficient or resulted in prejudice. Slip Op. at 8.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **This Court should accept review to interpret the attempting to elude a pursuing police vehicle statute because the State did not prove beyond a reasonable doubt that Mr. Cargill drove in a reckless manner while attempting to elude a pursuing police vehicle and the Court of Appeals decision ignores the language of the statute.**

Mr. Cargill stopped his vehicle immediately after Officer Sargent gave the signal to stop. When Mr. Cargill drove away, the officer did not pursue him. Thus, the State did not prove beyond a

reasonable doubt that Mr. Cargill recklessly drove a vehicle while attempting to elude a pursuing police vehicle. The Court of Appeals decision affirming Mr. Cargill's conviction incorrectly construes the eluding statute and raises a constitutional issue. RAP 13.4(a)(3), (4).

The Due Process Clause protects the accused from conviction unless the State proves every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. The attempting to elude a pursuing police vehicle statute, RCW 46.61.024, reads:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his 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 the signal shall be in uniform and his vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1).

Three essential elements of the crime "must occur in sequence." State v. Stayton, 39 Wn. App. 46, 49, 691 P.2d 596 (1984), rev. denied, 103 Wn.2d 1026 (1985); accord Seth A. Fine & Douglas J. Ende, 13 Wash. Prac., Criminal Law With Sentencing Forms, § 2204 (2013-14 ed). First, a uniformed police officer with a vehicle equipped with

lights and sirens must give a signal to a driver to bring the vehicle to a stop. Second, the driver must willfully fail to immediately stop. Finally, the driver must drive his vehicle in a reckless manner "while attempting to elude a pursuing police vehicle." RCW 46.61.024(1); see Stayton, 39 Wn. App. at 49-50 (interpreting prior version of RCW 46.61.024(1)); 13 Wash. Prac., § 2204.

An essential element of the crime is thus that the defendant drove "in a reckless manner while attempting to elude a pursuing police vehicle." RCW 46.61.024(1). In interpreting a statute, this Court looks first to its plain language. State v. K.L.B., 180 Wn.2d 735, 739, 328 P.3d 886 (2014); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Courts refer to principles of statutory construction only if the statute is ambiguous. K.L.B., 180 Wn.2d at 739; State v. Armedariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Terms not defined by statute are given their common law or ordinary meaning. State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). A non-technical term may be given the definition found in a dictionary. Id. The terms "pursuing" and "police vehicle" are not defined in the motor vehicle code, RCW 46.06, and thus are given their commonly accepted meaning.

"Pursue" means to chase or follow something, usually in order to catch it. Webster's Third New International Dictionary Unabridged, p. 1848 (1993) ("To follow with enmity; to follow usually determinedly in order to capture, kill or defeat.") Dictionary.com Unabridged[2] (based upon the Random House Dictionary) ("to follow in order to overtake, capture, kill, etc.). Black's Law Dictionary similarly defines "pursuit" as "the act of chasing to overtake or apprehend." Black's Law Dictionary, p. 574 (Second Pocket Ed. 2001). Using the common meaning of pursuit, the evidence shows that Mr. Cargill was not being pursued by a police car when he drove in a reckless manner and thus did not do so in order to elude a pursuing police vehicle.

The Court of Appeals opinion does not mention the statutory language in its opinion. Instead, the Court of Appeals relies on a Division Three case addressing an eluding conviction under Former RCW 46.61.024, State v. Treat, 109 Wn. App. 419, 426-27, 35 P.3d 1192 (2001). Slip Op. at 4-5. The Court of Appeals, however, misreads the facts of Treat.

[2] Found at http://dictionary.reference.com/browse/puruse?s=ts (last viewed 5/28/15).

In Treat, the defendant was first pursued by Kootenai County sheriff's deputies but was able to evade them in his 1984 Datsun pickup. Treat, 109 Wn. App. at 422. Spokane County deputies later saw the pickup and pulled behind it again. Id. When the Datsun sped away, the Spokane deputy signaled it to stop, but the Datsun did not stop for approximately a quarter-mile. Id. at 423.

When the pickup stopped, the two Spokane deputies got out of their patrol car and approached the driver. Treat, 109 Wn. App. at 423. The Datsun rolled towards the deputies three or four times and then accelerated rapidly at one of them, who was afraid he would be run over. Id. The Datsun then drove away, but crashed after the deputies shot out its tires. Id. The driver, however, escaped on foot. Id.

Treat argued that the State did not prove that he willfully failed to stop, claiming it was reasonable to wait for a quarter of a mile before pulling over and that his subsequent attempt to get away did not establish eluding because the officer were out of their car. Treat, 109 Wn. App. at 426. The Treat Court rejected the arguments because there was no evidence that Treat could not stop sooner and because the eluding statute "does not require that the 'pursuing police vehicle' remain moving at all times." Id. at 426-27.

In contrast, Mr. Cargill stopped his car immediately upon being signaled to do so; he did not continue to drive like Treat. In addition, Mr. Cargill did not argue that he was not eluding because the officer was out of his patrol car. Mr. Cargill stopped in response to the officer's signal to stop, but the officer did not pursue Mr. Cargill when he drove away. The Treat case thus does not support the Court of Appeals decision affirming Mr. Cargill's conviction.

Officer Sargent made it clear that he was not attempting to apprehend Mr. Cargill as he drove away. 1RP 49-50, 53-54. He testified that when he broadcast his situation over police radio, his sergeant immediately responded and stated "terminate." 1RP 49. When asked what that meant, the officer explained, "Terminate means to stop a pursuit." 1RP 49. Officer Sargent complied. 1RP 54. The officer was no longer pursuing Mr. Cargill, and he therefore was not driving in a reckless manner "while attempting to elude a pursuing police vehicle" as required by RCW 46.61.024.

Relying on Treat, the Court of Appeals failed to address the language of the eluding statute. The Court of Appeals' lack of attention to the language of the eluding statute is reflected in its incorrect statement of the elements of attempting to elude a police vehicle. Slip

Op. at 4. The statute was amended in 2003 to require that the defendant drive in a "reckless manner," which is defined as "a rash or headless manner, indifferent to the consequences." State v. Ridgley, 141 Wn. App. 771, 780-81, 174 P.3d 105 (2007); State v. Ratliff, 140 Wn. App. 12, 14-15, 164 P.3d 516 (2007); see State v. Roggenkamp, 153 Wn.2d 614, 618, 106 P.3d 196 (2005) (addressing same phrase in vehicular homicide and vehicular assault statutes); CP 112 (Instruction 8). The Court of Appeals recitation of the elements of the former statute – requiring that "the driver exhibits a willful or wanton disregard for others" – is incorrect. Slip Op. at 4 (quoting State v. Hudson, 85 Wn. App. 401, 403, 932 P.2d 714 (1997) and Former RCW 46.61.024).

Mr. Cargill initially responded promptly to the officer's signal to stop his car. When Mr. Cargill drove away before the arrest was effectuate, no police vehicle pursued him. This Court should accept review to interpret the language of RCW 46.61.024 and determine if the State proved all essential elements of the crime beyond a reasonable doubt. RAP 13.4(b)(3), (4).

2. **This Court should accept review because the prosecutor misstated the facts of the case in closing argument violating Mr. Cargill's constitutional right to a fair trial.**

A prosecutor's dual role requires him to both prosecute those who appear to have violated the law and to ensure that the accused receives a fair trial. State v. Walker, 182 Wn.2d 463, 476-77, 341 P.3d 976 (2015); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). While the prosecutor may argue reasonable inferences from the evidence, he may not alter or misstate that evidence or argue in a manner that inflames the prejudices of the jury. Walker, 182 Wn.2d at 478; Monday, 171 Wn.2d at 678; State v. Belgarde, 110 Wn.2d 504, 507-10, 755 P.2d 174 (1988). In Mr. Cargill's case, the prosecutor deputy prosecuting attorney exaggerated and misstated the evidence during closing argument, thus prejudicing Mr. Cargill's case. This Court should accept review of this important constitutional issue and provide further guidance to the participants in the criminal justice system. RAP 13.4(b)(3), (4).

A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v.

United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935); Walker, 182 Wn.2d at 476-77. When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. In re Personal Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); Monday, 171 Wn.2d at 676; State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

The deputy prosecuting attorney exceeded the scope of proper closing argument by misstating the evidence and appealing to the juror's passions or prejudices in four ways. First, the prosecutor told the jury that Mr. Cargill knew he had warrants for his arrest and intentionally stopped his car so he could escape when the police officer got out of his patrol car, using his passengers "as a shield." 2RP 68. The Court of Appeals held that this argument was a reasonable inference from the evidence presented at trial. Slip Op. at 6. None of the evidence produced by the State, however, supports an inference that Mr. Cargill was aware of arrest warrants or planned to escape when he stopped in response to the officer's signal to stop. In fact, when told he was under arrest, Mr. Cargill asked the officer why. 1RP 45-46.

The prosecutor also told the jury that Mr. Cargill was driving so fast that no one could catch him, when in fact no one tried to catch Mr. Cargill. 1RP 49-50, 56, 2RP 78. Although raised in Mr. Cargill's brief, the Court of Appeals did not address that comment. BOA at 17; Slip Op. at 6-7.

In addition, the prosecutor used language designed to appeal to the juror's passion and prejudice to improperly exaggerate the evidence against Mr. Cargill. The prosecutor twice referred to a "path of destruction" caused when Mr. Cargill drove away. 2RP 71, 79. The evidence, however, shows that no one was injured and no property damaged when cars pulled off the road; there was no destruction. 1RP 50, 53. And the prosecutor referred to the child in Mr. Cargill's vehicle, who was two or three years old, as a "baby," thus arousing prejudice against people who endanger young children. 1RP 46; 2RP 72. The Court of Appeals concluded these references were proper. Slip Op. at 6-7.

This was a short jury trial with only two witnesses. The prosecutor misstated the evidence and used prejudicial words that appeared to the jurors' prejudices throughout his brief closing remarks.

This continuing misconduct was flagrant and ill-intentioned, and there is a substantial likelihood that Mr. Cargill's case was prejudiced.

In Walker, this Court recently addressed prosecutorial misconduct in a case where the deputy prosecutor altered evidence and showed it to the jury in a power point presentation that accompanied his closing argument. Walker, 182 Wn.2d at 471-74. Although defense counsel did not object to the slides, the Walker Court found the misconduct so flagrant and ill-intentioned that no instruction would have cured the prejudice. Id. at 477-81. While the misconduct in Mr. Cargill's case is not as egregious as that addressed in Walker, it was improper and demonstrates the need for this Court to continue to provide guidance to the participants in our criminal justice system about prosecutorial misconduct and ensure that defendant are provided fair trials. This Court should accept review of this important constitutional issue. RAP 13.4(b)(3), (4).

3. **Mr. Cargill's constitutional right to effective assistance of counsel was violated.**

Because of defense counsel's critical role in the adversarial process, the right to counsel necessarily includes the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L.

Ed. 2d 674 (1984); United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); State v. A.N.J., 168 Wn.2d 91, 96-98, 225 P.3d 956 (2010). The right to effective counsel is not fulfilled simply because an attorney is present in court; the attorney must actually assist the client and play a role in ensuring the proceedings are adversarial and fair. Strickland, 466 U.S. at 685; A.N.J., 168 Wn.2d at 98.

The trial court granted Mr. Cargill's in limine motion to prohibit the State's witness from testifying that Mr. Cargill drove recklessly. 1RP 21 (witnesses could describe their observations but could not use the term "reckless driving"). Trial counsel, however, did not object when Officer Sargent testified that he informed dispatch that Mr. Cargill was "recklessly driving southbound on 51st." 1RP 48. In his Statement of Additional Grounds for Review, Mr. Cargill argued that his attorney was ineffective because she did not object to this testimony. SAG at 2-3. He also argued that counsel did not object when the prosecutor invited Officer Sargent to speculate about how many cars pulled to the side of the road or to the prosecutor's argument that Mr. Cargill was "absolutely reckless" when forced those cars off

the road. SAG at 2 (citing 1RP 50-51; 2RP 78). The Court of Appeals rejected Mr. Cargill's argument. Slip Op. at 7-8.

Mr. Cargill had the constitutional right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I § 22. This Court should accept review of this constitutional issue. RAP 13.4(b)(3).

F. CONCLUSION

Mr. Cargill asks this Court to accept review of the Court of Appeals decision affirming his conviction for attempting to elude a pursuing police vehicle.

DATED this 28th day of May 2015.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS DECISION TERMINATING REIVEW

May 4, 2015

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

STATE OF WASHINGTON, Respondent, v. JOSHUA O'HARA CARGILL, Appellant.	)	No. 71291-8-I UNPUBLISHED OPINION FILED: May 4, 2015

VERELLEN, A.C.J. — Evidence is sufficient to support a conviction for attempting to elude a pursuing police vehicle when, as here, after an initial brief stop, the defendant drove away upon being approached by the officer and told to turn off the vehicle and not to leave. Accordingly, we affirm.

FACTS

On June 28, 2013, Joshua Cargill had two outstanding warrants for his arrest. On that day, an off-duty Arlington detective who was aware of the outstanding warrants saw Cargill at a Walmart store in Arlington. The detective called an on-duty officer, Officer Sargent, and advised him of Cargill's location and the outstanding warrants.

Sargent confirmed the two outstanding warrants and located Cargill driving eastbound on 172nd Street approaching the intersection of 51st Avenue. Cargill was traveling behind a large motor home. Sargent was traveling westbound and activated his emergency lights when he saw Cargill. Sargent made a U-turn and pulled in directly behind Cargill. The intersection light was red, and Cargill was stopped behind the motor

home. When the light turned green, Cargill turned right onto 51st and pulled off to the side.

Sargent pulled in behind Cargill and exited his car. He approached Cargill's car with his gun drawn. The driver side window was down and there was a woman in the front passenger seat. Sargent announced to Cargill that he was under arrest. Cargill responded, "No," and revved his car engine.[1] Sargent said, "Don't do it," meaning don't flee.[2] Sargent then said, "Turn your vehicle off and put your hands out of the window."[3] Cargill said, "Are going to shoot me? There's a kid in the back seat."[4] Once Sargent saw that there was a child approximately two or three years old in the back seat, he holstered his gun. Cargill then put the car into gear and drove off at a high rate of speed. Cargill drove southbound into the northbound lane of 51st Avenue. Traffic was very congested, and several cars had to drive off the road to avoid a collision. Cargill weaved in and out of the northbound and southbound lanes at a high rate of speed.

Sargent notified dispatch that Cargill had fled with passengers in the car and that he was driving recklessly southbound on 51st Avenue. Due to safety concerns, Sargent was advised to terminate a pursuit. Sargent then followed Cargill in his car at a safe speed and confirmed to other police units Cargill's direction of travel. Sargent also checked on motorists that had pulled over to avoid colliding with Cargill's car. Sargent eventually lost sight of Cargill and was unable to arrest him at that time.

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[1] Report of Proceedings (RP) (Nov. 25, 2013) at 45.

[2] Id.

[3] Id.

[4] Id. at 46.

The State charged Cargill with one count of attempting to elude a pursuing police vehicle. Cargill moved to dismiss before trial and also at the close of the State's case for insufficient evidence, but the trial court denied the motions. The jury was instructed on the lesser included charge of failure to obey an officer, but found Cargill guilty as charged. The jury also found by special verdict that one or more persons was threatened with physical injury or harm by Cargill's actions during the commission of the crime, an aggravating factor. The court imposed a sentence of 29 months and 1 day of confinement.

Cargill appeals.[5]

ANALYSIS

Cargill contends the evidence is insufficient to support his conviction because there was no evidence that he failed to stop when signaled to pull over or that he drove recklessly while being pursued by an officer. We disagree.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.[6] "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."[7] "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant."[8] Circumstantial evidence and direct evidence are

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[5] The State also filed a notice of cross appeal, but the State's briefing does not identify any assignments or error or provide argument on any cross appeal issues. Thus, we consider the cross appeal abandoned.

[6] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[7] Id.

[8] Id.

deemed equally reliable.[9] We leave credibility determinations to the trier of fact and will not review them on appeal.[10]

"The purpose of the eluding statute is to prevent unreasonable conduct in resisting law enforcement activities."[11] To convict Cargill of the crime of attempting to elude, the State had to prove that "(1) a uniformed officer in a marked vehicle gives a signal to stop, (2) a driver willfully fails to stop, and (3) the driver exhibits a willful or wanton disregard for others in attempting to elude the police vehicle."[12]

Cargill contends that the State failed to prove that he failed or refused to immediately bring the vehicle to a stop because the undisputed evidence showed that he pulled over as soon as he was able. But the evidence also shows that as soon as the officer approached him, he revved his engine, distracted the officer by alerting him there was a child in the back, and drove off. He did so despite the officer's instruction to turn off the car and that he not flee. Viewing this evidence in the light most favorable to the State and drawing all reasonableness inferences against Cargill, this conduct showed that he willfully failed to stop when signaled by a uniformed officer to do so.

Similar evidence was held to be sufficient in State v.Treat.[13] There, the defendant stopped briefly after being signaled to pull over, but when the officers exited their vehicle and approached him, he accelerated toward one of the officers and then

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[9] State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

[10] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

[11] State v. Treat, 109 Wn. App. 419, 426, 35 P.3d 1192 (2001).

[12] State v. Hudson, 85 Wn. App. 401, 403, 932 P.2d 714 (1997); RCW 46.61.024.

[13] 109 Wn. App. 419, 426-27, 35 P.3d 1192 (2001).

drove away.[14] The court concluded that "Mr. Treat was attempting to elude a pursuing police vehicle even though it had stopped and the deputies got out."[15]

Cargill further contends that the State failed to prove that he drove recklessly while being pursued by a police car, noting that the officer conceded that he was instructed to terminate pursuit once Cargill drove off and that he simply followed Cargill. Cargill appears to concede that his driving thereafter was reckless and focuses instead on the lack of pursuit during the reckless driving.[16] But as the court recognized in Treat, "[W]hile the eluding statute requires that the defendant elude a 'pursuing police vehicle,' it does not require that the police vehicle remain moving at all times."[17]

As discussed above, Cargill was attempting to elude a pursuing police vehicle when he drove off after the officer told him he was under arrest, to turn off his car, and not to flee.[18] The evidence was sufficient to support the conviction.

Cargill next contends that he was denied a fair trial by the prosecutor's improper comments during closing argument. We disagree.

On a claim of prosecutorial misconduct, the defendant bears the burden of proving that the prosecutor's conduct was improper and prejudicial.[19] Where, as here, the defendant fails to object at trial, the defendant must show that the misconduct was

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[14] Id. at 426.

[15] Id. at 427.

[16] "The only reckless driving in this case occurred when Mr. Cargill was not being pursued by a police car." Br. of Appellant at 8.

[17] 109 Wn. App. at 427.

[18] Additionally, when the officer got back in his car and continued to follow Cargill, he activated his emergency lights. Thus, even though from the officer's standpoint, he was technically not "in pursuit," a reasonable inference to be drawn was that Cargill understood the officer was signaling him to stop.

[19] State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

so flagrant and ill-intentioned that the resulting prejudice could not have been cured with a limiting instruction.[20] We determine the effect of any improper conduct by examining "'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'"[21]

Cargill contends that the prosecutor misstated the evidence in a manner that prejudiced his case. Specifically, he contends that the prosecutor improperly speculated about his intent by arguing that Cargill knew he had warrants before he was stopped, that he only stopped so he could escape and avoid arrest when the officer got out of his car, and that he used the child in his car as a shield. We disagree.

Prosecutors are afforded wide latitude in making arguments to the jury and are permitted to draw reasonable inferences from the evidence.[22] The prosecutor's argument was a reasonable inference to be drawn from the evidence. From the moment he pulled over, Cargill's conduct evidenced such an intent: he kept the engine running after pulling over, revved the engine once the officer exited the police car and approached him, refused to turn off the car when ordered to do so, and replied, "No," when told not to leave.[23] When he saw the officer's gun drawn, he called attention to the child in the back seat of the car and, as soon as the officer holstered the gun, he drove off.

Cargill further contends that the prosecutor improperly appealed to the passion of the jury by using the phrase "path of destruction" to describe his flight from the officer,

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[20] Id. at 760-61.

[21] State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551, 555 (2011) (quoting State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

[22] State v. Anderson, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009).

[23] RP (Nov. 25, 2013) at 45.

and by referring to the child in his car as "a baby."[24] Again, this was reasonable argument based on the evidence. Testimony at trial established that cars were split along the roadway, "hugging the ditch" after having to pull off to the side to avoid colliding with Cargill, literally creating a path for the fleeing vehicle.[25] Although no actual destruction occurred, the testimony described a situation where several cars were in danger of a head-on collision with Cargill in heavy traffic.

Cargill also fails to show that referring to the child as a baby was unduly prejudicial. While referring to a two- to three-year-old child as "a baby" is technically inaccurate, the actual age of the child was in evidence before the jury. In any event, Cargill fails to show that it is any less prejudicial to argue that he was endangering a toddler. Viewed in context, the prosecutor properly argued that there were other lives endangered by Cargill's conduct, including the child in the back seat. Cargill fails to demonstrate that the prosecutor committed prejudicial misconduct.

Statement of Additional Grounds

In a statement of additional grounds, Cargill raises claims of additional prosecutorial misconduct and ineffective assistance of counsel, both of which lack merit. He first contends that the prosecutor committed misconduct because during the officer's testimony and closing argument, the State used the term "reckless driving." But because Cargill did not object at trial and fails to show flagrant and ill-intentioned misconduct resulting in prejudice, the claim of prosecutorial misconduct fails. As noted

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[24] Br. of Appellant at 16.

[25] RP (Nov. 25, 2013) at 48. The officer testified that he saw "[n]umerous cars splitting the road, having to drive off onto the shoulder to avoid [a] collision," and that the shoulder was very limited and bordered a ditch. Id. at 47.

above, the issue at trial was not the recklessness of the driving but whether he failed to stop and whether the police vehicle was pursuing him during the reckless driving.

Cargill further claims his attorney was ineffective by failing to object to the State's use of the term "reckless" and by failing to question the officer if the several cars pulled off the road was simply "a chain reaction" upon seeing other cars already pulled over rather than being caused by his driving.[26] Cargill fails to show that his attorney's performance was deficient and resulted in prejudice. As discussed above, Cargill fails to show any prejudicial effect of the State's use of the term "reckless," and counsel's choice to not ask a question that was based on speculation was legitimate trial strategy. Accordingly, his claim of ineffective assistance of counsel fails.

We affirm the judgment and sentence.

WE CONCUR:

Cox, J.

Becker, J.

[26] Statement of Additional Grounds at 3.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71291-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

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Date: May 28, 2015