NO. 46632-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY TOLMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 14-1-02363-6

BRIEF OF RESPONDENT

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

1. Should this court uphold the jury's verdict on defendant's conviction for attempting to elude when it is supported by sufficient evidence?
2. Was the Amended Information charging defendant with attempting to elude sufficient?
3. Does the Amended Information include sufficient facts to protect against double jeopardy?
4. Is WPIC 4.01 a correct statement of the law, especially given that the Supreme Court has ordered its use in trial?

B. STATEMENT OF THE CASE.

1. Procedure

On June 18, 2014, Anthony Joshua Tolman ("defendant") was charged by Information in Pierce County Superior Court cause number 14-1-02363-6 with one count of attempting to elude a pursuing police vehicle, one count of unlawful possession of a stolen vehicle, one count of making or possessing motor vehicle theft tools, and one count of driving while in suspended or revoked status in the first degree. CP 71-72. On August 28, 2014, the State filed an Amended Information adding one count of possessing stolen property in the second degree and adding an

enhancement to the attempting to elude alleging that the defendant endangered one or more person during the elude based on RCW 46.61.024(1). CP 8-10.

The case was called for trial on August 28, 2014. 8/26/14 RP 7. At trial, the State called Deputy Scott Wheeler, 8/26/14 RP 41-104, Deputy Levi Redding, 8/26/14 RP 105-130, Deputy Jerry Johnson, 8/26/14 RP 131-143, Deputy Don Carn, 8/27/14 RP 154-172, Deputy Michael Rawlins, 8/27/14 RP 173-191, Detective Ryan Salmon, 8/27/14 RP 191-2015, Officer Bradley Paulson 8/27/14 RP 205-211, Detective Nathaniel Rossi, 8/27/14 RP 212-237, Li Ning, 8/27/14 RP 237-240, Eli Gonzalez, 8/27/14 RP 240-257, and Juan Blanco, 8/27/14 RP 257-269. Prior to closing arguments, the trial court dismissed the charge of making or possessing motor vehicle theft tools. 8/28/14 RP 284-285. Defendant was convicted of all remaining charges, and the jury found the aggravating circumstance for charge of attempting to elude. 8/28/14 RP 318-321; CP 4, 5, 6, 7, 8. On September 2, 2014, defendant was sentenced to 57 months in prison. CP 47-59. Defendant timely appealed. CP 65.

2. Facts

On June 17, 2014, Deputy Scott Wheeler was on routine patrol when he was notified by the King County Sheriff's Department that a stolen vehicle, specifically a black Nissan Sentra, was in the vicinity.

8/26/14 RP 51. Deputy Wheeler located the car driving westbound on Emerald and confirmed it was the stolen car. 8/26/14 RP 54. Deputy Wheeler turned on his emergency lights to signal the vehicle to stop. 8/26/14 RP 57.

Instead of stopping, defendant accelerated away and ran a stop sign. 8/26/14 RP 58. Defendant, traveling at around 50 MPH, drove down the middle of a Safeway parking lot, hitting a shopping cart rack. 8/26/14 RP 61. This collision damaged the vehicle's right front tire, causing it to deflate. 8/26/14 RP 61. Defendant got back on the road traveling southbound on Meridian. 8/26/14 RP 64. Because of the flat tire, defendant was driving the car on its rim and sparks were coming off the road. 8/26/14 RP 68. The car was also weaving back and forth. 8/26/14 RP 68. Defendant was traveling over 50 MPH in a 35 MPH zone and driving in and out of the lane of travel and the center lane. 8/26/14 RP 68.

At 36th street, Deputy Wheeler noted another vehicle in the turn lane. 8 26/14 RP 69. Defendant went around the car by driving into oncoming traffic. 8/26/14 RP 69-70. Defendant continued crossing into oncoming the oncoming traffic lane. 8/26/14 RP 72.

Deputy Wheeler caught up to the vehicle and observed defendant as the driver. 8/26/14 RP 73-74. Soon after, defendant pulled into a car

dealership parking lot, exited the car, and took off running. 8/26/14 RP 77. During a K-9 track of the area, officers located a jacket with defendant's wallet and iPhone in it. 8/26/14 RP 87. The wallet contained defendant's Washington ID card. 8/26/14 RP 87. Also in the wallet was a stolen Discover credit card with the name Li Ning on it. 8/26/14 RP 92.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. ***State v. Lopez***, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" ***State v. Brockob***, 159 Wn.2d 311, 336, P.3d 59 (2006) (*quoting* ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, sufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential

elements of the crime beyond a reasonable doubt. ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (quoting ***State v. Myers***, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, determinations of credibility are for the fact finder and are not reviewable on appeal. ***Brockob***, 159 Wn.2d at 336; ***State v. Locke***, 175 Wn. App. 779, 788-89, 307 P.3d 771, 776 (2013). In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99, 101 (1980). In addition, a jury can infer the specific criminal intent of a criminal defendant where it is a matter of logical probability. *Id.*

To convict defendant of attempting to elude a pursuing police vehicle, the State proved that defendant unlawfully, feloniously, and willfully failed or refused 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. RCW 46.61.024(1). Defendant challenges only the sufficiency of the reckless manner of the driving. BOA 7.

There was sufficient evidence for a rational trier of fact to determine that defendant drove in a reckless manner. Jury instruction number 10 defined "reckless manner" as "to drive in a rash or heedless manner, indifferent to the consequences. CP24. While defendant argues that defendant exhibited "imperfect driving," his driving rose to the level of "reckless manner."

Defendant began the crime by accelerating away from Deputy Wheeler and running a stop sign. 8/26/14 RP 58. Defendant, traveling at around 50 MPH in a 35 MPH zone, next drove down the middle of a Safeway parking lot, hitting a shopping cart rack. 8/26/14 RP 61. This collision damaged the vehicle's right front tire causing it to start to deflate. 8/26/14 RP 61. The vehicle then got back on the road traveling southbound on Meridian. 8/26/14 RP 64. Because of the flat tire, defendant was driving the car on its rim and sparks were coming off the road and the car was weaving back and forth. 8/26/14 RP 68. Defendant, still traveling about 15 MPH over the speed limit, was driving in and out of the lane of travel and the center lane. 8/26/14 RP 68.

At 36th street, Deputy Wheeler noted another vehicle in the turn lane. 8 26/14 RP 69. Defendant went around the car by driving into

oncoming traffic. 8/26/14 RP 69-70. Defendant continued crossing into oncoming the oncoming traffic lane. 8/26/14 RP 72. All of the above driving indicates that defendant's driving was done in a rash or heedless manner indifferent to the consequences. There is sufficient evidence to uphold defendant's conviction.

The fact that this driving occurs at 2:00 a.m. does not make a difference. "The State need not prove that anyone else was endangered by the defendant's conduct, or that a high probability of harm actually existed." ***State v. Whitcomb***, 51 Wn. App. 322, 327, 753 P.2d 565, 568 (1988). In ***Whitcomb***, the Court noted that Whitcomb's driving of an ATV on a public road at night, speeding and running a red light was sufficient evidence to support the charge of attempting to elude a police vehicle. *Id.* at 239. Defendant's driving in the case at bar is similar to ***Whitcomb***, arguably more dangerous due to the flat tire.

Defendant's driving was also found to have endangered another person on the road as evidenced by the jury's special verdict. Defendant argues that there was no evidence that this car was occupied, and even if there was evidence of an occupant, there was no proof that defendant's conduct threatened this person with physical injury or harm. It is a reasonable inference that someone was in the car given that the car was in the turn lane waiting to turn, not sitting in the middle of the road

unoccupied. In addition, the evidence was that defendant was speeding, with a flat tire, sparks flying off the road, and swerved into oncoming traffic in order to avoid this car. The evidence supports the special verdict that defendant endangered another person during the commission of his crime. Defendant's conviction and the special verdict should be upheld by the Court as there was sufficient evidence to support it.

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.

An Information is constitutionally sufficient if it includes all essential elements of a crime. ***State v. Vangerpen***, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). An "essential element" is an element whose specification is necessary to establish the very illegality of the act charged. ***State v. Zillyette***, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). Although essential elements are required to make an Information constitutionally sufficient, the State need not include definitions of the elements. ***State v. Johnson***, 180 Wn.2d 295, 302, 325 P.3d 135 (2014). Requiring all statutory and non-statutory elements in the charging document provides the accused of fair notice of the charges against him to afford him the opportunity to prepare a defense. ***Vangerpen***, 125 Wn.2d at 787.

If the Information is challenged initially on appeal, it will be construed quite liberally. ***State v. Hopper*** 118 Wn.2d 151, 156, 822 P.2d 775 (1992). "A Court should be guided by common sense and practicality in construing the language. Even missing elements may be implied if the language supports such a result." ***State v. Campbell***, 125 Wn.2d 797, 801, 888 P.2d 1177 (1995)(*quoting* ***State v. Hopper***, 118 Wn.2d 151, 822 P.2d 775 (1992)). "[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). 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; ***State v. Naillieux***, 158 Wn. App. 630, 643, 241 P.3d 1280 (2010).

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."

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

> "That ANTHONY JOSHUA TOLMAN, in the State of Washington, on or about the 17th day of June, did unlawfully, feloniously, and willfully 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 8.

Defendant argues the Amended Information is insufficient because it did not include RCW 46.61.024(1)'s second sentence, "The signal given by the police officer may be by hand, voice, emergency light, or siren." This exact argument was resolved in ***State v. Pittman***, --- Wn. App. ---, 341 P.3d 1024, 1028 (2015), "The specific manner by which police signal someone to stop is not an essential element of the crime of attempting to elude a police vehicle."

The Court will overrule a prior decision only upon a clear showing that the rule it announced is incorrect and harmful. ***State v. W.R., Jr.***, 181 Wn.2d 757, 768, 336 P.3d 1134 (2014). Defendant fails to make a clear

showing that Pittman was incorrect or that it is harmful.

Pittman was correctly decided. The ***Pittman*** Court noted that "RCW 46.61.024(1) must be interpreted to require that the police have reasonably signaled the defendant to stop, but not that they must have made that signal exclusively by hand, voice, emergency light, or siren." *Id.* Defendant's example of a person failing to stop after an officer beeps her horn could be accused of eluding (BOA at 13) fails to take this account that a single horn beep is a reasonable signal for a driver to stop.

Defendant has also not show that ***Pittman*** is harmful. Defendant cites to a hypothetical example to show possible harm, but as argued above, the ***Pittman*** Court noted that it must be a reasonable signal to stop in interpreting RCW 46.61.024(1). Defendant fails to cite any other example, case, or authority showing how ***Pittman*** is harmful.

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

3. THE AMENDED INFORMATION INCLUDED SUFFICIENT FACTS TO PROTECT AGAINST DOUBLE JEOPARDY.

For a charging document to be sufficient, it must (1) include the elements of the offense; (2) provide adequate notice as to the charge; and

(3) provide protection against double jeopardy. ***State v. Kjorsvik***, 117 Wn.2d 93, 98, 812 P.2d 86 (1991)(*citing* 2 W. LaFave & Israel, Criminal Procedure § 19.2(b), at 445 (1984)).

LaFave & Israel have noted that this need has been supplanted due to modern procedure: "Thus, commentators and a few courts have questioned whether the double jeopardy function of pleadings has any modern relevancy, as related either to the essential elements requirement or the sufficient specificity requirement." 5 Crim. Proc. § 19.2(b) (3d ed.). This is because defendant now has available not only the information, but also the entire record of his trial. *See e.g.,* ***State v. Smith***, 102 Idaho 108, 110, 626 P.2d 206, 208 (1981); ***U.S. v. Staggs***, 881 F.2d 1527, 1530 (10th Cir. 1989); ***State v. Gifford*** 595 A.2d 1049 (Me. 1991).

Defendant also argues this principal citing ***Russell v. United States***, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 8 L.3d.2d 240(1962). However, ***Russell*** is distinguishable as it was based on a federal prosecution involving indictments charging individuals with refusal to answer certain questions before a congressional subcommittee where these indictments did not identify the subject under investigation. Multiple federal courts have limited the ***Russell*** decision because of the specific nature of the federal crime at issue. *See e.g.* ***U.S. v McClean***, 528 F.2d 1250, 1257 (2nd Cir. 1976).

In this case, the Amended Information is sufficient to protect against double jeopardy as it is accompanied by a Declaration of Probable Cause. Among other facts, the Declaration of Probable Cause in this case names Deputy Wheeler as the deputy that defendant eluded, lists the location of the crime and the specific conduct constituting the offense, identifies the stolen vehicle, and identifies the owner of the stolen vehicle. CP 74. This document, which was filed in open court and provided to the defendant along with the Information, provided defendant with sufficient facts to protect against double jeopardy. Although not a case specifically about double jeopardy, the Court notes in ***State v. Greathouse***, 113 Wn. App. 889, 905-906, 56 P.3d 569 (2002), that the State can lay out it's theory of the case in the declaration of probable cause. ***Greathouse*** dealt with the sufficiency of the Information, rejecting defendant's argument that the victim needs to be named in the Information. *Id.*

In addition, defendant never asked for a bill of particulars, which would have cured any lack of specificity complained of by defendant. A defendant may not challenge a charging document for "vagueness" on appeal if no bill of particulars was requested at trial. ***State v. Leach***, 113 Wn. 2d 679, 687, 782 P.2d 552, 555 (1989).

The Amended Information, coupled with the detailed Declaration

of Probable Cause, is sufficient to protect defendant against double jeopardy. He was provided with the facts laying out the charges against him, his victims, the date and time of the crime, and other information. In addition, his trial was transcribed and would be available in the future to protect him against any attempt at a subsequent prosecution on these same charges. The Court should uphold his convictions.

4. JURY INSTRUCTION 2, BASED ON WPIC 4.01, IS A CORRECT STATEMENT OF THE LAW.

Jury instructions are reviewed de novo, within the context of the jury instructions as a whole. ***State v. Levy***, 156 Wn.2d 709, 720, 132 P.3d 1076 (2006). A jury instruction is sufficient if it correctly states the law, is not misleading, and permits counsel to argue their theory of the case. ***State v. Mark***, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

In ***State v. Bennett***, 161 Wn.2d 203, 318, 165 P.3d 1241 (2007), the Supreme Court, using its inherent supervisory power, ordered that trial courts use only the approved pattern instruction WPIC 4.01. The Court noted that this instruction is derived from the instruction in ***State. v. Tanzymore***, 54 Wn.2d 290, 340 P.2d 178 (1959), and that "this instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error criticizing the instruction] without merit. ***Bennett***, 161 Wn.2d at 308, *quoting* ***Tanzymore***, 54 Wn.2d at 291.

In ***State v. Pirtle***, 127 Wn.2d 628, 658, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996), the

defendant challenged the "reasonable doubt" instruction. While the focus was on the "abiding belief" language, the Court examined the entire instruction. The Court quoted the challenged instruction, highlighting the first sentence with approval: "A reasonable doubt is *one for which a reason exists and may arise from the evidence or lack of evidence*." ***Pirtle***, 127 Wn.2d at 657 (emphasis in the original). The Court went on to say that "WPIC 4.01 adequately defines reasonable doubt. Addition of the last sentence was unnecessary but was not an error." *Id.* at 658.

In ***Pirtle***, the Supreme Court measured the reasonable doubt instruction against federal constitutional law. The Court compared the language of the instruction at issue to the requirements of ***Victor v. Nebraska***, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). ***Pirtle***, at 657-658. While the Court did not do a full constitutional analysis, it did consider the issue of constitutionality, stating; "Without the last sentence, the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster." *Id.* at 658.

The trial court in the case at bar gave WPIC 4.01 as jury instruction number 2. CP 16. The instruction read:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding believe in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 16.

This instruction given to the jury mirrors WPIC 4.01, with the exception of the inserted bracketed language making the instruction fit the facts of this case. Defendant did not object to jury instruction number 2. 8/27/14 RP 270. It also does not appear from the record that defendant proposed an alternative jury instruction to jury instruction number 2 regarding reasonable doubt.

First, defendant does not assert that this error rises to a level of constitutional magnitude as required under RAP 2.5(a)(3). The Court will not assume an alleged error is of constitutional magnitude. ***State v. O'Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). It is an error of constitutional magnitude to fail to define reasonable doubt in the jury instructions. ***State v. McHenry***, 88 Wn.2d 211, 558 P.2d 188 (1977). However, in this case, reasonable doubt was defined as required by the Supreme Court. Defendant has not demonstrated that this alleged error in this case rises to constitutional magnitude.

Second, pursuant to ***Bennett***, the Supreme Court has ordered trial courts to use this jury instruction. Defendant relies on ***State v. Emery***, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012) in his argument attacking this instruction, but as defendant points out in his parenthetical, the case is about prosecutorial misconduct and the prosecutor's remarks, not the instruction itself. ***Emery*** itself cites to ***Bennett***. Jury instruction number 2 was properly given and is a correct statement of the law. Defendant's convictions should be upheld.

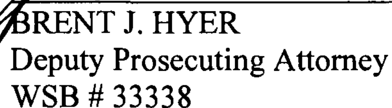
D. CONCLUSION.

The Court should uphold the convictions and special verdict as sufficient evidence was introduced to support all of defendant's convictions and the special verdict. The Amend Information was sufficient and included all of the essential elements in it. Additionally, the Amended Information, along with the Declaration of Probable Cause, was sufficient to protect against double jeopardy. Lastly, jury instruction 2, which defined reasonable doubt for the jury, is a correct statement of the

law and was properly given. The Court should affirm defendant's convictions in this case.

DATED: April 29, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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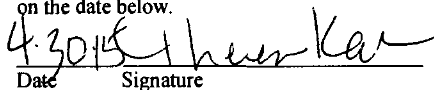
Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be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



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