No. 47136-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DALE HARVEY OYA, III,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

After what was at worst a mishap, the Pierce County Prosecuting Attorney's Office overcharged a case that cried out for restraint. The State claimed that Daniel Oya purposefully hit his child's mother with the family minivan, failed to remain on the scene to help her, and three days later tried to elude the police.

By denying a motion to sever the last charge from the first two, the trial court missed an opportunity to bring some balance into the proceedings. Unfortunately, the disparate accusations – topped off with defense counsel's failure to protect Mr. Oya's Sixth Amendment right to confrontation – brought about an unjust, compromised verdict. The jury found Mr. Oya not guilty of assault in the second degree, but failed to recognize that the State's evidence was legally insufficient on the other two counts as well. Mr. Oya stopped to check on the complainant after the accident, leading the prosecutor to all but concede the matter in closing argument. Likewise, Mr. Oya's driving during the alleged eluding was anything but reckless.

The convictions should be reversed and dismissed for insufficient proof. In the alternative, the other errors require that a new, fair trial be ordered.

B. ASSIGNMENTS OF ERROR

1. The trial court denial of the defense motion to sever Count III (attempting to elude a police officer allegedly occurring on February 7, 2014) from Counts I and II (assault in the second degree and felony hit and run injury allegedly occurring on February 4, 2014) deprived Mr. Oya of his right to a fair trial.

2. The trial court erred in allowing the State to present a non-testifying declarant's out-of-court statement in violation of Mr. Oya's Sixth Amendment right to confrontation.

3. In only making a hearsay objection, and failing to object to this testimony on constitutional grounds, defense counsel rendered ineffective assistance in violation of Mr. Oya's Sixth Amendment right to counsel.

4. In the absence of proof beyond a reasonable doubt of each element in the "to convict" instruction, Mr. Oya's conviction for felony hit and run injury deprives him of due process

5. The State did not prove beyond a reasonable doubt that Mr. Oya committed the crime of attempting to elude a pursuing police vehicle because there was insufficient evidence to support the allegation that he drove in a reckless manner.

6. Because the State did not prove beyond a reasonable doubt that one or more persons were threatened by Mr. Oya's alleged eluding, the special verdict finding under RCW 9.94A.834 is not supported by sufficient evidence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. "Joinder of counts should never be used in such a way as to unduly embarrass or prejudice a defendant or deny [the defendant] a substantial right."[1] Mr. Oya wanted to testify in his own defense with respect to the alleged eluding, but he wanted to exercise his right to remain silent with respect to the incident involving Ms. Boyd. The State's evidence regarding the eluding was not cross-admissible as to the other two counts. Did the denial of his motion to sever violate Mr. Oya's constitutional right to a fair trial?

2. The Confrontation Clause of the Sixth Amendment provides that a defendant has the right to confront and cross-examine his accusers. Did the admission of a non-testifying witness's claim that Mr. Oya was purposefully running away from the police violate his confrontation rights under the Sixth Amendment? Should this Court

[1] State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747 (1994).

remedy this constitutional error even though defense counsel only lodged a hearsay objection to the offending testimony?

3. 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. XIV. The State took on the burden of proving Mr. Oya failed to discharge four duties as a driver who had been in an injury accident. CP 61. Witness after witness reported that Mr. Oya stopped at the scene and that it was the complainant who refused any further assistance. Moreover, the complainant was a family member of Mr. Oya's and she was the registered owner of the car he was driving. Under these circumstances, should the hit and run conviction be set aside for insufficient evidence?

4. The driver of a vehicle commits the crime of attempting to elude a pursuing police vehicle if he fails or refuses to immediately bring his vehicle to a stop after being signaled to stop by a uniformed police officer and drives in a reckless manner while attempting to elude a pursing police vehicle. RCW 46.61.024(1). Here, Mr. Oya may have been speeding, but otherwise his driving was lawful and safe. Even viewing the evidence in the light most favorable to the State, should

Mr. Oya's conviction for attempting to elude a pursuing police vehicle be reversed and dismissed?

5. The sufficiency of the evidence standard also applies to special verdict allegations. Here, the State charged Mr. Oya with endangering his passenger. But, at the beginning of the police pursuit, Mr. Oya was observed obeying all traffic laws, and the alleged speeding occurred after the passenger got out of the car. Should the special verdict be reversed for insufficient evidence?

D. STATEMENT OF THE CASE

1. Three different charges, two different days, one trial.

The Pierce County Prosecuting Attorney's Office accused Daniel Oya of committing three felony crimes: assault in the second degree (Count I), failure to remain at injury accident (Count II), and attempting to elude a pursuing police vehicle (Count III). CP 1-2. Counts I and II were alleged to be crimes of "domestic violence" under RCW 10.99.020, committed against Angel Boyd on February 4, 2014. CP 1-2. Count III was alleged to have occurred on February 7, 2014, three days after the accident that gave rise to Counts I and II. CP 1-2. Defense moved to sever Count III from the other counts; the trial court

denied the motion, even when renewed. 1RP 10[2], 2RP 33-58, 3RP 299, 4RP 447-49; CP 9-15 (arguing in part against joinder because Count III occurred on a "different date in a different place involving different parties").

2. The February 4, 2014 accident at the gas station.

Complainant Angel Boyd testified about Mr. Oya, who is the father of her child, and the event that led to others calling 911. 3RP 198. On February 4, 2014, she and Mr. Oya drove around in the family car: "our minivan, Town and Country minivan," and ended up at a gas station. 3RP 199, 201. On cross-examination, Ms. Boyd elaborated that they had been at a casino with a friend and went back to Mr. Oya's apartment afterwards. 3RP 218-19. Ms. Boyd then left to look for illegal drugs for herself and Mr. Oya found out she had been injecting heroin in the family minivan. 3RP 220-23.

Mr. Oya was upset with her because it was his birthday and she had used drugs. 3RP 202, 218. Ms. Boyd testified she used "a lot" of

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[2] The verbatim report of the trial is referred to by the volume number provided by the court reporter. (Unused volumes omitted.)

2RP = November 12, 2014 (marked Vol. 2)
3RP = November 13, 2014 (marked Vol. 3)
4RP = November 18, 2014 (marked Vol. 4)
5RP = November 19, 2014 (marked Vol. 5)
8RP = January 9, 2015 (marked Vol. 8)

methamphetamine and "quite a bit" of heroin. 3RP 203. Mr. Oya "didn't know that I was getting high." 3RP 204. "He just wanted me and baby and him to be together for his birthday. He didn't want me to be out running around doing drugs." 3RP 225.

Mr. Oya wanted her to go with him, but Ms. Boyd "wanted to go and get high." 3RP 203-04, 206. Conflicted, she was "telling him to go, but I really didn't want him to go." 3RP 205-06; 230-31. She was hysterical and really mad. 3RP 231. Mr. Oya asked her to get in the minivan with him, but she would not. 3RP 232-234. She directed her "friend" Arlene to "block him so he couldn't leave." 3RP 207. That is when the accident happened: "I was blocking him the other way… I ran out and blocked him. Before I knew it, I was on the floor. That's all I remember." 3RP 207. She added: "I stepped in front of the vehicle when he was trying to go, and that's all that I really remember." 3RP 207. She was just not sure how she got on the ground. 3RP 208. She testified she did not think that Mr. Oya intentionally tried to hit her. 3RP 236, 240.[3]

After she fell to the ground, Mr. Oya was still there, still asking that she come with him: "He was upset. He was crying. He was telling

[3] The jury declared a not guilty verdict on the assault in the second degree charge, Count I. CP 74.

me to get back into the minivan." 3RP 208, 239. In retrospect, she wished she had gotten into it. 3RP 241.

Ms. Boyd testified, that in her state, she felt "stuck," explaining: "I was really high. I don't know. I just felt stuck." 3RP 208. She told Mr. Oya "get the hell out of here… leave," just "kept cussing at him and telling him to go… go, the cops are coming… Go, get out of here… he left." 3RP 209.

She "had warrants and [] didn't want to deal with the police." 3RP 209. She was scared, she was "under the influence, and I probably even had drugs on me." 3RP 215. She told the police she "had nothing to say to them" and avoided talking to them because she was "high." 3RP 210, 215. She did not recall talking with medical staff and testified that she did not need aid because she was not injured.[4] 3RP 212, 213, 232, 236.

Ms. Boyd had no need for Mr. Oya to give her his address or license information because she knew his birthdate and where to find him. 3RP 233-34. Computer records relied on by the police listed her as

[4] Some witnesses described seeing Ms. Boyd limping, possibly having swelling on her leg, or walking with one shoe on and the other off. 3RP 253-54, 4RP 380, 396.

the vehicle's registered owner so the police reported her as the minivan's owner. 3RP 283.[5]

One of the officers who responded, Officer Jimmy Welsh testified he saw Ms. Boyd crying[6] and sitting down on a curb. 3RP 246. He questioned her after unnamed medics contacted her. 3RP 254. Defense counsel did not object when Officer Welsh testified about what Ms. Boyd told him that night. This included, in part, Ms. Boyd telling him that she had argued with Mr. Oya about infidelity, not her drug use, that the minivan had knocked her down, and that she had to roll out of its way a second time. 3RP 254-56, 258, 278-79.

On the scene, Ms. Boyd declined to give a written statement or sworn statement. 3RP 256, 4RP 395-96. She declined medical aid. 3RP 271. She did not want to be photographed. 3RP 253.

Civilian witness Lacee Sharp saw the minivan moving toward Ms. Boyd, but did not observe any impact. 4RP 357. Lacee Sharp then saw the minivan circle back and when it did so, the driver avoided a path that could have endangered Ms. Boyd. 4RP 358. The driver

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[5] However, Ms. Boyd testified she did not know the license plate number, who the minivan was actually registered to, and that while the couple referred to the minivan as "ours" it was actually "his." 3RP 233, 237.

[6] A civilian witness testified seeing that Ms. Boyd "completely stopped crying" after another woman who was with her helped her. 4RP 363.

stopped. 4RP 358. Only then did the minivan leave. 4RP 361. The driver was not acting aggressively. 4RP 365

Lacee's mother, Connie Sharp also did not see the minivan hit anyone, but she saw it turn around: "[i]t came back in, pulled up alongside the lady again." 4RP 370. There was nothing dramatic going on. 4RP 378. The woman and the driver were talking, arguing. 4RP 371, 374. Then, the driver left. 4RP 379.

3. Three days later, the police pursue Mr. Oya.

Officer Douglas Walsh did not see the minivan on the day of the accident but he saw it three days later. 3RP 304-05. When the minivan pulled out of a parking lot, he and Officer Travis Waddell turned on the sirens in their squad cars and the vehicle stopped, but then took off. 3RP 305-07, 311-13. The police followed with their lights and sirens on. 3RP 315. A little later the minivan came to an abrupt stop and a passenger jumped out. 3RP 316, 337.

Officer Waddell was right behind the minivan and he testified that before the passenger jumped out, the minivan was not speeding, even though it was traveling at an estimated 40 to 50 miles an hour. 4RP 409-10, 424, 440. According to Officer Waddell, the driver he was

pursuing was "following the traffic laws." 4RP 424. Officer Waddell "didn't observe any direct traffic violations." 4RP 424.[7]

According to Officer Walsh, after the passenger left, the vehicle started moving again, but "not particularly fast," and within the speed limit. 3RP 316, 323. Its speed then picked up and varied, from 15 to 20 miles to an estimated top speed of 70 or 75 miles an hour. 3RP 316.

The roadway was dry with "few isolated spots of ice." 3RP 318. It was hilly. 3RP 325. During the pursuit, the driver maintained full control over the vehicle; the minivan did not collide with anyone or anything. 3RP 332. The minivan did not drive into oncoming traffic. 3RP 330, 332. The minivan slowed down for turns. 3RP 331, 339. After maybe half, or three quarters of a mile, the minivan slowed down and pulled over safely for good. 3RP 321, 335.

Officer Walsh arrested the driver, Mr. Oya, who was completely cooperative and compliant. 3RP 317, 319.

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[7] Officer Waddell chased and detained the passenger. 4RP 410-12. Defense counsel lodged only a hearsay objection – not a Sixth Amendment right to confront objection – when the prosecutor asked Officer Waddell to tell the jury what the passenger said to him.4RP 412. The trial court overruled the objection when the prosecutor said the officer described the passenger as "excited." 4RP 412. The officer testified that the passenger, Jordan George, said the minivan's driver, Mr. Oya, "knew that the police were behind him… that [Mr. Oya] knew that he was going to get stopped." 4RP 412. After police questioning, Mr. George was released because the police decided "[t]here was no probable cause to arrest him." 4RP 438. He did not testify at Mr. Oya's trial.

4. Closing argument and the compromised verdict.

As requested by defense counsel, the trial court instructed the jury on the lesser included offense of failure to obey a police officer. 4RP 452-53; CP 66-68. In reviewing the elements of the hit and run charge against the witness testimony, the prosecutor conceded that the State had a proof problem: "theoretically, he stopped, right. He came back around." 5RP 476; CP 61. Regarding the eluding charge, and the special verdict, the prosecutor specified that "[t]he person who is endangered here is the passenger." 5RP 484. In closing, and in rebuttal, the prosecutor asked the jury to rely on what the officer said the passenger said to convict Mr. Oya of the substantive charge and the special verdict. 5RP 483-85; 540-41.

Mr. Oya was acquitted on Count I, assault in the second degree, but convicted of Count II, failing to remain at injury accident. CP 74, 75. The jury found that at the time, he and Ms. Boyd were "members of the same family or household." CP 79. He was also convicted of Count III, attempting to elude a pursuing police vehicle and the jury did not reach the question of the lesser included offense of failure to obey a police officer. CP 76-77. Last, the jury found that the "during [Mr. Oya's] commission of the crime of attempting to elude a police

vehicle," another person, besides Mr. Oya or the pursuing police, was threatened with physical injury or harm. CP 80.

Mr. Oya received a statutory maximum 60 month sentence on Count II and a 41 month sentence on Count III, to be run concurrently. CP 85-93. At sentencing, the trial judge noted that he does not see Mr. Oya as "being the big dangerous guy," considered a defense application for a Drug Offender Sentencing Alternative "seriously," and imposed a standard range sentence largely because defense counsel failed to deliver the necessary screening report. 8RP 581-83. Mr. Oya timely appealed.

E. ARGUMENT

1. The denial of the motion to sever deprived Mr. Oya of his right to a fair trial.

a. Because joinder is inherently prejudicial, severing joined offenses may be necessary to preserve a fair trial.

The rules governing severance are based on the fundamental concern that an accused person receive "a fair trial untainted by undue prejudice." State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998); U.S. Const. amends. V, XIV; Wash. Const. Art. I, §§ 3, 22; CrR 4.4(b).

Court rules provide that severance of offenses "shall" be granted whenever "severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). Joinder of offenses is deemed "inherently prejudicial" and, "[i]f the defendant can demonstrate substantial prejudice, the trial court's failure to sever is an abuse of discretion." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). In assessing whether severance is appropriate, courts weigh the inherent prejudice of joinder against the State's interest in maximizing judicial economy. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

Prejudice from joinder will result if a single trial invites the jury to cumulate evidence to find guilt or otherwise infer a criminal disposition. State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989), citing State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968) vacated in part on other grounds, 408 U.S. 934 (1972)). Prejudice may also occur when the accused is embarrassed or confounded in presenting separate defenses. Watkins, 53 Wn. App. at 268. "A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the

charging of several crimes as distinct from only one." State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) (internal citation omitted).

To assist courts in protecting the defendant's right to a fair trial, the Supreme Court set out four "prejudice-mitigating" factors that a court should consider when deciding whether the potential for prejudice calls for severance: 1) the strength of the State's evidence on each count; 2) the clarity of defenses as to each count; 3) the court's instructions to consider each count separately; and 4) the admissibility of evidence of other charges even if not joined for trial. State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1968); State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994); State v. Rodriguez, 163 Wn. App. 215, 228, 259 P.3d 1145 (2011).

A trial court severance ruling is reviewed under an abuse of discretion standard and a trial court abuses its discretion when its decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 653, 71 P.3d 638 (2003). Fundamentally, the exercise of the trial court's discretion regarding severance rests on an evaluation of whether severance promotes a fair determination of guilt or innocence. In re Davis, 152 Wn.2d 647, 711, 101 P.3d 1 (2004); CrR 4.4(b).

b. Combining Count III with the others was unduly prejudicial.

1. Strength of the evidence.

Severance is warranted where the strength of one count bolsters a weaker count. Russell, 125 Wn.2d at 63-64. Here, the State's case was not strong on any of the counts. In fact, the jury rejected the assault charge, but the inclusion of the sensational nature of that accusation prejudiced the jury against Mr. Oya. Mr. Oya's departure from the gas station was legally insufficient to establish that he actually committed the crime of hit and run. The eluding charge appeared to be the easiest charge for the State to prove-up, in part because it was based on the testimony of law enforcement professionals, but it also lacked a solid evidentiary foundation. Because the charges pressed against Mr. Oya were rather technical, mixing them together like potpourri made it easier for the State to eek out *some* guilty verdict, which is why this was error.

2. Clarity of defenses.

A defendant's desire to testify on one count but not on another count requires severance where the defendant has important testimony to give on the one count and a strong need to remain silent on the other count. Russell, 125 Wn.2d at 65, citing Watkins, 53 Wn. App. at 270.

This factor weighed in favor of severance. Mr. Oya indicated that he wanted to present evidence in his own behalf regarding Count III[8], but he did not want to give up his right to remain silent to present his defense as to Counts I and II. 2RP 45. He renewed this motion at least twice, emphasizing his need to testify to respond to the endangerment allegation on Count III. 3RP 299, 4RP 447-50.

In this case, testifying about his relationship with Ms. Boyd, her drug activities, the couple's argument and the accident, would have been a messy, embarrassing proposition for Mr. Oya. The denial of the severance motion left him unable to adequately defend against at least one charge. He was prepared to explain why he failed to obey the police order to stop, and how he had not been reckless in his driving, but could not do it because Counts I and II remained joined. 2RP 47; CP 13-14. He really had a strong incentive to take the stand in his own defense, because the police officers' testimony about the quality of his driving was completely subjective. The police had not paced the minivan, used a radar, or done anything of the sort. The denial of the

[8] Defense counsel made the following offer of proof that Mr. Oya would testify: "he wasn't intending to get away from the cops. He wasn't driving recklessly. He was trying to get to a house where he thought he could park his van so it wouldn't get impounded by the police… My client is going to testify that he didn't' feel that he was driving recklessly. He didn't put people in danger… For Mr. Oya to get up there and offer an alternative to what they [the police] are saying, I think it is important." 2RP 47.

severance also resulted in Mr. Oya being able to testify that his passenger was never endangered.

3. Instructions.

The court properly instructed the jury to consider each count separately. But instructions alone could not overcome the improper bolstering resulting from joinder, the confusion of defenses, the prejudice resulting from Mr. Oya's need to testify to present his defense theory on Count III and his equally compelling need to remain silent on Counts I and II, and the admission of evidence that was not otherwise cross-admissible.

In the instant case, the jury was instructed: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count." CP 50. Though no limiting instruction was likely to cure the inevitability of prejudice, certainly the curt and uninformative limiting instruction given here was insufficient. See, e.g., State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) ("despite an instruction to consider the counts separately, there was extreme danger that the defendants would be prejudiced").

The instruction used merely informs the jury that each count must be decided separately and the verdict on one count cannot control the verdict on the other. CP 50. The instruction contains no admonishment, for example, that evidence from one count cannot be used in determining the verdict on the other count, or that the jurors should not presume Mr. Oya to be a law breaker because he is accused of committing multiple crimes over multiple days.

Even if a more comprehensive instruction had been given, the joint trial would still have caused the jurors to have a "latent feeling of hostility engendered by the charging of several crimes as distinct from only one." Harris, 36 Wn. App. at 750. This factor weighs in favor of severance, in part because the introduction of multiple counts into one proceeding is not all that different than presenting information about a past offense and "[s]tatistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record." State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

4. Cross-admissibility of evidence.

Cross-admissibility considerations involve evaluating whether the evidence of various offenses would be admissible to prove the other charges if each offense was tried separately. State v. Ramirez, 46 Wn. App. 223, 226, 730 P.3d 98 (1986). "In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence." State v. Sutherby, 165 Wn.2d 870, 887, 204 P.3d 916 (2009) (internal citations omitted). Cross-admissibility of evidence is analyzed under ER 404(b). Traditionally the State may not introduce evidence of a defendant's prior bad acts, because "such evidence has a great capacity to arouse prejudice." State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984).

In determining whether evidence is admissible under ER 404(b), courts must "(1) identify the purpose for which the evidence is to be admitted; (2) determine that the evidence is relevant and of consequence to the outcome; and (3) balance the probative value of the evidence against its potential prejudicial effect." State v. Lough, 70 Wn. App. 302, 313, 853 P.2d 920 (1993) (citing State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

The trial court saw the attempted eluding evidence as cross-admissible, as evidence of flight, and therefore guilt, with respect to the assault in the second degree and hit and run charge. RP 54. This was error. "Analytically, flight is an admission by conduct. Evidence of flight is admissible if it creates 'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.'" State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001) (footnote omitted), quoting State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971). Notably, when evidence of flight is admissible, it tends to be only marginally probative to the ultimate issue of guilt or innocence. Freeburg, 105 Wn. App. at 498. "Therefore, while the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful."

The probative value of evidence of flight as circumstantial evidence of guilt depends on the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of

guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. Id. "The inference of flight must be "substantial and real" not "speculative, conjectural, or fanciful."" State v. Price, 126 Wn. App. 617, 645, 109 P.3d 27, 41 (2005), quoting State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965).

For example, in Price, the murder suspect had traveled outside Washington State "shortly after the murder with a backpack full of grooming supplies, medications, and hair trimmers." Id. He had used the hair trimmers to shave his hair and change his appearance to avoid detection. Id. The evidence was properly admitted because the connection was clear-cut.

Unlike Price or even Freeburg, Mr. Oya did not actually flee the jurisdiction. On February 7, 2014, he was still in Washington, still in Pierce County, still driving the same minivan on the open streets of Tacoma. And, as Ms. Boyd testified, he left the gas station because she told him to. 3RP 209. Fundamentally, that is not flight.

The inference that he failed to obey a police directive to stop three days after the accident at the gas station is speculative, not

substantial or real.[9] Freeburg, at 498. Moreover, Mr. Oya's defense counsel made an offer of proof that Mr. Oya failed to stop when directed to by the police for a different reason altogether: he was not insured and did not have a driver's license. 2RP 42.

In Freeburg, that murder defendant's possession of a handgun – after he fled abroad – was deemed, on appeal, to have been wrongly admitted as evidence of flight. If that felon's criminal possession of a firearm was not categorically admissible as evidence of flight, then this Court should similarly reject the notion that there is some categorical link between the attempted eluding charged against Mr. Oya and an ambiguous incident from three days earlier.[10]

In finding that the eluding evidence was not substantially more prejudicial than probative, the trial court erred again. 2RP 57-58. Even

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[9] Defense counsel correctly argued in pretrial motions that if the eluding had occurred "immediately on leaving the [accident] scene," then the inference of consciousness of guilt would have been clearer. 2RP 42. Unfortunately, the trial court's analysis on this point was lacking. The trial court did not expressly determine if the inference of flight was substantial and real. In fact, the trial court appears to have denied the severance motion while accepting the possibility that an alternative explanation could be equally true. The judge described the two incidents as "connected together… related because the action on that date tends to show what his intent was on the prior date, at least the State's account of this does. That may not be true, but that's for the jury to decide." 2RP 57-58.

[10] Freeburg made a statement suggesting that his gun possession was part of intentional flight, but that statement was excluded and thus could not be used to connect the dots. Freeburg, at 501. Likewise, the State cannot rely on the wrongly admitted statement of the passenger, suggesting that Mr. Oya expected to be arrested, as evidence that the attempted eluding was flight indicative of consciousness of guilt.

evidence relevant under ER 401 may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. The attempted eluding evidence was prejudicial, especially with respect to the State's request for a special verdict of endangerment, because it invited speculation that Mr. Oya is the kind of person who uses a motor vehicle to hurt, or nearly hurt, others.

The joint trial of these separate offenses created an improper impression that Mr. Oya has a "general propensity" toward criminal acts. Ramirez, 46 Wn. App. at 227; see also Watkins, 53 Wn. App. at 272 (trial court's failure to properly analyze cross-admissibility element constitutes abuse of discretion). This factor, thus, weighs heavily in favor of reversing the convictions for the wrongful denial of the severance motion.

c. Mr. Oya's right to a fair trial outweighed any judicial economy interests.

The interest in judicial economy is served where testimony would be repeated in separate trials. For example, in Russell, 125 Wn.2d at 68, the court noted that judicial economy was served by joinder where the crimes were uniquely similar and the testimony of

witnesses acquainted with the defendant during the time of the crimes would be repeated if counts were severed.

Here, the testimony for Counts I and II was not needed for the State's case regarding Count III. And, jurors deciding Counts I and II did not need to hear the evidence that was elicited from the police officers regarding the February 7, 2014 incident. Two separate trials would not have strained judicial resources, but the failure to sever did deprive Mr. Oya of his constitutionally guaranteed right to a fair trial.

d. The proper remedy for the denial of the motion to sever is reversal.

Where a trial court erroneously denies a motion to sever, the proper remedy is reversal, unless the error was harmless. Bryant, 89 Wn. App. at 864; Ramirez, 46 Wn. App. at 228. The error was not harmless here. As discussed, given the general weakness of the three counts, the differing defense theories, Mr. Oya's desire to take the stand in his own defense only regarding Count III, the inherent prejudice of joining the unrelated charges, and the difficulty in compartmentalizing the evidence relevant to each count, the error was not harmless. The compromised verdict reached – in a case where Mr. Oya should have been acquitted of all charges – confirms this. In the absence of prejudice-mitigating factors as well as the lack of judicial

economy, the trial court's failure to sever the counts was an abuse of discretion. Reversal for a new trial is required.

2. The trial court erred in admitting a non-testifying declarant's hearsay statement in violation of Mr. Oya's Sixth Amendment right to confrontation.

a. The Confrontation Clause prohibits the admission of testimonial statements made by non-testifying declarants.

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. Admission of testimonial statements denies the defendant the opportunity to test accusers' statements "in the crucible of cross examination." Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The confrontation clause applies not only to in-court testimony, but also to out-of-court statements introduced at trial, regardless of their admissibility under the evidence rules. Id. at 50-51.

The admission of testimonial statements of a witness who does not appear at a criminal trial violates the Confrontation Clause of the Sixth Amendment unless (1) the witness is unavailable to testify, and (2) the defendant had a prior opportunity for cross examination.

Crawford, 541 U.S. at 53-54. An out of court statement is testimonial if the primary purpose is to establish or prove past events relevant to later criminal prosecution. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial are testimonial. Id. at 52. Statements are testimonial when the circumstances objectively indicate that there is no ongoing emergency and the primary purpose is to establish or prove past events. Davis, 547 U.S. at 822.

b. The passenger's custodial statement to the police was a testimonial statement which should have been excluded under the Confrontation Clause.

In general, "[s]tatements taken by police officers in the course of interrogations are [] testimonial." Crawford, 541 U.S. at 52. What the passenger said in response to Officer Weddell's questioning was testimonial, because he said it while in custody. Officer Weddell pursued the passenger "to detain" him and put him "in wrist restraints." 4RP 409-11. The officer kept him in handcuffs until he had verified that the passenger had no outstanding warrants and determined "he had nothing to do with what was going on." 4RP 437-38. "[I]nterrogations

by law enforcement officers" generate testimonial statements within the meaning of the Sixth Amendment. Id. ("We use the term 'interrogation' in its colloquial, rather than any technical legal, sense." Id., fn 4.) Under the circumstances, Mr. Oya had a constitutional right to cross-examine the passenger, a right he was unable to exercise because the State did not produce him as a witness.

"Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Cross examination is the "greatest legal engine ever invented for discovery of the truth." Kentucky v. Stincer, 482 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (quoting California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)). "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

Officer Waddell told the jury that the passenger, Mr. George, said that Mr. Oya "knew that the police were behind him because he

[Mr. Oya] said something to the effect that he [Mr. Oya] knew that he was going to get stopped" and but that Mr. George "didn't realize that Mr. Oya was wanted." 4RP 412.

Neither Mr. Oya nor the jury had the benefit of having what the officer attributed to the passenger be subjected to cross examination to uncover bias, expose error, and reveal the truth. Mr. Oya had a constitutional right to confront and cross examine the declarant of this testimonial statement, which was made for the purpose of establishing and proving a past and specific fact: that Mr. Oya knew he was eluding and that he had a guilty mind, presumably about the accident from three days earlier. RP 412. Mr. Oya had no opportunity to assess the reliability of this evidence by testing it "in the crucible of cross-examination." See Crawford, 541 U.S. at 60. Because the evidence was testimonial and Mr. Oya had no opportunity to cross examine the witness about these assertions, its admission violated the Sixth Amendment.

c. The admission of the passenger's accusations against Mr. Oya was deeply prejudicial.

Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967);

State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 411, 425, 705 P.2d 1182 (1985). The error can only be harmless if the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant's guilt. Id. at 426. A conviction must be reversed "where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." Id.

By its content, the passenger's statement introduced against Mr. Oya, was deeply prejudicial. First, when the officer reported that the passenger told him "basically, [Mr. Oya] knew that the police were behind him," it was plainly used to show that Mr. Oya was knowingly eluding the officers. 4RP 412. The second part of that utterance by the passenger alleged that "he [Mr. Oya] knew that he was going to get stopped." 4RP 412. This portion of the statement suggests that Mr. Oya was acknowledging having a guilty state of mind. Naturally, with the joinder of all three counts, the implication was that he was acknowledging having done something illegal at the time of the gas station accident. The passenger's second statement, that he "didn't

realize that Mr. Oya was wanted by police or anything like that," is also consistent with the interpretation that Mr. Oya had that knowledge, that guilty conscience, of being pursued. 4RP 412.

The passenger's accusation was also prejudicial in how the prosecutor used it. First, with respect to the claim that a special verdict applied to the eluding charge, the prosecutor specified that "[t]he person who is endangered here is the passenger." 5RP 484. In making this assertion, the State explicitly relied on what the police said the passenger said. 5RP 483-84. "His actions have endangered that passenger who stated that he wanted nothing to do with this." 5RP 485. (Emphasis added).

The prosecutor also argued that what the officer said the passenger said proved that Mr. Oya had a guilty mind because he

> knew that he was going to get stopped. He told the passenger that. He said, *we are going to get stopped. I'm going to get pulled over*. The passenger told Officer Waddell that. The defendant knew. The defendant knew that the police were after him. Of course, he does. Again, we know from earlier, he injured his girlfriend, left her at the gas station. So, the defendant's actions were knowingly.

5RP 485 (emphases added). And, the prosecutor revisited this evidence in rebuttal. 5RP 540 ("[H]e knows that he is going to get pulled over. He tells his passenger that.")

Because of both the content and the use of the passenger's accusations, the State cannot prove that this violation of Mr. Oya's confrontation rights was harmless beyond a reasonable doubt. This Court should reverse and remand both convictions for a new trial.

d. This Court should reach the underlying constitutional error even though defense counsel failed to lodge a Sixth Amendment objection.

Denial of a defendant's right to effective assistance of counsel is an error of constitutional magnitude. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (applying the two–prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). U.S. Const. Amend. VI. Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d

1242 (1972). State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995).

To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show: (1) the absence of a legitimate strategic or tactical reason for not objecting; (2) that the trial court would have sustained the objection if made; and (3) the result of the trial would have differed if the evidence had not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Defense counsel was appropriately trying to prohibit the State from using the statement, but hearsay was an insufficient objection. 4RP 412. The proper objection would have relied on the Sixth Amendment right to confront. Under Crawford, the trial court would have sustained that objection. The prejudice to Mr. Oya is plainly apparent. Because Mr. Oya received ineffective assistance of counsel, this Court should reach the underlying constitutional Sixth Amendment error.

e. Mr. Oya's convictions should be reversed.

As discussed above, the prejudice to Mr. Oya from the wrongful admission of the passenger's statements warrants reversal of both convictions and the special verdict.

3. The State did not prove beyond a reasonable doubt that Mr. Oya committed a hit and run, or the attempted eluding, or the special endangerment verdict.

a. Due process required the State prove each element of every offense beyond a reasonable doubt.

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient only if, reviewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Even when additional elements are added to the "to convict" instruction, and the State does not object, the additional element becomes the "law of the case" and must be proved beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). If the State failed to meet this burden with respect to the added element, the conviction must be dismissed. Id. at 103. When a special verdict is challenged based on sufficiency of the evidence, the question is

whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the relevant facts proven beyond a reasonable doubt. State v. Chanthabouly, 164 Wn. App. 104, 142–43, 262 P.3d 144 (2011).

A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

b. The State did not prove beyond a reasonable doubt that Mr. Oya committed hit and run because he stayed at the scene and because his relationship with Ms. Boyd obviated the need for him to exchange information with her.

The "to convict" instruction given for Count II required the State to prove that Mr. Oya was knowingly involved in an injury-causing motor vehicle accident in Washington State, and:

> failed to satisfy his obligation to fulfill all of the following duties:
>
> (a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible.
>
> (b) Immediately return to and remain at the scene of the accident until all duties are fulfilled.

(c) Give his name, address, insurance company, insurance police [sic] number and vehicle license number and exhibit his driver's license to any person struck or injured, and

(d) Render to any person injured in the accident reasonable assistance…

Instruction No. 14, CP 61 (emphasis added).

By this grammatical structure and the use of the conjunctive "and," the State was obligated to prove that Mr. Oya failed to discharge "all" four duties. Hickman, 135 Wn.2d at 99. The State did not meet that burden because Mr. Oya most certainly stopped his vehicle at the scene of the accident.[11]

In fact, in closing argument, the prosecutor outlined how Mr. Oya stopped as required and that the State's proof in this regard was lacking:

> Let's look at the elements for hit-and-run.
> …
> We also have testimony from the 9-1-1 callers that the minivan strikes her and then comes back around and talks to her, right.
> …
>
> He came back around the gas pump and stopped by Ms. Boyd, okay. You heard the testimony from Connie Sharp that she also saw the minivan come back, right.
> …

[11] The charging document was different. It used a disjunctive grammatical approach, alleging that Mr. Oya committed a hit and run because he: "did fail to immediately stop and/or return to and/or remain at the scene of that accident." CP 2 (emphasis added).

He is talking to her [Ms. Boyd] at that point…

5RP 473-75 (emphasis added).

Reading over the four duties enumerated in the "to convict" instruction, the prosecutor conceded the lack of proof:

> The first one is, immediately stops the vehicle at the scene of the accident or as close thereto as possible. **Well, theoretically, he stopped, right. He came back around, and he stopped by Ms. Boyd when they have this altercation. Theoretically, he did stop right after the accident.**

5RP 475-76.

Having realized this problem the prosecutor shifted focus to the argument that Mr. Oya left. 5RP 476. ("However, (b) he didn't do.") But, as the jury was instructed, the State bore the burden of proving that Mr. Oya: 1) did not stop and, 2) did not remain, and, 3) did not exchange information, and, 4) did not render reasonable assistance. Instruction No. 14, CP 61. Under Hickman, the hit and run conviction cannot stand.

Separately, the conviction cannot stand because Ms. Boyd was the registered owner, knew Mr. Oya and how to find him, and she voluntarily directed him to leave the scene. 3RP 283, 3RP 233-34, 3RP 209. Factually, what occurred has much in common with State v. Teuber, 19 Wn. App. 651, 577 P.2d 147, review denied, 91 Wn.2d

1006 (1978), where this court reversed a hit and run conviction for insufficiency of the evidence. In Teuber, the drivers involved were next door neighbors and each knew the other's address. The occupants of the damaged vehicle left the scene. Id. at 657. In so doing, they "obviated the requirement that Teuber exhibit his vehicle operator's license." Id. Accord City of Spokane v. Carlson, 96 Wn. App. 279, 287, 979 P.2d 880 (1999) (distinguishing Teuber because the involved parties "did not have a relationship in which either could locate the other to exchange information.")

Here, Ms. Boyd did not leave, but she did direct Mr. Oya to, even as he was asking that she come with him. 3RP 208-09, 239, 241. And, just as the fact that the Teuber parties knew each other well rendered the requirement of exchanging information useless, the same holds true for Mr. Oya and Ms. Boyd, whom the jury correctly recognized as members of the same family or household. CP 79.

c. The State did not prove that Mr. Oya committed the offense of attempted eluding because there is an absence of evidence that he drove in a reckless manner.

Mr. Oya was convicted of attempting to elude a pursuing police vehicle, RCW 46.61.024. CP 76. 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 the 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.

Here, the State did not prove beyond a doubt that Mr. Oya drove in a reckless manner in order to elude a pursing police vehicle. "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c). This definition has subjective and objective components because it involves what the defendant knew and how a reasonable person would have acted knowing what the defendant knew. State v. Graham, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005).

Jury instruction number 17 specified that "To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences." CP 64. Speeding is prima facie evidence of reckless driving. RCW 46.61.465. But, speeding is not necessarily reckless. Accord State v. Randhawa, 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997) (driver's speed of 10 to 20 miles per hour over posted speed limit of 50 miles per hour was not "so excessive that one can infer solely from that fact that the driver was driving in a rash or heedless manner, indifferent to the consequences.").

Here, Mr. Oya's driving was generally lawful. And, certainly his mere speeding – even if it happened as the police say it did – was not excessive enough to constitute recklessness.[12]

State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005) illustrates what kind of driving is sufficient to recklessly endanger another person. There, an inexperienced 16-year-old girl drove at double the posted speed limit of 40 miles per hour, purposefully rocked

[12] The officer who followed Mr. Oya testified the speeds were varying and claimed "70, 75 was the tops." 3RP 316. He testified Mr. Oya started off at "30, 40, not particularly fast." 3RP 316. The alleged speeding was only on Portland Ave. 3RP 338. The officer's testimony is somewhat convoluted, but there was no pacing; the speed was estimated. 3RP 333-34. Because the entirety of the pursuit covered one-half, to maybe three-fourths of a mile, it could have possibly only been momentary. There were no near contacts with any other vehicles, pedestrians, or property 3RP 332. In the end, Mr. Oya slowed down and pulled over properly. 3RP 334-35.

the steering wheel back and forth to make the car swerve, and tried to adjust the car stereo, culminating in an accident that killed one of the passengers and injured three others. Graham, 153 Wn.2d at 403. The Supreme Court held the evidence was sufficient to find the defendant guilty for three counts of reckless endangerment. Id. at 402.

The best summary of why Mr. Oya's driving – even after the passenger got out and certainly beforehand – was generally within the norm of what one would expect of a reasonable driver, came from the trial judge who granted Mr. Oya's requested instruction on the lesser included offense of failure to obey a police officer. Instruction No. 19, CP 66. In making that decision, the trial judge acknowledged the speeding, but said that Mr. Oya's driving

> was arguably otherwise not exceptional, not violating stop signs, not swerving into other lanes of traffic, not losing control of the vehicle, not striking other vehicles or telephone poles or causing any kind of property damage, not blowing signal lights. Apparently, yielding the right of way and all of that kind of stuff as far as we can tell.

5RP 462-63.

Because the State did not prove that Mr. Oya was driving in a "rash or heedless manner, indifferent to the consequences," the attempted eluding conviction cannot stand. CP 64.

d. Even if this Court finds sufficient evidence to uphold the attempted eluding conviction, the special verdict of endangerment is not supported by sufficient evidence.

The State alleged that during Mr. Oya's attempted eluding he "endangered one or more persons other than [himself] or the pursuing law enforcement officer," contrary to RCW 9.94A.834.[13] CP 2. The State elected to prove that it was the non-testifying passenger who was endangered by Mr. Oya's allegedly reckless driving: "The person who is endangered here is the passenger. The passenger was threatened with physical injury or harm by the actions of the defendant during the attempted elude." 5RP 484; Special Verdict Form Count III CP 80.

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[13] The statute reads:

RCW 9.94A.834 Special allegation — Endangerment by eluding a police vehicle — Procedures.

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

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

Perhaps because the evidence failed to establish a real threat, the prosecutor asked the jury to speculate that the police may have shot the passenger as he fled or that they would crash into him with their squad cars. 5RP 485. The first of these imaginative arguments would have the police violating long-standing United States Supreme Court precedent barring the indiscriminate use of deadly force to prevent the escape of felony suspects. Tennessee v. Garner, 471 U.S. 1, 11-12, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The second would lead to the illogical conclusion that every driver endangers every passenger, because a third party could bring about harm. (Such a reading would also strain the statute's restriction that the special allegation applies when the victim was "threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle." RCW 9.94A.834(1).)

However it is the factual record, not the prosecutor's argument that shows that the passenger was neither threatened nor endangered. The passenger was in the minivan very briefly and when he was in it, as Officer Waddell testified, the minivan was not speeding. 4RP 409, 424, 440. The driver was "following the traffic laws." 4RP 424. Officer Waddell was right behind the minivan and "didn't observe any direct

traffic violations." 4RP 424. The passenger jumped out when the minivan had either stopped (3RP 316, 337) or slowed down to a coast. 4RP 409-10. In either event, there was no evidence that Mr. Oya made the passenger leave or that the non-testifying passenger's exit out of the car was particularly dangerous.

On these facts, the special verdict which essentially amounts to a speeding ticket sentence worth twelve months in prison, cannot stand.

e. The Court should reverse Mr. Oya's convictions and the special verdict.

As in any case involving insufficient evidence, the absence of proof beyond a reasonable doubt of an element or added element requires dismissal of the conviction and charge. Hickman, 135 Wn.2d at 99 (citing Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). As in any case reversed for insufficient evidence, the Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. Hickman, 135 Wn.2d at 99 (citing inter alia, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)). Mr. Oya's convictions, and the special verdict, should be reversed and dismissed.

E. CONCLUSION

For all of the reasons set out above, Mr. Oya's convictions for hit and run injury and attempted eluding should be reversed and dismissed, as should the special verdict. In the alternative, a new, fair trial should be ordered.

DATED this 9th day of October 2015.

Respectfully submitted,

s/ Mick Woynarowski

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Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. DALE OYA III, Appellant.	)))))))))	NO. 47136-1-II

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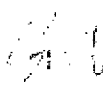

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