Supreme Court No. ____
(COA No. 74559-0-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DESTRY SCHNEBLY,

Petitioner.

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

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Destry Schnebly, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Schnebly seeks review of the Court of Appeals decision dated June 12, 2017, a copy of which is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

Was Mr. Schnebly denied his due process right to proof beyond a reasonable doubt when the instructions to the jury failed to define endangerment, instead directing the jury to only find threat of physical injury or harm?

D. STATEMENT OF THE CASE

At trial, Mr. Schnebly only contested whether he had endangered anyone other than himself and the pursuing officer when he committed the crime of attempting to elude a police vehicle. RP 101.

Mr. Schnebly was parked near the Tulalip Indian Reservation Casino when Dep. Bryson McGee first saw him in his car. RP 32.

When the officer saw Mr. Schnebly, there were two passengers in his car. RP 43.

The deputy attempted to stop Mr. Schnebly's car. RP 34-35. Mr. Schnebly accelerated away instead. RP 37. While on street roads, Mr. Schnebly drove between 50 and 60 miles an hour. RP 38. There was no traffic on the roads. RP 62. On the highway, Mr. Schnebly's speed varied from 40 to 100 miles an hour. RP 39.

Mr. Schnebly left the highway. RP 44-45. He continued to drive at speeds of roughly 50 to 60 miles an hour. RP 53. Mr. Schnebly came to a stop when the road came to a dead end. RP 53. Mr. Schnebly's break lights came on, and his car skidded, as his wheels caught upon dry leaves covering the road. RP 53. He hit a tree at a low speed. RP 53.

Dep. McGee never lost sight of Mr. Schnebly's car. RP 63. The deputy was able to match Mr. Schnebly's speed because Mr. Schnebly's "driving wasn't very fast." RP 63. The deputy would have ceased the pursuit if the pursuit became dangerous. RP 66-67. He agreed both he and his supervisor did not think they should terminate the pursuit. RP 66-67.

At the close of the prosecution's case, Mr. Schnebly moved to dismiss the sentencing enhancement. RP 84. The court denied Mr. Schnebly's motion. RP 85.

The jury instructions did not the terms of the sentencing enhancement. The terms are also not defined in the "to convict" instruction. CP 128. The only instruction the jury had with regard to the sentencing enhancement was contained in the verdict form itself. CP 117. This form asked "was any person, other than the defendant, or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of the defendant during his commission of the crime of attempting to elude a police vehicle?"

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

Special Verdict Form, CP 117.

The special verdict form did not contain the language found in the special allegation statute which requires the government "to 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." RCW 9.94A.834(2).

Mr. Schnebly was convicted of attempting to elude a police vehicle. CP 118. The jury also found the government had proven the special allegation. CP 37.

In addition to a standard range sentence of twenty-five months, the court imposed the sentencing enhancement of twelve months and one day. CP 17.

E. ARGUMENT

RAP 13.4(b) is satisfied when the question being considered by the court involves a significant question under the federal and state constitution. Mr. Schnebly was deprived of his due process right to have every element of the charges proved beyond a reasonable doubt when the government was relieved of its burden of proving the elements of the special allegation beyond a reasonable doubt. Mr. Schnebly asks this Court to accept review of this due process violation.

1. Due process requires the government to prove all essential elements of a crime beyond a reasonable doubt.

The Due Process Clause protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (*citing* U.S. Const. amend. XIV; Const. art. I, § 22; *Jackson*

v. Virginia, 443 U.S. 307, 311, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Due process is violated when the trial court's instructions relieve the government of the burden of proving all elements of a crime beyond a reasonable doubt. U.S. Const. amend XIV; Const. art I, § 22; *see also State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). "What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause." *State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785 (2013) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)). A challenge to the elements of an offense constitutes manifest constitutional error. *State v. Dow*, 162 Wn. App. 324, 330, 253 P.3d 476 (2011); *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

2. The government was relieved of its burden of proving the special allegation of endangerment.

The jury's instructions on whether Mr. Schnebly endangered persons other than himself and pursuing law enforcement were insufficient because they failed to allege the essential element of endangerment. *See* CP 117. Instead, the special verdict form merely defined when the prosecution may file a special allegation of

endangerment, rather than when it is proven beyond a reasonable doubt. CP 117.

The Court of Appeals relied on *State v. Williams* to deny Mr. Schnebly relief. Slip Op. at 3 (citing *State v. Williams*, 178 Wn. App. 104, 109, 313 P.3d 470 (2013). *Williams* addresses the question of whether the information filed by the government was constitutionally sufficient. 178 Wn. App. at 473-74. And although the Court of Appeals also found the instructions to be sufficient, the court did not engage in a significant constitutional analysis of the question. *Id*.

This Court should take review because this involves a significant constitutional question. RAP 13.4(b). RCW 9.94A.834 creates two burdens on the government. For charging, the government must be able to allege that the where there is evidence the person charged with eluding a police officer threatened physical injury or harm to persons other than the pursuing officer. RCW 9.94A.834(1).

The enhancement may not be imposed, however, unless the government is able to prove beyond a reasonable doubt the eluding endangered one or more persons other than the pursuing officer and the person charged. RCW 9.94A.834(b).

The terms "threatened physical injury or harm" and "endangered" are not defined in the statute. Their plain meaning demonstrates the legislature intended for the words to mean different things.

Where a term is not defined, courts give the terms its plain and ordinary meaning, unless contrary legislative intent is indicated. *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920–21, 969 P.2d 75 (1998).

"Threaten" is defined as (1) "to say that you will harm someone or do something unpleasant or unwanted especially in order to make someone do what you want or (2) to be something that is likely to cause harm to (someone or something): to be a threat to (someone or something)" Merriam-Webster's Learner's Dictionary (2017).[1]

"Harm" is defined as "physical or mental damage or injury: something that causes someone or something to be hurt, broken, made less valuable or successful, etc." Merriam-Webster's Learner's Dictionary (2017).[2]

[1] Available at http://www.merriam-webster.com/dictionary/threaten
[2] Available at http://www.merriam-webster.com/dictionary/harm

"Endanger" is defined as either (1) to bring into danger or peril or (2) to create a dangerous situation. Merriam-Webster's Learner's Dictionary (2017).[3]

While these terms are similar, they are not the same. Endanger describes peril and the creation of a dangerous situation. Threat and harm do not rise to this level. Instead, these terms define a much lower threshold of unpleasant behavior.

When interpreting a statute, the "fundamental objective" of the court is to give effect to the intent of the legislature. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015) (citing *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012)). Where the statute's meaning is plain on its face, the court must give that meaning "as an expression of legislative intent." *Id.* (citing *State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876 (2010)). Courts determine a statute's plain language by looking to the text of the statute, its context, related provisions and the statutory scheme as a whole. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Statutes must be interpreted so that all the language used is given effect, "with no portion rendered meaningless or superfluous." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

[3] Available at http://www.merriam-webster.com/dictionary/endanger

By failing to properly define "endangerment" in the jury instructions or on the special verdict form, the State was relieved of the burden of proving every essential element of the crime charged. *Jackson*, 443 U.S. at 316; *Brown*, 147 Wn.2d at 339. Instructions which relieve the State of its burden violate due process. *State v. Bennett*, 161 Wn.2d 303, 306-7, 165 P.3d 1241 (2007). This failure to properly define "endangerment" violated Mr. Schnebly's right to due process. Because this issue involves a significant question of constitutional law, RAP 13.4(b) is satisfied.

3. The failure to properly instruct the jury on "endangerment" was not harmless beyond a reasonable doubt.

By relying on *Williams*, the Court of Appeals failed to engage in an analysis of whether Mr. Schnebly's conviction should be reversed. Constitutional instructional error requires reversal unless it affirmatively appears the error was harmless beyond a reasonable doubt. *Brown*, 147 Wn.2d at 341 (citing *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). An instructional error is presumed to have been prejudicial unless it affirmatively appears it was harmless. *State v. Smith*, 131 Wn.2d 258, 263–64, 930 P.2d 917 (1997) (citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). A new trial is required where the error is not harmless

beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 383, 300 P.3d 400 (2013) (referencing *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

While Mr. Schnebly's actions were harmful, they do not meet the higher threshold required to find he endangered others. Admittedly, Mr. Schnebly drove in excess of the speed limit, did not stop his car despite being chased by the police, was seen swerving, did not stop at stop signs, and only stopped when he came to a dead end road. RP 34, 35, 45, 51, 51-52.

Mr. Schnebly's actions did not endanger anyone during the pursuit, including his passengers. The deputy acknowledged the police will cease their pursuit of a suspect when the chase becomes dangerous. RP 66-67. The officer stated both he and his supervisor determined the pursuit did not need to be terminated. RP 66-67.

Mr. Schnebly "driving wasn't very fast." RP 63. Traffic was light. RP 62. There were a few cars on the road when Mr. Schnebly was on the highway and none when he drove on other roads. RP 42, 62. For most of the time, the deputy was within a few car lengths of Mr. Schnebly. RP 43. The officer did not note any significant damage in his

reports. RP 67. There was no testimony that Mr. Schnebly's vehicle had been damaged. RP 67-68.

The instructional error is especially important because it was the only issue contested at trial. RP 101. At the close of the prosecution's case evidence, Mr. Schnebly moved to dismiss the sentencing enhancement because the government failed to establish Mr. Schnebly endangered anyone. RP 84. Because the government is not able to establish this essential element was supported by uncontroverted evidence, reversal is required. *Brown*, 147 Wn.2d at 341.

F. CONCLUSION

Based on the foregoing, petitioner Mr. Schnebly respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 11th day of July 2017.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DESTRY ADAM SCHNEBLY, Appellant.	No. 74559-0-I DIVISION ONE UNPUBLISHED OPINION FILED: June 12, 2017

TRICKEY, J. — Destry Schnebly appeals his conviction of attempting to elude a police vehicle with a sentencing enhancement of endangerment. Schnebly argues that the State was relieved of its burden to prove the sentencing enhancement because the special verdict form given to the jury for the sentencing enhancement used the language "threatened with physical injury or harm," rather than "endangerment." Because we have previously held that the language used in Schnebly's special verdict form is proper, we affirm.

FACTS

On January 25, 2015, Snohomish County Sheriff's Deputy Bryson McGee arrested Schnebly after a lengthy car pursuit. Deputy McGee observed that Schnebly had two passengers in his car. Schnebly violated numerous traffic laws and forced other cars out of the way of the pursuit. After he was arrested, Schnebly told the officers that neither passenger could leave the car during the pursuit.

The State charged Schnebly with attempting to elude a pursuing police vehicle while on community custody. The State alleged as an aggravating factor that "one or more persons other than the defendant or the pursuing law

enforcement officer were threatened with physical injury or harm by the defendant's actions . . . as provided by RCW 9.94A.834."[1]

At trial, Schnebly admitted that he was guilty of attempting to elude a police vehicle. He challenged only whether he had endangered anyone other than himself and the officer while committing his crime.[2]

The jury was provided with a special verdict form that asked, "Was any person, other than the Defendant, or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of the Defendant during his commission of the crime of attempting to elude a police vehicle?"[3] Schnebly did not object to the special verdict form.

The jury found Schnebly guilty of attempting to elude a police vehicle and returned a "Yes" answer on the endangerment special verdict form.[4] The trial court sentenced Schnebly to 25 months of incarceration for his offense plus an additional 12 months and one day for the endangerment sentencing enhancement.

Schnebly appeals.

ANALYSIS

Endangerment Essential Element

Schnebly argues that his due process rights were infringed when the State was relieved of its burden of proving every element of the charged crime and sentencing enhancement beyond a reasonable doubt. Specifically, he contends

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[1] Clerk's Papers (CP) at 152.
[2] At the close of the State's case, Schnebly moved to dismiss the sentencing enhancement for lack of evidence. The trial court denied the motion.
[3] CP at 117.
[4] CP at 117-18.

that the special verdict form did not require the State to prove "endangerment" because it asked whether anyone was "threatened with physical injury or harm," instead of asking whether anyone was "endangered." The State responds that our decision in State v. Williams, 178 Wn. App. 104, 109, 313 P.3d 470 (2013), controls and precludes Schnebly's arguments. The State also argues that Schnebly cannot raise this error because he did not object to the verdict form below. Assuming without deciding that Schnebly has alleged a constitutional error that we can review for the first time on review, we agree with the State that Williams controls.

In a case involving attempting to elude a police vehicle, the State may file a special allegation where there is sufficient evidence to show that "one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm" due to the actions of the defendant. RCW 9.94A.834(1). At trial, the State must 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." RCW 9.94A.834(2).

In Williams, the appellant argued that the special verdict instruction relieved the State of its burden to prove the sentencing enhancement beyond a reasonable doubt because it stated "'threatened with physical injury or harm'" instead of "'endangered.'" 178 Wn. App. at 109. We upheld the special verdict form because "threatened with physical injury or harm" provided the definition of "endangerment" and, therefore, the jury was properly instructed on the law. 178 Wn. App. at 109. We concluded that the instructions were sufficient and did not relieve the State of

its burden to prove the sentencing enhancement beyond a reasonable doubt. Williams, 178 Wn. App. at 109.

Schnebly's argument is identical to the one raised by the defendant in Williams. Moreover, the special verdict forms here and in Williams were based on the Washington Pattern Jury Instructions courts are advised to use when the defendant is charged with attempting to elude a police vehicle with the endangerment sentencing enhancement. See 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL § 190.12, at 664 (3d ed. 2008); Williams, 178 Wn. App. at 107 n.1. Schnebly has not distinguished his case from Williams in any way. Thus, we conclude that Schnebly has not shown that the State was relieved of its burden of proving an essential element of the charged offense.

Appellate Costs

Schnebly asks that no costs be awarded on appeal. Appellate costs are generally awarded to the substantially prevailing party on review. RAP 14.2. But when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2.

Here, the trial court found Schnebly indigent. If the State has evidence indicating that Schnebly's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner.

Affirmed.

Trickey, J

WE CONCUR:

Cox, J.

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. 74559-0-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:

☒ respondent Mara Rozzano, DPA
[mrozzano@snoco.org]
Snohomish County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 11, 2017

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