Supreme Court No. 95710-0
Court of Appeals No. 34528-9-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA V. FOWLER,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Joshua Fowler, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision 34528-9-III pursuant to RAP 13.3 and RAP 13.4(3) issued on February 22, 2018. The opinion is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

Was Mr. Fowler's right to fair trial violated by the "to convict" instruction that misstated the prosecution's burden of proof of the mental state for recklessness, by instructing that the jury need only find that Mr. Fowler "drove his vehicle in a **manner indicating a reckless manner"** rather than requiring the prosecution to prove that he in fact "…**did drive** his vehicle **in a reckless manner** while attempting to elude a pursuing police vehicle…"? (Emphasis added) CP 10, 95.

And was Mr. Fowler further deprived of his jury trial right by the officer's testimony stating the ultimate fact, that Mr. Fowler drove in a reckless manner?

C. STATEMENT OF THE CASE.

Joshua Fowler was driving with his girlfriend, Haley Lloyd, when Sergeant Vigesaa recognized Mr. Fowler, who he suspected of driving with a suspended license. RP 130. The officer also recognized

Ms. Lloyd, who he knew had a felony warrant. RP 130. Sergeant Vigesaa did a U-turn to follow Mr. Fowler. RP 130. When Ms. Lloyd spotted police behind them, she told Mr. Fowler to "go." RP 226.

Mr. Fowler sped away from the officer for about four to five blocks before turning into an apartment complex parking lot where he stopped the car. RP 133, 134, 142, 226. Mr. Fowler and Ms. Lloyd both jumped out of the vehicle and ran away on foot. RP 144, 226.

Sergeant Vigesaa ran after Mr. Fowler until Mr. Fowler stopped. RP 146, 226, 227. Sergeant Vigesaa then retraced their path. He found a gun and ammunition in the bushes. RP 149. Mr. Fowler was charged with attempting to elude a police vehicle, second degree unlawful possession of a firearm, and possession of a stolen firearm. CP 10-11.

At trial, Mr. Fowler admitted that he sped away from police and fled on foot, but denied the gun or ammunition were his. RP 226, 228.

Sergeant Vigesaa claimed that he pursued Mr. Fowler with flashing lights and siren in a marked police vehicle, and that Mr. Fowler did not reduce his speed through intersections. RP 133-137. He testified that Mr. Fowler's driving was "reckless." Sergeant Vigesaa estimated that Mr. Fowler drove about 45 miles per hour through a 25

mile per hour residential neighborhood by looking down at his speedometer while following Mr. Fowler. RP 133-134, 140.

The jury acquitted Mr. Fowler of possessing a stolen firearm, but found him guilty of attempting to elude a police officer and unlawful possession of a firearm. CP 110-112.

The jury was improperly instructed. The "to convict" instruction reduced the prosecutor's burden to prove Mr. Fowler drove recklessly, by only instructing the jury that they needed to find Mr. Fowler "drove his vehicle in a manner indicating a reckless manner" rather than requiring the prosecution to prove that Mr. Fowler "…did drive his vehicle in a reckless manner while attempting to elude a pursuing police vehicle…" CP 10, 95. And the jury heard the officer testify that Mr. Fowler drove "recklessly" while attempting to elude him, which should have been a question for the jury alone. RP 137, 143.

The Court of Appeals recognized both the error in this instruction and the officer's testimony, but found the errors to be harmless. Slip Op. at 7, 9.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

REVIEW BY THIS COURT IS NEEDED TO DECIDE WHETHER MR. FOWLER'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE "TO CONVICT" INSTRUCTION THAT DILUTED THE

STATE'S BURDEN OF PROOF AND THE OFFICER'S TESTIMONY THAT INVADED THE PROVINCE OF THE JURY.

1. The Court of Appeals agreed that the "to convict" instruction misstated the law, but disagreed that this error diluted the State's burden of proof, ignoring contrary Washington Supreme Court precedent.

The constitutional demand of a fair trial requires that jury instructions, when read as a whole, correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); U.S. Const. amend. XIV, VI; Const. art I, § 22.

Due process requires that the "to convict" instruction contain all the elements of the offense. *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002). The purpose of requiring all the elements to be contained in the "to convict" instruction is to protect the due process rights of criminal defendants. *Id.*

RCW 46.61.024(1) makes it a class C felony for a person to willfully fail or refuse to immediately bring his 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." (Emphasis added).

Accordingly, the Information correctly alleged that Mr. Fowler "…**did drive** his vehicle **in a reckless manner** while attempting to elude a pursuing police vehicle…" (Emphasis added). CP 10. The "to convict" instruction however, erroneously instructed that Mr. Fowler "**drove** his vehicle in a **manner indicating a reckless manner."** (Emphasis added). CP 95.

This error no doubt derived from the 2003 changes to RCW 46.61.024(1), when the legislature replaced the phrase, "manner indicating a wanton or willful disregard for the lives or property of others" with "reckless manner." *State v. Ratliff*, 140 Wn. App. 12, 14, 164 P.3d 516 (2007) (citing Laws of 2003, ch. 101, § 1).

Before the 2003 change in the statute, the Supreme Court considered whether a manner *indicating* a wanton and willful disregard meant that the person *actually* drove wantonly and willfully. *State v. Sherman* 98 Wn.2d 53, 57, 653 P.2d 612 (1982). The court found that the word "indicating" in the statute conveys both an objective and subjective component. *Id.* at 58. "Indicating" may show that conduct was exhibited, but does not require that the accused in fact possessed

the requisite mental state in every case. *Id*. For example, someone having a seizure while driving may exhibit wanton and willful disregard, but would not have the requisite mental state: "[w]hile his manner of driving would **indicate** wanton and willful disregard, the defendant would not actually have wanton and willful disregard for others." *Id*. at 59 (emphasis added). Because conduct that "indicates" a mental state does not in fact establish a mental state, the Court ruled that "indicating" created a rebuttable presumption of a wanton or willful mental state based on objectively observed conduct: "Circumstantial evidence may 'indicate' a wanton and willful disregard, but the defendant may rebut that inference from circumstantial evidence." *Id.*

Sherman thus directed trial courts to instruct the jury that circumstantial evidence of a defendant's driving created a rebuttable inference that the defendant had "wanton and willful disregard." *State v. Aamold*, 60 Wn. App. 175, 180, 803 P.2d 20 (1991) (citing *Sherman*, 98 Wn.2d at 58-59).

Like in *Sherman*, the jury in Mr. Fowler's case was instructed to find that he drove in a manner that merely **indicated** a reckless manner. CP 95. This instruction required a finding as to objective conduct, but

not necessarily Mr. Fowler's subjective mental state. *See Sherman*, 98 Wn.2d at 59. The erroneous "to convict" instruction thus did not require the State to prove that Mr. Fowler possessed the mental state of driving in a "reckless manner."

The Court of Appeals decision did not address *Sherman's* analysis of how the language of "indicating a reckless manner" dilutes the State's burden of proof as to the requisite mental state and instead only looks to the dictionary definition of the term. Slip op. at 8-9. The Court of Appeals' error violates the "fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

2. The erroneous "to convict" instruction that relieved the prosecution of its burden of proof cannot be harmless error.

The Court of Appeals wrongly adopted the prosecutor's claim that this was not harmless error. Slip Op. at 9.

Though jury instructions that relieve the State of its burden may be subject to harmless error analysis, the "to convict" instruction enjoys a special status. *State v. Pope*, 100 Wn. App. 624, 630, 999 P.2d 51 (2000). This is because "[a] to-convict instruction… serves as a yardstick by which the jury measures the evidence to determine the

defendant's guilt or innocence." *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (citing *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)) "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." *Smith*, 131 Wn.2d at 263 (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)). Thus, even in cases where the error may seem "picayune," "the jury has the right…to regard the 'to convict' instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand." *Id*.

A "clear misstatement of the law" in a jury instruction is presumed to be prejudicial. *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977). A "to convict" instruction that misstates an element of the offense is not harmless error unless the court is convinced, beyond a reasonable doubt, that the error did not contribute to the verdict. *Brown*, 147 Wn.2d at 341 (citing *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). An instructional error may be of constitutional magnitude if it relieves the state of its burden of proof. *O'Hara*, 167 Wn.2d at 105 (emphasis added). To determine whether

the instruction was an error of constitutional magnitude, the court examines "whether the instruction omitted an element so as to relieve the State of its burden or merely failed to further define one of those elements." *Id.*

Here, the erroneous "to convict" instruction misstated the law, relieving the prosecution of having to prove beyond a reasonable doubt that Mr. Fowler in fact drove in a reckless manner.

The Court of Appeals wrongly adopted the prosecutor's claim on appeal that Mr. Fowler "conceded" the elements of the crime of reckless driving. Slip Op. at 9. Mr. Fowler admitted to eluding and speeding to get away from police, but the question remained, as argued by defense in closing, of "how reckless his driving was." RP 302. This is not a concession that renders the to-convict instruction harmless. The jury was tasked with determining whether Mr. Fowler in fact drove in reckless manner as defined by law—an element that the State was required to prove. Unlike in *Sibert,* where there was no question of the drug that was at issue, here there was a question of whether Mr. Fowler's driving while trying to avoid police was in fact reckless.

To the contrary, Mr. Fowler's trial testimony specifically established that he did not possess the mental state of recklessness. He

testified that he paid attention to the road ahead of him. RP 225. He did not believe that people were in the area he traveled. RP 226. He drove only four to five blocks before stopping his vehicle in an apartment complex parking lot and running away on foot. RP 226. And though he admitted speeding, this is not enough to establish "a reckless manner." RP 237; *See State v. Randhawa,* 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997) (the inferred fact of reckless driving did not flow from the evidence of speed alone.). Like in *Randhawa,* Sergeant Vigesaa estimated that Mr. Fowler drove only about 20 miles above the speed limit, which does not necessarily support the inference that a person drove in a reckless manner. *Id*. at 77–78 (traveling 10 to 20 m.p.h. over the posted speed limit "is 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.").

And though Sergeant Vigesaa described Mr. Fowler's driving as "reckless," Mr. Fowler presented a competing description of the danger posed by his speeding for a very short distance. RP 137, 143, 225-226. Because of the divergent testimony and Sergeant Vigesaa's very limited observation of Mr. Fowler's driving, it cannot be argued that the erroneous "to convict" instruction which relieved the State of

proving Mr. Fowler in fact drove in a reckless manner did not affect the jury's verdict.

The Court of Appeals' finding to the contrary deprived Mr. Fowler of his constitutional right to a jury trial.

3. Sergeant Vigesaa impermissibly testified to the ultimate issue of fact, that Mr. Fowler drove recklessly in an attempt to elude police; this was not harmless error.

Sergeant Vigesaa's repeated testimony that Mr. Fowler drove recklessly while attempting to elude police invaded the province of the jury and thus further deprived Mr. Fowler of his jury trial right. The Court of Appeals erred in finding this was harmless error. Slip Op. at 7.

Opinion testimony regarding a defendant's guilt is reversible error if the testimony violates the defendant's constitutional right to a jury trial. This includes the independent determination of the facts by the jury. *State v. King*, 167 Wn.2d 324, 329–30, 219 P.3d 642 (2009) (citing *State v. Kirkman*, 159 Wn.2d 918, 938, 155 P.3d 125 (2007)); U.S. Const. amend. VI; Const. art. 1 § 21**.** An explicit or almost explicit witness statement on an ultimate issue of fact results in manifest constitutional error. *Kirkman*, 159 Wn.2d at 938.

Opinion testimony regarding the guilt or veracity of the accused is prejudicial "because it 'invades the exclusive province of the

jury.'" *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). Thus, neither a lay nor an expert witness "may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *King*, 167 Wn.2d at 331 (citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)).

To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of a case, including, "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) "the other evidence before the trier of fact." *King*, 167 Wn.2d at 332–33 (citing *Kirkman*, 159 Wn.2d at 928).

A law enforcement officer's opinion testimony may be especially prejudicial because the "officer's testimony often carries a special aura of reliability." *King*, 167 Wn.2d at 331 (citing *Kirkman*, 159 Wn.2d at 928).

Opinion testimony that is manifest constitutional error can be raised for the first time on appeal where there is actual prejudice that affects the accused's trial right, which includes the independent determination of the facts by the jury. *King*, 167 Wn.2d at 329-330

(citing *Kirkman,* 159 Wn.2d at 926-927); RAP 2.5(a)(3). Such was the case here where Sergeant Vigesaa offered repeated, conclusive legal opinion that Mr. Fowler eluded police by driving recklessly:

> Q: And what happened after you made that U-turn?
> A. The defendant immediately began **eluding** me, accelerated away from me.

RP 130 (emphasis added). Then again: "he immediately tries to **elude** me." RP 133. In response to the prosecution's request to more specifically describe Mr. Fowler's driving Sergeant Vigesaa opined:

> A. Well, he was attempting to **elude** me. He was driving **recklessly** at speeds almost twice the speed limit[…]
> I've been doing this job for almost 25 years. …his behavior was to drive faster, **recklessly**, and try to get away from me.

RP 137. And despite the fact that the Sergeant Vigesaa provided few specifics about the apartment building's parking lot, he concluded that people were endangered "due to the **reckless behavior** of the defendant." RP 143.

Sergeant Vigesaa's opinion testimony that Mr. Fowler committed the elements of the offense was manifest constitutional error under the factors set out in *King.* First, his status as an officer carries an "aura of reliability" that gives undue credence to the officer's repeated, overt legal conclusions that Mr. Fowler "eluded" and drove

"recklessly." *King*, 167 Wn.2d at 331. This impermissible opinion testimony overshadowed the refuted evidence of reckless driving.

The State offered no other witnesses to testify about Mr. Fowler's driving. Mr. Fowler admitted to driving away from police, but drove only four to five blocks, saw no people around, and the officer's speed estimations were neither precise nor inordinately high. RP 134, 226, 237. Thus, it was for the jury to decide whether Mr. Fowler's conduct established that he "eluded" police by driving in a "reckless manner" as required by RCW 46.61.024(1).

In light of the erroneous jury instruction that relieved the prosecution of its burden to prove beyond a reasonable doubt whether Mr. Fowler in fact drove in a reckless manner, the officer's repeated declaration that Mr. Fowler drove recklessly simply cannot be harmless error. The Court of Appeals decision to the contrary deprives Mr. Fowler of his jury trial right and requires review by this Court.

E. CONCLUSION

Mr. Fowler requests review of the Court of Appeals' erroneous affirmation of Mr. Fowler's conviction based on a "to-convict" instruction that relieved the State of its burden of proof, and officer

testimony about the ultimate fact that deprived Mr. Fowler of a fair trial under the United States and Washington State Constitutions.

Respectfully submitted this the 26th day of March 2018.

s/ Kate Benward
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FILED
FEBRUARY 22, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JOSHUA V. FOWLER, Appellant.	)	No. 34528-9-III UNPUBLISHED OPINION

KORSMO, J. — Joshua Fowler appeals from his convictions for unlawful possession of a firearm and attempting to elude a pursuing police vehicle, raising two challenges to the latter conviction. We affirm.

FACTS

The incident in question arose when Sergeant Kurt Vigesaa of the Spokane Police Department, while driving in his patrol car, recognized Mr. Fowler as the driver of an oncoming vehicle. The two men made eye contact and the officer made a U-turn to get his vehicle behind Fowler's. The sergeant had recently stopped Mr. Fowler for driving while license suspended.

When the officer made the U-turn, Mr. Fowler accelerated his vehicle away from the patrol car. Sergeant Vigesaa responded by turning on his lights and siren and followed in pursuit. After four or five blocks, Mr. Fowler pulled into the parking lot of an apartment complex. He stopped the car and fled to the southeast, while his passenger, Haley Lloyd, fled to the west. The sergeant followed Mr. Fowler with his patrol vehicle for a distance before parking and chasing him on foot. During the foot pursuit, Vigesaa observed Fowler reach into his waistband while running through an area of shrubs and trees. Shortly thereafter, he surrendered.[1]

The prosecutor filed charges of second degree unlawful possession of a firearm, possession of a stolen firearm, and attempting to elude a pursuing police officer. The matter proceeded to jury trial.

Several times during the testimony of Sergeant Vigesaa, the prosecutor asked him to describe the defendant's driving. On one occasion, the officer responded that Mr. Fowler "upon seeing me and making a U-turn, immediately tries to elude me." Report of Proceedings (RP) at 133. Later, the prosecutor asked for a description of the driving through intersections:

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[1] After arresting Fowler, Vigesaa checked the shrubbery and found a .45 Smith & Wesson handgun along with a box of ammunition. The gun's owner later reported it missing and identified the recovered weapon as his.

> [Sergeant Vigesaa]: Well, he was attempting to elude me. He was driving recklessly at speeds almost twice the speed limit and was not reducing his speed at each one of these uncontrolled intersections.
> [Prosecutor]: In your mind, how did you know or believe that he was trying to elude you?
> [Sergeant Vigesaa]: I've been doing this job for almost 25 years. I've had numerous people run from me, elude me. I knew immediately upon—that he was driving normal. And upon seeing me and his acceleration and his failure to stop/pull over, which normal—normal—is the normal behavior for citizens upon hearing lights and sirens—his behavior was to drive faster, recklessly, and try to get away from me.

RP at 137. On another occasion, the prosecutor asked about Mr. Fowler's speed:

> [Sergeant Vigesaa]: I said approximately 45 miles an hour. That's a fluctuation of me a little bit and trying to catch up to him; so we were not exactly traveling at 45 miles per hour, but it fluctuated as he's trying to elude me and I'm trying to catch that. And I base that on an average of each time I looked down at the speedometer.
> [Prosecutor]: At what moment and what precise location, if you can estimate, did you turn on and activate both your audible and visual sirens on your vehicle?
> [Sergeant Vigesaa]: I . . . immediately noticed he was trying to elude. I initially hit my emergency lights, and I knew at this point that he was trying to get away. And at that point, I activated my siren with my emergency lights.

RP at 140. No objection was raised to any of the noted testimony.

Mr. Fowler testified in his own defense that he had fled from Sergeant Vigesaa at the urging of his passenger, Ms. Haley, who had outstanding arrest warrants. In closing argument, defense counsel conceded the eluding charge in order to argue for acquittal on the two firearms counts:

> There are facts in this case that are just not in dispute. There are elements, as [the prosecutor] eloquently went through, that have been proven by the

> state beyond a reasonable doubt. Mr. Fowler, in his Yukon with his girlfriend, felony warrant next to him, at some point, one or both see Sergeant Vigesaa. They decide, Nope, warrant. Go, run. They do.
>
> They take off for a few blocks, go into a parking lot, stop. He was driving with a suspended license, but he didn't have a warrant, but he was clearly trying to get away. Yeah, he was eluding. He was attempting to, anyway; no question about that. It's not in dispute.
>
> What else isn't in dispute? Well, he is a convicted felon. We know that. We've talked about it already. He's been convicted of three forgeries. You heard his testimony on the stand. He pled guilty to those. Why? He said he did it. He didn't take those to trial, but here he is in trial today. And again, it's not because of the elude. He's already admitted to that on the stand. The state's right. He did that. But here's what's not clear, and here's what he didn't do. He didn't possess a firearm; and even if he did, he sure didn't know it was stolen.

RP at 293-294. Counsel also argued:

> There was some mention in the state's first closing about reckless driving. It is part of attempt to elude. I think there is some question as to how reckless the driving was, but again, Mr. Fowler said he was trying to get away, that he was traveling over the speed limit. I think there's some question of how many people were wherever.
>
> You also heard Sergeant Vigesaa testify that, Yeah, sometimes we actually end pursuit if it's too dangerous. Well, he didn't do that here. But as I already said, Mr. Fowler admitted to eluding. That's something that's not in dispute. The elements are satisfied by the state there, but they're not satisfied with respect to possession of the firearm because he didn't have it.

RP at 302.

The court instructed the jury on the elements of attempting to elude:

> [E]ach of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1) That on or about September 5th, 2014, the defendant drove a motor vehicle;
>
> 2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;

> 3) That the signaling police officer's vehicle was equipped with lights and siren;
> 4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
> 5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle *in a manner indicating a reckless manner*; and
> 6) That the acts occurred in the state of Washington.

Clerk's Papers (CP) at 95 (emphasis added). The definitional instruction told the jury that the offense required proof that the vehicle was driven "in a reckless manner." CP at 94 (Instruction 7). There were no objections to these instructions.

The jury convicted on the eluding and unlawful possession counts, but acquitted on the stolen firearm charge. After the court imposed a standard range sentence, Mr. Fowler appealed to this court. A panel considered the matter without argument.

ANALYSIS

This appeal raises two arguments. First, we briefly consider Mr. Fowler's contention that Sergeant Vigesaa improperly expressed an opinion by repeated use of the word "elude." We then consider whether the elements instruction prejudiced Mr. Fowler's trial.

Testimony

Mr. Fowler argues that the repeated use of the word "elude" during the testimony of the officer constituted improper opinion testimony. Without deciding that issue, it is clear that any error was not manifest and was completely harmless in light of the defendant's own testimony and the concession that the elements were established.

Witnesses are not permitted to opine as to the guilt of the defendant. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). A proper objection must be made at trial to perceived errors in admitting or excluding evidence; the failure to do so precludes raising the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). "'[A] litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.'" *Id.* (quoting *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)).

An exception to this general rule exists if the issue involves a manifest error affecting a constitutional right. RAP 2.5(a). A party claiming the existence of manifest constitutional error is first required to establish the existence of error that is constitutional in nature. If such an error is demonstrated, the party must then show that the error was not harmless and actually had an identifiable and practical impact on the case. *State v. Scott*, 110 Wn.2d 682, 687-688, 757 P.2d 492 (1988); *State v. Kirkman*, 159 Wn.2d 918, 934-935, 155 P.3d 125 (2007). Opinion testimony indirectly related to an ultimate fact is not a "manifest" constitutional error that may be raised for the first time on appeal. *Kirkman*, 159 Wn.2d at 936.

The word "elude" is a synonym for "evade" or "escape."[2] Given the name of the crime of attempting to elude, as well as its elements, we recommend that officers avoid use of the word "elude" when describing flight or other evasive behavior. But, even if the officer erred here, any error was not meaningful in light of the defense theory of the case. The defendant himself admitted he was trying to evade the officer in order to allow his passenger to escape capture. Defense counsel agreed with that factual position in his closing argument and used it to ask the jury to hold his client accountable for the offense he agreed he had committed (the eluding) while acquitting him on the (more serious) firearm charges. That approach proved successful in part.

Under these circumstances, Mr. Fowler cannot show that he was prejudiced by the officer's testimony. Accordingly, he has not established that manifest constitutional error occurred. We therefore decline to further consider this claim.

Jury Instruction

Mr. Fowler also argues that the elements instruction was constitutionally defective. We again conclude that, despite the extraneous verbiage in the instruction, he has not established manifest constitutional error.

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[2] *Webster's Third New International Dictionary* at 738, in part, recognizes modern meanings for the word as including: 2 : to avoid slyly or adroitly (as by artifice, stratagem, or dexterity) : EVADE 3 : to escape the notice or perception; syn see ESCAPE.

A challenge on appeal to a jury instruction that was not challenged in the trial court is treated similarly to the evidentiary issue previously discussed. Only if the alleged instructional error raises a question of manifest constitutional error is the claim reviewable under RAP 2.5(a). *Scott*, 110 Wn.2d at 687-688. Again, he has not met the burden of establishing prejudicial error that makes his claim manifest.

The eluding statute currently prohibits driving "in a reckless manner" while fleeing a police officer. RCW 46.61.024. Prior to its amendment in 2003, the eluding statute had prohibited driving in a "manner indicating a wanton or wilful disregard for the lives or property of others." Former RCW 46.61.024 (2002). The instruction used in this case grafted on the "manner indicating" language of the former statute to the current "reckless manner" standard. Mr. Fowler argues that by doing so, the instruction altered the elements so that the State needed to only prove the appearance of driving in a reckless manner rather than that he had actually driven in a reckless manner.

Although the language is erroneous, we disagree that "indicating" means what Mr. Fowler says that it means. That particular verb has many meanings, including to show, demonstrate, or to point out.[3] While the language of this hybrid instruction is strange and erroneous, it did not necessarily dilute the prosecutor's burden of proof. Instruction 7

[3] *Id.* at 1150.

properly defined the crime for the jury, making it unlikely that the elements instruction would be read as Mr. Fowler suggests.

However, the error is not manifest for the same reasons that the officer's testimony did not constitute manifest constitutional error. Defense counsel agreed that the elements of the crime were established and argued that point to the jury as part of the defense strategy for acquittal on the greater crimes. Having conceded this offense to the jury, Mr. Fowler simply does not have a colorable claim of manifest constitutional error from the inapt wording of this instruction.

The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 34528-9-III
	)	
JOSHUA FOWLER,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MARCH, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GRETCHEN VERHOEF [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] JOSHUA FOWLER 33 E GRAVES RD APT 49 SPOKANE, WA 99218	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF MARCH, 2018.

X_____

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Appellate Court Case Title:	State of Washington v. Joshua Vincent Fowler
Superior Court Case Number:	14-1-03172-7

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