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Supreme Court No. 97925-1
(Court of Appeals No. 78618-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TERRY KERTIS,

Appellant.

PETITION FOR REVIEW

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WASHINGTON APPELLATE PROJECT
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A. INTRODUCTION

Terry Kertis was driving his motorcycle at an annual motorcycle rally when he encountered an aggressive rider. While attempting to avoid this rider, he skidded behind an unmarked police car. The officer driving the unmarked car followed Mr. Kertis home and questioned him, but did not arrest him. The officer later cited Mr. Kertis for attempting to elude a police vehicle, although Mr. Kertis testified at trial that he did not see the officer signal him to pull over and did not recognize the unmarked car as a police vehicle.

The jury received a pattern jury instruction defining the element of "knowledge." Contrary to this Court's opinion in *State v. Shipp*, 93 Wn.2d 510, 610 P.2d 1322 (1980), this instruction did not require the State to prove Mr. Kertis had actual, subjective knowledge that he was signaled to stop or that the unmarked car was a police vehicle. Instead, the instruction permitted the jury to convict based on what a "reasonable person" would know, an objective standard. This Court should accept review in order to clarify that the pattern jury instruction defining "knowledge" unconstitutionally relieves the State of its burden of proving actual knowledge.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Mr. Kertis asks this Court to review the opinion of the Court of Appeals in *State v. Kertis*, No. 78618-1-I (filed November 4, 2019) (unpublished). A copy of the opinion is attached as Appendix A. A copy of the pattern instruction defining "knowledge" submitted to the jury in this case is attached as Appendix B.

C. ISSUE PRESENTED FOR REVIEW

Due process requires the State to prove every element of the charged crime beyond a reasonable doubt. To satisfy the elements of the crime of attempting to elude, the State must prove the driver *actually* knew he was being signaled to stop and that the pursing vehicle was a police vehicle. Here, the jury was instructed it could find the element of knowledge was satisfied if Mr. Kertis had "information that would lead a reasonable person in the same situation to believe that a fact exists." Should this Court grant review in order to clarify that this instruction is unconstitutional pursuant to *State v. Shipp*, 93 Wn.2d 510, 610 P.2d 1322 (1980), because it permits conviction based on an objective knowledge standard? *See* RAP 13.4(1), (3).

D. STATEMENT OF THE CASE

Terry Kertis attended the 2016 Oyster Run, an annual motorcycle rally in Anacortes. *See* RP 6/18/2018 at 91, 134. He rode his Harley

Davidson motorcycle around downtown Anacortes for several hours, talking to people about his unique bike, before heading home. RP 6/18/2018 at 135, 142–43. While riding, Mr. Kertis wore a helmet with a tinted visor. RP 6/18/2018 at 135–36.

On his way home, Mr. Kertis encountered another motorcycle rider who was driving aggressively. RP 6/18/2018 at 135. Mr. Kertis thought this rider was trying to knock him down, and their wheels rammed into each other several times. RP 6/18/2018 at 135. This caused Mr. Kertis to fear for his safety and panic. RP 6/18/2018 at 144–45. As Mr. Kertis was trying to get away, he had to brake suddenly to avoid hitting a black car that also braked suddenly. RP 6/18/2018 at 140. This car turned out to be an unmarked police car—a Toyota Camry—driven by police Captain Lucien D'Amelio. RP 6/18/2018 at 93, 112.

According to Captain D'Amelio, he saw a motorcycle rider he later concluded was Mr. Kertis brake suddenly and skid behind him, drive onto the shoulder of the road, and accelerate past the speed limit. RP 6/18/2018 at 95–96, 101. Captain D'Amelio pursued Mr. Kertis, who eventually stopped at a red light. RP 6/18/2018 at 97. Captain D'Amelio pulled up next to Mr. Kertis, rolled down the window of his car, and yelled at Mr. Kertis to pull over, but Mr. Kertis did not comply. RP 6/18/2018 at 97–98. Captain D'Amelio did not remember being able to see through Mr. Kertis'

helmet visor. RP 6/18/2018 at 114. Captain D'Amelio further testified Mr. Kertis then sped away and ran a red light, but that traffic thwarted further pursuit. RP 6/18/2018 at 100. Captain D'Amelio testified he was familiar with Mr. Kertis and his unique motorcycle and decided to drive to Mr. Kertis' house to investigate further. RP 6/18/2018 at 101, 106–107.

When Mr. Kertis arrived home, the unmarked black car driven by Captain D'Amelio and a marked police car pulled up to his property. RP 6/18/2018 at 136–37. Captain D'Amelio and a second officer, Chad Pruiett, exited the vehicles and Captain D'Amelio engaged Mr. Kertis in what Mr. Kertis thought was a "casual conversation." RP 6/18/2018 at 136–37. Captain D'Amelio informed Mr. Kertis he was not under arrest but that he should stop riding his motorcycle. RP 6/18/2018 at 137–38. Based on their conversation, Mr. Kertis did not believe he was under investigation for any crime. RP 6/18/2018 at 138. Mr. Kertis was very surprised when he was charged several months later with attempting to elude a pursuing police vehicle. RP 6/18/2018 at 138; CP 1–7.

At trial, Mr. Kertis testified he did not recognize the unmarked black Toyota Camry as a police car when he almost skidded into it. RP 6/18/2018 at 139. Mr. Kertis also testified he did not see an officer in uniform direct him to stop, or see police sirens or lights while driving home. RP 6/18/2018 at 136, 139. He further denied making any

inculpatory statements during the conversation at his property. RP 6/18/2018 at 142.

The jury received instructions on the *mens rea* required to convict for the crime of attempting to elude a police vehicle, including a pattern jury instruction on the definition of "knowledge." CP 31 (attached as Appendix B). The pattern jury instruction on the definition of knowledge read in relevant part:

> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

See CP 31; 11 Washington Practice: Washington Pattern Jury Instructions; Criminal 10.02 (4th ed. 2016) ("WPIC 10.02"). The jury returned a guilty verdict. CP 35–36. Mr. Kertis received a 14-month sentence and has since served his time. CP 43; Op. at 7.

The Court of Appeals summarily rejected Mr. Kertis' argument that the knowledge jury instruction was constitutionally deficient, relying on this Court's decision in *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990). *See* Op. at 6–7. Mr. Kertis now petitions this Court for review.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

a. The State has the burden of proving the element of actual, subjective knowledge.

"Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt." *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); *see also* U.S. Const. amend. XIV; Const. art. I, § 22. In order to convict a defendant of attempting to elude a police vehicle, the State must prove beyond a reasonable doubt that the defendant "willfully fail[ed] or refuse[d] to immediately bring his or her vehicle to a stop and [drove] 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." RCW 46.61.024(1) (defining the crime of attempting to elude a police vehicle). "Willfulness in this context is identical with knowledge." *State v. Flora*, 160 Wn. App. 549, 553, 249 P.3d 188 (2011) (quoting *State v. Mather*, 28 Wn. App. 700, 702, 626 P.2d 44 (1981)).

For all crimes requiring a *mens rea* of knowledge, this Court recognized in *State v. Shipp* that the jury must find *actual* knowledge to satisfy due process requirements, but may make such a finding with circumstantial evidence. 93 Wn.2d 510, 516, 610 P.2d 1322 (1980); *see also State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (citing

Shipp). *Shipp* stands for the proposition that the jury must apply a subjective knowledge standard that accounts for the defendant's individual intelligence, mental condition, perception, and level of attentiveness. 93 Wn.2d at 514–16.

Constructive knowledge, or what "an ordinary person in the defendant's situation would have known," is not constitutionally sufficient to convict. *Shipp*, 93 Wn.2d at 514. "Although subtle, the distinction between finding actual knowledge through circumstantial evidence and finding knowledge because the defendant 'should have known' is critical." *Allen*, 182 Wn.2d at 374. Even when presented with circumstantial evidence, the jury must still reach a conclusion that the defendant had actual, subjective knowledge in order to convict. *See id.*

To satisfy the elements of the crime of attempting to elude, "the driver must not only *know* that he is being signaled to stop but must also *know* that the pursuing vehicle is a police vehicle." *Flora*, 160 Wn. App. at 555 (emphasis added). Thus the State had the burden of proving, through direct or circumstantial evidence, that Mr. Kertis had *actual knowledge* he was being signaled to stop and also had *actual knowledge* the pursuing vehicle was a police vehicle. *See id.*; *Allen*, 182 Wn.2d at 374.

b. The knowledge instruction relieved the State of its burden of proving actual knowledge.

"To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." *O'Hara*, 167 Wn.2d at 105 (citations omitted). Accordingly, the jury instructions must "make the relevant legal standard manifestly apparent to the average juror." *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Here, the jury was instructed it could find the element of knowledge was satisfied if Mr. Kertis had "information that would lead a reasonable person in the same situation to believe that a fact exists." *See* CP 31. This instruction was taken directly from the Washington Pattern Jury Instructions defining "knowledge." *Compare* WPIC 10.02 *with* CP 31. As this Court acknowledged in *State v. Leach*, this pattern jury instruction was modified in an attempt to correct the constitutional deficiency identified by *Shipp*. 114 Wn.2d 700, 709–710, 790 P.2d 160 (1990); *see also* WPIC 10.02 (comment).

However, this modification failed at its task. Although the instruction has been "repeatedly" upheld, *see Leach*, 114 Wn.2d at 710, it is misleading to the average juror and strongly implies a conviction may

rest on constructive, objective knowledge alone. As this Court recognized in *Shipp*, such an interpretation is unconstitutional. 93 Wn.2d at 514–16.

The instruction's reference to a "reasonable person" does not require the jury "to consider the subjective intelligence or mental condition of the defendant." *Shipp*, 93 Wn.2d at 515. The instruction "redefines knowledge with an objective standard which is the equivalent of negligent ignorance," a less culpable mental state. *Id.* "Such a redefinition is inconsistent with the statutory scheme which creates a hierarchy of mental states for crimes of increasing culpability." *Id.* (citing RCW 9A.04.020(1)(d), RCW 9A.08.010(2)).

It is also inconsistent with the "ordinary and accepted meaning" of the word "knowledge," which implies a subjective understanding or awareness. *See Shipp*, 93 Wn.2d at 515; *see also* Black's Law Dictionary, "Knowledge" (11th ed. 2019). By contradicting the ordinary and accepted meaning of "knowledge," the instruction is confusing and misleading to "[t]he ordinary person." *See Shipp*, 93 Wn.2d at 515.

In order to comply with *Shipp*, the pattern instruction defining knowledge should clearly state that a finding of actual, subjective knowledge is required to convict, but that the jury may consider circumstantial evidence in making this finding. *See Shipp*, 93 Wn.2d at

517. The instruction should also remove all reference to a "reasonable person," as it implies that an objective standard is sufficient to convict.

At worst, the knowledge instruction was an incorrect statement of law that lessened the State's burden of proof. At best, it was confusing to the common juror. *See Allen*, 182 Wn.2d at 374 (recognizing the instruction makes a "subtle" but "critical" distinction). Accordingly, the instruction violated the constitutional demands of a fair trial. *O'Hara*, 167 Wn.2d at 105; *Walden*, 131 Wn.2d 469, 473. This Court should accept review to provide guidance on the proper wording of the knowledge instruction in order to comply with the constitutional strictures as outlined in *Shipp*. *See* RAP 13.4(1), (3).

c. The erroneous jury instruction requires a new trial.

"It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden" of proving "every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions that misstate the law "must be presumed to have misled the jury in a manner prejudicial to the defendant." *State v. Irons*, 101 Wn. App. 544, 559, 4 P.3d 174 (2000). To overcome this presumption, the State has the burden of showing that misleading jury instructions are harmless beyond a reasonable doubt. *See id.* An instructional error is harmless only if it "*in no way affected the*

final outcome of the case.'" *Walden*, 131 Wn.2d at 478 (internal citations and quotation marks omitted) (emphasis in the original).

This Court has the discretion to review manifest errors affecting a constitutional right for the first time on appeal. *See* RAP 2.5(a). A constitutional error is manifest if the defendant can make a showing it had "practical and identifiable consequences" at trial. *State v. Fields*, 87 Wn. App. 57, 64, 940 P.2d 665 (1997) (internal citations and quotation marks omitted). "Manifest" constitutional errors include jury instructions that relieve the State of its burden of proof. *O'Hara*, 167 Wn.2d at 105.

Here, the knowledge instruction permitted the jury to convict Mr. Kertis on the basis of constructive knowledge, or what a reasonable person would know. *See* CP 31. In doing so, the instruction lessened the State's burden of proof and violated Mr. Kertis' right to due process. *See O'Hara*, 167 Wn.2d at 105. Further, Mr. Kertis testified he did not see an officer signal a stop and he did not know the black car was an unmarked police car—that he lacked actual, subjective knowledge. RP 6/18/18 at 136, 139. His subjective knowledge of the circumstances was key to the disposition of the case, but based on the knowledge instruction, the jury may have focused instead on what a reasonable person would have known. *See* CP 31.

Had the jury been properly instructed that Mr. Kertis was required to *actually know* he was being signaled to stop and *actually know* the unmarked black car was a police vehicle, there is a possibility it would have acquitted him of the charge of attempting to elude. *See Flora*, 160 Wn. App. at 555. Thus the "knowledge" instruction was manifest constitutional error and was not harmless. *Fields*, 87 Wn. App at 64 (an error is manifest if it had "practical and identifiable consequences" at trial); *Walden*, 131 Wn.2d at 473 (erroneous jury instructions were not harmless because they "may have" affected the outcome of the case). Accordingly, Mr. Kertis is entitled to a new trial. *See Fields*, 87 Wn. App. at 65; *Walden*, 131 Wn.2d at 479.

F. CONCLUSION

Mr. Kertis respectfully requests this Court accept review in order to clarify the constitutional requirements for jury instructions defining "knowledge."

DATED this 3rd day of December, 2019.

Respectfully submitted,

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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TERRY LEE KERTIS, Appellant.	No. 78618-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 4, 2019

APPELWICK, C.J. — Kertis appeals his conviction and sentence for attempting to elude a police vehicle. He claims that the jury instructions at trial relieved the State of proving the required mens rea beyond a reasonable doubt. He further claims that the trial court did not consider his request for a first time offender waiver because it erroneously believed that it was barred by statute. We affirm.

FACTS

In September 2016, Terry Kertis attended the annual Oyster Run in Anacortes. He drove home from the event at around 4:30 p.m. on his Harley Davidson motorcycle. Kertis claims that he got into a conflict with another motorcyclist while driving his motorcycle up Commercial Avenue on his way home. He claims the other motorcyclist rammed the wheels of his motorcycle several times. He further claims that this interaction made him feel fearful and panicked.

Captain Lucien D'Amelio made contact with Kertis while driving on Commercial. He was driving an unmarked black Toyota Camry equipped with lights and sirens, but was dressed in his police officer's uniform. The lights and sirens on his vehicle were at the top of his windshield, rather than on the roof of his car as they would be in a marked police car. D'Amelio testified that a motorcycle skidded sideways behind his car. Kertis admitted he was driving the motorcycle. D'Amelio thought Kertis would hit him, so he moved his car forward to avoid contact. Kertis completed his skid stopping his bike near the rear quarter panel of D'Amelio's car with his bike in the center turn lane. He then moved his bike behind D'Amelio as traffic began to move. The pair proceeded to move forward in stop and go traffic down Commercial.

D'Amelio testified that about a block later, Kertis began loudly revving his engine. Kertis then moved his bike to the center turn lane, passing on D'Amelio's left, then drove in between cars to the right shoulder. D'Amelio watched as Kertis accelerated up the right shoulder. He estimated that Kertis was driving well over the 30 mile per hour speed limit.

D'Amelio then activated his lights and siren and moved forward through traffic. Other cars moved out of D'Amelio's way after the lights and siren were activated. With his lights and siren still on, D'Amelio pulled up to the side of Kertis's bike near the intersection of 32nd Street and Commercial. D'Amelio rolled down his window and told Kertis to pull over.

Kertis looked at D'Amelio, who was in uniform, pulled into the right hand turning lane, and accelerated straight through a red light in the intersection ahead.

D'Amelio saw two cars brake hard to avoid a collision with Kertis in the intersection. Kertis proceeded to weave between the two braking cars, to hop up to the sidewalk then drive on the sidewalk as he continued to move away from D'Amelio. D'Amelio determined he would be unable to pursue Kertis due to traffic. He shut down his lights and sirens.

D'Amelio had recognized Kertis's unique motorcycle and surmised that Kertis was the rider. He made the decision to proceed to Kertis's residence. D'Amelio met Sergeant Chad Pruiett near Kertis's residence, and they proceeded to the residence together.

The officers found Kertis outside his home when they arrived. They both testified that Kertis made a series of incriminating statements during the conversation. These statements included that Kertis knew D'Amelio was a police officer and was trying to stop him. D'Amelio also testified that Kertis acknowledged driving on the sidewalk and speeding to get away from him.

The State charged Kertis with attempting to elude a police vehicle. At trial, Kertis denied knowing that D'Amelio's car was a police vehicle while he was riding his motorcycle. He testified that he did not observe any lights or sirens, or an officer directing him to pull over. He acknowledged driving on the sidewalk, but said he was unable to recall passing cars in the turning lane or running a red light. He also said that he could not recall making incriminating statements to D'Amelio at his home.

A jury found Kertis guilty of attempting to elude a pursuing police vehicle. It also found that he endangered people other than the pursuing officer. Kertis had

no prior felonies and requested a 90 day sentence pursuant to a first time offender waiver. The trial court sentenced Kertis to 14 months and one day imprisonment. It indicated that it did not believe that the 12 month endangerment enhancement was waivable, stating that its "hands [were] tied." The court also imposed $600 in legal financial obligations (LFOs).

Kertis appeals.

DISCUSSION

Kertis makes two arguments. First, he argues that he is entitled to a new trial because the knowledge instruction given to the jury was constitutionally deficient. Second, he argues that he should be resentenced because the trial court erroneously believed that it could not consider his request for a first time offender waiver.

I. Jury Instructions

Kertis argues that the jury instructions were constitutionally deficient. Specifically, he argues that the knowledge instruction relieved the State of its burden to prove actual knowledge and instead allowed the State to prove only constructive knowledge. Kertis did not object to the jury instructions at trial. He argues that he is not precluded from raising the issue for the first time on appeal because the instructional deficiency is a manifest error affecting a constitutional right. RAP 2.5(a).

In analyzing an asserted constitutional interest, we do not assume the alleged error is of constitutional magnitude. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). We look first to the asserted claim and assess whether, if

correct, it implicates a constitutional interest as compared to another form of trial error. Id. If we find the error of constitutional magnitude, we must then determine whether the error was manifest in the trial record. Id. at 99.

Our Supreme Court has held that an instruction relieving the State of its burden to prove actual knowledge to be of constitutional magnitude. See State v. Shipp, 93 Wn.2d 510, 515, 610 P.2d 1322 (1980). If Kertis is correct that language in his jury instructions relieved the state of its burden, then the error would be manifest in the record because it appears in the jury instructions.

In this case, the jury was instructed on the elements that must be proven beyond a reasonable doubt to convict Kertis of attempting to elude a police vehicle:

> To convict the defendant of the crime of attempting to elude a police vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 25, 2016, 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 reckless manner; and
>
> (6) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

> On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Another instruction defined "willfully": "A person acts willfully as to a particular fact when he or she acts knowingly as to that fact." To assist with this definition, another instruction was included defining "knowledge":

> A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

Kertis claims that the use of "reasonable person" language causes this instruction to suffer from the same constitutional defects as the knowledge instruction rejected in Shipp. Most notably, he claims that it allowed the jury to convict Kertis based on constructive, rather than subjective knowledge.

In light of Shipp, the pattern instruction was revised. State v. Leech, 114 Wn.2d 700, 710, 790 P.2d 160 (1990), abrogated on other grounds by In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). This is the same instruction used to define knowledge in this case. See 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.02, at 222 (4th ed. 2016). The Supreme Court found the revised instruction constitutional in the face of a similar challenge. Leech, 114 Wn.2d at 710.

We find no constitutional error in the jury instructions.

II. First Time Offender Waiver

Kertis next contends that the trial court erred in failing to consider his request for a first time offender waiver under RCW 9.94A.650(2). He claims that the trial court erroneously believed that the first time offender waiver could not be applied to the 12 month endangerment enhancement. Kertis has already been released from prison. A case is moot if a court can no longer provide effective relief. Orwick v City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984).

Kertis argues that the issue is not moot because a finding that he should have been given a first time offender waiver would relieve him of certain LFOs. He points to RCW 9.94A.650(4), "As a condition of community custody . . . the court may order the offender to pay all court-ordered legal financial obligations." He argues this language precludes the imposition of LFOs except as a condition of community custody.

Kertis misreads the statute. By its plain terms, the statute does not prohibit LFOs being assessed against first time offenders. It merely gives the court the option to require payment of all LFOs as a condition of community custody, rather than setting monthly payments under RCW 9.94A.760. RCW 9.94A.650(4). The LFOs assessed against Kertis are mandated by RCW 7.68.035(1)(a) and RCW 43.43.7541. Neither statute contains a waiver provision for first time offenders. RCW 7.68.035(1)(a); RCW 43.43.7541.

Because Kertis has already served his sentence, and a first time offender waiver would not relieve him of his LFOs, we can no longer provide him effective

relief. The issue is therefore moot, and we decline to address whether the trial court mistakenly believed it could not waive the endangerment enhancement.

We affirm.

Cupelwick, C.J.

WE CONCUR:

Smith, J.

Dwyer, J.

APPENDIX B

INSTRUCTION NO. 8

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

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. 78618-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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