Supreme Court No. 98924-9
(Court of Appeals No. 52629-8-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JONATHAN SUTLEY RHOADS,

Petitioner.

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# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Mr. Sutley Rhoads asks this Court to review the opinion of the Court of Appeals in *State v. Sutley Rhoads*, No. 52629-8-II (filed June 16, 2020). Mr. Sutley Rhoads filed a motion for reconsideration, which was denied July 20, 2020. Copies of the opinion and the order denying reconsideration are attached in the appendix.

B. ISSUES PRESENTED FOR REVIEW

1. A prosecutor's misstatements of law in closing argument constitute prosecutorial misconduct violating a defendant's constitutional right to a fair trial. Here, the prosecutor misstated the *mens rea* element of "knowledge" in closing argument, improperly arguing that objective knowledge, as opposed to actual knowledge, was sufficient to convict. Division II of the Court of Appeals agreed the prosecutor misstated the law in closing, but held any prejudice could have been cured by directing the jury to the given pattern knowledge instruction. In doing so, Division II declined to follow recently published precedent from Division III in *State v. Jones*, No. 36795-9-III, 463 P.3d 738, 746–49 (May 19, 2020), which held a prosecutor's similar misstatement of the knowledge element could not be cured by the "confusing[]" pattern instruction. Should this Court accept review because the decision below is in conflict with a

published decision of the Court of Appeals holding similar prosecutorial misconduct was incurable? RAP 13.4(b)(2).

2. It is misconduct for a prosecutor to refer to facts not in evidence in closing argument. Here, the prosecutor erroneously described the period of time Mr. Sutley Rhoads allegedly eluded police as "nine minutes long," when the evidence presented at trial showed the pursuit lasted less than a minute. While the Court of Appeals acknowledged these statements were "inconsistent with the evidence," it held the prosecutor clarified his misstatements in rebuttal argument, thus curing any prejudice. However, the Court disregarded evidence the jury's deliberations were affected by the prosecutor's factual misrepresentations. Should this Court accept review because the Court of Appeals decision was in conflict with the well-established precedent of this Court that a prosecutor's misconduct is reversible error if it results in incurable prejudice? RAP 13.4(b)(1).

C. STATEMENT OF THE CASE

Jonathan Sutley Rhoads was driving in southwest Thurston County on a rural road in the late evening. RP 225, 228. It was pitch dark outside. RP 226. He noticed that a speeding car was following him. RP

230–31. Concerned the car might rear-end him, Mr. Sutley Rhoads drove past a stop sign at an intersection and turned. RP 233–34.

The car followed and turned on emergency blue and red lights and a siren. RP 234. The siren surprised Mr. Sutley Rhoads and caused him to temporarily hit the accelerator. RP 234. Mr. Sutley Rhoads quickly realized he was being followed by a police car and looked for a safe place to pull over. RP 237.

The road Mr. Sutley Rhoads was driving on was marked by ditches and did not have a paved shoulder. RP 236. Although there were several driveways, Mr. Sutley Rhoads did not want to pull onto anyone's private property. RP 237. He eventually pulled over onto the first safe location he saw, which was wide enough for his car and the police car to park without blocking the main road. RP 237–38.

The police car was driven by Deputy Brett Campbell. RP 170. After pulling Mr. Sutley Rhoads over, Deputy Campbell waited for backup to arrive. RP 170. Several other deputies arrived, and Deputy Campbell arrested Mr. Sutley Rhoads and read him his *Miranda* rights. RP 170–71, 216–19. Mr. Sutley Rhoads was charged with attempting to elude a police vehicle. CP 4.

At trial, Deputy Campbell, other responding deputies, and Mr. Sutley Rhoads all testified. RP 149–282. During closing argument, the

prosecutor stated that Mr. Sutley Rhoads had attempted to elude police for "nine minutes." RP 315. The prosecution was apparently relying on Deputy Campbell's incident report, which indicated there was a nine-minute time frame from when Deputy Campbell observed Mr. Sutley Rhoads allegedly speeding to when he read Mr. Sutley Rhoads his *Miranda* rights. *See* CP 2–3. However, this report was never entered into evidence, and, regardless, did not state that the alleged chase itself was nine minutes in duration. *See* CP 2–3, 61–62. None of the deputies testified the chase was nine minutes long.

Specifically, the prosecutor argued: "It was nine minutes. We are not talking about ten seconds. We are not talking 30 seconds. We are talking nine minutes of driving through Thurston County, running stop signs, doubling the speed limit, driving in other lanes, driving off the roadway." RP 315. Defense counsel countered that, given the distance of the alleged chase and Mr. Sutley Rhoads' alleged speed, the entire pursuit took less than a minute. RP 321–22. In rebuttal, the prosecutor acknowledged "[t]he officer never said the pursuit lasted nine minutes," but asserted "[a] lot of stuff happened" in the nine minute time frame,

including "[catching] up" to Mr. Sutley Rhoads and "chas[ing] him down the streets." RP 327.

The jury received instructions that described the "knowledge" *mens rea* element in part as follows: "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." CP 32. During closing argument, the prosecutor described the *mens rea* element of knowledge to the jury as follows:

> So willful is that knowing portion, and in this one, it tells you you are allowed to consider what would lead a reasonable person in a same situation to know. So we don't have to try and climb into someone else's head and say what does that person know. That would be impossible. What it does is says, hey, would a reasonable person know this?

RP 308. In rebuttal, the prosecutor again referred to the *mens rea* element:

> The defense just talked about we have to know the intent of Mr. – the defendant, and I ask you to read this instruction, because it's not in there. The law is not that you have to know his intent. That's not the law. This is the law. We can't get inside of his mind.

RP 328.

After the jury began deliberations, it submitted a question to the court that read as follows: "What is the RCW interpretation of 'immediately stopping after being signaled by a police officer?'" RP 337;

CP 26. The court responded, "The jury has been provided all the law that it will be given in the Court's instructions. Please reread the instructions and continue to deliberate." RP 339; CP 26. The jury subsequently submitted two additional questions to the court, one noting that Instruction No. 7, defining the crime of attempting to elude, did not include the word "immediately," whereas Instruction No. 9, the "to convict" instruction, did. The jury also asked "Does 'immediately' also mean safely?" RP 340; CP 27; *see also* CP 33–34. The court provided the same answer it had previously given. RP 341–42; CP 27.

The jury found Mr. Sutley Rhoads guilty of attempting to elude and he was sentenced to twenty days. RP 343; CP 36, 41.

On appeal before Division II, Mr. Sutley Rhoads argued the prosecutor engaged in prejudicial misconduct by misstating both the law and the facts of the case in closing argument. The Court of Appeals agreed the prosecutor engaged in misconduct by misstating the knowledge element in closing argument, but held any possible prejudice could have been cured had Mr. Sutley Rhoads objected. Slip Op. at 8 (attached in the Appendix). Specifically, the Court held the trial court "could have instructed the jury to disregard such statements and directed the jury's attention to the proper standard for knowledge contained [in the knowledge jury instruction.]" Slip. Op. at 8. In a footnote, the Court of

Appeals stated it "disagree[d]" with a recently published opinion by Division III of the Court of Appeals with similar facts that reached the opposite conclusion. Slip Op. at 8 n.4 (citing *State v. Jones*, No. 36795-9-III, 463 P.3d 738 (May 19, 2020)). The Court of Appeals also acknowledged the prosecutor's statement Mr. Sutley Rhoads eluded police for nine minutes was "inconsistent with the evidence," but held there was no misconduct because the prosecutor clarified his misstatement on rebuttal. Slip Op. at 6.

Mr. Sutley Rhoads filed a motion for reconsideration. In his motion, he argued the Court of Appeals ignored the prejudicial impact of the prosecutor's misstatements of fact on the jury, as evidenced by the jury's questions to the trial court. Mot. for Reconsideration, *State v. Sutley Rhoads*, No. 52629-8-II at *2–3 (July 6, 2020). He also argued the Court should follow *Jones* and conclude the prosecutor's misstatement of law could not be cured through reference to the jury instructions. *Id.* at *3–6. The Court of Appeals denied the motion. Order Denying Mot. for Reconsideration, *State v. Sutley* Rhoads, No. 52629-8-II (attached in the Appendix). Mr. Sutley Rhoads now petitions this Court for review.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

**1. Review is required to resolve a split in the Court of Appeals regarding whether a prosecutor's misstatement of the "knowledge" element can be cured by the pattern jury instruction.**

a. The element of knowledge requires proof of actual, subjective knowledge.

For the crime of attempting to elude, the State must prove the defendant "*willfully* fail[ed] or refuse[d] to immediately bring his or her vehicle to a stop and who [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) (emphasis added). "Willfulness in this context is identical with knowledge." *State v. Flora*, 160 Wn. App. 549, 553, 249 P.3d 188 (2011) (citation and quotation marks omitted).

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). For crimes requiring a *mens rea* of knowledge, this Court has recognized that "to pass constitutional muster, the jury must find *actual knowledge* but may make such a finding with circumstantial evidence." *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (citing *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980))

(emphasis added). Constructive knowledge, or what "an ordinary person in the defendant's situation would have known," is not constitutionally sufficient to convict. *Id.* (quoting *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." *Id.* Thus, the State has the burden of proving, through direct or circumstantial evidence, that the defendant had *actual knowledge* they were being signaled to stop and also had *actual knowledge* the pursuing vehicle was a police vehicle. *Flora*, 160 Wn. App. at 555; *Allen*, 182 Wn.2d at 374.

b. <u>The prosecutor misstated the knowledge element in closing argument.</u>

A prosecutor's improper and prejudicial remarks violate the constitutional right to a fair trial. *See State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). It is improper for a prosecutor to misstate the law. *See Warren*, 165 Wn.2d at 28. A prosecutor's misstatement of the law during closing argument has "the grave potential to mislead the jury" and is thus "particularly egregious." *Allen*, 182 Wn.2d at 380.

Here, the prosecutor argued in closing that "we don't have to try to climb into someone else's head and say what does that person know. That would be impossible. What it does is says, hey, would a reasonable person know this? . . . The law is not that you have to know his intent. That's not the law. This is the law. We can't get inside his mind." RP 308, 328. This argument misstated the applicable law because it implied the jury could convict Mr. Sutley Rhoads on the basis of objective knowledge alone, as opposed to his actual knowledge. *See Allen*, 182 Wn.2d at 374. Additionally, the misstatement was repeated in both the prosecutor's opening and rebuttal arguments, creating a "cumulative effect." *Id.* at 376.

This repeated misstatement of the knowledge element is similar to the prosecutor's argument found improper by this Court in *Allen.* In that case, the prosecutor argued that evidence the defendant "should have known" was sufficient to convict, and that "under the law, *even if he doesn't actually know*, if a reasonable person would have known, he's guilty." 182 Wn.2d at 375–76 (italics in the original). This Court held this was an incorrect statement of the law, and also that the statement was prejudicial as it pertained to a "key issue of the case" that "was critically important." *Id.* at 375.

Here, Mr. Sutley Rhoads testified he did not realize he was being followed by a police car and did not see the car signal him to stop until shortly before he pulled over—that he lacked actual, subjective knowledge. RP 234–35, 238–39. His subjective knowledge was key to the disposition of the case, but based on the prosecutor's repeated misstatements of the requisite *mens rea*, the jury may have focused instead on what a reasonable person would have known. *See* RP 308, 328.

c. The jury instructions could not cure the prosecutor's misstatement of the law.

Prosecutorial misconduct that results in "incurable prejudice" is preserved for appellate review even if the defendant does not object at trial. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). Here, Mr. Sutley Rhoads did not object to the prosecutor's misstatement of the knowledge element. However, the prejudice caused by the prosecutor's misstatement of law could not have been cured because the "knowledge" jury instruction was similarly misleading.

Instruction No. 6 informed the jury it could find the element of knowledge was satisfied if Mr. Sutley Rhoads had "information that would lead a reasonable person in the same situation to believe that a fact exists." CP 32. The instruction's reference to a "reasonable person" did not require the jury "to consider the subjective intelligence or mental

condition of the defendant." *Shipp*, 93 Wn.2d at 515. Further, the knowledge instruction "redefine[d] 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)). The instruction's redefinition also contradicted the "ordinary and accepted meaning" of the word "knowledge" by conflating it with "negligent ignorance." *See Shipp*, 93 Wn.2d at 515. By contradicting the ordinary and accepted meaning of knowledge, the instruction was confusing and misleading to "[t]he ordinary person." *See id.*

Instruction 6 tracks the Washington Pattern Jury Instruction defining "knowledge," which has been repeatedly upheld. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.02 (4th ed. 2016); *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). However, as Division III of the Court of Appeals recent recognized in *State v. Jones*, this instruction contravenes the "constitutional injunction" that the State must prove actual, subjective knowledge. *State v. Jones*, No. 36795-9-III, 463 P.3d 738, 743, 746–49 (May 19, 2020). The instruction "confusingly" informs the jury it "cannot

convict the accused based on constructive knowledge, but may determine constructive knowledge to be evidence of subjective knowledge." *Id.* Accordingly, the instruction cannot cure a prosecutor's misstatements of the knowledge element. *Id.*

In *Jones*, the prosecutor made similar statements in closing regarding the knowledge element, to which the defendant did not object. *Id.* at 746. The Court of Appeals held the "trial court could not have cured the prejudice resulting from the State's attorney's closing argument with another instruction" as "[t]he court already instructed the jury in accordance with precedent and standard instructions that the jury must find actual knowledge, but that the jury may infer actual knowledge by constructive knowledge. The court would only repeat the previously delivered instruction." *Id.* at 748.

In its opinion on this case, Division II of Court of Appeals agreed with Mr. Sutley Rhoads that the prosecutor misstated the "knowledge" element in closing. Slip Op. at 7. However, contrary to *Jones*, Division II held any challenge was waived because the resulting prejudice could have been cured by the court directing the jury to the knowledge instruction. Slip Op. at 8. In a footnote, this panel dismissed the *Jones* opinion by simply stating it "disagree[d]." Slip Op. at 8 n.4.

Division II's decision in this case conflicts with the Court of Appeals published decision in *Jones.* This conflict in the Court of Appeals may only be resolved by this Court accepting review. *Matter of Arnold*, 190 Wn.2d 136, 151, 410 P.3d 1133 (2018); RAP 13.4(b)(2).

**2. Review should be granted because the Court of Appeals did not follow this Court's precedent that a prosecutor's misrepresentation of the evidence is reversible error if it results in incurable prejudice.**

To prove that a person is guilty of attempting to elude, the State must prove they willfully failed or refused to immediately stop their car when signaled to do so. *See* RCW 46.61.024(1); *see also* CP 34 ("to convict" instruction). Here, the issue of whether Mr. Sutley Rhoads willfully failed to *immediately* stop was, as the prosecutor described it, one of the "few disputed facts" at trial. RP 309–310. To bolster his argument, the prosecutor injected facts during closing that were not supported by any of the evidence presented at trial.

A prosecutor commits misconduct by misrepresenting the evidence presented at trial. *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015). If a prosecutor commits misconduct and there is no objection, this Court must consider whether the misconduct prejudiced the jury verdict and whether that prejudice could have been cured. *Emery*, 174 Wn.2d at 760–61.

Here, the prosecutor claimed the alleged pursuit lasted nine minutes long, arguing that "We are not talking about ten seconds. We are not talking about 30 seconds. We are talking about *nine minutes of driving through Thurston County.*" RP 315. The prosecutor further argued this was evidence Mr. Sutley Rhoads did not "immediately stop." RP 315–16.

This claim was not supported by the testimony of any witness, nor was it supported by any of the exhibits admitted. As defense counsel pointed out, given the alleged distance traveled during the pursuit and the alleged speeds involved, the pursuit could not have lasted more than a minute. RP 321–22. Although the prosecutor appeared to try to walk back his exaggerated statement during rebuttal, he did not explicitly correct himself. *See* RP 327.

The Court of Appeals acknowledged the prosecutor's initial statements were "inconsistent with the evidence." Slip Op. at 6. However, this Court held the prosecutor's rebuttal clarified his statements, and thus there was no misconduct. Slip Op. at 6. In doing so, this Court did not account for the demonstrated impact the prosecutor's misstatements had on the jury.

During deliberations, the jury submitted two questions to the court concerning the meaning and significance of the word "immediately" in the

"to convict" instruction. *See* CP 26–27. The "to convict" instruction informed the jury it could not convict unless it found "the defendant willfully failed or refused to *immediately* bring the vehicle to a stop after being signaled to stop." CP 34 (emphasis added). The jury's questions indicate its verdict turned on how long it took Mr. Sutley Rhoads to pull over.

The jury's questions suggest the verdict was impacted by the prosecutor's initial misstatements of fact, which were not cured by the prosecutor's rebuttal statements. The Court of Appeals' decision thus conflicts with this Court's precedent that a prosecutor's misrepresentation of evidence is reversible error if it results in "incurable prejudice." *See Emery*, 174 Wn.2d at 762; *Walker*, 182 Wn.2d at 478. Review is warranted. RAP 13.4(b)(1).

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E. CONCLUSION

For the reasons stated above, this Court should accept review.

DATED this 19th day of August, 2020.

Respectfully submitted,

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JONATHAN LEE SUTLEY RHOADS,<br><br>Appellant. | No. 52629-8-II<br><br>UNPUBLISHED OPINION |

MAXA, J. – Jonathan Sutley Rhoads[1] appeals his conviction of attempting to elude a pursuing police vehicle and an interest accrual provision for the legal financial obligations (LFOs) in his judgment and sentence. His conviction arose from an incident in which he failed to stop during a pursuit after a deputy sheriff observed him speeding.

We hold that (1) the prosecutor's initial misstatement regarding the length of the pursuit did not constitute misconduct because he corrected the misstatement on rebuttal; (2) the prosecutor's statement regarding the standard for determining a knowing violation was improper, but Sutley Rhoads waived his challenge because he did not object and an instruction would have cured any prejudice; and (3) the interest accrual provision should be stricken. Accordingly, we

[1] The record is inconsistent as to whether the defendant's last name is hyphenated. This opinion uses "Sutley Rhoads" because that is how it appears in his briefing and the trial court's judgment and sentence.

affirm Sutley Rhoads's conviction, but we remand for the trial court to strike the interest accrual provision from the judgment and sentence.

## FACTS

*Initial Incident*

Shortly before 10:00 PM on June 28, 2018, Thurston County Deputy Sheriff Brett Campbell measured the speed of an oncoming vehicle driven by Sutley Rhoads at 18 miles per hour over the posted speed limit. Campbell changed his direction and drove after the vehicle.

Sutley Rhoads turned onto a side road and Campbell followed. Sutley Rhoads turned again at another intersection without stopping for a posted stop sign. At some point during the pursuit, Campbell activated his overhead lights and later activated his siren. Campbell eventually caught up to Sutley Rhoads, matching the vehicle's speed at 60 mph in a 35 mph zone. Sutley Rhoads continued at a high rate of speed with Campbell in pursuit. Sutley Rhoads finally slowed down and pulled over. Campbell remained with his vehicle and waited for backup to arrive. He then arrested Sutley Rhoads and read him his constitutional rights.

The State charged Sutley Rhoads with attempting to elude a pursuing police vehicle.

*Trial and Closing Argument*

At trial, the main issue was whether Sutley Rhoads stopped his vehicle quickly enough. Witnesses testified to the facts stated above. Campbell testified that the "beginning of the stop" occurred at 9:59 PM and that Sutley Rhoads was read his *Miranda*[2] rights at 10:08 PM. 1 Report of Proceedings (RP) at 156.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

One of the elements in the to-convict instruction for attempting to elude was that "the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop." Clerk's Papers (CP) at 34. Another instruction stated, "A person acts willfully as to a particular fact when he acts knowingly as to that fact." CP at 32. Instruction 6, which addressed knowledge, included the following statement: "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." CP at 32. Sutley Rhoads did not object to instruction 6.

During closing argument, in arguing that Sutley Rhoads did not immediately stop his vehicle, the prosecutor stated:

> We know when this stop happened. It started at 9:59 and ended at 10:08. It was nine minutes. We are not talking ten seconds. We are not talking 30 seconds. We are talking nine minutes of driving through Thurston County, running stop signs, doubling the speed limit, driving in other lanes, driving off the roadway.

2 RP at 315. Sutley Rhoads did not object to this statement.

In his closing argument, Sutley Rhoads constructed a timeline of the incident using map distances and speeds at which the vehicles were traveling. Based on this analysis, Sutley Rhoads argued that "this did not take nine minutes." 2 RP at 321. Instead, he suggested that a minute or less had passed between the point he turned onto the first side road and the point where he stopped his vehicle.

During rebuttal, the prosecutor responded, "The defense is pointing to the time frame. The officer never said the pursuit lasted nine minutes. He said he flipped on his radar detector, nine minutes later, he read him his *Miranda* warnings. A lot of stuff happened in between." 2 RP at 327.

The prosecutor also addressed the knowledge requirement. He quoted the language from instruction 6 about the knowledge of a reasonable person. In explaining what this instruction meant, the prosecutor stated:

> [Y]ou are allowed to consider what would lead a reasonable person in a same situation to know. So we don't have to try to climb into someone else's head and say what does that person know. That would be impossible. What it does is says, hey, would a reasonable person know this?

2 RP at 308. Sutley Rhoads did not object to this statement.

*Conviction and Sentence*

The jury found Sutley Rhoads guilty of attempting to elude a pursuing police vehicle. As part of the sentence, the trial court imposed a $500 crime victim penalty assessment. The judgment and sentence provided that the LFOs would bear interest until paid in full.

Sutley Rhoads appeals his conviction and the LFO interest accrual provision.

## ANALYSIS

### A. PROSECUTORIAL MISCONDUCT

Sutley Rhoads argues that the prosecutor committed misconduct during closing argument when he argued both that Campbell pursued Sutley Rhoads for nine minutes and that the jury could find Sutley Rhoads had the required knowledge by applying a reasonable person standard. We conclude that (1) the first statement did not constitute misconduct because the prosecutor corrected his initial misstatement; and (2) the second statement was improper, but Sutley Rhoads waived his challenge.

#### 1. Legal Principles

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). To establish prosecutorial misconduct during closing argument, a defendant must show that the

prosecuting attorney's statements were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). We must consider the prosecutor's conduct in the context of the record and all the circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

During closing argument, it is improper for a prosecutor to present facts not admitted as evidence during the trial. *Glasmann*, 175 Wn.2d at 705. It also is improper for the prosecutor to misstate the evidence presented at trial. *See State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015). However, during closing argument, the prosecutor is given wide latitude to assert reasonable inferences from the evidence. *Glasmann*, 175 Wn.2d at 704. In addition, "[a] prosecuting attorney commits misconduct by misstating the law." *Allen*, 182 Wn.2d at 373.

Here, Sutley Rhoads did not object to the challenged statements. When the defendant fails to object to the prosecutor's statements, he or she "is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). The defendant must show that (1) no curative instruction would have eliminated the prejudicial effect, and (2) the prejudice had a substantial likelihood of affecting the verdict. *Id.* at 761. "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762.

2. Misstating the Evidence

Sutley Rhoads argues that the prosecutor committed misconduct by asserting that the pursuit was nine minutes long. As Sutley Rhoads notes, the evidence showed that the *entire*

*incident*, not the pursuit, lasted nine minutes. Campbell testified that the "beginning of the stop" occurred at 9:59 PM and that he read Sutley Rhoads his constitutional rights at 10:08 PM.

The prosecutor initially stated that the pursuit itself lasted nine minutes: "We are talking *nine minutes of driving*." 2 RP at 315 (emphasis added). This statement was inconsistent with the evidence because Campbell testified that the entire incident took nine minutes, including the time he waited in his vehicle for backup after Sutley Rhoads pulled over and before arresting him. Therefore, Campbell could not have been *driving* in pursuit of Sutley Rhoads for nine minutes.

However, Sutley Rhoads challenged this statement during his closing argument. And the prosecutor clarified his misstatement on rebuttal: "*The officer never said the pursuit lasted nine minutes*. He said he flipped on his radar detector, nine minutes later, he read him his *Miranda* warnings." 2 RP at 327 (emphasis added). This statement correctly characterized the evidence. Therefore, considering the closing arguments in their entirety, we conclude that the prosecutor did not commit misconduct.

We hold that Sutley Rhoads's prosecutorial misconduct claim on this basis fails.

3. Misstating the Legal Standard for "Knowledge"

Sutley Rhoads argues that the prosecutor committed misconduct by suggesting that the jury could find that Sutley Rhoads had the required knowledge by applying a reasonable person standard.

A person attempts to elude a police vehicle if he or she drives in a reckless manner and willfully fails to immediately stop his or her vehicle after a uniformed police officer provides a visual or audible signal. RCW 46.61.024(1). In this context, willfulness is identical to

knowledge. *State v. Flora*, 160 Wn. App. 549, 553, 249 P.3d 188 (2011). The trial court instructed the jury that a person acts willfully when he acts knowingly.

RCW 9A.08.010(1)(b)(ii) states that a person acts knowingly when "he or she has information which would lead a reasonable person in the same situation to believe" that a fact exists. When knowledge is an element of a crime, "the jury must find actual knowledge but may make such a finding with circumstantial evidence." *Allen*, 182 Wn.2d at 374. As a result, it is improper for a prosecutor to argue that the State need not prove actual knowledge and must only show that a reasonable person would have known. *Id.* at 375. In instruction 6, the trial court instructed the jury regarding the knowledge requirement.

During closing argument, the prosecutor stated: "[W]e don't have to try to climb into someone else's head and say what does that person know. That would be impossible. What it does is says, hey, *would a reasonable person know this*?" 2 RP at 308 (emphasis added). We agree with Sutley Rhoads that this statement improperly suggests that the State needed to prove only what a reasonable person would have known, not what Sutley Rhoads actually knew. The prosecutor should have informed the jury that the State must prove that Sutley Rhoads had actual knowledge, but that actual knowledge can be established by considering what a reasonable person would know.[3]

Even though the prosecutor's statements were improper, Sutley Rhoads's failure to object means that he must demonstrate that no curative instruction would have eliminated any

[3] Sutley Rhoads also challenges another statement the prosecutor made in rebuttal: "The law is not that you have to know his intent. That's not the law. This is the law. We can't get inside of his mind." 2 RP at 328. However, the context of the statement clearly shows that the prosecutor was addressing a separate intent requirement, not the knowledge requirement. He was directly responding to Sutley Rhoads's contention that the State had to prove his intent. Therefore, we conclude that this statement did not misstate the knowledge requirement.

prejudicial effect. *Emery*, 174 Wn.2d at 761. But here, the court could have instructed the jury to disregard such statements and directed the jury's attention to the proper standard for knowledge contained in instruction 6. Therefore, we conclude that Sutley Rhoads waived his challenge because any possible prejudice could have been cured by an instruction to the jury.[4]

Sutley Rhoads argues that a reference to instruction 6 could not have cured the prosecutor's misstatements in this case because the instruction was an incorrect statement of law. However, this instruction tracks the language of WPIC 10.02. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.02 (4th ed. 2016). In addition, the court in *Allen* expressly stated that an instruction with identical language as instruction 6 "correctly stated the law regarding 'knowledge.' " 182 Wn.2d at 372. Therefore, we reject Sutley Rhoads's argument.

We hold that Sutley Rhoads's prosecutorial misconduct claim on this basis fails.

B. INTEREST ON LFOS

Sutley Rhoads argues, and the State concedes, that we should remand for the trial court to strike the interest accrual provision in his judgment and sentence. We agree.

In 2018, the legislature amended RCW 10.82.090, which now states that no interest will accrue on nonrestitution LFOs after June 7, 2018. RCW 10.82.090(1). Therefore, we accept the State's concession and hold that the interest accrual provision should be stricken.

[4] In *State v. Jones*, Division Three of this court summarily held that referring the jury to the knowledge instruction previously given to the jury could not have cured the prejudice resulting from a similar closing argument. No. 36795-9-III, slip op. (Wash. Ct. App. May 19, 2020), http://www.courts.wa.gov/opinions/pdf/367959_pub.pdf. We disagree.

CONCLUSION

We affirm Sutley Rhoads's conviction, but we remand for the trial court to strike the interest accrual provision from the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

LEE, C.J.

CRUSER, J.

Filed
Washington State
Court of Appeals
Division Two

July 20, 2020

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JONATHAN LEE SUTLEY RHOADS,<br><br>Appellant. | No. 52629-8-II<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Jonathan Sutley Rhoads moves for reconsideration of the court's June 16, 2020 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Cruser

FOR THE COURT:

Maxa, J.

MAXA, 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. 52629-8-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Joseph Jackson
[jacksoj@co.thurston.wa.us]
Thurston County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 19, 2020
Washington Appellate Project

## WASHINGTON APPELLATE PROJECT

## August 19, 2020 - 3:47 PM

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| **Appellate Court Case Number:** | 52629-8 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Jonathan Sutley Rhoads, Appellant |
| **Superior Court Case Number:** | 18-1-01106-3 |

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