

64149-2

64149-2

NO. 64149-2-I

**IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON
Respondent,

v.

JAMES FLORA,
Appellant.

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY**

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

James Flora appeals from his conviction for attempting to elude a pursuing police vehicle following a jury trial.

Flora contends that his counsel was ineffective for failing to request an affirmative defense. Since he carried the burden on the defense and the evidence did not support the defense, the decision could have been tactical and he was not prejudiced.

Second, Flora contends that the trial court's refusal to give a definition for the term willful and knowledge regarding the fact he was being pursued was improper. The State contends that in the eluding statute, willful does not carry the same definition as suggested by the general statute and any error was harmless.

Third, Flora claims the trial court erred in failing to give a missing witness instruction. Since the witness was a civilian not particularly available to the State this was not an abuse of discretion.

Finally, Flora claims that the trial court erred in admission of his statement showing his recognition of the officer. This was not an abuse of discretion.

Flora's conviction must be affirmed.

II. ISSUES

1. Was counsel ineffective for failing to request an affirmative defense where the decision may have been tactical to avoid having to prove the affirmative defense?
2. Was counsel ineffective for failing to request an affirmative defense where the evidence did not support the defense?
3. Has the defendant established prejudice since the evidence did not support the affirmative defense?
4. Did the trial court err by not defining the term willful in the jury instructions for eluding?
5. If it was error to failure to further define the term willful, was the error harmless in light of that element given and the evidence presented at trial?
6. Did the trial court abuse its discretion in not giving a missing witness instruction where a civilian was not particularly available to the State?
7. Did the trial court abuse its discretion in admission of his statement showing his recognition of the officer

showing that he was aware that there was a willful failure to stop.

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On April 25, 2008, James Flora was charged with Attempting to Elude a Pursuing Police Vehicle alleged to have occurred on December 27, 2007. CP 1.

On May 8, 2009, an amended information was filed alleging a second incident of eluding occurring on January 16, 2009. CP 6-7.

On August 12, 2009, the trial court heard various motions and the trial court granted severance. 8/12/09 RP 2, 27-8.¹

On August 18, 2009, the incident from December 27, 2007, proceeded to trial on 8/18/09 RP1 1.

On August 19, 2009, the jury returned a verdict finding Flora guilty of Attempting to Elude a Pursuing Police Vehicle. CP 112.

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

8/12/09 RP	3.5, Severance & Knapstad Motion
8/13/09 RP	Knapstad Motion ruling
8/18/09 RP1	Trial Day 1 – Motions in Limine
8/18/09 RP2	Trial Day 1 - Jury Voire Dire
8/18&19/09 RP	Trial Day 1 & 2 – Testimony & Jury Instructions.

On August 28, 2009, the trial court sentenced Flora to three months of confinement served as two months of straight jail time and one month of community service. CP 124.

On August 28, 2009, Flora timely filed a notice of appeal. CP 129-30.

2. Summary of Testimony at Trial

Officer Radley from the Swinomish Police Department testified at trial. 8/18&19/09 RP 4. Radley was a traffic officer for the Swinomish Police Department. 8/18&19/09 RP 4.

On December 27, 2008, Radley was working traffic duties when he was involved in an eluding incident close to 8:00 p.m. 8/18&19/09 RP 6. The weather was cold and the roads were wet and had iced up a little bit. 8/18&19/09 RP 6. Traffic was intermittent. 8/18&19/09 RP 7. Radly was in a two-tone uniform with a black body, tan on top with reflective piping and with a badge and insignias on both shoulder patches. 8/18&19/09 RP 7-8. Radley also had a radio attached to the center of his shirt and a duty belt with baton, two sets of handcuffs, flashlight, handgun, spare magazines and a bullet proof vest. 8/18&19/09 RP 8, 10. Radley had a female civilian rider in the front passenger seat of the vehicle. 8/18&19/09 RP 11, 53.

The civilian rider was wearing dark colored professional clothing.
8/18&19/09 RP 52-3.

Radley was driving a 2007 Dodge Charger patrol vehicle.
8/18&19/09 RP 11. The vehicle had police markings of gold with a black stripe and seven point star on both sides of the vehicle.
8/18&19/09 RP 12. The vehicle has ten strobes underneath the roof line of the vehicle that extend out to the side providing 360 degrees of coverage. 8/18&19/09 RP 12. The headlights also have alternating flashing. 8/18&19/09 RP 13. The vehicle had a multi-tone siren which is standard on most law enforcement vehicles. 8/18&19/09 RP 13-4. Photographs of the vehicle were admitted. 8/18&19/09 RP 12-19.

Officer Radley saw two vehicles approaching a traffic light on Highway 20 when a newer white Camaro came upon them. 8/18&19/09 RP 19-20, 25. The Camaro appeared not to slow as quickly as the other cars and did a panic stop causing it to move from the left to right lane. 8/18&19/09 RP 20-1. Radley pulled his vehicle behind the Camaro. 8/18&19/09 RP 25. The Camaro continued to cross out of the turn lane onto the hard shoulder of the road. 8/18&19/09 RP 25. The Camaro when through the intersection and stopped. 8/18&19/09 RP 26. Radley stopped behind the vehicle

without activating his emergency lights. 8/18&19/09 RP 26. The driver quickly came out of the Camaro and aggressively approached Radley. 8/18&19/09 RP 26. Radley did not know the driver. 8/18&19/09 RP 4. His fists were clenched and he was rigid. 8/18&19/09 RP 26-7. Radley could see his lips moving but could not hear what he was saying. 8/18&19/09 RP 28. Radley opened his door, got out of his vehicle and told the driver to get back in his vehicle. 8/18&19/09 RP 28. The driver stopped for a moment, then turned around and ran to his vehicle. 8/18&19/09 RP 29.

After the driver entered his car, he put it in reverse and rapidly accelerated. 8/18&19/09 RP 29. The vehicle then quickly entered into traffic. 8/18&19/09 RP 29-30. Radley then activated all his emergency lights and siren. 8/18&19/09 RP 30. The Camaro rapidly accelerated to about seventy miles per hour and changed lanes without signaling. 8/18&19/09 RP 32. Radley got up to within twenty feet of the vehicle while pursuing it. 8/18&19/09 RP 33.

As the vehicle approached the next signal, it slowed and then turned against a red arrow across oncoming traffic. 8/18&19/09 RP 34-5. Radley stopped his vehicle because he was concerned about going through the red light against oncoming traffic. 8/18&19/09 RP 35. Radley stopped at the intersection, turning off his emergency

lights and siren so that oncoming traffic did not get in an accident.
8/18&19/09 RP 36.

Radley watched the vehicle after it made the left turn and saw it make an immediate right turn and stop at the edge of a church parking lot. 8/18&19/09 RP 36-7. Radley saw the driver exit his vehicle quickly and run west behind the church. 8/18&19/09 RP 37. It appeared to Radley that the person had his hand up to his ear with a cell phone. 8/18&19/09 RP 37. Radley saw the general area where the driver fled. 8/18&19/09 RP 39-40. Radley drove to where the vehicle was, turned his lights on and stopped behind the vehicle 8/18&19/09 RP 40. He checked the car and could see the keys were missing. 8/18&19/09 RP 40. He yelled stop police, but no one returned. 8/18&19/09 RP 40. Other officers arrived to help locate the driver, but he could not be found. 8/18&19/09 RP 41-3.

Radley could not reach the female registered owner and the vehicle was impounded. 8/18&19/09 RP 44, 64. Mount Vernon Officers had been scanning radio traffic and contacted Radley. 8/18&19/09 RP 45. Radley then was able to pull up a photograph of James Flora and recognized him as the driver. 8/18&19/09 RP 45. Radley identified Flora as the driver in court. 8/18&19/09 RP 45-6.

Radley also testified that he came into contact with Flora on January 16, 2009. 8/18&19/09 RP 75. At that time Flora asked Officer Radley if he was the same officer driving the same vehicle who had chased him in December 27, 2007. 8/18&19/09 RP 75.

The parties stipulated that Flora had met with his attorney and reviewed the police reports prior to January 16, 2009. 8/18&19/09 RP 71.

After consulting with his attorney, Mr. Flora chose not to testify. 8/18&19/09 RP 78,

IV. ARGUMENT

- 1. Trial counsel was not ineffective for failing to propose the reasonable belief defense to eluding since the defense has the burden of proof, the defendant did not testify and the driving was not reasonable under the circumstances.**

Flora claims his counsel was ineffective by failing to request an instruction on the defense to attempting to elude that a reasonable person would not have believed the stop was by an officer in 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 94.10 (3d Ed).

The State contends that since the defendant failed to testify and because it would have been difficult for defense to argue that cutting across lanes of opposing traffic coming at fifty-five miles per

hour against a red light would not have been “reasonable under the circumstances” the defense likely made a tactical decision not to seek the instruction.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) **defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances;** and (2) **defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.** State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)).

State v. McFarland, 127 Wn.2d 322, 334-5, 899 P.2d 1251 (1995)

(emphasis added).

Courts engage in a strong presumption counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226, 743 P.2d 816. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

- i. **Defense cannot establish that the decision not to seek an instruction on the defense to attempting to elude was not a tactical decision.**

The defendant here chose not to testify, therefore the defendant's counsel would have had to carry the burden of proof of the instruction.²

WPIC 94.10 Attempting to Elude a Police Vehicle—Reasonable Belief That Pursuer Is Not a Police Officer—Defense

It is a defense to a charge of attempting to elude a police vehicle that a reasonable person would not have believed that the signal to stop was given by a police officer and that the defendant's driving after the signal to stop was reasonable under the circumstances.

The defendant has the burden of proving this defense by preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty *[on this charge]*.

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 94.10 (3d Ed).

² The defendant may have chosen not to testify based upon the risk of impeachment due to crimes of dishonesty for six convictions of theft or attempted theft. 8/18/09 RP 5.

Since the defendant did not testify, the only evidence as the eluding incident was the testimony of the officer. Here the officer testified that he attempted to stop the defendant who was driving seventy miles per hour. 8/18&19/09 RP 82. Then, the defendant slowed for a stop light and against a red light and oncoming traffic coming at fifty-five miles per hour on a divided highway, the defendant turned left. 8/18&19/09 RP 34-5.

The State contends that the evidence would not have supported the instruction. Thus, it would have been easier for defense to claim that the State had failed to prove all elements of the crime, than to establish under the defendant's burden of proof that the driving was reasonable under the circumstances.

The defendant cannot establish that the decision was not tactical.

ii. Since the defense would not have received the instruction, the defense cannot establish prejudice.

The State contends that Flora would not have received the instruction for defense of a reasonable belief that the officer was not an officer.

The evidence here was that the officer was in uniform and started to get out of his vehicle when approached by Flora.

8/18&19/09 RP 6-8, 28. The officer was in a vehicle marked with emblems and displayed flashing lights and a siren during the pursuit. 8/18&19/09 RP 11-14. During the pursuit the defendant drove at seventy miles per hour. 8/18&19/09 RP 82.

In addition to the reasonable belief regarding the officer, Flora had to establish that the driving was reasonable under the circumstances. To escape the defendant slowed for a red light and against oncoming traffic, turned left against the light in a maneuver the officer found to risky to follow. 8/18&19/09 RP 34-6. The defendant also drove to a secluded area and fled his vehicle, rather than driving slowly to a public location. 8/18&19/09 RP 39-40

Finally, the defendant did not testify which would have established his reasonable belief or that his driving was reasonable.

The State contends that the evidence did not support the defense and the trial court would have not have abused its discretion in denying the defense. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (factual reasons to refuse instructions are reviewed for abuse of discretion).

Since the defendant cannot establish prejudice from the failure to give the affirmative defense, his ineffective assistance claim fails. State v. Goodin, 67 Wn. App. 623, 632-635, 838 P.2d 135 (1992) (no

prejudice established for ineffective assistance for failure to propose affirmative defense where the evidence rebutted the affirmative defense).

2. Any error for failing to further define the term willful in the jury instructions for eluding was harmless by beyond a reasonable doubt.

The trial court gave the standard elements instruction for attempting to elude a pursuing police vehicle. That instruction read:

To convict the defendant 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 December 27, 2007, 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.

CP 107, 11A Wash. Prac. Pattern Jury Instr. Crim. WPIC 94.02 (3d Ed), RCW 46.61.024³.

At trial, Flora asked that the trial court give an instruction that required the defendant had knowledge that the officer had given the signal and was a “statutorily appropriate officer.” CP 97. That instruction read:

For the purposes of element four (4) in Instruction No. ___, a willful failure to stop requires that the defendant have knowledge that a statutorily appropriate signal was given by a statutorily appropriate officer.

For the purposes of element five (5) in Instruction No. ___, an attempt to elude requires knowledge that there is a pursuing police vehicle.

CP 97. The proposed instruction referenced the comment to WPIC 94.02 and case law that interpreted the prior version of the attempting to elude statute which was adopted in 2003.

³ (1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his 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, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

(2) It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.

...
RCW 46.61.024.

The trial court had a discussion on the record with counsel about the proposed instruction. 8/18&19/09 RP 84-94. Defense specifically wanted to add an element of knowledge that the officer was in uniform and that there was a pursuing police vehicle. 8/18&19/09 RP 86-9, 91-2.⁴ When the trial court offered the defense to provide the pattern instruction for willful that equated it to knowingly, defense wanted an additional instruction that “an attempt to elude requires knowledge there is a pursuing police vehicle.” 8/18&19/09 RP 90. The prosecutor then pointed out that there was no evidence and no testimony from Flora that showed he lacked knowledge there was a pursuing police vehicle. 8/18&19/09 RP 90. The trial court noted the two different options for defining willful, the first based upon equating willful to knowing and the second based upon equating willful to intentionally. 8/18&19/09 RP 92.

THE COURT: I'm just a little worried about exceeding what the WPIC requires. If, in fact, this was something that -- I mean this is an issue in every eluding case. And clearly the drafters of the WPIC don't feel it's appropriate to give supplemental instructions on the knowing portion of this and believe that the word willful takes care of the problem without definition because they don't suggest that you give

⁴ It appears that defense counsel was attempting to reinstate the element of knowledge of the pursuing police vehicle which has replaced with the affirmative defense of a reasonable belief that it was not an officer and that the driving was reasonable under the circumstances.

the definition. So I'm going to leave the instructions the way they are, Ms. Bonkoski.

MS. BONKOSKI: Your Honor, you're not even giving the willful WPIC?

THE COURT: No. I'm not. I'm afraid by defining willful as knowing what I've done is reduced the burden of proof that the State is held to by requiring that they only show that this was knowing as opposed to showing that it was willful. Because I don't know, frankly, whether willful in this context means intentional or whether it means knowing.

8/18&19/09 RP 93.

The State contends that since defense was seeking to add an element of knowledge of the status of the officer which has become part of the affirmative defense, the trial court did not commit error by reducing the State's burden by reducing willful to knowing or by an adding the element as defense requested that the knowledge be applied to the defendant's awareness of the officer and the signal to stop. RCW 9A.08.010 defines knowledge and references that willful can be established by knowledge.

General requirements of culpability

(1) Kinds of Culpability Defined.

...

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that

facts exist which facts are described by a statute defining an offense.

...

(4) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

RCW 9A.08.010.

In 2003, the eluding statute was amended to remove the wanton and willful disregard for safety for the lives or property of others, and instead provide that the State must prove that the driving was in a reckless manor and for defense which must be established by a preponderance of the evidence that the person reasonably believed the person was not an officer and the driving was reasonable under the circumstances. RCW 46.61.024. The element that the State must prove that the person willfully failed or refused to bring his or her vehicle to a stop was not modified when the statute was amended.

The trial court believed that term willful as used in the statute implied a higher level of culpability than knowledge but not so high as to reach the level of intentional conduct. 8/18&19/09 RP 92. Since the annotations to the pattern instructions did not suggest the term willful be further defined, the trial court did not do so. The State

contends that under RCW 9A.08.010(4) “a purpose to impose further requirements plainly appears” in the eluding statute and it is not error to define willful based upon knowledge to the new eluding statute.

In addition, the defense specifically wanted the trial court to apply to use the willful and knowing definitions to tie that to the defendant’s awareness that he was being followed by an officer in a marked vehicle. 8/18&19/09 RP 86-9, 91-2. Those elements are no longer implicit elements of the offense given the statutory defense. The court must give jury instructions that accurately state the law, that permit the defendant to argue his theory of the case, and that the evidence supports. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Here the defense wanted instruction as to proof of knowledge that did not accurately state the law.

Furthermore, in the context of the present case, any error in failure to further define the term willful was harmless by beyond a reasonable doubt.

“An erroneous instruction is **harmless** if, from the record in [the] case, it appears **beyond a reasonable doubt** that the error complained of did not contribute to the verdict obtained.” *Id.* Whether a flawed **jury instruction** is **harmless** error depends on the facts of a particular case. *Id.*

State v. Carter, 154 Wn.2d 71, 81, 109 P.3d 823 (2005) *citing*. State v. Brown, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). Black's Law Dictionary defines willful as "voluntary and intentional but not necessarily malicious. Black's Law Dictionary, 7th ed. pg 159 (1999). The standard language definition for willful defines the term as "1 : obstinately and often perversely self-willed 2 : done deliberately : intentional." Merriam-Webster's Collegiate Dictionary, 10th ed. pg 1394 (1994).

Here the willful language modified the element of bringing the vehicle to a stop.

(4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;

CP 107. In the context of the case, there was no disputed evidence that Flora failed or refused to immediately bring his vehicle to a stop after being signaled to stop. Instead, he continued to speed, passed through a red light against oncoming traffic. This evidence cannot reasonably be argued to have been bringing his vehicle to a stop immediately.

At trial, defense argued the element of willful and continued to attempt to add element that the defendant had knowledge he was being followed by an officer.

And to go back to the instructions, the instructions talk about being willful and attempting to elude a pursuing police vehicle. That means that it has to be knowing or intentional; that it has to be willful on Mr. Flora's part. It doesn't mean you happen to be going down the road oblivious to an officer, if an officer tries to stop you and you have no idea they are there. That's not attempting to elude a pursuing police vehicle. Mr. Flora has to know that there's an officer giving him a signal and know the officer is pursuing him. He willfully failed to stop with all of that knowledge.

8/18&19/09 RP 113. Despite the attempts to argue an additional element, Flora had the ability to argue the elements of the crime and any error in further definition of willful was harmless.

3. The trial court did not abuse its discretion by declining to provide a missing witness instruction for a person who was a civilian ride-along with the officer on the night of the incident.

Flora claims that the trial court abused its discretion in failing to give a missing witness instruction. The witness that the defense claimed this instruction applied to was a civilian ride-along who was present with the officer during the eluding incident.

The defense had interviewed the officer in advance of trial and found out about the civilian ride-along two months before trial. 8/18&19/09 RP 83. Thereafter defense sent the prosecutor an e-mail indicating it believed the ride-along was deceased. 8/18&19/09 RP 83. When the prosecutor received the defense's proposed missing

witness instruction on the first day of trial, the prosecutor found out the name and was able to locate the telephone number in minutes. 8/18&19/09 RP 84. The prosecutor then gave the defense the person's name and telephone number during the lunch hour that first day of trial. 8/18&19/09 RP 84. At trial, the State also offered to permit the defense to interview the witness and reopen the case. 8/18&19/09 RP 84.

The trial court ruled that the witness was not within the control of the State and denied giving WPIC 5.20. 8/18&19/09 RP 84, 11 Wash. Prac. Pattern Jury Instr. Crim. WPIC 5.20 (3rd ed).

The inference that witnesses available to a party and not called would have testified adversely to such party arises only where, under all the circumstances of the case, such unexplained failure to call the witnesses creates a suspicion that there has been a willful attempt to withhold competent testimony. Wright v. Safeway Stores, Inc., 1941, 7 Wn.2d 341, 109 P.2d 542, 135 A.L.R. 1367.

State v. Baker, 56 Wn.2d 846, 859-860, 355 P.2d 806 (1960).

In order to satisfy the missing witness rule, (1) the witness must be peculiarly available to the party; (2) the testimony must relate to an issue of fundamental importance as contrasted to a trivial or unimportant issue; and (3) the circumstances must establish, as a matter of reasonable probability, that the party would not knowingly

fail to call the witness in question unless the witness's testimony would be damaging. See, e.g., State v. Montgomery, 163 Wn. 2d 577, 183 P.3d 267 (2008); see generally Tegland, 5 Washington Practice: Evidence Law and Practice § 402.8 (5th ed.). It is error for a judge to give this instruction unless there is evidence supporting each of the factors. State v. Montgomery, 163 Wn. 2d at , 183 P.3d 267 (2008).

For a witness to be 'available' to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

State v. Davis, 73 Wn.2d 271, 277, 438 P.2d 185 (1968).

Here the trial court declined to give the missing witness instruction because the witness was not uniquely within the control of a party. The witness was not a law enforcement officer, but instead was a civilian. There was also no information presented to the trial court about how the civilian might have testified indicating that there was an attempt to withhold competent testimony.

Flora argues that the witness because uniquely within control of the State since the officer did not write in his report that he had a

civilian rider in his car. However, the identity was not hidden since the officer had disclosed the identity at a defense interview. In addition, when the issue was raised by defense based upon the instructions at trial, the State was able to locate the witness and offer the defense an interview or time to prepare.

The trial court did not abuse its discretion in denial of the instruction. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (factual reasons to refuse instructions are reviewed for abuse of discretion).

4. Since the defense was based upon a claim that the defendant did not know he was being stopped by the officer, the trial court did not abuse its discretion in admitting a defendant's subsequent statement showing he recognized the officer.

Flora claims that the trial court erred in admission of the defendant's subsequent statement that indicated that he recognized the officer, when the two has contact on another date. Brief of Appellant page 33.

At trial defense sought to exclude prior bad acts. 8/18/09 RP 7. This was an eluding incident subsequent to the present incident involving the same officer. 8/18/09 RP 7-8. During that incident, the defendant made a statement that could be perceived as recognizing

the officer from the prior eluding. 8/18/09 RP 8-9. The trial court initially indicated that the State could cross-examine Flora with the prior statement, but then permitted the State to revisit the issue depending on the cross-examination of the officer. 8/18/09 RP 11-12.

Toward the end of Officer Radley's testimony, the State moved to be permitted to ask the officer if he had contact with the defendant on a subsequent date where the defendant asked the officer if he was the same officer in the same vehicle on the day of the eluding. 8/18&19/09 RP 67-9.⁵

The trial court admitted the statements finding:

The jury could infer from that statement Mr. Flora recognized the officer and recalled the case on December 27th. He is both offering information and an explanation of why he made that statement. But one possible explanation for the statement is that he recognized the officer and that he remembered him from December 27th. There are alternative explanations for the statement. But that does not make it irrelevant. And I don't think at this point Mr. Flora has to testify in order to raise the issue. It's an element of the crime.

8/18&19/09 RP 70. Defense did not seek a limiting instruction or request a weighing under ER 404(b).

The questioning of the officer was as follows.

⁵ Although there had been a prior ruling regarding severance by another judge that evidence of the second incident would not be admissible in the first

Q. Officer Radley, since December 27th, 2007, did you ever have a chance to -- did you ever contact Mr. Flora?

A. I did. I came in contact with Mr. Flora.

Q. When was that?

A. January 16th of this year, 2009.

Q. Did Mr. Flora have anything to say?

A. He did.

Q. What was that?

A. He asked me if I was the same officer, driving the same vehicle as the same vehicle who had chased him on December 27th, 2007.

Q. And were you in the same vehicle, or did you have somewhere by you the same vehicle on January 16th of this year that you had on December 27th?

A. I did.

8/18&19/09 RP 75-6.

A decision involving the admission of evidence lies within the sound discretion of the trial court and will not be reversed unless abuse of discretion can be shown. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The State contends that the trial court did not abuse its discretion in admission of the statement. In the case, Flora's defense was that the State had not proven that Flora did not know that the person following him was a uniformed officer in a marked police

incident, the trial court did not rule on the admissibility of the statement of Flora given during the second incident. 8/12/09 RP 27-8.

vehicle with lights and siren. The defendant's statements to the officer that suggested that he recognized the officer appropriately assist the State in establishing that Flora was eluding from the officer.

Flora also contends that the trial court did not appropriately weigh unfair prejudice under ER 403 or undergo an analysis under ER 404(b). However, the State sought admission of the evidence in a manner that did not establish that there had been criminal or improper conduct, thus not resulting in evidence of "other crimes, wrongs or acts" under ER 404(b). Additionally, the court's ruling showed it was weighing the risk of unfair prejudice under ER 403 given the content of the statements. The State contends the risk of prejudice was not unfair where it goes to the State's element of a crime charged.

The trial court did not abuse its discretion in admission of Flora's statement showing he recognized the officer.

V. CONCLUSION

For the foregoing reasons, Flora's appeal must be denied and the conviction and sentence for attempting to elude a pursuing police vehicle affirmed.

DATED this 13th day of July, 2010.

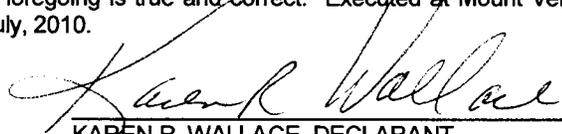
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: ELAINE L. WINTERS, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 13th day of July, 2010.


KAREN R. WALLACE, DECLARANT