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Court of Appeals
Division I
State of Washington

NO. 73045-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AZEB ABAY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. This Court reviews a challenge to the sufficiency of the evidence by determining whether, after viewing all the evidence and making all reasonable inferences in the light most favorable to the State, any rational jury could have found the elements of the crime beyond a reasonable doubt. In Abay's trial for felony hit and run, the evidence showed that Abay knew that her SUV had collided with a pedestrian, yet she continued driving with stop-and-go traffic, bypassing about 11 clearly accessible commercial driveways, and failed to stop immediately even when a patrol car followed her with lights and siren. Abay herself testified that she had wanted to leave the scene and go somewhere else to "calm down," but then decided to stop when a police car appeared behind her. Viewing all the evidence in the proper light, could any rational jury find Abay guilty of hit and run?

2. A criminal statute establishes alternative means for committing a crime only when each alleged alternative describes distinct acts, while nuances are mere facets of the same criminal conduct. Even if an offense has alternative means, express jury unanimity as to the means is not required when there is sufficient evidence to support each alternative means. The state hit-and-run

statute, designed to prevent drivers from escaping liability and to provide immediate help to those injured, provides that a crime is committed when a driver involved in an accident fails to stop to fulfill a duty consisting of several responsibilities, including providing identity and insurance information and rendering aid if needed. In Abay's case, the evidence showed that Abay performed none of the required responsibilities. Does the hit-and-run statute contain only a single means of committing hit and run? Even if the different obligations form independent means of committing hit and run, was the evidence sufficient to prove Abay failed all of them?

3. A statute is unconstitutionally vague when ordinary people cannot understand what conduct is prohibited or required, or the statute does not provide clear enough standards to protect against arbitrary enforcement. The state hit-and-run statute requires drivers to stop at the accident scene or "as close thereto as possible," a phrase the court of appeals long ago held is not vague. Has Abay failed to meet her high burden of demonstrating beyond a reasonable doubt that the phrase "as close thereto as possible" is unconstitutionally vague?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Azeb Abay was charged by amended information with felony

Hit and Run, alleging that:

[O]n or about March 20, 2014, in King County, Washington, while driving a motor vehicle, was knowingly involved in an accident resulting in injury to another person and failed to carry out all of the following duties: 1) immediately stop her vehicle at the scene of the accident or as close thereto as possible; 2) immediately return to and remain at the scene of the accident until all duties are fulfilled; 3) give her name, address, insurance company, insurance policy number, vehicle license number and exhibit her driver's license to any person struck or injured or the driver of or any occupant of or any person attending any vehicle collided with; and 4) render to any person injured in the accident reasonable assistance, including the carrying or making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or such carrying is requested by the injured person or on his or her behalf.

CP 7.

A jury convicted Abay as charged. The trial court imposed a first-time offender waiver with credit for three days in custody and an additional 80 hours of community service. CP 35. Abay timely appealed. CP 39.

2. SUBSTANTIVE FACTS

On March 20, 2014, Kristian Hendrickson, a University of Washington doctoral candidate in traffic engineering, was

participating in a traffic-congestion study of Bothell Way Northeast (State Route 522) in Kenmore, King County, Washington. 4RP 39-42.¹ He was wearing an orange safety vest and was carrying a video camera to record traffic. 4RP 44, 58.

At about 2 p.m. on this clear, sunny day, Hendrickson was crossing Bothell Way at a crosswalk, along with other pedestrians, when Azeb Abay, driving a Nissan SUV, turned right from 73rd Avenue Northeast to westbound Bothell Way, striking Hendrickson to the pavement. 5RP 18-19, 40, 74, 79, 102, 110, 128; Ex. 3, 11. Hendrickson's video camera was rolling and captured the collision. Ex. 3. Abay stopped her SUV for a moment as witnesses yelled at her to stop, but she drove away with the heavy westbound traffic. 5RP 111, 131.

King County Sheriff's Deputy Hughes Ebinger happened on the scene almost immediately and found Hendrickson unconscious on the pavement, apparently convulsing. 5RP 21-22. Witnesses pointed out Abay's vehicle, which was already a long city block

¹ The verbatim report of proceedings in this case is divided into seven individually numbered volumes that the State refers to as follows: 1RP (May 19, 2014); 2RP (October 8, 2014); 3RP (November 25, 2014); 4RP (December 1, 2014); 5RP (December 2, 2014); 6RP (December 3, 2014); 7RP (January 8, 2014).

Away, headed west in the normal flow of Bothell Way traffic. 5RP 23-24. Deputy Ebinger told the bystanders to wait for aid, and he went after Abay's vehicle with his lights flashing and siren blaring. 5RP 24.

The deputy pulled up behind Abay's vehicle, now roughly three city blocks from the accident, but Abay did not stop or move over, and bypassed at least two more major driveways. 5RP 26; Ex. 11. The deputy drove alongside the driver's side of Abay's SUV and gestured for her to pull over. 5RP 28-30. Abay appeared to be using her cell phone. 5RP 30-31. She bypassed the entrance to a strip mall, but finally turned right onto 68th Avenue Northeast — five long city blocks from the accident at 73rd — and then turned into a drugstore parking lot and stopped. 5RP 31; Ex. 11.

Deputy Ebinger identified 11 open turnouts that Abay could have used along westbound Bothell Way between 73rd and 68th, including an auto-parts store where an eyewitness parked, a McDonald's restaurant, a bank, a Subway restaurant, a Safeway gas station, a Safeway supermarket parking lot, and the strip mall.

5RP 42-44, 75; Ex. 11.² The bus lane between Abay's lane and all those turnouts was also a right-turn lane and was clear during the entire time Abay was driving in stop-and-go traffic along Bothell Way. 5RP 71.

Abay testified that she knew she hit the pedestrian but was "shocked," and "didn't want to see that – the scene." 5RP 149. She did not pull over because she was "not in good condition and I just wanted to calm myself." 5RP 150. She did not decide to stop until "I saw the police car." Id. She said she did not pull into any of the many driveways because she was unfamiliar with the route, even though she commuted that way daily. 5RP 152-55. Abay admitted she did not call 911. 5RP 160. She said she initially left the scene because she figured the police would take care of the victim. 5RP 161. She said she "only wanted to be safe." 5RP 163. "I was focused on myself." Id.

Hendrickson suffered head, neck, hip and shoulder injuries. 5RP 90-98. He did not remember anything about the incident.

4RP 44.

² Deputy Ebinger placed markings on Exhibit 11 to illustrate certain events (4RP 42-43): (1) was where Abay's vehicle was when the deputy first saw it; (2) showed where Ebinger pulled behind Abay's SUV; (3) marked where he drove alongside Abay; (4) showed where Abay stopped. The deputy also placed 11 circles along the route to show the available driveway turnouts that Abay could have used. Ex. 11.

C. ARGUMENT

1. SUBSTANTIAL EVIDENCE SUPPORTED THE CONVICTION.

Abay first contends that the State presented insufficient evidence of hit and run because Abay testified that she had intended to return to the accident scene, and that her arrest five blocks and eleven driveways away means the State is unable to prove “volition.” Her argument fails because she is essentially complaining that the jury did not accept her story, while the standard of review here requires her story to be viewed in the light most favorable to the State. The State is not obligated to prove “volition” as an extra element of an offense, and the facts belie her claim of involuntariness.

A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and any reasonable inferences drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Id. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id.

The Court does not reweigh the evidence. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Instead, it defers to the jury's resolution of conflicting testimony, evaluation of witness credibility, and the weight to be given the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Direct and circumstantial evidence carry the same weight. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

To convict a defendant of felony hit and run, the State must prove (1) there was an accident resulting in death or injury, (2) the driver failed to immediately stop and return to the scene to provide the required information and assistance, and (3) the driver had knowledge of the accident. RCW 46.52.020(1); State v. Bourne, 90 Wn. App. 963, 969, 954 P.2d 366 (1998). The State is not required to prove knowledge of injury. State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983).

RCW 46.52.020(3) requires:

... [T]he driver of any vehicle involved in an accident resulting in injury to or death of any person, or involving striking the body of a deceased person, or resulting in damage to any vehicle which is driven or attended by any person or damage to other property *shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any*

such vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person or on his or her behalf.

The jury in Abay's case was instructed with the usual pattern instruction that tracks the language of the statute. Appendix A; CP 26-27. See also WPIC 97.02.

In this case, the evidence of all required elements of the crime was clearly met: Abay struck victim Hendrickson in a marked crosswalk and admitted to the jury that she knew it immediately. Hendrickson was injured. Abay paused long enough to decide that she did not wish to see what she had done, but instead wanted to go somewhere else and calm down. She was focused on herself, and decided she should stop only when the police officer appeared behind her, blocks from the accident scene. Abay drove past about 11 easily accessible, commercial parking-lot entrances before finally stopping for an officer using lights and sirens and physical hand gestures to get her to yield. She admitted she did not call 911 and figured the police would tend to her victim. She made no efforts to impart her identity or driving information to anyone. The evidence —

in almost any light, but certainly in the light most favorable to the State — was overwhelming of felony hit and run.

Nonetheless, Abay contends that her conviction must be reversed because she had meant to return to the accident scene and provide her information, but the police prevented this by arresting her. This argument is baseless both in law and in the plain facts of her case.

Abay compares her case to State v. Eaton to assert that the State here had a burden to prove an additional element that Abay “voluntarily” or “volitionally” failed to return to the scene, provide her information and render aid. 168 Wn.2d 476, 229 P.3d 704 (2010). There is no comparison to Eaton here.

In Eaton, the defendant was convicted of possession of methamphetamine with a sentencing enhancement because Eaton had the drug inside a jail. Id. at 480. Our supreme court held narrowly that as to the particular sentencing enhancement of having drugs in an “enhanced zone,” there is a “volitional element” that the State must prove. Id. at 487-88. This element “may be as simple as choosing to put one foot in front of the other to enter the zone,” the court said. Id. at 488. But in Eaton’s case, where he was “forcibly

transported by police to the area giving rise to additional punishment, he did not have the requisite ability to choose.” Id. at 486.

In Abay’s case, there is no evidence that the deputy forced Abay to drive her SUV five blocks, past 11 driveways, before finally stopping only because a police car with lights and siren was tailing her. Abay’s portrayal now — that she had decided to stop and return to the scene, but the heavy hand of the police prevented it — is not supported even by her own trial testimony. Because this Court reviews the evidence in the State’s best light, it should flatly reject Abay’s interpretation of events, including her alleged intentions, her supposed state of mind, and her claimed inability to pull her car off the street.

Moreover, our supreme court has held subsequent to Eaton that “requiring the prosecution to establish volition ... as an ‘element’ in the strict sense is unreasonable.” State v. Deer, 175 Wn.2d 725, 732-33, 287 P.3d 539 (2012) (in third-degree child rape case, defendant claimed to be asleep during some of the sex). The court rejected Deer’s argument that if a defendant merely raises a lack of volition then the State has to prove volition beyond a reasonable doubt. Id. at 732. Instead, if a defendant raises lack of volition as a defense at trial, it must be done as an affirmative defense, with the

defense bearing the burden of proving it by a preponderance of the evidence. Id. at 732-36. Abay did not raise this as a defense in her case, but even if she did, the evidence would not support it by any standard.

While Abay's situation and background may have been sympathetic, the most reasonable conclusion from the evidence, when viewed in the proper light, was that Abay simply chose to drive away from the collision in the vain hope that she would not have to deal with it. Because the evidence in this case was overwhelming that Abay failed to meet any aspect of her duty as a motorist after driving into a pedestrian, any rational jury would have convicted her. Her argument fails.

2. HIT AND RUN IS NOT AN ALTERNATIVE-MEANS CRIME.

Abay next claims that hit and run is an alternative means crime, so her right to a unanimous verdict was violated because the jury did not specify which of the supposed means was used to commit the crime. To the contrary, felony hit and run is not an alternative means crime because it proscribes a single act — failure to fulfill a motorist's duty when involved in an accident. Abay is attempting to create alternative means from facets and nuances of

the same criminal conduct, which our courts reject. In any event, her argument is futile because even if the crime had all the alternative means she claims, the evidence overwhelmingly proved all of them because Abay did nothing to meet any of her responsibilities after the accident.

Under article I, section 21 of the Washington Constitution, criminal defendants have a right to a unanimous jury verdict. State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). This right may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime. Id. In reviewing this type of challenge, courts apply the rule that when there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required. Id.

Generally, an alternative means crime is one by which the criminal conduct may be proved in a variety of ways. The “statutory analysis focuses on whether each alleged alternative describes ‘*distinct acts that amount to the same crime.*’” State v. Sandholm, ___ Wn.2d ___, 90246-1, 2015 WL 7770651, at *3 (Dec. 3, 2015) (the

“affected by” provisions of Washington’s DUI³ statute do not create alternative means) (quoting State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010)). The more varied the criminal conduct, the more likely the statute describes alternative means. Id. But when the statute describes minor nuances inhering in the same act, the more likely the various “alternatives” are merely facets of the same criminal conduct. Id.

The legislature has not defined what constitutes an alternative means crime or designated which crimes are alternative means crimes. Owens, 180 Wn.2d at 95 (2014). Instead, each case must be evaluated on its own merits. State v. Klimes, 117 Wn. App. 758, 769, 73 P.3d 416 (2003).

Definitional instructions and statutory definitions do not create a “means within a means.” State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007) (Jury instructions setting forth three common-law definitions of assault did not constitute alternative means of committing the crime of assault in whichever degree charged). The use of a disjunctive “or” in a list of methods of committing the crime *does not* necessarily create alternative means

³ Driving Under the Influence.

of committing the crime. State v. Peterson, 168 Wn.2d 763, 769, 770, 230 P.3d 588 (2010).

For example, theft is an alternative means crime because it may be committed by (1) wrongfully obtaining or exerting control over another's property or (2) obtaining control over another's property through color or aid of deception. State v. Linehan, 147 Wn.2d 638, 644-45, 647, 56 P.3d 542 (2002). In each alternative means of committing theft, the defendant's conduct varies significantly. Peterson, 168 Wn.2d at 770.

By contrast, failure to register as a sex offender is not an alternative-means crime because the statute prohibits a single act of failing to perform a duty of providing proper notice after moving. Id. In Peterson, the defendant argued that the failure to register statute is an alternative means crime because the crime can be committed by failing to register as a sex offender after (1) becoming homeless, (2) moving between residences in one county, or (3) moving between counties. Id. at 769-70. The court held that these were not alternative means because an individual's conduct in each of the three scenarios did not vary significantly, i.e., they were facets of the single prohibited act. Id. at 770.

In Sandholm, our high court found the Peterson reasoning persuasive in determining that the “affected by” prong of the DUI statute was a single means because the “fact that one substance or multiple substances may have caused the influence does not change the fundamental nature of the ‘influence of’ or ‘affected by’ criminal act.” 2015 WL 7770651, at *4.

The purpose of our state’s hit-and-run statute, RCW 46.52.020, is to promote immediate assistance to injured persons and to facilitate accident investigations, including preventing drivers from avoiding liability for their acts by leaving the scene without providing the required information. Vela, 100 Wn.2d at 641; State v. Silva, 106 Wn. App. 586, 593, 24 P.3d 477 (2001). As in Owens and Peterson, the crime of hit and run does not involve alternative means because it describes one act: the failure to fulfill a driver’s statutory duty to remain, help and cooperate when there is an accident. The State needs to prove only that one of the parts of that duty was not fulfilled; the *actus reus* of the crime is the singular failure to do them all — one means.

Abay’s attempt to divvy up her responsibilities into distinct alternative means also fails because the conduct does not vary significantly; they are all part of meeting the single duty. For

example, Abay is apparently contending that failing to “stop” and failing to “return and remain at the scene” are alternative means of committing hit and run, while they are facets of fulfilling the single duty. The responsibilities of providing identity and insurance information and giving aid, while somewhat different, both are part of providing assistance and facilitating accident investigations. They are not so distinct as to rise to alternative means requiring jury unanimity.

With all that said, it is academic here. Abay claims four alternative means — (1) failure to stop, (2) failure to return and remain, (3) failure to give identity and driving information, and (4) failure to render aid. Even assuming, without conceding, that the statute establishes those four alternative means, the evidence in this case was overwhelming that Abay failed all four. To argue otherwise, Abay returns to the claim, rejected by the jury, that she would have returned, provided information and render aid, but for her arrest. As discussed earlier, the evidence here is evaluated in the light that gives Abay’s interpretations no credence. It was beyond a reasonable doubt here that she drove away from every one of her responsibilities. Her argument is without merit.

3. THE STATUTE IS NOT VAGUE.

Lastly, Abay avers that the state's hit-and-run statute is unconstitutionally vague because the phrase "as close thereto as possible," is somehow so indefinite that a person of ordinary intelligence cannot understand what it requires. She is wrong because the phrase is clear and commonly understood — and the court of appeals has already held that it is not vague.

A statute is presumed to be constitutional. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). The party challenging a statute's constitutionality for vagueness bears the burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague. City of Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990). When First Amendment rights are not involved, the constitutionality of the statute is evaluated as applied to the defendant. Id. at 182-83.

A statute meets constitutional requirements "[i]f persons of ordinary intelligence can understand what the ordinance proscribes." Douglass, 115 Wn.2d at 179. It is not enough to hold a statute vague merely because "a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." Haley v. Med. Disciplinary Bd.,

117 Wn.2d 720, 740, 818 P.2d 1062 (1991) (quoting Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)). After all, “[s]ome measure of vagueness is inherent in the use of language.” Id. Thus, vagueness “is not mere uncertainty.” State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. State v. Branch, 129 Wn.2d 635, 648, 919 P.2d 1228 (1996).

Seventy-nine years ago, in 1937, Washington’s hit-and-run statute was amended to require that:

An operator of any vehicle involved in an accident resulting in the injury to or death of any person shall immediately stop such vehicle at the scene of such accident **or as close thereto as possible** but shall then forthwith return to, and in every event remain at, the scene of such accident until he has fulfilled the requirements of subdivision (c) of this section.

LAWS OF 1937, ch. 189, § 134(a) (emphasis added).⁴ The phrase “as close thereto as possible” remains, as previously stated, part of the statute. RCW 46.52.020.

⁴ The previous version said: “Every person operating or driving any motor or other vehicle or riding or driving any animal upon the public highway and coming in contact with any pedestrian, vehicle or other object on such highway, *shall stop* and render such aid and assistance as may be required, and [furnish identification and vehicle information].” LAWS OF 1927, ch. 309, § 50 (emphasis added).

Additionally, many city ordinances in Washington use this term. See e.g. SMC § 11.56.430 (Seattle). The state Model Traffic Code for municipalities adopts by reference RCW 46.52.020. WAC 308-330-325. And at least 23 other states use the phrase “as close thereto as possible” or “as close as possible” in their hit-and-run statutes.⁵

In 1999, Division III of the Court of Appeals was confronted with a vagueness challenge to the specific phrase “as close thereto as possible” in Spokane’s hit-and-run ordinance, which mirrored the state statute.⁶ City of Spokane v. Carlson, 96 Wn. App. 279, 283,

⁵ See Ala. Code 1975 § 32-10-19(a) (Alabama); A.C.A. § 27-53-101(a)(1) (Arkansas); C.R.S.A. § 42-4-1601(1) and 42-4-1602(1) (Colorado); F.S.A. § 316.027(2)(c) (Florida); Ga. Code Ann., § 40-6-270(a) (Georgia); HRS § 291C-12.6(a) (Hawaii); I.C. § 18-8007(1)(a) (Idaho); 625ILCS 5/11-401(a) (Illinois); I.C.A. § 321.261(1) (Iowa); K.S.A. 8-1602(a) (Kansas); 29-A M.R.S.A. § 2252(1) (Maine); MD Code, Transportation, § 20-102(a)(1) (Maryland); N.R.S. 484E.010(1) (Nevada); N.J.S.A. 39:4-129(a) (New Jersey); N.M.S.A. 1978 § 66-7-201(A) (New Mexico); NDCC, 39-08-04(1) (North Dakota); 47 Okl.St. Ann. § 10-102(A) (Oklahoma); O.R.S. § 811.705(1)(a) (Oregon); 75 Pa.C.S.A. § 3742(a) (Pennsylvania); V.T.C.A., Transportation Code § 550.021(a)(1) (Texas); W. Va. Code, § 17C-4-1(a) (West Virginia); W.S.A. 346.67(1) (Wisconsin); W.S.1977 § 31-5-1101(a) (Wyoming). See also 14 Navajo Code § 711(A) (Navajo Nation) (“scene of the accident or as close thereto as possible”).

⁶ Spokane’s hit-and-run ordinance at the time read:

(2) The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person or damage to other property shall immediately stop such vehicle **at the scene of such accident or as close thereto as possible** and shall forthwith return to, and in any event shall remain at, the scene of such accident until he has fulfilled the requirements of subsection (3) of this section; every such stop shall be made without obstructing traffic more than is necessary.

Carlson, 96 Wn. App. at 284.

979 P.2d 880 (1999). The court looked at the entire ordinance and found that “[e]ven a cursory review of the (law) shows a clear road map for its violation.” Id. at 284. “This ordinance defines the criminal offense with sufficient certainty to avoid arbitrary enforcement.” Id.

Similarly, the Superior Court of Pennsylvania, that state’s criminal appellate court, specifically rejected a vagueness challenge to the term “at the scene of the accident or as close thereto as possible.” Com. v. Kinney, 863 A.2d 581, 587 (Penn., 2004). The appellant there, as here, had “several opportunities ... to stop her vehicle after the accident,” and “could have pulled off onto the roadside or into one of the several driveways along the road,” but kept driving for half a mile until pulling off because of the condition of her car, and calling 911. Id. at 583, 586-87. But Kinney complained that the language of the statute made it unclear where precisely a driver must stop. Id. at 587.

The Kinney court held that Kinney’s “efforts to inject confusion where none exists fail.” Id. “Upon review, we conclude that the term ‘scene of the accident or as close thereto as possible’ simply is not a confusing term.” Id. “[The statute] provides a reasonable standard by which drivers may gauge their conduct.”

Id. at 587-88. Additionally, “we fail to see how persons of common intelligence would be forced to guess at the meaning and application of [the statute], and, therefore, we conclude that it is not void for vagueness.” Id. (internal quotations removed).⁷

The reasoning in Carlson and Kinney is sound. The term “as close thereto as possible” is a commonsense phrase that needs no further definition for a person of ordinary intelligence. It is self-explanatory and part of everyday vernacular. As applied to Abay, no ordinarily intelligent person would be so confused about the phrase as to wonder whether driving five blocks and bypassing 11 commercial parking lots, even when a police car was following with lights and siren, was as “close thereto as possible.” That is especially so when Abay’s claims about intending to stop and being unable to figure out how to steer off the street must be discounted.

Still, Abay continues to complain, in essence, that no one believed her version of the events. She laments that the prosecutor was allowed to urge the jury to disregard her story and “adopt his

⁷ The Kinney court also criticized Kinney’s attempts to use her purported lack of knowledge of the accident as part of the vagueness challenge, saying that her alleged state of mind has nothing to do with whether the statute is understandable. 863 A.2d at 587. Kinney also argued that even if the statute was not vague, she “‘substantially complied’ with its terms” by eventually turning off the road and stopping. 863 A.2d at 588. Because Kinney’s claim was essentially a challenge to the sufficiency of the evidence, the Pennsylvania court faulted Kinney for basing her legal claims “on her version of events.” Id.

point of view on the matter.” Brief of Appellant (BOA) at 19. But that is the prosecutor’s job. Abay complains that the jury was not ordered to consider Abay’s “state of mind,” thus giving them “unfettered discretion to choose what the law was.” BOA at 20. But the jury was instructed to follow the court’s instructions on the law, consider all the evidence, and to be the sole judge of credibility. CP 17-18. If the jury decided that Abay’s story did not add up, and that her actions did not amount to stopping “as close thereto as possible,” that was its role as factfinder. None of this is evidence of an unconstitutionally vague statute.

Abay argues, among a series of what-ifs, that “a different police officer, or prosecutor, or jury” might reach a different conclusion about whether Abay’s being forced off the roadway by a police officer five blocks from the accident scene was “close enough.” BOA at 18. But “[t]he mere fact that a statute may require some degree of subjective evaluation by a police officer to determine whether the statute applies does not mean the statute is unconstitutionally vague.” State v. Harrington, 181 Wn. App. 805, 825, 333 P.3d 410, rev. denied, 337 P.3d 326 (2014). The fact that prosecutors have broad charging discretion does not render a statute unconstitutionally vague. See State v. Rice, 174 Wn.2d

884, 279 P.3d 849 (2012) (prosecutorial discretion inherent in constitutional executive authority). The possibility that a different jury might reach a different verdict on the ultimate issue of fact does not make a statute unconstitutionally vague. See Harrington, 181 Wn. App. at 827 (jury asking for further definition does not equal unconstitutional vagueness of term). Rather, the defendant must prove beyond a reasonable doubt that a person of ordinary intelligence would be unable to know what the statute proscribes. Douglass, at 179. Abay fails in that burden here.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Abay's judgment and sentence.

DATED this 20th day of January, 2016.

Respectfully submitted,

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King County Prosecuting Attorney

By: 

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APPENDIX A

(CP 26-27 — Jury Instruction #7 — “To Convict”).

No. 7

To convict the defendant of hit and run, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 20, 2014, the defendant was the driver of a vehicle;

(2) That the defendant's vehicle was involved in an accident resulting in injury to any person;

(3) That the defendant knew that she had been involved in an accident;

(4) That the defendant failed to satisfy her obligation to fulfill all of the following duties:

(a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible;

(b) Immediately return to and remain at the scene of the accident until all duties are fulfilled;

(c) Give her name, address, insurance company, insurance policy number and vehicle license number, and exhibit her driver's license, to any person struck or injured;

(d) Render to any person injured in the accident reasonable assistance, including the carrying or making of arrangements for the carrying of such person to a physician or hospital for medical

treatment if it is apparent that such treatment is necessary or such carrying is requested by the injured person or on her behalf; and

(5) That any of these 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.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mick Woynarowski, the attorney for the appellant, at mick@washapp.org, containing a copy of the BRIEF OF RESPONDENT in State v. Azeb Weldetensay Abay, Cause No. 73045-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of January, 2016.



Name:

Done in Seattle, Washington