

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

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SEATTLE WASHINGTON

NO. 34940-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM BARGE,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
SEP 27 2011  
SEATTLE

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

The Honorable Nelson E. Hunt, Judge

APPELLANT'S OPENING BRIEF

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*pm 9-26-06 from Div I*

**TABLE OF CONTENTS**

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE ..... 3

E. ARGUMENT ..... 7

    1. THE TRIAL COURT ERRED BY FAILING TO HOLD A CrR 3.5 HEARING TO DETERMINE THE ADMISSIBILITY OF BARGE'S ALLEGED STATEMENTS TO TROOPER MURPHY..... 7

        a. The state and federal constitutions bar admission of custodial statements absent *Miranda* waiver. .... 7

        b. The CrR 3.5 hearing is mandatory..... 8

        c. The trial court's failure to hold the CrR 3.5 hearing prejudiced Barge..... 9

    2. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT BARGE COMMITTED FELONY HIT-AND-RUN. .... 11

        a. The hit-and-run statute does not apply to a person who is hit by a pursuing police officer..... 11

        b. Even if the statute applied, the State here failed to present sufficient evidence to prove each element of the crime charged beyond a reasonable doubt. .... 13

F. CONCLUSION ..... 16

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

*State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996)..... 7

*State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). .... 13

*State v. Vela*, 100 Wn.2d 636, 673 P.2d 185 (1983)..... 12

**Washington Court of Appeals Decisions**

*Seattle v. Stokes*, 42 Wn. App. 498, 712 P.2d 853 (1986)..... 12

*State v. Falk*, 17 Wn. App. 905, 567 P.2d 235 (1977)..... 10

*State v. Fanger*, 34 Wn. App. 635, 663 P.2d 120 (1983) ..... 9

*State v. Joseph*, 10 Wn. App. 827, 520 P.2d 635 (1974) ..... 11

*State v. Kidd*, 36 Wn. App. 503, 674 P.2d 674 (1983)..... 9, 10

*State v. Miller*, 92 Wn. App. 693, 964 P.2d 1196 (1998) ..... 8

*State v. Mustain*, 21 Wn. App. 39, 584 P.2d 405 (1978) ..... 10

*State v. Nogueira*, 32 Wn. App. 954, 650 P.2d 1145 (1982) ..... 11

*State v. Porter*, 5 Wn. App. 460, 488 P.2d 773 (1971)..... 11

*State v. Renfro*, 28 Wn. App. 248, 622 P.2d 1295 (1981)..... 10

*State v. Silva*, 106 Wn. App. 586, 24 P.3d 477 (2001)..... 12, 14

*State v. Sutherland*, 104 Wn. App. 122, 15 P.3d 1051 (2001)..... 14

*State v. Teuber*, 19 Wn. App. 651, 577 P.2d 147, *rev. denied* 91  
Wn.2d 1006 (1978)..... 15

**United States Supreme Court Decisions**

*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)..... 13

*Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) ..... 8

*In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ..... 13

*Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ..... 13

*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ..... 7, 8

**Washington Statutes**

RCW 46.52.020..... 12, 14

**Constitutional Provisions**

U.S. Const. amend. 14..... 13

U.S. Const. amend. V ..... 7

Wash. Const. art. 1, § 3 ..... 13

Wash. Const. art. 1, § 9 ..... 7

**Rules**

CrR 3.5..... 8

#### A. SUMMARY OF ARGUMENT

At the close of a high-speed chase a police officer's vehicle struck defendant William Barge's vehicle broadside. Within seconds Mr. Barge came to a stop on top of a high curb behind a Pizza Hut, where he was promptly pulled from his car at gunpoint and placed into custody. In addition to charging Mr. Barge with Attempt to Elude a Pursuing Police Vehicle, which Mr. Barge did not contest, the State charged him with Hit and Run Injury. Because his conviction on that charge was based on an improper application of the statute, insufficient evidence, and an inadmissible confession that was not subjected to a CrR 3.5 hearing, it should be reversed.

#### B. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to hold a CrR 3.5 hearing.
2. The trial court erred in admitting testimony about Mr. Barge's alleged admissions over the defendant's objection that he had invoked his *Miranda* rights.
3. The trial court erred in entering Finding of Fact 1.17 ("the defendant started up his car again after the collision and left the scene") partly on the basis of inadmissible testimony.

4. The trial court erred in entering Finding of Fact 1.18 (“the defendant had no intent to stop”) partly on the basis of inadmissible testimony.

5. The trial court erred in entering Finding of Fact 1.21 (“all his actions are consistent with trying to run away as well as his admission to the officer”) partly on the basis of inadmissible testimony.

6. The trial court erred in adjudicating the defendant guilty of Hit and Run Injury because the hit-and-run statute does not apply under these circumstances and the State in any event failed to present sufficient evidence to prove each element of the crime beyond a reasonable doubt.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A CrR 3.5 hearing is mandatory where the State seeks to introduce a statement the defendant allegedly made during a custodial interrogation. Did the trial court err in failing to hold such a hearing, where the omnibus order shows that the defendant requested a CrR 3.5 hearing, the State’s witness at trial testified about admissions the defendant allegedly made while questioned in the back of a police car, and the defendant objected on the basis that he had invoked his *Miranda* rights? (Assignments of Error 1-5).

2. The State bears the burden of proving every element of an offense beyond a reasonable doubt. Did the State fail to present sufficient evidence that the defendant committed felony hit-and-run, where the statute was not intended to apply to this context, where a portion of the evidence should not have been admitted, and where the defendant's duties under the statute were discharged by incapacitation? (Assignment of Error 6).

D. STATEMENT OF THE CASE

On December 6, 2005, William Barge was engaged in a high-speed police chase. 2 RP 11-13.<sup>1</sup> He was driving a car that had been reported stolen. 2 RP 71. During the chase, one of the pursuing officers slammed into Mr. Barge's vehicle broadside, and Mr. Barge's car eventually stopped on top of a curb in a Pizza Hut parking lot. 2 RP 14, 39, 62.

Two officers then performed a "felony car stop" with firearms drawn. 2 RP 17. They ordered Mr. Barge out of the vehicle and placed him into custody. 2 RP 41. Mr. Barge was "rocking back and forth," was sweating, and "could barely keep his eyes open." 2 RP

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<sup>1</sup> The Verbatim Report of Proceedings consists of two volumes, and will be cited as follows:

1 RP: 1/18/06 hearing to waive speedy trial and bench trial.

2 RP: 5/4/06 hearing on state's motion to continue; 5/17/06 trial; 6/5/06 entry of findings of fact, conclusions of law, and sentencing.

67. The sergeant removed a glass pipe with residue from Mr. Barge's pocket. 2 RP 30. The residue later tested positive for methamphetamine. 2 RP 22.

The State charged Mr. Barge with Attempt to Elude a Pursuing Police Vehicle (RCW 46.61.024(1)), Possession of Stolen Property in the First Degree (RCW 9A.56.150), Hit and Run – Injury (RCW 46.52.020(3)), and Possession of a Controlled Substance (RCW 69.50.4013(1)). CP 21-22. Mr. Barge waived his rights to a jury trial. CP 20.

At his bench trial, Mr. Barge did not contest the attempt-to-elude and drug possession charges. 2 RP 116. He did contest that he knowingly possessed a stolen vehicle, but the court found that a "bill of sale" he produced for the car was "questionable at best," that the ignition was punched, that his other actions that night were consistent with the crime, and that the car was worth over \$1500. CP 14.

As to the felony hit-and-run, the three State's witnesses (all police officers) testified that after Officer Lowry broadsided Mr. Barge, Mr. Barge came to a stop, started up again, and sped to the Pizza Hut parking lot where he was stymied by the curb. 2 RP 14, 40-41, 56. Trooper Murphy testified that she spoke to Mr. Barge

after he was placed into custody in the back of Officer Carrell's patrol car. 2 RP 67. After Trooper Murphy confirmed that she had advised Mr. Barge of his *Miranda* rights, defense counsel objected and stated, "It's my understanding he invoked his rights. Why are we pursuing this line of questioning?" 2 RP 69. The court replied, "There's a dispute about whether statements were made? Well, continue." *Id.* The prosecutor proceeded to question Trooper

Murphy:

Q: After you read the defendant his Miranda warnings, did he agree to speak with you?

A: Yes. I asked him if he would like to talk to me about the collision, which he said he would. He stated that he was attempting to lose the cop . . . he said that when he pulled the emergency brake the car spun around but it stopped instead of doing a full spin as he intended, and he said he looked up to his left and saw the patrol car coming and it swerved and hit him in the driver's door.

Q: Did he say anything else about after they struck?

A: He did. He said that he continued and went through the parking lot of the Pizza Hut, not knowing that it wasn't a thoroughfare.

2 RP 69-70. Other than defense counsel's objection, there was no discussion about whether Mr. Barge had invoked or waived his right to counsel. 2 RP 1-129.

Mr. Barge later denied making the statements Trooper Murphy attributed to him. 2 RP 94. He explained that the impact of the collision sent him into the Pizza Hut parking lot. 2 RP 82. He stated that if he were going to run away after a collision, he would not have gone into the Pizza Hut lot because he knew it was a dead end; he had gone there many times for pizza and his ex-wife worked there. 2 RP 100.

The court found Mr. Barge guilty on all counts. 2 RP 116-18; CP 15. The court's findings of fact included "that the defendant started up his car again after the collision and left the scene," "that the defendant had no intent to stop," and "that all his actions are consistent with trying to run away as well as his admission to the officer." CP 14. Mr. Barge was ordered to serve concurrent sentences of 60 months for the hit-and-run, 57 months for possession of stolen property, 29 months for attempting to elude a pursuing police vehicle, and 24 months for drug possession. CP 7.

Mr. Barge appeals. CP 1.

E. ARGUMENT

1. THE TRIAL COURT ERRED BY FAILING TO HOLD A CrR 3.5 HEARING TO DETERMINE THE ADMISSIBILITY OF BARGE'S ALLEGED STATEMENTS TO TROOPER MURPHY.

a. The state and federal constitutions bar admission of custodial statements absent *Miranda* waiver. The Fifth Amendment to the United States Constitution provides that no person “. . . shall be compelled in any criminal case to be a witness against himself . . .” Article 1, § 9 of the Washington Constitution provides, “No person shall be compelled in any criminal case to give evidence against himself . . . .” The privilege against self-incrimination “is fully applicable during a period of custodial interrogation.” *Miranda v. Arizona*, 384 U.S. 436, 460-61, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). A defendant's statement in response to a custodial interrogation is involuntary, and therefore inadmissible, unless the defendant knowingly, intelligently, and voluntarily waived his rights to an attorney and to silence after proper warnings. *State v. Aten*, 130 Wn.2d 640, 663, 927 P.2d 210 (1996); *Miranda*, 384 U.S. at 460-61.

If the defendant invokes his rights rather than waiving them, interrogation must cease. *Miranda*, 384 U.S. at 473-74; *Edwards v.*

*Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). It is the government's "heavy burden" to prove that the defendant did not invoke his rights but instead knowingly, intelligently, and voluntarily waived them. *Miranda*, 384 U.S. at 475. If the government does not meet this heavy burden, the statements are not admissible during the State's case-in-chief. *Id.* at 479.

b. The CrR 3.5 hearing is mandatory. Where the State plans to introduce a defendant's statement at trial, CrR 3.5 requires that the court hold a hearing to determine admissibility:

When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

CrR 3.5(a). This rule provides the procedural mechanism by which Washington courts preserve and protect the constitutional right against self-incrimination. CrR 3.5 further requires the trial court to enter written findings of fact and conclusions of law with sections on undisputed facts, disputed facts, conclusions regarding disputed facts, and the conclusion and reasons regarding the admissibility of the defendant's statements. CrR 3.5(c) ; *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998).

The defendant may waive his right to a CrR 3.5 hearing if he does so “knowingly and intentionally.” *State v. Fanger*, 34 Wn. App. 635, 637, 663 P.2d 120 (1983). The defendant also impliedly waives this right if his attorney fails to object to the admission of the statements in question at trial. *Id.* at 638. Otherwise, the hearing is mandatory. *State v. Kidd*, 36 Wn. App. 503, 509, 674 P.2d 674 (1983).

Here, counsel requested a CrR 3.5 hearing, but none was held. Omnibus Order 2. There is no waiver on the record and no indication as to why the hearing did not occur. At trial, defense counsel objected to Trooper Murphy’s testimony about Barge’s alleged admissions on the grounds that Barge had invoked his *Miranda* rights. 2 RP 69. The court allowed the testimony to continue anyway, *id.*, and never ruled on the admissibility of the statements, either orally or in the manner prescribed by CrR 3.5(c). The court then included the alleged admission in its findings and apparently relied on it in its decision. CP 14-15 (Findings of Fact 1.18, 1.21; Conclusion of Law 2.6).

c. The trial court’s failure to hold the CrR 3.5 hearing prejudiced Barge. Mere failure to hold a CrR 3.5 hearing does not render an otherwise admissible statement inadmissible. *State v.*

*Mustain*, 21 Wn. App. 39, 42, 584 P.2d 405 (1978). Thus, the failure to hold a hearing is not prejudicial where the defendant was not in custody when he made the confession or admission. *State v. Falk*, 17 Wn. App. 905, 908, 567 P.2d 235 (1977). Nor is there prejudice if the defendant's statements were not the product of an interrogation. *Id.* at 909; *Kidd*, 36 Wn. App. at 509. This court has also found the failure to hold a CrR 3.5 hearing harmless where the defendant did not deny making the statements in question. *Falk*, 17 Wn. App. at 908. Finally, where both the defendant and his counsel acknowledged that he had waived his *Miranda* rights, his statements were admissible and the failure to hold a CrR 3.5 hearing was not prejudicial. *State v. Renfro*, 28 Wn. App. 248, 253, 622 P.2d 1295 (1981).

Barge's alleged statement, unlike those described above, was *not* admissible. First, it was undisputedly a product of a custodial interrogation: Officers Lowry and Carrell placed Barge into custody in the back of the latter's patrol car, where Trooper Murphy questioned him. 2 RP 41, 67. Trooper Murphy stated that Barge did not make any unsolicited statements. 2 RP 69. Barge denied having made the statements at all, 2 RP 94, and indicated that he

invoked his *Miranda* rights. 2 RP 69. Under such circumstances, the failure to hold a CrR 3.5 hearing is prejudicial.

The conviction for hit-and-run must be reversed, because absent Barge's improperly considered alleged admission, there was insufficient evidence to prove beyond a reasonable doubt that he committed the crime (see Section (E)(2) below). Alternatively, the case should be remanded for the trial judge's ruling after consideration of evidence sufficient to determine whether Barge invoked his rights or waived them knowingly, intelligently and voluntarily. See *State v. Nogueira*, 32 Wn. App. 954, 958, 650 P.2d 1145 (1982). If the judge determines that Barge either invoked his rights or submitted an improper waiver, he must be granted a new trial on the hit-and-run charge. See *State v. Porter*, 5 Wn. App. 460, 464, 488 P.2d 773 (1971); *State v. Joseph*, 10 Wn. App. 827, 830-31, 520 P.2d 635 (1974).

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT BARGE COMMITTED FELONY HIT-AND-RUN.

a. The hit-and-run statute does not apply to a person who is hit by a pursuing police officer. “[T]his court must construe statutes to avoid strained or absurd results.” *State v. Silva*, 106 Wn. App. 586, 592, 24 P.3d 477 (2001). RCW 46.52.020 “is aimed at

protecting accident victims.” *Seattle v. Stokes*, 42 Wn. App. 498, 502, 712 P.2d 853 (1986). Its “underlying rationale” is to “facilitat[e] investigation of accidents and provid[e] immediate assistance to those injured.” *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983).

These legislative goals are not served by applying the statute to a driver who was broadsided by a patrol car during a high-speed chase. The crime of Attempt to Elude a Pursuing Police Vehicle punishes fleeing motorists and protects police-officer victims. The facilitation of accident investigation and provision of immediate assistance to those injured is not at risk where law enforcement officers are swarming the scene. Accordingly, RCW 46.52.020 is inapplicable here.

Furthermore, the hit-and-run statute “shall not apply to any person injured or incapacitated by such accident to the extent of being physically incapable of complying with this section.” RCW 46.52.020(4)(d). Here, the State’s witnesses admitted that the officer had rammed into Barge’s driver’s side door, 2 RP 18, and that Barge was experiencing severe trauma after the accident – rocking back and forth, sweating profusely, and unable to open his eyes. 2 RP 67. Because the legislature did not intend the hit-and-

run statute to apply to drivers hit during police chases or to drivers who are physically incapacitated, the conviction on that count should be reversed.

b. Even if the statute applied, the State here failed to present sufficient evidence to prove each element of the crime charged beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the State to prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14; Wash. Const. art. 1, § 3. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

To convict a defendant of felony hit-and-run, the State must prove (1) an accident resulting in death or injury to a person, (2) "failure of the driver of the vehicle involved in the accident to stop his vehicle and return to the scene in order to provide his name,

address, vehicle license number and driver's license and to render reasonable assistance to any person injured in such accident," and (3) the driver's knowledge of the accident. *State v. Sutherland*, 104 Wn. App. 122, 130, 15 P.3d 1051 (2001) (construing RCW 46.52.020). Each element must be proved beyond a reasonable doubt. *Silva*, 106 Wn. App. at 590.

Here, the State did not present sufficient evidence that Barge "failed to stop his vehicle and return to the scene in order to provide his name, address, vehicle license number and driver's license and to render reasonable assistance to any person injured in such accident." Barge's alleged statement that he continued driving after the collision and did not know the Pizza Hut had no egress was inadmissible, or at best of indeterminate admissibility, and therefore should not have been relied upon to find that Barge failed to stop and return to the scene of the collision. (See Section (E)(1) above). Furthermore, when Officer Lowry, within seconds of the collision, pulled Barge from his car and placed him under arrest, he obviated the need for Barge to return to the scene and offer paperwork and medical assistance. *Cf. State v. Teuber*, 19 Wn. App. 651, 657, 577 P.2d 147, *rev. denied* 91 Wn.2d 1006 (1978) (other driver and passenger obviated requirement of RCW

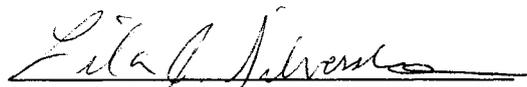
46.52.020(3) by leaving car in parking lot and going inside to call police). Because the requirements of the statute were obviated by Barge's arrest, and because the court improperly relied on Barge's alleged admission, the hit-and-run conviction should be reversed.

F. CONCLUSION

Because the trial court failed to hold a mandatory CrR 3.5 hearing and relied on the defendant's alleged admission even though he invoked his *Miranda* rights, and because the State presented insufficient evidence to prove that Barge committed felony hit-and-run beyond a reasonable doubt, the conviction on that count should be reversed. Alternatively, the case should be remanded for a CrR 3.5 hearing to resolve the question of whether Barge invoked or waived his *Miranda* rights.

DATED this 25<sup>th</sup> day of September, 2006.

Respectfully submitted,



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Attorneys for Appellant



- 1 1.3 That the defendant was given a visual and audible signal to bring his vehicle to a stop;
- 2 1.4 That the defendant willfully did refuse to bring his motor vehicle to a stop;
- 3 1.5 That the defendant drove in a reckless manner while attempting to elude the pursuing police
- 4 vehicle.
- 5 1.6 That the testimony clearly establishes that other vehicles, the passenger, the police officers
- 6 and other general members of the public who may be unidentified were all endangered by the
- 7 defendant's driving.
- 8 1.7 That as to Possession of a Controlled Substance, the pipe was found on the defendant;
- 9 1.8 That the pipe contained a powder that tested positive for methamphetamine;
- 10 1.9 That as to the Possession of Stolen Property in the First Degree, that the defendant
- 11 knowingly possessed stolen property;
- 12 1.10 That the vehicle was stolen;
- 13 1.11 That the ignition was punched;
- 14 1.12 That the defendants actions were consistent with someone driving to avoid capture for a
- 15 felony and;
- 16 1.13 that the vehicle was valued in excess of \$1,500.00.
- 17 1.14 That with respect to the Hit and Run the Officers testimony was credible;
- 18 1.15 That the vehicle came to at least a pause after the collision
- 19 1.16 That the collision spot is the scene of the accident;
- 20 1.17 That the defendant started up his car again after the collision and left the scene
- 21 1.18 That the defendant had no intent to stop.
- 22 1.19 That the statute requires that the defendant shall stop immediately at the scene of impact,
- 23 "or as close thereto as possible but shall then forthwith return to and in every event remain at
- 24 the scene of such accident" and that the defendant did not do any of those things.
- 25 1.20 That the defendant passed 30 parking spaces, or at least seven before the defendant ended
- 26 up behind the back (of the building).
- 1.21 That all his actions are consistent with trying to run away as well as his admission to the officer.

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II. CONCLUSIONS OF LAW

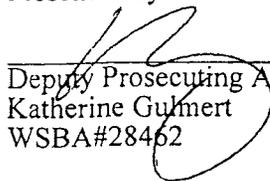
- 2.1 The court has jurisdiction over the Defendant and the subject matter of this action.
- 2.2 That the entire events of this case occurred in Lewis County Washington on December 6, 2005.
- 2.3 That there was no contest as to Counts I and IV.
- 2.4 That the defendant is guilty of Count I, Attempt to Elude a Pursuing Police Vehicle beyond a reasonable doubt.
- 2.5 That the defendant is guilty of Count II, Possession of Stolen Property in the 1<sup>st</sup> Degree, beyond a reasonable doubt.
- 2.6 That the defendant is guilty of Count III, Hit and Run Injury, beyond a reasonable doubt; and
- 2.7 That the defendant is guilty of Count IV, VUCSA possession of Methamphetamine, beyond a reasonable doubt.

That the defendant is guilty of all counts.

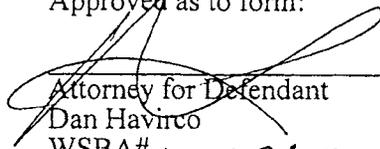
DONE IN OPEN COURT this 5 day of June, 2006

  
Superior Court Judge

Presented by:

  
Deputy Prosecuting Attorney  
Katherine Gilmert  
WSBA#28462

Approved as to form:

  
Attorney for Defendant  
Dan Havnco  
WSBA# 19926

