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COURT OF APPEALS  
DIVISION II

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No. 35498-5-II

STATE OF WASHINGTON  
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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Kevin Lee Roller,**

Appellant.

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Lewis County Superior Court

Cause No. 06-1-00559-1

The Honorable Judge H. John Hall

**Appellant's Reply Brief**

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## ARGUMENT

### I. RESPONDENT'S CONCESSION REQUIRES REVERSAL OF THE ELUDING CHARGE.

Respondent concedes that the court's instructions, including the "to convict" instruction, "were not an accurate statement of the law..." Brief of Respondent, p. 1. Respondent goes on to address only one error in the "to convict" instruction: the court's failure to require proof that the accused drove "in a reckless manner." Brief of Respondent, pp. 1-3. Respondent apparently concedes that the other instructional errors raised in the Opening Brief require reversal. *See* Appellant's Opening Brief, p. 7. The jury was permitted to convict without finding that (1) the officer gave "a visual or audible signal" to stop, (2) Mr. Roller's attempt to elude occurred *after* he was signaled to stop, and (3) Mr. Roller drove in a reckless manner *after* he was signaled to stop. Instruction No. 13, 14, Supp. CP. These errors in the court's instructions require reversal of the conviction.

Respondent's argument regarding the single error it does address are not persuasive. By omitting the requirement that the state prove Mr. Roller drove "in a reckless manner," the court's instructions allowed conviction without proof beyond a reasonable doubt of every element of the offense. Respondent erroneously contends that driving "in a manner

indicating a wanton or willful disregard for the lives or property of others” sets forth a higher standard than driving “in a reckless manner.” Brief of Respondent, p. 2. Respondent is incorrect.

First, the eluding statute requires proof of *actual* reckless driving. By contrast, the instruction given by the court allowed conviction if Mr. Roller’s driving indicated that he had a particular mental state, regardless of whether or not his driving was reckless. Compare RCW 46.61.024(1) with Instruction No. 13, Supp. CP. If the jury thought that Mr. Roller’s driving was not actually reckless, but gleaned from his driving that he had a “wanton or willful disregard for the lives or property of others,” the instruction authorized them to convict even though he was not driving in a reckless manner. For example, if a car is speeding on a deserted road, a jury could conclude that the driver is not actually driving “in a reckless manner,” but still decide that the act of speeding establishes the driver’s wanton or willful disregard for the lives or property of others.

Second, having failed to require proof of driving “in a reckless manner,” the court also neglected to instruct the jury that conviction required proof that Mr. Roller drove “in a rash or heedless manner, indifferent to the consequences.” *State v. Roggenkamp*, 153 Wn.2d 614 at 622, 106 P.3d. 196 (2005). If the jury viewed the “wanton or willful”

standard as something less than “rash or heedless and indifferent to the consequences.” this error also reduced the prosecution’s burden of proof.

Where instructional errors relieve the state of its burden to prove each element, prejudice is presumed. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67; 941 P.2d 661 (1997). Reversal is required unless the state establishes beyond a reasonable doubt that the error is harmless. *State v. Jones*, 106 Wn. App. 40 at 45, 21 P.3d 1172 (2001). See *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439, (1987). Respondent does not suggest the error here was harmless beyond a reasonable doubt.<sup>1</sup> Accordingly, Mr. Roller’s conviction for Attempting to Elude must be reversed, and the case remanded for a new trial.

**II. ASSAULT IN THE SECOND DEGREE REQUIRES PROOF THAT THE DEFENDANT ACTED UNDER CIRCUMSTANCES NOT AMOUNTING TO ASSAULT IN THE FIRST DEGREE.**

Respondent has failed to address Mr. Roller’s arguments regarding the sufficiency of the Information and the adequacy of the “to convict”

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<sup>1</sup> Respondent concedes the error, but suggests that it did not relieve the state of its burden, and thus is not of constitutional dimension. Brief of Respondent, pp. 1-3.

instruction for Counts I and II. Accordingly, Mr. Roller stands on the argument made in his Opening Brief.

**III. RCW 9A.36.021 (1)(C) VIOLATES THE SEPARATION OF POWERS.**

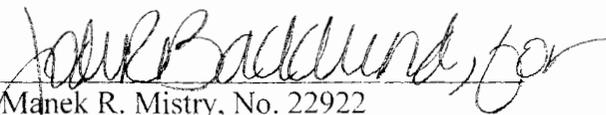
The Washington Supreme Court has accepted review of *State v. Chavez*, 134 Wn.App. 657, 142 P.3d 1110 (2006). The Supreme Court's decision in that case will control the outcome of Mr. Roller's separation of powers argument. Accordingly, Mr. Roller stands on the argument made in his Opening Brief.

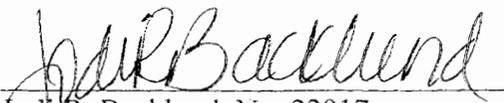
**CONCLUSION**

For the foregoing reasons, Mr. Roller's convictions must be reversed. Counts I and II must be dismissed without prejudice, because the Information was deficient. All three counts must be remanded for a new trial because of errors in the court's instructions.

Respectfully submitted on July 20, 2007.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON  
*[Signature]*  
DEPUTY

I certify that I mailed a copy of Appellant's Reply Brief to: BY

Kevin Roller, DOC# 976093  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

and to:

Lewis County Prosecuting Attorney  
MS:pro01  
360 NW North Street  
Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 20, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 20, 2007.

*[Signature]*  
\_\_\_\_\_  
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