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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 37099-9-IBY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

William Feddersen,

Appellant.

Pierce County Superior Court

Cause No. 06-1-02203-5

The Honorable Judges Brian Tollefson and Vicki L. Hogan

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial judge erred by allowing the prosecutor to make a missing witness argument in closing argument.
2. The prosecutor committed misconduct during closing argument.
3. The prosecutor shifted the burden of proof in closing arguments.
4. The trial judge violated Mr. Feddersen's right to due process by admitting tainted eyewitness identification evidence.
5. The conviction was based on insufficient evidence.
6. The court's instructions omitted an essential element.
7. The court erred by giving Instruction No. 6, which reads as follows:

A person commits the crime of attempting to elude a pursuing police vehicle when he willfully fails or refuses to bring his vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle he drives his vehicle in a reckless manner.

A signal to stop given by a police officer may be by hand, voice, emergency light, or siren. The police officer giving such a signal must be in uniform and the police officer's vehicle must be appropriately marked showing it to be an official police vehicle.

8. The court erred by giving Instruction No. 7, which reads as follows:

To convict the defendant of attempting to elude a pursuing police vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 12th day of March, 2006, 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 appropriately marked, showing it to be an official police vehicle;
- (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;

(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 of 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.

9. The trial court erred by failing to properly determine Mr. Feddersen's criminal history.

10. The trial court erred by failing to properly determine Mr. Feddersen's offender score.

11. The trial court erred by adopting Finding No. 2.2, which purported to list Mr. Feddersen's criminal history as follows:

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	IND LIBS	04/14/89	Pierce County Superior Court, Pierce Co., WA	02/04/88	JUV	NV
2	ROBBERY 1	11/16/90	Pierce County Superior Court, Pierce Co., WA	03/31/90	JUV	V
3	TMVWOP	03/18/91	Pierce County Superior Court, Pierce Co., WA	01/07/91	JUV	NV
4	THEFT	02/03/93	Thurston County Superior Court, Thurston Co., WA	09/30/92	A	NV
5	UPCS	11/12/97	Pierce County Superior Court, Pierce Co., WA	10/21/97	A	NV
6	ATT UPCS	06/02/99	Pierce County Superior Court, Pierce Co., WA	05/02/99	A	NV
7	UPCS METH	11/21/00	Pierce County Superior Court, Pierce Co., WA	09/06/00	A	NV
8	UMCS METH	08/23/01	Pierce County Superior Court, Pierce Co., WA	05/17/01	A	NV
9	COMMUNITY CUSTODY					

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525)

The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

CP 6.

12. The trial court erred by adopting Finding of Fact No. 2.3, which reads (in part) as follows:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	7	I	14 TO 18 MOS.		14 TO 18 MOS.	5 YRS. / \$10,000

CP 6.

13. The trial court erred by sentencing Mr. Feddersen with an offender score of seven.

14. Mr. Feddersen was denied his constitutional right to a jury trial because the jury did not determine whether or not he had any criminal history.

15. Mr. Feddersen was denied his constitutional right to a jury determination of all facts that increased the penalty for his offenses.

16. The trial court erred by sentencing Mr. Feddersen to a prison term greater than that permitted by the jury's verdict.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor commits prejudicial misconduct by shifting the burden of proof. The prosecutor shifted the burden of proof through improper use of the missing witness doctrine during closing arguments. Does the prosecutor's misconduct require reversal? Assignments of Error Nos. 1, 2, 3.
2. Due process prohibits use at trial of tainted eyewitness identification testimony. Deputy Sargent's identification of Mr. Feddersen occurred under circumstances that were impermissibly suggestive, and was further tainted by his review of a booking photo to refresh his recollection prior to testifying. Should Deputy Sargent's identification testimony have been excluded? Assignment of Error No. 4.

3. Conviction of Attempting to Elude requires proof that the police vehicle was equipped with “sirens.” The evidence at trial did not establish that either police vehicle was equipped with more than one siren. Was the evidence insufficient to support Mr. Feddersen’s conviction for Attempting to Elude? Assignments of Error Nos. 5, 6, 7, 8.
4. Instructions that relieve the state of its burden to prove each essential element of an offense violate due process. The court’s instructions relieved the state of its burden to prove the police car was equipped with lights and sirens. Does the error in the court’s instructions require reversal of Mr. Feddersen’s conviction for Attempting to Elude? Assignments of Error Nos. 5, 6, 7, 8.
5. Absent an admission from the offender, criminal history must be established by a preponderance of the evidence. Mr. Feddersen did not admit to any prior convictions and the state did not submit any evidence of criminal history. Did the trial court err by sentencing Mr. Feddersen with an offender score of seven? Assignments of Error Nos. 9, 10, 11, 12, 13.
6. The Sixth Amendment (applicable through the Fourteenth Amendment) does not differentiate between elements of an offense and sentencing factors that elevate punishment. Certain Washington offenses include prior convictions as elements that must be proved to a jury beyond a reasonable doubt. Must prior convictions be proved to a jury beyond a reasonable doubt when used as sentencing factors to elevate punishment? Assignments of Error Nos. 9, 10, 11, 12, 13, 14, 15, 16.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On March 12, 2006, the driver of a black pick-up truck, who had just purchased the truck, was checking various functions (including the lights) as he drove. RP 99. Pierce County Deputy Sargent noticed the truck's lights flick on and off. He turned around, and pulled the vehicle over, assuming the flashing lights meant that the driver wanted contact. RP 96-97. He spoke with the driver. The driver assured him that he did not need help, but was just checking his lights. RP 98. The deputy got paperwork from the driver, including identification belonging to William Feddersen. RP 101-102. While the deputy was running the information at his vehicle, the driver of the truck drove away. RP 102. Deputies chased the truck until their supervisor terminated the pursuit. RP 103-110.

The state charged William Feddersen with Attempting to Elude a Pursuing Police Vehicle, and with Driving While License Suspended in the Third Degree. CP 1-2.

When the case came up for trial in December of 2007, Deputy Sargent looked up a recent booking photo of William Feddersen, to remind himself of what Mr. Feddersen looked like. RP 76. Defense counsel objected to the deputy's proposed testimony identifying William Feddersen as the driver in front of the jury. RP 51-90. Mr. Feddersen

argued that the identification procedure was suggestive, in that it was based initially on Mr. Feddersen's driver's license, and then on only one booking photo viewed prior to trial. RP 51, 58-59, 62. Deputy Sargent stated, without the jury present, that he used the booking photo to remind himself of what the defendant looked like, and noted that he had longer hair and a goatee in the license photo he saw at the time (and retained as evidence). RP 76-77. The court ruled that the procedure used was not suggestive, and allowed Deputy Sargent to identify Mr. Feddersen as the driver in front of the jury. RP 88-90.

Deputy Sargent testified at trial that at the time of the stop he was in a police vehicle with overhead lights and a "siren." RP 95, 97, 103.¹ After he lost sight of the black truck, another officer subsequently located it and pursued, using lights and "sirens." RP 109, 127.

Mr. Feddersen testified, telling the jury that he was not the driver of the vehicle, and that he wasn't even in Pierce County at the time of the crime. RP 135-142. He explained that he had broken up with his girlfriend and left their shared residence without all of his personal belongings (including his identification, which he never was able to

¹ He was subsequently asked "did you still have your lights and sirens going?" and he responded in the affirmative. RP 109.

recover). RP 135-137. During cross-examination by the state, Mr. Feddersen said that he was no longer in touch with his former girlfriend and did not know where she lived or how to contact her or her mother. He also said that when he last asked her, she said his items (including the license) were no longer in her possession. RP 137-141.

The state requested a “missing witness” instruction, since Mr. Feddersen did not call his former girlfriend as a witness. RP 148. The court denied the request, but told the state that it would be allowed to make a “why isn’t she here?” argument to the jury. RP 151, 155. The state did: “This is a woman, Erica Cooper, who’s the defendant’s ex-girlfriend, date for two to three years, knows his mom – knows her mom, they call her Duffy. He says that he contacted her, she said she didn’t have it. But you’ve heard no testimony from her.” RP 177.

The court gave the following instructions regarding the eluding charge:

A person commits the crime of attempting to elude a pursuing police vehicle when he willfully fails or refuses to bring his vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle he drives his vehicle in a reckless manner.

A signal to stop given by a police officer may be by hand, voice, emergency light, or siren. The police officer giving such a signal must be in uniform and the police officer’s vehicle must be appropriately marked showing it to be an official police vehicle. Instruction No. 6, Supp. CP.

To convict the defendant of attempting to elude a pursuing police vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 12th day of March, 2006, 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 appropriately marked, showing it to be an official police vehicle;
- (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;
- (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 of 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.
Instruction No. 7, Supp. CP.

Mr. Feddersen was convicted as charged. CP 5.

At sentencing, the defense did not stipulate to any prior convictions. RP 205; Supp. CP, Stipulation on Criminal History (unsigned). Even so, the court found the following criminal history:

2.2 **CRIMINAL HISTORY (RCW 9.94A.525):**

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	IND LIBS	04/14/89	Pierce County Superior Court, Pierce Co., WA	02/04/88	JUV	NV
2	ROBBERY 1	11/16/90	Pierce County Superior Court, Pierce Co., WA	03/31/90	JUV	V
3	TMVWOP	03/18/91	Pierce County Superior Court, Pierce Co., WA	01/07/91	JUV	NV
4	THEFT	02/03/93	Thurston County Superior Court, Thurston Co., WA	09/30/92	A	NV
5	UPCS	11/12/97	Pierce County Superior Court, Pierce Co., WA	10/21/97	A	NV
6	ATT UPCS	06/02/99	Pierce County Superior Court, Pierce Co., WA	05/02/99	A	NV
7	UPCS METH	11/21/00	Pierce County Superior Court, Pierce Co., WA	09/06/00	A	NV
8	UMCS METH	08/23/01	Pierce County Superior Court, Pierce Co., WA	05/17/01	A	NV
9	COMMUNITY CUSTODY					

[] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525)

[X] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

CP 6.

Calculating the offender score to be seven, and the sentencing range therefore as 14 to 18 months, the court sentenced Mr. Feddersen to 18 months. CP 5-15. This timely appeal followed. CP 16.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT BY SHIFTING THE BURDEN OF PROOF DURING CLOSING ARGUMENTS.

Criminal defendants have a constitutional right to be presumed innocent and to have the government prove guilt beyond a reasonable doubt. *See, e.g., United States v. Gaudin*, 515 U.S. 506 at 510, 115 S. Ct.

2310, 132 L. Ed. 2d 444 (1995); *Sullivan v. Louisiana*, 508 U.S. 275 at 277-78, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

A prosecuting attorney commits misconduct by making an argument during its closing argument that shifts the burden of proof to the defendant. *United States v. Perlaza*, 439 F.3d 1149 at 1171 (9th Cir., 2006). Such misconduct affects a constitutional right and requires reversal of the conviction unless the error is harmless beyond a reasonable doubt. *State v. Moreno*, 132 Wn. App. 663 at 672, 132 P.3d 1137 (2006); *see also Perlaza*, at 1171, *citing Neder v. United States*, 527 U.S. 1 at 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

Here, over defense objection, the trial court allowed the state to argue that Mr. Feddersen should have called his former girlfriend to testify, presumably to confirm that she retained some of his possessions (including his driver's license) after they separated. RP 148-151, 155-161, 177.

This argument shifted the burden of proof and requires reversal. *Perlaza, supra*.

Due process limits use of the 'missing witness' doctrine in criminal cases. *State v. Montgomery*, 163 Wn.2d 577 at ___, 183 P.3d 267 (2008). The doctrine applies only if (1) the potential testimony is material and not cumulative, (2) the missing witness is particularly under the control of the

accused, (3) the witness's absence is not satisfactorily explained.

Montgomery, at _____. Furthermore, the argument may not be used under circumstances where it shifts the burden of proof. *Montgomery*, at _____.

Finally, “[t]he missing witness doctrine must be raised early enough in the proceedings to provide an opportunity for rebuttal or explanation.”

Montgomery, at _____.

Even assuming that Mr. Feddersen’s ex-girlfriend’s testimony would have been material and not cumulative, the state’s missing witness argument was improper. First, Mr. Feddersen’s ex-girlfriend was not particularly under his control. The Court’s statement about landlords and tenants in *Montgomery* (“few tenants believe they control their landlords”) applies with even greater force to former boyfriends and girlfriends: few people believe they control their exes. Second, Mr. Feddersen had a satisfactory explanation for his ex-girlfriend’s absence. Eighteen months had passed since the breakup, he did not know where she was, and he did not know her mother’s full name. RP 140, 149.

Third, as in *Montgomery*, *supra*, the prosecutor raised the missing witness issue after both parties had rested, denying Mr. Feddersen the opportunity to present evidence explaining his ex-girlfriend’s absence and rebutting the inference that she would provide unfavorable testimony. RP 143, 148; *see Montgomery*, at _____. Fourth, the misconduct shifted the

burden of proof. Mr. Feddersen did not suggest that his girlfriend would corroborate his testimony; thus there was no need for the state to emphasize her absence. RP 134-142.

The error is not harmless. Mr. Feddersen's case rested on his claim of mistaken identity. His testimony—that his ex-girlfriend had his license at the time of the offense—was the only evidence presented on this point, and the prosecutor's suggestion that he should have brought his ex-girlfriend to court to testify may have affected the outcome.

Because the prosecuting attorney committed misconduct and shifted the burden of proof, Mr. Feddersen's conviction for Attempting to Elude must be reversed and the case remanded for a new trial.

Montgomery, supra.

II. THE TRIAL COURT VIOLATED MR. FEDDERSEN'S RIGHT TO DUE PROCESS BY ADMITTING TAINTED IDENTIFICATION TESTIMONY INTO EVIDENCE.

A criminal defendant has a constitutional right to due process of law. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3. Admission into evidence of an eyewitness's identification violates due process if it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377 at 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968); *State v. McDonald*, 40 Wn. App. 743, 700 P.2d 327 (1985). Whether or not

admission of an identification violates due process is an issue of law reviewed *de novo*. See *Wright v. West*, 505 U.S. 277 at 301, 112 S.Ct 2482, 120 L.Ed. 2d 225 (1992); *United States v. Beck*, 418 F.3d 1008 at 1012 n. 1 (9th Cir. 2005); *Montgomery, supra*.²

The admission into evidence of a witness's identification of the accused violates due process if the accused can show that the identification procedure was impermissibly suggestive. The court is then required to examine the totality of the circumstances to determine whether the procedure created a "substantial likelihood of irreparable misidentification." *State v. Vickers*, 148 Wn.2d 91 at 118, 59 P.3d 58 (2002). Under this test, the corrupting effect of a suggestive identification is weighed against factors indicating reliability. *McDonald*, at 747. These factors include (1) the opportunity of the witness to view the perpetrator, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the witness' certainty at the time of the identification, and (5) the length of time between the crime and the identification.

² In Washington, Division III has reduced the issue to one of simple evidentiary admissibility, governed by an abuse of discretion standard. See *State v. Kinard*, 109 Wn. App. 428 at 432, 36 P.3d 573 (2001). This is incorrect. Like any other mixed question of fact and law, the appropriate standard of review is *de novo*. See e.g., *State v. Rankin*, 151 Wn.2d 689 at 709, 92 P.3d 202 (2004); *Port of Seattle v. Pollution Control*, 151 Wn.2d 568 at 588, 90 P.3d 659 (2004); *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001).

McDonald, at 747, citing *Neil v. Biggers*, 409 U.S. 188, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972).

An out-of-court photographic identification is impermissibly suggestive if it directs undue attention to a particular photo. *State v. Kinard*, 109 Wn. App. 428 at 432-433 (2001). As a matter of law, the presentation of a single photograph is impermissibly suggestive, and therefore requires analysis of the *Neil v. Biggers* factors prior to admission. *State v. Maupin*, 63 Wn. App. 887 at 896-897, 822 P.2d 355 (1992).

In this case, Deputy Sargent had a brief encounter with a driver, who handed him a driver's license bearing Mr. Feddersen's name and photograph. RP 98-102, 115. Approximately 18 months later, he viewed a booking photo of Mr. Feddersen, and then saw him in the courtroom. RP 9, 76, 120. Even assuming that the deputy had sufficient opportunity and the necessary degree of attention to properly observe the driver, there was no indication that he gave a contemporaneous description, or expressed certainty (at the time of the encounter) that the driver was the person identified by the license. RP 76-83. The problem was compounded when the officer viewed a booking photo of Mr. Feddersen before testifying. RP 120.

Under these facts, the officer's prior and in-court identifications of Mr. Feddersen were tainted by impermissibly suggestive circumstances, creating a substantial likelihood of irreparable misidentification. *Vickers*, at 118. Mr. Feddersen's convictions must be reversed, the identification testimony suppressed, and the case remanded for a new trial. *Vickers*, *supra*.

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT EACH POLICE VEHICLE WAS EQUIPPED WITH MORE THAN ONE SIREN.

In a criminal case, conviction requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On review, evidence is not sufficient to support a conviction unless, after viewing the evidence in the light most favorable to the state, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842 at 849, 72 P.3d 748 (2003). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *DeVries*, at 849. The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *DeVries*, at 849.

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. In the end, the evidence must be sufficient to convince a rational jury beyond a reasonable doubt. *Devries, supra*. Since the reasonable doubt standard is the highest standard of proof, review is more stringent for criminal cases than in civil cases.

In other words, the proof must be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005). It also must be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough to allow the [reviewing] court to conclude that the allegations are 'highly probable.'" *In re A.V.D.*, 62 Wn.App. 562 at 568, 815 P.2d 277 (1991), *citation omitted*.

The elements of an offense are determined with reference to the language of the statute. *See State v. Leyda*, 157 Wn.2d 335 at 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269 at 274, 110 P.3d 1179 (2005). The meaning of a statute is a question of law reviewed *de novo*. *State Owned Forests v. Sutherland*, 124 Wn.App. 400 at 409, 101

P.3d 880 (2004). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186 at 194, 102 P.3d 789, (2004). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Sutherland, supra*, at 409; *see also State v. Punsalan*, 156 Wn.2d 875, 133 P.3d 934 (2006) ("Plain language does not require construction;" *Punsalan*, at 879, *citations omitted*). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

Attempting to Elude a Police Vehicle is defined by RCW

46.61.024(1), which reads:

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.*
RCW 46.61.024, *emphasis added*.

Under the plain language of the statute, conviction requires proof that the police vehicle be "equipped with... sirens." RCW 46.61.024(1). The use of the plural word "sirens" requires that the police vehicle be equipped with more than one siren.

The statute is not ambiguous, and thus is not subject to statutory construction. *Punsalan, supra*. Furthermore, this language must be given effect, and may not be rendered superfluous. *Sutherland*, at 410. Finally, giving force to this provision does not render the entire statute absurd or meaningless; thus this court may not “correct” the statute on that basis. *In re Det. of Martin*, 163 Wn.2d 501 at 512-513, 182 P.3d 951 (2008).

In this case, the evidence established that Deputy Sargent’s vehicle was equipped with a siren (singular), but that Deputy Christian’s vehicle was equipped with sirens (plural).³ RP 95, 97, 103, 109, 127. Thus conviction was only permitted if the jury concluded that Mr. Feddersen drove recklessly while attempting to elude Deputy Christian’s vehicle (since the evidence established that Deputy Sargent’s vehicle was equipped with only one siren). The jury’s verdict was in the form of a general verdict. Verdict form A. Supp. CP. There was no way to determine whether the jury believed the driver was attempting to elude and driving in a reckless matter after having been signaled to stop by Deputy Sargent, by Deputy Christian, or both.

³ Deputy Sargent twice used the singular word “siren.” RP 95, 97. However, on one occasion, he replied in the affirmative when the prosecutor asked “did you still have your lights and sirens going?” RP 109. Either Deputy Sargent misspoke, mis-heard, did not view the difference as significant, or interpreted the word “you” in the question to refer collectively to both officers.

Accordingly, the evidence was insufficient. In the absence of proof that each vehicle had more than one siren, the evidence was insufficient to prove all the elements of the offense beyond a reasonable doubt. The conviction for Attempting to Elude must be reversed and the case dismissed with prejudice.

IV. THE TRIAL COURT’S “TO CONVICT” INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT THE POLICE VEHICLE WAS EQUIPPED WITH LIGHTS AND SIRENS.

Due process bars conviction of a crime absent proof beyond a reasonable doubt of every essential element. U.S. Const. Amend. XIV; *In re Winship*; Wash. Const. Article I, Section 3; *State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001). Jury instructions that relieve the state of its burden to prove every element violate due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). This rule applies with special force where “to convict” instructions are involved. A “to convict” instruction must, by itself, contain all the elements of the charged crime. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). In a criminal case, the court’s “to convict” instruction serves as the yardstick by which the jury measures the evidence to determine an accused’s guilt or innocence. *Lorenz*, at 31. The jury has the right to regard the “to convict” instruction as a complete statement of the law. *Lorenz*.

The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. DeRyke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003). If a deficient “to convict” instruction relieves the state of its burden to establish every element, the appellant is entitled to automatic reversal, regardless of whether the error is prejudicial or harmless. *State v. Seek*, 109 Wn. App. 876 at 883, 37 P.3d 339 (2002)⁴. The only exception to this rule is where the element is uncontested, in the sense that the accused concedes the element.⁵ *Brown*, at 340, citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). If the element is uncontested (by concession) the reviewing court must apply the stringent constitutional harmless error test. *Brown*, at 339-340. Under that test, error is presumed to be prejudicial; to overcome the presumption, the state

⁴See also *State v. Brown*, 147 Wn.2d 330 at 339, 58 P.3d 889 (2002) (“An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal”); *DeRyke* at 912 (“DeRyke would be eligible for an automatic reversal only if the trial court failed to instruct the jurors on all the elements...”); *State v. Shouse*, 119 Wn. App. 793 at 796, 83 P.3d 453 (2004).

⁵ An accused need not present evidence or make an argument in order to “contest” an element; instead, it is enough if the accused does not concede the issue. See *DeRyke* at 913 n.1 (“The State argues the error was harmless because ‘DeRyke did not contest one of the essential elements or even the peripheral elements of the definition of Rape in the First Degree, but instead claimed the victim was making up an allegation.’ ... But that is beside the point.... DeRyke maintains his conviction violated due process because the erroneous instruction allowed the jury to convict him without proof of every element of the crime charged beyond a reasonable doubt.”) But see *State v. Jones*, 117 Wn. App. 221 at 231, 70 P.3d 171 (2003) (instruction omits knowledge element, but error is harmless because uncontroverted video evidence establishes guilty knowledge).

must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Gonzales Flores*, ___ Wn.2d ___ at ___, ___ Wn.App. ___ (2008); *Brown*, at 341.

As noted above, Attempting to Elude requires proof that the pursuing police vehicle be “equipped with lights and sirens.” RCW 46.61.024. The trial court’s “to convict” instruction was deficient because it left out the requirement that the vehicle be “equipped with lights and sirens.” Instruction No. 7, Supp. CP. The error was not corrected by the instruction defining Attempting to Elude. Instruction No. 6, Supp. CP. Nor did any other instruction inform the jury that the state was required to prove beyond a reasonable doubt that the pursuing police vehicle was equipped with lights and sirens. *See* Court’s Instructions, Supp. CP.

By entering a “not guilty” plea, Mr. Feddersen put in controversy the element relating to the pursuing vehicle’s lights and sirens. Instruction No. 2, Supp. CP. He did not concede the issue at trial, either through testimony or during closing argument. RP 134-143; 179-186. It is irrelevant that he presented no evidence addressing the element, since a defendant never bears the burden to disprove elements of a crime. *See DeRyke at 913 n.1.*

Because the “to convict” omitted an essential element of the charged crime, and because Mr. Feddersen did not concede that element, automatic reversal is required. *Brown, supra; Seek, supra.*

Even if the element were deemed “uncontested,” the state cannot establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Gonzales Flores, supra.* The officers made only passing references to using their lights and siren(s). RP 103, 127. It is possible that one or more jurors would have missed the references, or concluded that this brief testimony was insufficient to constitute proof beyond a reasonable doubt.

In addition, one officer referred to his car having a siren (singular), but later used the word sirens (plural). The other officer’s vehicle was described as having sirens (plural). The statute requires that the police vehicle be equipped with “sirens” (plural). It is unlikely that all twelve jurors would have considered this evidence to be proof beyond a reasonable doubt that Mr. Feddersen drove recklessly while attempting to elude a pursuing police vehicle equipped with sirens (plural).

Thus the erroneous instruction was not trivial, formal, or merely academic, and it cannot be said beyond a reasonable doubt that the error created no prejudice and had no effect on the final outcome. *Gonzales-*

Flores. For these reasons, Mr. Feddersen's conviction for Attempting to Elude a Police Vehicle must be reversed and the case remanded for a new trial. *Brown, supra*.

V. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. FEDDERSEN'S CRIMINAL HISTORY AND OFFENDER SCORE.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing "before imposing a sentence upon a defendant." Furthermore, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record... Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys." RCW 9.94A.500(1).

"Criminal history" means more than just a list of prior felonies (although it is often treated as such). Instead, "criminal history" is defined to include all prior convictions and juvenile adjudications, and "shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration." RCW 9.94A.030(13). To establish criminal history, "the trial court may rely on no more information than is admitted by the plea

agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2).

The state does not meet its burden to establish an offender’s criminal history through “bare assertions, unsupported by evidence.” *State v. Ford*, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999). Furthermore, an offender’s “failure to object to such assertions [does not] relieve the State of its evidentiary obligations.” *Ford*, at 482. This rule is constitutionally based, and thus cannot be altered by statute: requiring the offender to object when the state presents no evidence “would result in an unconstitutional shifting of the burden of proof to the defendant.” *Ford, supra*, at 482.

In this case, the state presented no evidence that Mr. Feddersen had any criminal history; nor did Mr. Feddersen admit or acknowledge any prior convictions. RP 204-207. Instead, the prosecuting attorney submitted a document captioned “Stipulation on Prior Record and Offender Score (Plea of Guilty),” which purported to list Mr. Feddersen’s criminal history. Supp. CP. The signature lines for both Mr. Feddersen and

his attorney read “Did not sign.” Supp. CP. Defense counsel stated on the record that the defense did not stipulate to the criminal history.⁶ RP 205.

The sentencing court did not determine his criminal history or calculate his offender score on the record. Despite the absence of any evidence of criminal history, the Judgment and Sentence reflected a finding that Mr. Feddersen had five prior adult felony convictions and three prior juvenile felony convictions, and was on community custody at the time of the offense, yielding an offender score of 7. CP 6. There is no indication in the record as to how this finding was made. RP 204-207.

A trial court’s findings are reviewed for substantial evidence.

Rogers Potato v. Countrywide Potato, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004). Because of the absence of any evidence of criminal history, the findings in this case are completely unsupported and must be vacated. *Rogers Potato, supra*. The sentence must also be vacated, and the case remanded for resentencing. *See State v. Mendoza*, 139 Wn. App. 693, 162 P.3d 439 (2007), *review granted at* 163 Wn.2d 1017, 180 P.3d 1292 (2008).

⁶ Defense counsel also told the court the defense did not object to the criminal history. RP 205. In other words, defense counsel sought to hold the state to its minimal burden of establishing Mr. Feddersen’s criminal history.

VI. CERTAIN FACTS RELATING TO PRIOR CONVICTIONS MUST BE PROVED TO A JURY BEYOND A REASONABLE DOUBT BEFORE SUCH PRIOR CONVICTIONS CAN BE USED TO ENHANCE A SENTENCE (INCLUDED FOR PRESERVATION OF ERROR).

A. This Court should limit application in Washington of the *Almendarez-Torres* exception for “the fact of a prior conviction.”

The U.S. Supreme Court has held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466 at 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), *emphasis added*; *see also State v. Thieffault*, 160 Wn.2d 409 at 418, 158 P.3d 580 (2007). The exception for “the fact of a prior conviction” stems from *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

The continuing validity of the exception is in doubt. *See, e.g., State v. Mounts*, 130 Wn. App. 219, 122 P.3d 745 at 746, n. 10 (2005), *quoting* Justice Thomas’ observation in *Shepard v. United States*, 44 U.S. 13, 125 S.Ct. 1254 at p. 1264, 161 L.Ed.2d 205 (2005) that *Almendarez-Torres* “has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”

Until the U.S. Supreme Court formally reverses *Almendarez-Torres* and until our state Supreme Court has occasion to reconsider its decision in *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003) (holding that the state constitution does not confer a right to a jury determination of prior convictions), it is appropriate to examine the limits of the *Almendarez-Torres* exception.

B. In Washington, prior convictions are sometimes characterized as elements that must be proved to a jury beyond a reasonable doubt.

In Washington, prior convictions are sometimes treated as facts that must be proved to a jury beyond a reasonable doubt. For example, in *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002), the Washington Supreme Court made clear that prior convictions elevating an offense from a gross misdemeanor to a felony must be proved to a jury beyond a reasonable doubt.⁷ *Oster*, at 148.

Similarly, in *State v. York*, ___ Wn.App. ___, ___ P.3d ___ (2008), this Court reversed a conviction and ordered dismissal when the state failed to prove to the jury beyond a reasonable doubt that the accused had the two prior convictions required to elevate his offense to felony violation

⁷ The issue in *Oster* was whether it was permissible to remove the existence of the prior convictions from the “to convict” instruction and place them in a separate special verdict form.

of a no contact order. *See also State v. Arthur*, 126 Wn. App. 243, 108 P.3d 169 (2005). In *State v. Lopez*, 107 Wn. App. 270, 27 P.3d 237 (2001), Division III reversed a conviction for Unlawful Possession of a Firearm in the First Degree under RCW 9.41.040, where defense counsel failed to move for dismissal despite the absence of proof of a prior conviction of a serious offense.

The basis for these decisions is a distinction made between cases where prior convictions are viewed as elements of the offense (*see, e.g., Oster, York, and Arthur, Lopez*) and cases where prior convictions are viewed as sentencing factors (*Smith, supra*). But the distinction between elements and sentencing factors is no longer viable, in light of *Apprendi* and its progeny:

[W]hen the term “sentence enhancement” is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an “element” of the offense. *Apprendi* at 494 n. 19.

This is undoubtedly one reason why a majority of U.S. Supreme Court justices have recognized that *Almendarez-Torres* was wrongly decided, as noted above. This Court should recognize the inconsistency between cases such as *Oster* and *York* on the one hand, and the *Almendarez-Torres* exception on the other.

- C. The *Almendarez-Torres* exception applies only to the *existence* of a prior conviction, not to other facts relating to the conviction.

The *Almendarez-Torres* exception relates only to “the *fact* of a prior conviction;” that is, its *existence*: “In applying *Apprendi*, we have held that the *existence* of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt.” *In re Pers. Restraint of Lavery*, 154 Wn.2d 249 at 256, 111 P.3d 837 (2005), *emphasis added*. This is so because “a certified copy of a prior judgment and sentence is highly reliable evidence.” *Lavery*, at 257.

The exception *does not* allow judicial determination of facts relating to prior convictions that go beyond the mere existence of the prior conviction. For example, in *Lavery, supra*, the state sought to establish that a prior federal conviction for bank robbery was equivalent to a Washington conviction for second-degree robbery. Noting that the two offenses were not legally coextensive, the Washington Supreme Court refused to remand the case for a judicial determination of the facts underlying the federal conviction. *Lavery*, at 256-258. Similarly, the U.S. Supreme Court has refused to extend judicial factfinding to facts beyond the mere existence of a prior conviction:

While the disputed fact here [the underlying evidence supporting a conviction for burglary] can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to

Jones and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. *Shepard v. United States*, *supra*, at 25, citing, *inter alia*, *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999).

The *Shepard* Court limited the trial court's factual inquiry into the underlying facts of the offense to “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” *Shepard v. United States* at 26.

The relationship between a prior conviction and the person on trial—that is, the question of “identity”—is a fact beyond the mere existence of the prior conviction. “Identity” is comprised of two parts—the identity of the person previously convicted, and the identity of the person currently on trial. Proof of identity can be attempted through “otherwise-admissible booking photographs, booking fingerprints, eyewitness identification, or, arguably, distinctive personal information.” *State v. Huber*, 129 Wn. App. 499 at 503, 119 P.3d 388 (2005), *footnotes and citations omitted*. As these methods of proof demonstrate, the question of “identity” is the kind of fact-based inquiry for which a jury determination is required. “Identity” is a fact beyond the bare existence of a prior conviction, and is not suitable for judicial factfinding.

Whether a prior conviction is characterized as an element (as in *Oster, supra*) or as a sentencing factor (as in this case), the identity of the person named in the prior conviction and the identity of the person currently on trial are facts (other than the bare existence of the prior conviction) that must be proved to a jury beyond a reasonable doubt.⁸ See *State v. Womac*, 160 Wn.2d 643 at 662 n. 11, 160 P.3d 40 (2007) (“[F]or Sixth Amendment purposes, elements and sentencing factors must be treated the same as both are facts that must be tried to the jury and proved beyond a reasonable doubt.”) A judge could not constitutionally remove the “identity” issue from the jury’s consideration in *Oster*; the same must be true of the issue when it is characterized as a sentencing factor.

Here, the state alleged that Mr. Feddersen had six prior adult felonies and three prior juvenile felonies. There is no indication in the record that Mr. Feddersen personally waived his constitutional right to a jury trial. RP 204-207. Such a waiver must be knowingly, intelligently, and voluntarily made, and must be in writing or done orally on the record. *State v. Treat*, 109 Wn.App. 419 at 427-428, 35 P.3d 1192 (2001).

⁸ This Court has previously ruled that the “fact” of a prior conviction under *Almendarez-Torres* includes the offender’s identity. See *State v. Lewis*, 141 Wn. App. 367 at 393, 166 P.3d 786 (2007); *State v. Rudolph*, 141 Wn. App. 59 at 63, 168 P.3d 430 (2007); *State v. Ball*, 127 Wn. App. 956, 113 P.3d 520 (2005). These decisions should be reconsidered.

Despite the absence of a waiver, the “identity” issue—that is the identity of the offender convicted of the prior offenses and the identity of the person on trial for the current offense—was not submitted to the jury. Instead, the trial court implicitly found that Mr. Feddersen’s identity matched the identity of the person(s) named in the prior convictions. This judicial factfinding violated Mr. Feddersen’s constitutional right to a jury trial under the Sixth Amendment, and the resulting sentence was improper.

Under Washington law, the error is not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428 at 440, 180 P.3d 1276 (2008), *citing* Wash. Const. Article I, Section 21.⁹ Accordingly, Mr. Feddersen’s aggravated sentence must be vacated, and the case remanded for sentencing with no criminal history.

CONCLUSION

Mr. Feddersen’s conviction for Attempting to Elude must be reversed and his case dismissed for insufficient evidence. In the alternative, the convictions must be reversed and the case remanded for a new trial.

⁹ By contrast, harmless error analysis does apply under federal law. *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

If the convictions are not reversed, the sentence must be vacated
and the case remanded to the Superior Court for a new sentencing hearing.

Respectfully submitted on August 15, 2008.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON

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

William Feddersen, DOC #704724
Washington Corrections Center
P. O. Box 900
Shelton, WA 98584

and to:

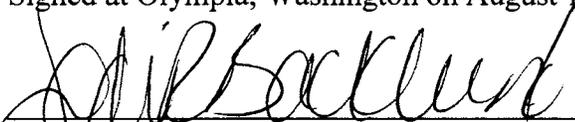
Pierce County Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 15, 2008.

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 August 15, 2008.



Jodi R. Backlund, WSBA No. 22917
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