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STATE OF WASHINGTON
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NO. 38606-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL HENRY BRESLER,

Appellant.

APPELLANT'S BRIEF

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A. Assignments of Error

Assignments of Error

1. The trial court erred when it denied the defendant's oral motion alleging lack of jurisdiction of his person or of the offenses of driving while license suspended in the third degree and of attempting to elude a pursuing police vehicle.
2. The trial court erred when it denied the defendant's oral motion for a new trial based on insufficiency of the proof of a material element of the crime because the defendant did not know that the person who approached him and who pursued him was a police officer.
3. The trial court erred when it denied the defendant's oral motion for a new trial based on irregularity in the proceedings by not conducting a CrR 3.5 hearing.
4. The defendant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments.
5. The defendant's Const. Art. 1, sec. 22 rights were violated when the court gave Instruction No. 21, which states in pertinent part:

“To convict the defendant of the crime of Driving While License Suspended or Revoked in the Third Degree as Charged in Count III, each of the following three elements of the crime must be proved beyond a reasonable doubt-

(4)(sic) That the acts occurred in the State of Washington.”

(see appendix where the trial court's instructions are set forth in full).

6. The trial court erred when it gave instruction No. 8: "A person commits the crime of attempting to elude a pursuing police vehicle..."
7. The trial court erred when it gave instruction No. 9: "A person acts willfully when he or she acts knowingly".
8. The trial court erred when it gave the "to convict" instruction No. 19.
9. The trial court erred when it refused to give the defendant's proposed definitional instruction: "A person commits the crime of attempting to elude a pursuing police vehicle..." (see appendix where the defendant's proposed instructions are set forth in full).
10. The trial court erred when it refused to give the defendant's proposed instruction which stated in part: "A person acts willfully under RCW 46.61.024 (attempt to elude a pursuing police vehicle statute)..."
11. The trial court erred when it refused to give the defendant's proposed "to convict" instruction.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred when it denied the defendant's oral motion, which was brought pursuant to CrR 7.4(a) - entitled Arrest of Judgments- alleging lack of jurisdiction of his person or of the offenses of driving while license suspended in the third degree and attempting to elude a pursuing police vehicle? (Assignment of Error 1.)

2. Whether the trial court erred when it denied the defendant's oral motion, which was brought pursuant to CrR 7.4(a)- entitled Arrest of Judgments- alleging insufficiency of the proof of a material element of the crime of attempting to elude a pursuing police vehicle because the defendant did not know that the person who approached him and who pursued him was a police officer. (Assignment of Error 2.)

3. Whether the trial court erred when it denied the defendant's oral motion, which was brought pursuant to CrR 7.5- entitled New Trial- alleging irregularity in the proceedings by not conducting a CrR 3.5 hearing before the defendant's oral statements were submitted to the jury. (Assignment of Error 3.)

4. Whether the defendant was denied effective assistance of counsel when his attorney did not move to suppress his oral statements pursuant to CrR 3.5?

Mr. Bresler's oral utterances included the statement "I am not going back to that jail", where the primary charge was an Attempt to Elude a Pursing Police Vehicle and the defendant's theory of the case was that he did not know he was being pursued by a police officer. (Assignment of Error 4.)

5. Whether the defendant's Const. Art. 1, sec. 22 right to be tried in the county in which the offense allegedly occurred was violated when the trial

court gave instruction No. 21 which only stated: "That the acts occurred in the State of Washington". The instruction did not require the jury to find as an element of Driving While License Suspended or Revoked in the Third Degree that the crime occurred in Kitsap County? (Assignment of Error 5.)

6. Whether the trial court erred when it refused to give the defendant's three proposed instructions that required the prosecutor to prove that the defendant knew he was being confronted by the police and instead gave the standard WPIC instructions Nos. 8, 9 and 19? (Assignments of Error 6,7,8,9,10 and 11.)

B. Statement of the Case

Statement of Procedure

Mr. Daniel H. Bresler was charged with Attempting to Elude a Pursuing police Vehicle on January 3, 2008 in Kitsap County, Washington (count I). RP 4; CP 13-14. He was also charged in the first amended complaint with Making a False or Misleading Statement to a Public Servant (Count II) and with Driving While License suspended or Revoked in the Third Degree on the same date and in Kitsap County. (Count III). RP 5; CP 14-15.

He was found guilty by jury verdict of Counts I and III and acquitted of Count II. CP 90-1. Prior to sentencing, his trial attorney was

replaced by another attorney because of a potential conflict of interest regarding whether it was ineffective assistance of counsel not to request a CrR 3.5 hearing. 10/10/2008 RP 2-3. On November 21, 2008 Mr. Bresler was sentenced to 30 days in custody for the eluding charge and to a 90 day suspended sentence for Driving While License Suspended or Revoked. RP 12.; CP 94-5, 104. A Notice of Appeal was filed on the same day. CP 105.

Testimony of Deputy Brett Anglin

Jefferson County Deputy Sheriff Brett Anglin testified that on January 3, 2008 at approximately 3:39 a.m. he was “parked alongside the road at Highway 104, which is the highway that has the Hood Canal Bridge on it...” in Jefferson County, Washington. RP 50. The deputy had his headlights on and had a set of binoculars to detect the license plate number of vehicles as they passed him on the highway. He ran the defendant’s vehicle’s license plate number through his onboard computer. RP 52. The computer readout indicated that the vehicle was registered to Mr. Bresler, that his license was suspended in the third degree and that there was an outstanding warrant for his arrest. RP 52-3.

Officer Anglin turned his vehicle around and followed the Bresler vehicle onto the Hood Canal Bridge- heading eastwardly toward Kitsap County. RP 53. The deputy accelerated to speeds over 100 m.p.h in a 40 m.p.h. zone on the bridge. RP 54. He did not have his overhead lights or

his siren on while he was confirming the validity of the outstanding warrant through his dispatch. Id. At the end of the bridge he was about 100 feet behind Mr. Bresler's vehicle.

At a traffic light, according to Deputy Anglin: "The driver at the time activated the left turn signal to turn left on Highway 104 and then make a quick right turn on to Highway 3." RP 55. The driver then made another quick right onto Bridge Way and stopped and turned off his lights. The deputy then stopped and activated his lights. Id. The deputy exited his vehicle and approached the driver's side of the vehicle with his flashlight. Inside the stopped vehicle, which was a Buick Century, was a large German Shepard dog in the passenger seat. RP 56.

The deputy asked the driver for his name and: "He said his last name was Bolland." RP 57. The driver inquired several times and asked why he had been stopped, although he had only rolled down his driver's side window about an inch. RP 57-8. The deputy testified in part: "I asked him to, uh, to step out of the vehicle and – and told him that I knew who he was. And at that point, he told me he was not going back to that jail and put the vehicle in drive and sped down Bridge Way." RP 58-9.

According to the deputy's recollection, the vehicle proceeded to the end of Bridge Way. It then turned right onto an access construction road that looped back toward the bridge. RP 59. The driver ran over a

large bump in the road at “a quite excessive speed.” RP 60. The vehicle then drove between jersey barriers, passed a car¹ and turned back onto Highway 104. id. “He then continued at a high rate.” RP 61.

Deputy Anglin had his vehicle’s siren and lights on during the chase at speeds “of about a hundred miles an hour” heading toward Port Gamble. RP 64. Shortly, after rounding a curb and not seeing the vehicle ahead of him, the deputy decided not to continue the chase. Multiple units then arrived to assist. They proceeded to check all side roads on the way to Port Gamble. RP 65.

The defendant was eventually located in a private driveway about one and a half miles towards Port Gamble on the left side of Highway 104. id. The vehicle was backed into and stuck in a muddy area between two driveways. Mr. Bresler was standing outside of the vehicle. He did not want to get on the ground and stated that he wanted a State Trooper to respond to the scene. RP 66, 70. He refused after three requests and was then tazed and taken into custody. RP 71.

Testimony of Daniel Bresler

Daniel Bresler testified that he was driving from the Seven Cedars Casino to the Suquamish Casino to continue his night of gambling at about

¹This vehicle was described by the deputy as being stopped in the eastbound lane heading toward Kitsap County.

2:30 a.m. II RP 133. He had \$2,500 cash on his person and \$6,000.00 in the trunk of his vehicle. RP 134. It was a concern that “someone could rob me.” RP 135.

He drove over the Hood Canal Bridge. He did not see any vehicles on the side of the road as he approached the west end of the Bridge. He turned right toward Suquamish and right again after about 100 yards so his dog could get out. He also had to take a comfort break. RP 136. This was a “regular stop” for him. Bresler testified that he did not recall seeing a police car behind him when he crossed over on the bridge. id.

The next thing that happened was: “I’m parked there, and, uh, someone at my window with a light in my eyes. “ RP 139. The vehicle was running, the radio was “most likely” on and his dog was barking. RP 141. The light was in his eyes. The person did not identify themselves. Bresler could not hear what was being said to him because his dog was barking.

Mr. Bresler rolled his window down “maybe an inch”. RP 142. He then heard: ”Roll it down now or I’m going to smash it.” id. He testified that that statement made him run. id. He could not see who was holding the flashlight, could not see his face and could not see what he was wearing. id. He just saw the light. id.

Bresler testified that after he heard the threat: “It was enough to put the car in drive and underestimating, I slammed it in drive and

punched it.” RP 143. Bresler was then asked:

“Q. What did you think the person meant to do?

A. I don’t know. Um, I know at that point that’s when my – realized there’s going to be glass coming in on me any second and I’m going to have a physical altercation with somebody and I – I’m not going to stay there.

Q. Would it be accurate to say you were scared?

A. Yeah, absolutely.

Q. So then you hit the gas?

A. Punched it. RP 143.

.....

Q. [By Mr. Lewis] So you are heading down Bridge Way, and what are you trying to do?

A. I’m running from a threat.

Q. And do you see the threat behind you?

A. I never looked behind me.

Q. So you don’t see anything in your rearview mirror?

A. No. I wasn’t looking in my rearview mirror.” RP 145.

Bresler testified that he drove up the dirt road, through a barricade.

A vehicle stopped for him when he reached the traveled portion of the road. Then he drove down Highway 104 toward Kingston. He looked into his rear view mirror and did not see or hear anything. RP 147.

He drove on Highway 104 until he reached a driveway. He testified: “...I backed my car into that second driveway at 4019 Forth, and I pulled off about 10 feet from the road, maybe 20 feet from the road...I wanted to make sure that if-- if for some reason someone came back after me that I could see them facing out.” RP 148.

Bresler continued: “I mean, I’ve never been in a situation like that

where I thought I was going to get robbed or beaten or whatever.” RP 149.

His vehicle became high centered and he became stuck at an angle

between the two driveways. RP 151, ex. 33, 35.

He then observed the police with spotlights searching driveways and cautiously approaching in his direction. Next, he heard the command:

“Keep your hands in the air and turn around. Let me see your waist.” RP

158. There were lights shining on him. He yelled, “Man, are you a cop?

Are you State Patrol? I’m not doing – I’m not doing anything until State Patrol gets here.” RP 158-9.

Bresler heard the reply, “Kitsap County Sheriff.” RP 159. Bresler was subsequently shot with a tazer because he did not “Get on the ground.” RP 160. He was jumped on when he was on the ground and handcuffed. He commented “Please don’t let them take me back to that jail.” RP 162.

Mr. Bresler testified on cross-examination that he said on being contacted on Bridge Way- when he stopped his vehicle: ““What do you want?” I don’t know what I said. I got my dog barking. I got my stereo going. I’ve got a stranger in my window. Um, it takes a few minutes to gather what’s going on. Finally, I rolled the window down maybe like that [indicating], an inch, and I asked him: What do you want, an/or something like that. And all of a sudden: Open the window now or I’m going to

smash it. Roll it down now or I'm going to smash it." RP 167.

Bresler, who thought he might be killed, testified: "And I jammed it into drive and I punched it. And I guarantee you, as fast as that car was going is as fast as I was going." RP 168. He continued: "So I'm coming out of that ramp and I flash my lights and he stops and I go right in front of him. I turn right and I got to the 104 at the stoplight and I turn left, and I punch it. And then I look behind me and there's – well, whatever it was is gone, is not following me or whatever. There's no one behind me." RP 170. Bresler testified that he was still scared for his life when we pulled on to Highway 104. RP 171.

C. Argument

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTIONS FOR ARREST OF JUDGMENT AND/OR NEW TRIAL.

After guilty verdicts to Counts I and III were rendered but before sentencing, the defendant's substituted attorney orally moved the trial court to consider the following arguments, which were denied by the trial court. 11/21/08 RP 4-6, 12:

(1) that venue/jurisdiction was not proper in Kitsap County.

(see Argument II incorporated herein by reference as if set forth in full.)

(2) that the jury heard statements Mr. Bresler allegedly made without a prior CrR 3.5 hearing. (see Argument III incorporated herein by

reference as if set forth in full with regard to ineffective assistance of counsel.)

(3) the facts did not support the elements of the charge because Mr. Bresler did not know that the person who was following him was a police officer. (see Argument IV incorporated herein by reference as if set forth in full.)²

CrR 7.5 states in part:

“(a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

...

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

...

(8) That substantial justice has not been done.”

(see appendix where CrR 7.5 is set forth in full.)

The standard for review of denial of a motion for a new trial is abuse of discretion standard. *State v. Boiko*, 138 Wn.App. 256, 260, 156 P.3d 934 (2007): “A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for

² The first and third arguments appear to fall under CrR 7.4 (a) Arrest of Judgments. The second argument appears to fall under CrR 7.5 entitled “New Trial.”

untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P.2d 775 (1971).”

CrR 7.4 entitled “Arrest of Judgment” states in part:

“(a) Arrest of Judgments. Judgment may be arrested on the motion of the defendant for the following causes:
(1) Lack of jurisdiction of the person or offense;
(2) the indictment or information does not charge a crime; or
(3) insufficiency of the proof of a material element of the crime.”

(see appendix where CrR 7.4 is set forth in full).

According to *State v. Ceglowski*, 101 Wn.App. 346, 349, 12 P.3d 160 (2000):

“Review of a trial court decision denying a motion for arrest of judgment requires the appellate court to engage in the same inquiry as the trial court. *State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256 (2000).”

In *State v. Coleman*, 54 Wn.App. 742, 775 P.2d 986 (1989) the trial court granted the defendant’s motion in arrest of judgment which claimed that there was insufficient evidence to prove theft beyond a reasonable doubt.

The State appealed. The appellate court reversed and stated:

“In reviewing the “sufficiency of the evidence”, which is legally the same issue as “insufficiency of the proof of a material element of the crime”, the standard is stated in *State v. Green* and *Jackson v. Virginia* whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt.” (footnotes and citations omitted).

According to Royce A. Ferguson, Jr. *13 Washington Practice* 330

(3rd ed. 2004): “A motion for arrest of judgment must be based upon matters of record, whereas a motion for a new trial may be based upon facts and circumstances outside the record.”

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION FOR ARREST OF JUDGMENT BASED ON LACK OF JURISDICTION/VENUE.

The defendant’s substituted attorney argued before sentencing:

“The defendant would like to put on the record that he objects to the jurisdiction of the Court for the charge that has been outlined here or that he was convicted of on Count I says, “Per the reports and testimony alleged, the incident began in Port Ludlow,” and I believe that the officer’s testimony was that the basis for the stop was driving while suspended, third degree, and Jefferson County warrant. And the officer testified that he ran his license plate while the defendant was on Highway 104 in Jefferson County, and also discovered defendant’s bench warrants out of there, and then followed and waited for confirmation whether the bench warrant still active. And this is what brought the Jefferson County Deputy in Kitsap County, across the Hood Canal Bridge and, um, so from Mr. Bresler’s position is that this actually should have been in, um, Jefferson County and he wants that noted for the record. He understands that the jury verdict has come back as a conviction. However, he feels there were some issues that were not raised at trial that he would like to make sure there’s a record of today.” 11/21/08 RP 4-5.

CrR 5.1 (b) states as follows:

“(b) Two or More counties. When there is reasonable doubt whether an offense has been committed in one of two or more counties, the action, may be commenced in any such county.”

CrR 5.2 entitled **Change of Venue** states: **(a) When Ordered-Improper County.** The court shall order a change of venue upon motion and showing that the action has not been prosecuted in the proper county.

According to Royce A. Ferguson, Jr. *13 Washington Practice* 354

(3rd ed. 2004) with regard to venue:

“It is insufficient to raise the objection for the first time after the verdict has been returned on a motion for arrest of judgment.”

(citing *State v. Escue*, 6 Wn.App. 607, 495 P.2d 351 (1972).³ However, according to *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) a defendant may challenge the sufficiency of the evidence as to that element on appeal. Here, there was insufficient evidence to support the element of venue/jurisdiction in the “to convict” instruction because no county was included in the instructions.

The elements of the charge of attempting to elude a pursuing police vehicle are stated in the “to convict” instruction given to the jury. CP 84; Instr. 19. That instruction included only the following: “(6) That

³ *Escue* stated the following: “Proof of venue is necessary in a criminal prosecution, but it is not an element of the crime. *State v. Hardamon*, 29 Wn.2d 182, 186 P.2d 634 (1947). Neither is it a question of jurisdiction. *State v. Miller*, 59 Wn.2d 27, 365 P.2d 612 (1961). It is a right which can be waived., *State ex rel. Howard v. Superior Court*, 88 Wash. 344, 153 P. 7 (1915); *State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952), and proof of venue is waived if it is not challenged. *State v. Miller, supra, State v. Hardamon, supra.*” id. at 607-8.

the acts occurred in the State of Washington.” id. The jury was not asked to determine in which county any of the acts occurred.

Basically, what the defendant argued is that the trial court in Kitsap County did not have jurisdiction over Count I, attempting to elude a pursuing Police Vehicle, because the arresting officer was a Jefferson County Deputy Sheriff. This deputy had no authority to pursue the defendant’s vehicle into Kitsap County for what was the basis of the conviction for Count III, driving while license suspended or revoked in the third degree.

When the Jefferson County Deputy Sheriff used his binoculars to read the front license plate of the approaching vehicle in Jefferson County, and ran that information in his computer, the only information he had was that the vehicle was registered to Daniel Bresler, that his license was suspended in the third degree and there may be an outstanding warrant for his arrest. RP 52-3.

RCW 10.93.120 states as follows:

“(1) Any peace officer who has authority under Washington law to make an arrest may proceed in fresh pursuit of a person (a) who is reasonably believed to have committed a violation of traffic or criminal laws, or (b) for whom such officer holds a warrant of arrest, and such peace officer shall have the authority to arrest and to hold such person in custody anywhere in the state.

(2) The term “fresh pursuit,” as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.”

In *City of Tacoma v. Durham*, 95 Wn. App. 876, 978 P.2d 514

(1999) the fresh pursuit of the motorist from City of Tacoma into city of Lakewood and outside the officer’s jurisdiction was justified and reasonable, pursuant to the above-stated statute, because Durham posed an immediate threat to human life and property. He was reported to be driving under the influence of intoxicants and driving erratically. Here, Mr. Bresler had not been consuming and was not driving in an erratic manner before he was pursued into Kitsap County.

Also, there was no information for the pursuing officer to assume that Daniel Bresler was the person who was actually driving the subject vehicle. However, according to *State v. Phillips*, 126 Wn. App. 584, 585-6, 109 P.3d 470 (2005), *review denied*, 156 Wn.2d 1012 (2006):

“A law enforcement officer may stop a motorist and ask for identification when a random vehicle registration check discloses that the registered owner’s driver’s license has been suspended...We reject Mr. Phillips’s argument that an investigative stop requires prior affirmative verification that the driver’s appearance matches that of the registered owner.”

See also RCW 46.20.349.⁴

III. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY DID NOT MOVE TO SUPPRESS HIS STATEMENTS.

The claim of ineffective assistance of counsel is reviewed de novo. *State v. Rainey*, 107 Wn App. 129, 135, 28 P.3d 10 (2001), *review denied*, 145 Wn.2d 1028 (2002). The review is a mixed question of law and of fact. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). “The appellant must show both that counsel’s performance was defective and that the error changed the outcome of the trial. *Strickland*, 466 U.S. at 687.” *State v. Horton*, 136 Wn.App. 239, 36, 146 P.3d 1227 (2006) .

According to *State v. Barron*, 139 Wn.App. 266, 276, 160 P.3d 1077 (2007): “Counsel’s performance is deficient if he or she fails to bring a viable motion to suppress when there is “no reasonable basis or strategic reason” for failing to do so.”

“A criminal defendant receives constitutionally ineffective

⁴ “Any police officer who has received notice of the suspension or revocation of a driver’s license from the department of licensing, may, during the reported period of such suspension or revocation, stop any motor vehicle identified by its vehicle license number as being registered to the person whose driver’s license has been suspended or revoked. The driver of such vehicle shall display his or her driver’s license upon request of the police officer.

assistance of counsel when no legitimate strategic or tactical explanation can be found for a particular trial decision. *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001) (citing *State v. McFarland*, 127 Wn. 2d 322, 336, 899 P.2d 1251 (1995)). Failure to bring a plausible motion to suppress potentially unlawfully obtained evidence is one such decision. *Rainey*, 107 Wn.App. At 136.”

State v. Meckelson, 133 Wn.App. 431, 433-34, 135 P.2d 991 (2006),
review denied, 159 Wn.2d 1013 (2007).

According to *State v. McFarland*, supra at 333-34, to determine whether counsel was ineffective, the court looks at the record and assesses the chances that a suppression motion would have succeeded. Here, Mr. Bresler’s attorney should have moved to suppress his statements pursuant to CrR 3.5. Failure to do so resulted in ineffective assistance of counsel because the chances were that Mr. Bresler’s statements would most likely have been suppressed.

According to *State v. Rainey*, supra, the burden is on the defendant to show: “...that counsel’s performance was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances based on the record established below and ...the deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” (citing *Strickland* at 687 and

State v. McFarland, 127 Wn.2d at 334-35).

Facts of the Case at Bench

On cross examination, Deputy Anglin testified that once he pulled behind the vehicle on Bridge Way he activated his overhead lights and spot light. RP 94. The deputy demanded that the occupant roll down his window. RP 96. Anglin testified: "I informed him that I was Deputy Anglin from the sheriff's office and informed him for the reason for the stop; that the registered owner had warrants and was suspended and asked him for his name or identification. Actually, at that point, I asked him if he was Daniel Bresler." RP 96.

Giving the *Miranda*⁵ warnings at this point would have assisted in identifying the deputy as a law enforcement officer to Mr. Bresler. Mr. Bresler testified that he did not know who he was being confronted by behind the shining flashlight; commanding him to roll down his window or it would be broken open. He testified he could not see who was holding the flashlight, could not see his face and could not see what he was wearing. I RP 142.

Obviously, Mr. Bresler was not free to leave the scene as the ensuing charge substantiates. According to *State v. Rainey*, 107 Wn. App.

⁵ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

139, n. 3: “A person is seized when, by means of a show of force or authority, his or her freedom of movement is restrained. *State v. Mendez*, 137 Wn.2d 208, 222, 970 P.2d 722 (1999). The test is whether a reasonable person under the circumstances, would have believed he or she was not free to leave. *Id.*”

According to *State v. Cunningham*, 116 Wn.App. 219, 228, 65 P.3d 325 (2003): the test is whether a suspect’s freedom “is curtailed to a “degree associated with formal arrest” (“That determination is based on how a reasonable person in the same circumstances would have perceived the situation.”) (citing *California v. Behler*, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)).

This creates the paradox that a reasonable person in Mr. Bresler’s position would have considered that he was not free to leave if they were able to discern that the person confronting them was a police officer.⁶

It was stated in *Rainey*: “*Miranda* warnings are required when police ask questions “designed to elicit incriminating statements.” *Moreno*, 21 Wn. App. At 434.” *State v. Rainey*, 107 Wn.App. 139 (citing

⁶ The defendant’s theory of the case was stated during exceptions to the instructions when the issue arose concerning a proposed stipulation that the defendant’s statements were admissible. Mr. Bresler’s attorney stated: “Our theory of the case is that he wasn’t – he didn’t know the person was a police officer; therefore, he didn’t know he was in custody.” II RP 215.

State v. Moreno, 21 Wn..App. 430, 585 P.2d 481 (1978)). According to these standards, Mr. Bresler should have been given the *Miranda* warnings before the officer asked the driver what his name was.

The next issue is whether except for counsel's errors, the result of the proceeding would have been different. The accused must show that his counsel's deficient performance prejudiced the defense. This requires proof that Mr. Bresler's counsel's errors were so serious that they deprived him of a fair trial. Under this, the prejudice prong, it must be shown that but for counsel's errors there is a reasonable probability that the result of the proceedings would have been different. *State v. Thomas*, 109 Wn.,2d. 222, 743 P.2d 816 (1987); *State v. McFarland*, supra; *Strickland v. Washington*, supra.

Arguably that is the situation in this case. The jury may well have found Mr. Bresler not guilty of attempting to elude a pursuing police officer if his incriminating and prejudicial statements had been excluded from the testimony. His first statement was: "I am not going back to that jail." This statement was argued as the motive for his speeding away from the officer at the Bridge Way location. The prosecutor stated during closing argument with regard to the identity of the person outside Mr. Bresler's vehicle behind a flashlight:

"The defendant at that point said, I don't want to go

back to that jail. It wasn't a random person, and he put his car into drive and he floored it and he traveled off the pavement on to the gravel road and up and back on to 104 here." II RP 224.

There is a reasonable probability that a successful CrR 3.5 hearing would change the result of the proceedings. Even without this hearing the defendant was acquitted of Count II (Making a False or Misleading Statement to a Public Servant.).

IV. THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION IN ARREST OF JUDGMENT AND ENTERED JUDGMENT AND SENTENCE BASED ON THE SUFFICIENCY OF THE EVIDENCE.

Mr. Bresler's substituted attorney argued at the time of the motion for Arrest of Judgment::

"And also his belief that substantial justice has not occurred because the defendant believes that the facts actually presented show that the officer had not identified himself and that he did not know that the person who was following him was an officer and/or the person that had stopped him on the initial stop was an officer." 11/21/08 RP 5.

The trial court denied this motion for new trial and then entered judgment and sentence. 11/21/08 RP 12.

The elements of the charge of attempting to elude a pursuing police vehicle include are stated in the "to convict" instruction given to the jury:

"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 3rd day of January, 2008, 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 sirens;
- (3) That the signaling police officer's vehicle was equipped with lights and sirens;
- (4) That the defendant wilfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and
- (6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all 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." CP 84; Instr. No. 19.

Willfully was further defined as: "A person acts willfully when he or she acts knowingly."⁷ CP 74; Instr. No. 9.

"The standard of review when determining the sufficiency

⁷ Instruction No.10 stated: "A person knows or acts knowingly when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally." CP 75.

of the evidence is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).”

State v. McAllister, 60 Wn.App. 645, 661, 806 P.2d 1251 (1999).

According to *McAllister*:

“Sufficient evidence means more than a mere scintilla of evidence; there must be that quantity of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *Fateley*, at 102.”

60 Wn. App. at 658 (citing *State v. Fateley*, 18 Wn.App. 99, 566 P.2d 959 (1977) (there must be *substantial evidence*, *i.e.*, that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved.) 18 Wn. App. At 102. See also, *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979).

Acting Wilfully

The defense argued during closing argument as follows:

“Now, we certainly can’t say that all of the testimony of Mr. Bresler is consistent with deputy Anglin’s. But there is some testimony that is consistent with each other. One of the things that’s consistent is that Deputy Anglin testified that he was behind the driver’s left shoulder. II RP 239.

The defense further argued:

“Mr. Bresler testified he’s got his radio on and that his dog barks at the approach of this person, or what he

presumes to be a person because he can't see because there's just a light over his left shoulder.

Mr. Bresler then says he can't hear what this person is saying. He just sees the light. Mr. Bresler does say, he rolls his window down an inch, and he says when he does that, what he hears is roll your window down all the way or I'm going to smash it...

Mr. Bresler testified he never saw any lights other than the flashlight. And he testified he never saw the person who was holding the flashlight, nor what that person was wearing." II RP 239-40..

Deputy Anglin did not use his loud-speaker to identify himself, but approached the vehicle from behind the driver's door while shining his flashlight into the car. RP 95-6. After the deputy advised him to step out of the car or he would break the window, Bresler sped away. RP 97. When the Deputy returned to his vehicle he turned on the siren. RP 99. In sum, there was insufficient evidence that the defendant acted wilfully.

Jurisdiction/venue

Examination of the "to convict" instructions show that the jury was never asked to determine whether the elude occurred in Kitsap County. CP 84. This is also true of the Driving While License Suspended or Revoked in the Third Degree charge in Count III. The jury was never asked to determine in which county the acts occurred in. CP 86.

V. THE TRIAL COURT ERRED WHEN IT DECLINED TO GIVE THE DEFENDANT'S THREE PROPOSED INSTRUCTIONS WITH REGARD TO WHETHER MR. BRESLER KNEW HE WAS BEING CONFRONTED BY THE POLICE.

During exceptions to the instructions, the defense proposed its instructions regarding its theory of the case that Mr. Bresler did not know that the person who was confronting him was a police officer. II RP 197.

The defense argued during exceptions to instructions:

MR. LEWIS: That's correct. You'll see my proposal. I've modified it in accordance with *State v. Stayton*, an element of this offense the defendant knows the person is a police officer. And so the only change I've made is I – I have modified the phrase to bring the vehicle to a stop by someone he knows is a police officer. And then further down while attempting to elude what he knows is a pursuing police vehicle. II RP 198.

The defendant's proposed "to convict" instruction added two elements (5) and (7) and stated:

"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 3rd day of January, 2008, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;
- (3) That the signaling police officer's vehicle was equipped with lights and sirens;
- (4) That the defendant wilfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That the defendant knew the signal to stop was give(sic) by a police officer;
- (6) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner;
- (7) That the defendant knew the pursuing vehicle

was a police vehicle; and

(8) 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.”

(citation stated: “WPIC 94.02 (modified in accord with *State v. Stayton*, 39 Wn.App. 46, 49 (1984) and to reflect current RCW 46.61.024 as amended in 2003)” CP 23-26.⁸

The defense argued at the time:

“MR. LEWIS: Just maybe to clarify my position on this. I agree with Mr. Wilkinson has presented what – what is the standard instruction. However, the nature of our defense in this case is that Mr. Bresler did not know the pursuing person was a police officer.

And this case, *State v. Stayton*, says that knowledge is

⁸ The defendant also proposed an instruction which stated: “A person acts willfully under RCW 46.61.024 (attempt to elude a pursuing police vehicle statute) when he acts with knowledge that the signal to stop was given by a police officer and that the pursuing vehicle is a police vehicle.” (citation stated: “WPIC 10.05 as modified by *State v. Stayton*, 39 Wn.App. 46, 49 (1984) when used in conjunction with an allegation that the defendant violated RCW 46.61.024.”) CP 19.

A third proposed instruction stated: “A person commits the crime of attempting to elude a pursuing police vehicle when he wilfully 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 someone he knows is a police officer, and while attempting to elude what he me knows is 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 officer’s vehicle must be equipped with lights and sirens.” (citation stated: “WPIC 94.01 (modified in accord with *State v. Stayton*, 39 Wn.App. 46, 49 (1984) and to reflect current RCW 46.61.024 as amended in 2003”) CP 21.

an essential element of the crime charged. Therefore, I think it needs to be in the definition and I think it needs to be in the to-convict instruction. Maybe not every case sometimes on an attempt to elude the issue is, was the driving reckless. But in this case the issue is knowledge.” II RP 199-200.

The trial court declined to give the defendant’s three proposed instructions and instead initiated Instruction No. 9 which stated “A person acts willfully when he or she acts knowingly.” CP 74. See also Instruction 10 defining “knowingly.” CP 75; n.7 infra.

According to *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980):

“An instruction is sufficient if it correctly states the law, is not misleading, and permits counsel to argue his theory of the case. *State v. Dana*, 73 Wn.2d 533, 439 P.2d 403 (1968).”

Here, Mr. Bresler’s theory of the case-on which point he introduced sufficient evidence through his testimony and by circumstantial evidence-was that he could not identify the person with whom he was being confronted. Case law supports his theory of the case that the accused has to know that he is being pursued by a police officer who is in uniform and who uses a police vehicle.

In *State v. Slayton*, 39 Wwn. App. 46, 691 P.2d 596 (1984), *review denied*, 103 Wn.2d 1026 (1985) the court stated:

“There can be no “attempt to elude” unless there is the

prerequisite knowledge that there is “a pursuing police vehicle.” There can be no willful failure to stop unless there is the prerequisite knowledge that a statutorily appropriate signal has been given by a statutorily appropriate police officer.”

39 Wn. App. At 49-50. The trial court agreed with this language and stated after reading the case: “It is clear to me that the element of “knowingly” has to be part of this act.” II RP 209.

State v. Mather, 28 Wn.App. 700, 626 P.2d 44 (1981) was cited in *Stayton*, where the unanimous court noted “We do not subscribe totally to the court’s statement in *Mather*,⁹ but we do agree with the *Mather* court’s conclusion that one element of the statutory crime is *knowledge* that the pursuing vehicle is a police vehicle.” 39 Wn. App at 49 (use of italics for emphasis of the word “knowledge” is by Judge Petrie.)

See also, *State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982). A motorcyclist was chased by police officers after being observed speeding at 85 m.p.h. in a 45 m.p.h. zone. Sherman maintained that he was unaware that the police were pursuing him. The *Sherman* court stated - when interpreting then RCW 46.61.024- that the phrase “in a manner indicating a wanton and wilful disregard” contained both an “objective and

⁹ *Mather* declared: “The statute, however, requires that the defendant wilfully fail and refuse to stop his vehicle while attempting to elude a pursuing police vehicle.” 28 Wn. App. At 702.

subjective component.” id. at 58.

The defense argued at the time of exceptions with regard to the trial court’s denial of its proposed instructions and reliance on the court’s instruction defining wilful:

“His entire defense is that he didn’t know this person was a police officer. We’re not allowed – and also the way the to-convict instruction on the attempt to elude statute, the word “willfully” is mentioned in context with failing or refusing to immediately bring the vehicle to a stop after being signaled to a stop.

So I understand that – you, know, you jump from “wilful” to the “knowledge,” and then you argue that he had to have the knowledge that it was a police officer who was asking him to bring it to a stop. But I think that should be in the, um, to-convict instruction itself, because it is an element.

As the *Stayton* case said normally the elements are in to-convict instructions and they are not separated sort of by 3 degrees of reasoning where are you going to jump from one instruction to another to make the argument that – that he does have to have this knowledge, and then – I’m just – I’m troubled by the fact.”

II RP 210.

According to *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d

1052 (1997):

“Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Failure to so instruct is reversible error. *State v. Griffin*, 100 Wn.2d 417 420, 670 P.2d 265 (1983). Williams introduced sufficient evidence to entitle her to a duress instruction.”

Mr. Bresler introduced enough evidence to warrant inclusion of an instruction which stated: "That the defendant knew the signal to stop was give(sic) by a police officer..." and "... That the defendant knew the pursuing vehicle was a police vehicle;" CP 23. He also produced sufficient evidence to warrant the use of his proposed instruction defining willful (A person acts willfully under RCW 46.61.024...) and the eluding definition instruction ("A person commits the crime of attempting to elude a pursuing police vehicle....").

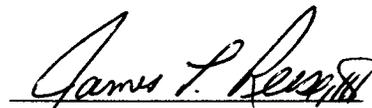
In sum, the trial court erred when it refused the defendant's proposed instructions.

D. Conclusion

This Court should reverse Mr. Bresler's convictions. In the alternative, this court should reverse his convictions and remand the case for a pre-trial suppression hearing.

Dated this 7th day of June 2009.

Respectfully Submitted,



James L. Reese, III

WSBA #7806

Court Appointed Attorney
For Appellant

RECEIVED AND FILED
IN OPEN COURT

SEP 25 2008

DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

DANIEL HENRY BRESLER,

Defendant.

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) No. 08-1-00292-4
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COURT'S INSTRUCTIONS TO THE JURY

DATED

Sept 24, 2008

Anna M. Lurie

JUDGE

A
ORIGINAL

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1

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the

proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other

evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common practice. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 1

It is not a defense to a criminal charge that the defendant believed his or her conduct was lawful. Ignorance of the law is no excuse for criminal conduct.

INSTRUCTION NO. 8

A person commits the crime of attempting to elude a pursuing police vehicle when he wilfully 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 officer's vehicle must be equipped with lights and sirens.

INSTRUCTION NO. 9

A person acts willfully when he or she acts knowingly.

INSTRUCTION NO. 10

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION No. 11

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION No. 12

To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.

INSTRUCTION NO. 13

A person commits the crime of Making a False or Misleading Statement to a Public Servant when he or she knowingly makes a false or misleading material statement to a public servant.

INSTRUCTION NO. 14

A Jefferson County Sheriff's Office employee is a public servant.

INSTRUCTION NO. 15

A material statement is a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

INSTRUCTION NO. 14

A person commits the crime of Driving While License Suspended or Revoked in the Third Degree when he or she drives a motor vehicle while an order is in effect that suspends or revokes his or her driver's license or driving privileges because the person failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or failed to comply with the terms of a notice of traffic infraction or citation, as provided in RCW 46.20.289.

INSTRUCTION NO. 17

A motor vehicle is any vehicle that is self-propelled.

INSTRUCTION NO. 18

A vehicle is any device capable of being moved upon a public highway and in, upon, or by which any person or property is or may be transported or drawn upon a public highway.

INSTRUCTION NO. 19

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 3rd day of January, 2008, the defendant drove a motor vehicle;

(2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;

(3) That the signaling police officer's vehicle was equipped with lights and sirens;

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

(5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all 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. 20

To convict the defendant of the crime of Making a False or Misleading Statement to a Public Servant as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt--

- (1) That on or about January 3, 2008, the defendant made a false or misleading statement to a public servant;
- (2) That the statement was material, as defined in these instructions;
- (3) That the defendant knew the statement was false or misleading, and that the statement was material; and
- (4) 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. 21

To convict the defendant of the crime of Driving While License Suspended or Revoked in the Third Degree as charged in Count III, each of the following three elements of the crime must be proved beyond a reasonable doubt—

(3) That on or about January 3, 2008, the defendant drove a motor vehicle;

That at that time of driving an order was in effect that suspended or revoked the defendant's driver's license or driving privilege because the defendant failed to

respond to a notice of traffic infraction, failed to appear at a requested hearing,

violated a written promise to appear in court, or failed to comply with the terms of

a notice of traffic infraction or citation, as provided in RCW 46.20.289; and

(4) 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. 22

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given any exhibits admitted in evidence, these instructions, and one verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

RECEIVED AND FILED
IN OPEN COURT
SEP 23 2008

DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DANIEL BRESLER,

Defendant.

NO. 08-1-00292-4

**DEFENDANT'S PROPOSED
JURY INSTRUCTIONS**

See attached.

B

CRAWFORD, MCGILLIARD, PETERSON AND YELISH

Attorneys at Law

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DEFENDANT'S PROPOSED JURY INSTRUCTIONS -- 1

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NO. _____

A person acts willfully under RCW 46.61.024 (attempt to elude a pursuing police vehicle statute) when he acts with knowledge that the signal to stop was given by a police officer and that the pursuing vehicle is a police vehicle.

WPIC 10.05 as modified by State v. Stayton, 39 Wn.App. 46, 49 (1984) when used in conjunction with an allegation that the defendant violated RCW 46.61.024.

NO. _____

A person commits the crime of attempting to elude a pursuing police vehicle when he wilfully 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 someone he knows is a police officer, and while attempting to elude what he knows is 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 officer's vehicle must be equipped with lights and sirens.

NO. _____

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 3rd day of January, 2008, the defendant drove a motor vehicle;

(2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;

(3) That the signaling police officer's vehicle was equipped with lights and sirens;

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

(5) That the defendant knew the signal to stop was give by a police officer;

(6) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner;

(7) That the defendant knew the pursuing vehicle was a police vehicle; and

(8) 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.

NO. _____

A person commits the crime of Making a False or Misleading Statement to a Public Servant when he or she knowingly makes a false or misleading material statement to someone he or she knows is a public servant.

WPIC 120.03 modified to make the implicit assumption that the defendant knows the person is a public servant explicit in accord with the reasoning in State v. Stayton, 39 Wn.App. 46, 49 (1984)

information is discovered during trial, the court shall also be notified.

(3) *Custody of Materials.* Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

(4) *Protective Orders.* Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's counsel to make beneficial use thereof.

(5) *Excision.* When some parts of certain material are discoverable under this rule, and other parts not discoverable, as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(6) *In Camera Proceedings.* Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(7) *Sanctions.*

(i) if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

[Amended effective September 1, 1986; September 1, 2005; September 1, 2007.]

Comment

Supersedes RCW 10.37.030, .033; RCW 10.46.030 in part.

RULE 4.8 SUBPOENAS

Subpoenas shall be issued in the same manner as in civil actions.

Comment

Supersedes RCW 10.46.030 in part; RCW 10.46.050.

**RULE 4.9 PRETRIAL CONFERENCE
[RESCINDED]**

[Rescinded effective September 1, 1983.]

RULE 4.10 MATERIAL WITNESS

(a) **Warrant.** On motion of the prosecuting attorney or the defendant, the court may issue a warrant, subject to reasonable bail, for the arrest of a material witness. The warrant shall issue only on a showing, by affidavit or on the record in open court, that the testimony of the witness is material and that

(1) The witness has refused to submit to a deposition ordered by the court pursuant to rule 4.6; or

(2) The witness has refused to obey a lawfully issued subpoena; or

(3) It may become impracticable to secure the presence of the witness by subpoena.

Unless otherwise ordered by the court, the warrant shall be executed and returned as in rule 2.2.

(b) **Hearing.** After the arrest of the witness, the court shall hold a hearing no later than the next judicial day after the witness is present in the county from which the warrant issued. The witness shall be entitled to be represented by a lawyer. The court shall appoint a lawyer for an indigent witness if it is required to protect the rights of the witness.

(c) **Release/Detention.** Upon a determination that the testimony of the witness is material and that one of the conditions set forth in section (a) exists, the court shall set conditions for release of the witness pursuant to rule 3.2. A material witness shall be released unless the court determines that the testimony of such witness cannot be secured adequately by deposition and that further detention is necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to rule 4.6.

[Adopted effective September 1, 1991.]

5. VENUE

RULE 5.1 COMMENCEMENT OF ACTIONS

(a) **Where Commenced.** All actions shall be commenced:

(1) In the county where the offense was committed;

(2) In any county wherein an element of the offense was committed or occurred.

(b) **Two or More Counties.** When there is reasonable doubt whether an offense has been committed in one of two or more counties, the action may be commenced in any such county.

(c) **Right to Change.** When a case is filed pursuant to section (b) of this rule, the defendant shall have the right to change venue to any other county in which the offense may have been committed. Any objection to venue must be made as soon after the initial pleading is filed as the defendant has knowledge upon which to make it.

Comment

Supersedes RCW 10.25.010, .020, .030, .040, .050, .060, .110.

RULE 5.2 CHANGE OF VENUE

(a) **When Ordered—Improper County.** The court shall order a change of venue upon motion and showing

that the action has not been prosecuted in the proper county.

(b) **When Ordered—On Motion of Party.** The court may order a change of venue to any county in the state:

(1) Upon written agreement of the prosecuting attorney and the defendant;

(2) Upon motion of the defendant, supported by affidavit that he believes he cannot receive a fair trial in the county where the action is pending.

(c) **Discharge of Jury.** When the court orders a change of venue it shall discharge the jury, if any, without prejudice to the prosecution, and direct that all the papers and proceedings be certified to the superior court of the proper county and direct the defendant and the witnesses to appear at such court.

Comment

Supersedes RCW 10.25.080, .090, .100; RCW 10.46.180.

6. PROCEDURES AT TRIAL

Comment

RCW 10.46.070 is superseded in part by all of CrR 6.

RULE 6.1 TRIAL BY JURY OR BY THE COURT

(a) **Trial by Jury.** Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.

(b) **Number of Jurors.** Unless otherwise provided by these rules, the number of persons serving on a jury shall be 12, not including alternates. If prior to trial on a noncapital case all defendants so elect, the case shall be tried by a jury of not less than six, or by the court.

(c) **Juror Unable to Continue.** If a case has not yet been submitted to the jury and a juror is unable to continue and no alternate jurors were selected or none are available, or if a case has been submitted to the jury and a juror is unable to continue, all defendants may elect to continue with the remaining jurors. The court shall declare a mistrial for any defendant who does not elect to continue with the remaining jurors. If some, but not all, defendants elect to continue with the trial, the court shall proceed with the trial for those defendants unless the court determines manifest necessity requires a mistrial.

(d) **Trial Without Jury.** In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

[Amended effective September 1, 1983.]

Comment

Supersedes RCW 10.49.020.

RULE 6.2 JURORS' ORIENTATION

All jurors will be given a general orientation when they report for duty.

(a) **Juror Handbook.** A copy of the Juror's Handbook to Washington Courts prepared by the Superior Court Judges' Association of the State of Washington and the Washington State Magistrates Association shall be provided to all petit jurors by the court in which they are to serve.

(b) **Juror Information Sheet.** Prior to the commencement of a petit juror's term of service, a juror information sheet shall be furnished to the juror by the court in which the person is to serve. The format of the information sheet shall be consistent with recommendations of the Administrator for the Courts.

[Amended effective July 1, 1974; September 1, 1984.]

RULE 6.3 SELECTING THE JURY

When the action is called for trial, the jurors shall be selected at random from the jurors summoned who have appeared and have not been excused.

[Amended effective September 1, 1993.]

RULE 6.4 CHALLENGES

(a) **Challenges to the Entire Panel.** Challenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law in their selection.

(b) **Voir Dire.** A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining

community service. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk. [Amended effective July 1, 1984.]

Comment

The rule codifies the existing practice allowing the court to impose special conditions on its sentence. The rule makes it clear that special conditions, including a specified schedule, may likewise be imposed with respect to an order for community service, restitution, or costs. (See RCW 9.94A.200, referring to terms and conditions of restitution.)

The rule is, of course, subject to any statutory restrictions on the court's sentencing authority. For example, a statute requires that a sentence of confinement for more than 60 days must be served on consecutive days (RCW 9.94A.120). The rule would not permit the court to order that such a sentence be served on intermittent days.

RULE 7.4 ARREST OF JUDGMENT

(a) **Arrest of Judgments.** Judgment may be arrested on the motion of the defendant for the following causes: (1) Lack of jurisdiction of the person or offense; (2) the indictment or information does not charge a crime; or (3) insufficiency of the proof of a material element of the crime.

(b) **Time for Motion; Contents of Motion.** A motion for arrest of judgment must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time until such time as judgment is entered.

The motion for arrest of judgment shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) **New Charges After Arrest of Judgments.** When judgment is arrested and there is reasonable ground to believe that the defendant can be convicted of an offense properly charged, the court may order the defendant to be recommitted or released to answer a new indictment or information. If judgment was arrested because there was no proof of a material element of the crime the defendant shall be dismissed.

(d) **Rulings on Alternative Motions in Arrest of Judgment or for a New Trial.** Whenever a motion in arrest of a judgment and, in the alternative, for a new trial is filed and submitted in any superior court in any criminal cause tried before a jury, and the superior court enters an order granting the motion in arrest of judgment, the court shall, at the same time, in the alternative, pass upon and decide in the same order the motion for a new trial. The ruling upon the motion for a new trial shall not become effective unless and until the order granting the motion in arrest of judgment is

reversed, vacated, or set aside in the manner provided by law.

[Rule 7.4(d)(2) rescinded effective July 1, 1976; remainder of Rule 7.4(d) consolidated effective September 1, 1984; amended effective September 1, 1991.]

RULE 7.5 NEW TRIAL

(a) **Grounds for New Trial.** The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
- (2) Misconduct of the prosecution or jury;
- (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
- (4) Accident or surprise;
- (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
- (6) Error of law occurring at the trial and objected to at the time by the defendant;
- (7) That the verdict or decision is contrary to law and the evidence;
- (8) That substantial justice has not been done.

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

(b) **Time for Motion; Contents of Motion.** A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

The motion for a new trial shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) **Time for Affidavits.** When a motion for a new trial is based upon affidavits they shall be served with the motion. The prosecution has 10 days after such service within which to serve opposing affidavits. The court may extend the period for submitting affidavits to a time certain for good cause shown or upon stipulation.

(d) **Statement of Reasons.** In all cases where the court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record which cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

community service. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk. [Amended effective July 1, 1984.]

Comment

The rule codifies the existing practice allowing the court to impose special conditions on its sentence. The rule makes it clear that special conditions, including a specified schedule, may likewise be imposed with respect to an order for community service, restitution, or costs. (See RCW 9.94A.200, referring to terms and conditions of restitution.)

The rule is, of course, subject to any statutory restrictions on the court's sentencing authority. For example, a statute requires that a sentence of confinement for more than 60 days must be served on consecutive days (RCW 9.94A.120). The rule would not permit the court to order that such a sentence be served on intermittent days.

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(b) **Time for Motion; Contents of Motion.** A motion for arrest of judgment must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time until such time as judgment is entered.

The motion for arrest of judgment shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) **New Charges After Arrest of Judgments.** When judgment is arrested and there is reasonable ground to believe that the defendant can be convicted of an offense properly charged, the court may order the defendant to be recommitted or released to answer a new indictment or information. If judgment was arrested because there was no proof of a material element of the crime the defendant shall be dismissed.

(d) **Rulings on Alternative Motions in Arrest of Judgment or for a New Trial.** Whenever a motion in arrest of a judgment and, in the alternative, for a new trial is filed and submitted in any superior court in any criminal cause tried before a jury, and the superior court enters an order granting the motion in arrest of judgment, the court shall, at the same time, in the alternative, pass upon and decide in the same order the motion for a new trial. The ruling upon the motion for a new trial shall not become effective unless and until the order granting the motion in arrest of judgment is

reversed, vacated, or set aside in the manner provided by law.

[Rule 7.4(d)(2) rescinded effective July 1, 1976; remainder of Rule 7.4(d) consolidated effective September 1, 1984; amended effective September 1, 1991.]

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(a) **Grounds for New Trial.** The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
- (2) Misconduct of the prosecution or jury;
- (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
- (4) Accident or surprise;
- (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
- (6) Error of law occurring at the trial and objected to at the time by the defendant;
- (7) That the verdict or decision is contrary to law and the evidence;
- (8) That substantial justice has not been done.

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

(b) **Time for Motion; Contents of Motion.** A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

The motion for a new trial shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) **Time for Affidavits.** When a motion for a new trial is based upon affidavits they shall be served with the motion. The prosecution has 10 days after such service within which to serve opposing affidavits. The court may extend the period for submitting affidavits to a time certain for good cause shown or upon stipulation.

(d) **Statement of Reasons.** In all cases where the court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record which cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(e) **Disposition of Motion.** The motion shall be disposed of before judgment and sentence or order deferring sentence.

[Formerly CrR 7.6. Amended effective September 1, 1984. Renumbered as CrR 7.5 and amended effective December 26, 2000.]

RULE 7.6 PROBATION

(a) **Probation.** After conviction of an offense the defendant may be placed on probation as provided by law.

(b) **Revocation of Probation.** The court shall not revoke probation except after a hearing in which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant is entitled to be represented by counsel and may be released pursuant to CrR 3.2 pending such hearing. Counsel shall be appointed for a defendant financially unable to obtain counsel.

[Formerly CrR 7.5. Renumbered as CrR 7.6 effective December 26, 2000.]

RULE 7.7 POST-CONVICTION RELIEF [RESCINDED]

[Rescinded effective July 1, 1976.]

RULE 7.8 RELIEF FROM JUDGMENT OR ORDER

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, 100, 130, and 140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(c) Procedure on Vacation of Judgment.

(1) **Motion.** Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) **Transfer to Court of Appeals.** The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) **Order to Show Cause.** If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

[Adopted effective September 1, 1986; amended effective September 1, 1991; June 24, 2003; September 1, 2007.]

8. MISCELLANEOUS

RULE 8.1 TIME

Time shall be computed and enlarged in accordance with CR 6.

RULE 8.2 MOTIONS

Rules 3.5 and 3.6 and CR 7(b) shall govern motions in criminal cases.

[Amended effective September 1, 1995.]

RULE 8.3 DISMISSAL

(a) **On Motion of Prosecution.** The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

(b) **On Motion of Court.** The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

[Amended effective September 1, 1995.]

RCW 10.93.070

General authority peace officer — Powers of, circumstances.

In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefor by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:

- (1) Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs;
- (2) In response to an emergency involving an immediate threat to human life or property;
- (3) In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority;
- (4) When the officer is transporting a prisoner;
- (5) When the officer is executing an arrest warrant or search warrant; or
- (6) When the officer is in fresh pursuit, as defined in RCW 10.93.120.

[1985 c 89 § 7.]

RCW 10.93.120

Fresh pursuit, arrest.

(1) Any peace officer who has authority under Washington law to make an arrest may proceed in fresh pursuit of a person (a) who is reasonably believed to have committed a violation of traffic or criminal laws, or (b) for whom such officer holds a warrant of arrest, and such peace officer shall have the authority to arrest and to hold such person in custody anywhere in the state.

(2) The term "fresh pursuit," as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.

[1985 c 89 § 12.]

RCW 46.61.024

Attempting to elude police vehicle — Defense — License revocation.

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

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

(3) The license or permit to drive or any nonresident driving privilege of a person convicted of a violation of this section shall be revoked by the department of licensing.

[2003 c 101 § 1; 1983 c 80 § 1; 1982 1st ex.s. c 47 § 25; 1979 ex.s. c 75 § 1.]

Notes:

Severability — 1982 1st ex.s. c 47: See note following RCW 9.41.190.

AMENDMENT VI

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT (XIV)

ss.1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

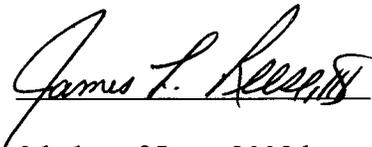
PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

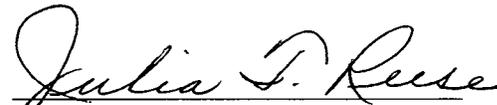
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 8th day of June, 2009, he personally hand delivered, the original and one(1) copy of Appellant's Brief in State of Washington v. Daniel Henry Bresler, No. 38606-2-II to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant, Daniel Henry Bresler, at his last known address: Daniel Henry Bresler, 134 Deer Haven Drive, Sequim, WA 98382.



Signed and Attested to before me this 8th day of June, 2009 by
James L. Reese, III.



Notary Public in and for the State of
Washington residing at Port Orchard.
My Appointment Expires: 4/04/13