

No. 40278-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARIO CHARLES,

Appellant.

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IDENTITY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY
The Honorable, Judge Gary R. Tabor
Cause No. 09-1-01228-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
1. <u>The trial court's refusal to allow testimony from Mr. Charles' parents was a reasonable exercise of discretion given the lack of relevance of the testimony</u>	2
2. <u>There was sufficient evidence adduced by the State to prove the charge of Bail Jumping beyond a reasonable doubt.</u>	7
3. <u>Mr. Charles' Fourteenth Amendment rights were not violated because the trial court's instructions to the jury did not relieve the State of its burden of proof</u>	11
4. <u>There was no violation of Mr. Charles' Sixth and Fourteenth Amendment right to trial by jury because the testimony submitted by the State's witnesses was permissible and did not include opinion evidence.</u>	15
5. <u>The testimony of the Deputy Prosecutor was not a constitutional violation.</u>	21
6. <u>Defense counsel's decision not to object was proper as it was consistent with the overall defense strategy at trial.</u>	22

7. The 2008 amendments were constitutional and as such, the Prosecuting Attorney's Statement of Criminal History was prima facie evidence of the Appellant's criminal history..... 25

D. CONCLUSION..... 32

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

Neder v. United States,
527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)..... 13-14

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 24

Washington v. Texas,
388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)..... 5

Washington Supreme Court Decisions

In re Pers. Restraint of Duncan,
167 Wn.2d 398, 219 P.3d 666 (2009) 3

In re Pers. Restraint of Goodwin,
146 Wn.2d 861, 50 P.3d 618 (2002) 30-31

In re Pers. Restraint of Pirtle,
136 Wn.2d 467, 965 P.2d 593 (1996) 23

Mayer v. Sto Indus., Inc.,
156 Wn.2d 677, 132 P.3d 115 (2006) (citation omitted)..... 3

State v. Bergeron,
105 Wn.2d 1, 711 P.2d 1000 (1985) 13

State v. Bergstrom,
162 Wn.2d 87, 169 P.3d 816, (2007) 30

State v. Burri,
87 Wn.2d 175, 550 P.2d 507 (1976) 14

State v. Cheatam,
150 Wn.2d 626, 81 P.3d 830 (2003) 16

State v. Delmarter,
94 Wn.2d 634, 618 P.2d 99 (1980) 6

<i>State v. Emmanuel</i> , 42 Wn.2d 799, 259 P.2d 845 (1953)	12
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999)	26-28
<i>State v. Golladay</i> , 78 Wn.2d 121, 470 P.2d 191 (1970)	14
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996)	23
<i>State v. Hudlow</i> , 99 Wn.2d 1; 659 P.2d 514 (1983)	5
<i>State v. Johnson</i> , 100 Wn.2d 607, 674 P.2d 145 (1983)	12
<i>State v. Majors</i> , 94 Wn.2d 354, 616 P.2d 1237 (1980)	31
<i>State v. McFarland</i> , 127 Wn.2d 332, 899 P.2d 1251 (1995)	24
<i>State v. Moen</i> , 129 Wn.2d 535, 919 P.2d 69 (1996)	30
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997) <i>cert. denied</i> , 523 U.S. 1008 (1998)	3, 23
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990)	16
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	23
<i>State v. Wanrow</i> , 88 Wn.2d 221, 559 P.2d 548 (1977)	14

Decisions Of The Court Of Appeals

<i>Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993).....	15, 18
<i>State v. Aguilar</i> , 153 Wn. App. 265; 223 P.3d 1158 (2009).....	10
<i>State v. Allen</i> , 50 Wn. App. 412, 749 P.2d 702 (1988).....	19
<i>State v. Ball</i> , 97 Wn. App. 534; 987 P.2d 632; (1999).....	6
<i>State v. Bryant</i> , 89 Wn. App. 857; 950 P.2d 1004 (1998).....	6
<i>State v. Downing</i> , 122 Wn. App. 185, 93 P.3d 900 (2004).....	4
<i>State v. Fisher</i> , 139 Wn. App. 578, 161 P.3d 1054 (2007).....	9
<i>State v. Gohl</i> , 109 Wn. App. 817, 37 P.3d 293 (2001).....	7
<i>State v. Hudson</i> , 150 Wn. App. 646, 208 P.3d 1236 (2009).....	16
<i>State v. Huynh</i> , 49 Wn. App. 192, 742 P.2d 160 (1987) <i>review denied</i> , 109 Wn.2d 1024 (1988)	20
<i>State v. Jones</i> , 59 Wn. App. 744, 801 P.2d 263 (1990).....	19, 22
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989).....	17, 20
<i>State v. Pope</i> , 100 Wn. App. 624; 999 P.2d 51 (2000).....	10

State v. Sanders,
66 Wn. App. 380, 832 P.2d 1326 (1992)..... 15, 19

State v. Wilber,
55 Wn. App. 294, 777 P.2d 36 (1989)..... 17, 22

Statutes and Rules

Adult Sentencing Guidelines Manual 29-30, 32

ER 401 3

ER 402 2-3

ER 403 5

ER 704 18

Laws of 2008, ch. 231, § 1 26

RCW 9.94A.500(1)..... 25-26, 28

RCW 9.94A.525(19)..... 31

RCW 9.94A.530(2)..... 25-27, 29

RCW 9A.08.010(l)(b)..... 11

RCW 9A.76.170 1, 5, 8

RCW 9A.76.170(1)..... 6-10, 14

RCW 9A.76.170(2)..... 4

RCW 46.61.024..... 18

Sentencing Reform Act (SRA)..... 26-30

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

The State accepts the Appellant's assignments of error.

B. STATEMENT OF THE CASE.

The Respondent accepts the Appellant's statement of the case, with the following additions: On Sept. 1, 2009, the day of Mr. Charles' arraignment, he signed the Conditions of Release and the Order Setting Trial Date, which listed the dates of subsequent hearings, including the status hearing set for Nov. 25, 2009. (01/27-8/09 RP at 78).

On Nov. 25, 2009, when Mr. Charles' case was called before the court, Mr. Charles was not present in the courtroom and thus did not appear before the court (01/27-8/09 RP at 102). Mr. Charles' defense attorney testified at trial, "after his name was called and he wasn't there, I went back out into the hall to tell him to come inside but he was gone". (RP at 105). A subsequent bench warrant was issued pursuant to *RCW 9A.76.170*.

At trial, the testimony of Officer Howson was substantiated by video and audio footage of the pursuit; this video was viewed by the jury at the time Officer Howson's testified (01/27-8/09 RP at 38 - 41).

Deputy Prosecutor Jackson's testimony was substantiated by documents, including the Conditions of Release and the Order Setting Trial Date, which included Mario Charles' signature.(01/27-8/09 RP at 79-80). These documents were entered into evidence so they could be reviewed by the jury. (01/27-8/09 RP at 80.)

In response to the charge of Eluding, defense counsel focused on disputing the identity of the driver; this argument included acknowledgment that the driver on the videotape was driving recklessly and attempting to elude the police. (01/27-8/10 RP at 127).

C. ARGUMENT.

1. The trial court's refusal to allow testimony from Mr. Charles' parents was a reasonable exercise of discretion given the lack of relevance of the testimony.

On appeal, Mr. Charles argues that the testimony of his parents was admissible under *ER 402*, and this testimony would have allowed defense counsel to argue that Mr. Charles "worked hard" to get to court that morning and any failure to appear was therefore caused by factors such as "the prosecutor's impatience in moving through the docket." (Appellant's Brief at 13). Whether Mr. Charles' failure to appear resulted from uncontrollable circumstances was at the discretion of the trier of fact. A trial court

abuses its discretion when its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). “A trial court’s decision is manifestly unreasonable if it adopts a view “that no reasonable person would take.” In *re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) citation omitted).

In this instance, the trial court refused to allow the testimony of Mr. Charles’ parents. (01/27-8/09 RP at 70). It is the State’s position that this was both a correct finding and within the trial court’s scope of discretion. Relevant evidence is any evidence that increases or decreases the likelihood that a material fact exists. *ER 401*. “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules, or by other rules or regulations applicable in the courts of this state.” *ER 402*. Evidence which is not relevant is not admissible. *Id.*

The testimony of Mr. Charles’ parents was not reasonably relevant at trial. “The elements of Bail Jumping are satisfied if the defendant (1) was held for, charged with, or convicted of a

particular crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required." *State v. Downing*, 122 Wn. App. 185, 192, 93 P.3d 900 (2004). The testimony of his parents described only the transportation Mr. Charles took on the morning of November 25, 2009. (01/27-8/09 RP at 7). This information is not related to the statutory elements of the charge nor is it within the scope of a recognized affirmative defense to Bail Jumping. *RCW 9A.76.170(2)* states:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

Further, the court allowed Mr. Charles to present the same argument through more direct evidence, namely the testimony of the defense attorney who was to represent him at his November 25, 2009 appearance. The defense attorney, Debra Murphy, testified to the fact that when she saw Charles that morning, he was sleeping outside the courtroom, and when his case was called, he did not appear before the court (01/27/10 RP at 102, 104-5). Mr.

Charles' defense attorney testified at trial, "after his name was called and he wasn't there, I went back out into the hall to tell him to come inside but he was gone". (RP at 105).

While a criminal defendant has the right to present a defense, there is no constitutional right to have irrelevant or inadmissible evidence admitted in his or her defense. *State v. Hudlow*, 99 Wn.2d 1; 659 P.2d 514 (1983). (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). Finally, even if this testimony were to be considered relevant, the trial court retained discretion to deem it inadmissible under *ER 403*, which provides for "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time."

On appeal, Mr. Charles also contends that the State provided only circumstantial evidence as to the charge of Bail Jumping because the State's witness relied on documentary evidence when he testified. (Appellant's Brief at 13). It is unclear how a failure to provide direct evidence relates to the Appellant's challenge of the lower court's refusal to allow the testimony of Mr. Charles' parents. Regardless, the State's position is that *RCW 9A.76.170* does not specify the type of evidence required to prove

guilt. It states:

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of Bail Jumping.

[RCW 9A.76.170(1)]

Mr. Charles offers no reasonable basis by which to infer the Legislature intended only direct evidence sufficient to prove the elements of the crime. Washington case law holds that circumstantial evidence is equally reliable to direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The State submits that it would be incongruous to assume the Legislature intended to depart from this long-standing principle in the unique instance of Bail Jumping. Indeed, Washington courts have upheld Bail Jumping convictions that were proven solely using circumstantial evidence. See *State v. Bryant*, 89 Wn. App. 857; 950 P.2d 1004 (1998); *State v. Ball*, 97 Wn. App. 534; 987 P.2d 632; (1999).

At trial, both defense and State witnesses confirmed in testimony that Mr. Charles was never seen inside the courtroom on November 25, 2009, nor did he appear before the judge. (01/27-

8/09 RP at 102). When reviewing a claim of insufficiency of the evidence, a court on appeal must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *State v. Gohl*, 109 Wn. App. 817, 823, 37 P.3d 293 (2001). Any rational trier of fact could conclude beyond a reasonable doubt that Mr. Charles failed to appear at his November 25, 2009 hearing; thus the evidence is sufficient to support Mr. Charles' conviction of Bail Jumping.

2. There was sufficient evidence adduced by the State to prove the charge of Bail Jumping beyond a reasonable doubt.

Mr. Charles disputes both the sufficiency of the State's evidence and the interpretation given to the term "appear" within *RCW 9A.76.170(1)*, alleging the term is ambiguous. The State submits that there is no ambiguity in this term. Based upon the plain language and the purpose of the statute, in addition to ordinary court procedure and the use and wording of related court documents, including Conditions of Release, the meaning of "appear" in *RCW 9A.76.170(1)* is clear.

The Appellant argues it is possible that "because Mr. Charles came into sight on the appointed day, as Ms. Murphy

testified, he did not fail to appear and the evidence was insufficient to convict him of Bail Jumping.” (Appellant’s Brief at 18). Mr. Charles provides no authority to support his argument. The State submits that the statutory elements of this offense speak directly to whether one in fact appears before the judge in the courtroom.

RCW 9A.76.170(1) states the following:

Any person having been released by court order or admitted to bail with knowledge of the requirement of *a subsequent personal appearance before any court of this state*, or of the requirement to report to a correctional facility for service of sentence, and who *fails to appear* or who fails to surrender for service of sentence as required is guilty of Bail Jumping.

[Emphasis added]

Mr. Charles’ argument twists the purpose and meaning of the statute, as well as common understanding of court procedure, beyond reasonable argument. The Appellant contends that the term “to appear” can be interpreted multiple ways, despite his own citation to the specialized legal meaning, which defines “appear” as “to come formally, especially as a party or counsel, *to a proceeding before a tribunal, authority, etc.*” (Appellant’s Brief at 17, emphasis added). It is the State’s position this definition applies in any statutory interpretation of *RCW 9A. 76.170*, thus resolving any ambiguity. The rule of lenity does not apply when a statute is

unambiguous. *State v. Fisher*, 139 Wn. App. 578, 585, 161 P.3d 1054 (2007). This definition is substantiated by consideration of the purpose of the statute. The mischief that *RCW 9A.76.170(1)* seeks to address is the failure of a defendant to appear before the authority in question, be that a tribunal, a judge or a magistrate, for the purpose of setting the next hearing so that the defendant's case can continue through the court process.

Finally, defendants appear daily across the state in response to similar notification, reflecting a common interpretation of this summons by defendants and courts alike. This understanding is reflected in the multiple notices of court appearance which are issued to defendants, including Mr. Charles, at arraignment. (01/27-8/09 RP at 77-8). At arraignment, Mr. Charles received and signed multiple documents notifying him of impending court dates at which the court required him to appear. *Id.*

This was not Mr. Charles' first time dealing with the criminal justice system in general nor dealing with the Thurston County Superior Court specifically; as Mr. Charles had seven prior felony convictions at the time, he was familiar with court procedure and thus could reasonably be expected to be familiar with what a court appearance requires. Given these considerations, it is beyond the

scope of credulity to interpret a court summons to mean nothing more than being in the vicinity of the courthouse.

Mr. Charles also contends the evidence was insufficient at trial because the prosecutor failed to prove the November 25, 2009 hearing took place in the Criminal Presiding Department of the Superior Court, held at Building Number 2 at 2000 Lakeridge Drive Southwest. The State submits that the specific address and room number of the court house is an element outside the scope of the requisite elements the State must prove. Washington case law recognizes that a prosecution for Bail Jumping under *RCW 9A.76.170(1)* does not even require the State to prove that the court actually convened on the date the defendant was scheduled to appear. *State v. Aguilar*, 153 Wn. App. 265; 223 P.3d 1158 (2009).

“The elements of bailing jumping are met if the defendant: (1) was held for, charged with, or convicted of a particular crime, (2) was released by court order or admitted to bail with the requirement of a subsequent personal appearance, and (3) knowingly failed to appear as required.” *State v. Pope*, 100 Wn. App. 624; 999 P.2d 51 (2000). “In addition to these elements, the statute implies a nexus between the crime for which the defendant was held, charged, or

convicted and the later personal appearance.” *Id.* “A person knows or acts knowingly or with knowledge when he or she (1) is aware of a fact, circumstance, or result described by a statute as being a crime or (2) has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute as being a crime.” *RCW 9A.08.010(l)(b)*. The State’s burden of proof relating to Mr. Charles’ failure to knowingly appear as required was met by the totality of the trial evidence and did not require proof as to exact address of the courtroom.

The State’s argument at trial was substantiated by overwhelming evidence, including the testimony of two witnesses, both of whom attended the November 25, 2009 hearing and neither of whom saw Mr. Charles present himself before the court. (01/27-8/09 RP at 84-5, 104). A bench warrant for Mr. Charles was issued the same day. *Id.* at 86. All evidence points to the conclusion that Mr. Charles never appeared before the court on November 25, 2009, and was thus sufficient to prove Mr. Charles guilty beyond a reasonable doubt.

3. Mr. Charles’ Fourteenth Amendment rights were not violated because the trial court’s instructions to the jury did not relieve the State of its burden of proof.

Mr. Charles takes issue with the “to convict” jury instruction, which describes the required element “that on or about the November 25, 2009, the defendant failed to appear before a court.” (Jury Instruction Number 11 at 7). Mr. Charles contends the omission of the qualifier “as required” constitutes reversible error. The State’s position is that the instruction which stipulated the jury to find whether or not the defendant failed “to appear” was correct because it did not reasonably affect the jury’s understanding of the required elements of the charge of Bail Jumping. In the alternative, the State submits that Mr. Charles received a fair trial notwithstanding the omission, and thus any omission was a harmless error.

“A ‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). “A defendant does not receive a fair trial if an instruction creates a situation where the jury must guess at the meaning of an essential element of a crime, or if it is possible for the jury to assume that an essential element does not need to be proved.” *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983) overruled on other

grounds in *State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985). Neither of these concerns are raised by the facts in the present case. The omission in instruction Number 11 did not suggest that an essential element need not be proved. It can reasonably be implied from the posting of bail, the notice to appear that was submitted to Mr. Charles directly, and purpose and language of the relevant statute, that neither the court nor the jury considered the question as to whether Mr. Charles was in fact required to attend the hearing to be a disputed element. The disputed issue at trial was whether Mr. Charles' attempts to reach the courtroom constituted a sufficient defense, not about whether Mr. Charles was not required to attend the hearing in the first place. In closing arguments, defense counsel raised no concerns or questions as to whether Mr. Charles was required to be present at the hearing. (01/27-8/09 RP at 137).

In the alternative that this court finds jury instruction number 11 to be in error, the State takes the position that any error was harmless. *Neder v. United States* held that a jury instruction which relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). An instruction

that omits an element of the offense may not necessarily taint the entire trial or otherwise make it unreliable to determine guilt or innocence. *Neder*, 527 U.S. at 9. It is thus subject to a harmless error analysis.

An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). It is the State's burden to show that it was harmless. *State v. Burri*, 87 Wn.2d 175, 182, 550 P.2d 507 (1976). "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." *State v. Wanrow*, 88 Wn. 2d 221, 559 P.2d 548 (1977) (quoting *State v. Golladay*, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)).

The State's evidence, namely the original *Order and Notice Setting Trial Date*, received by Mr. Charles and admitted into evidence as Exhibit No. 6 (01/27-8/10 RP at 88), established beyond a reasonable doubt that Mr. Charles himself was aware of the hearing and understood that he was required to attend the hearing, per *RCW 9A.76.170(1)*. Given this evidence in addition to the testimony previously discussed, it is not reasonable to infer that

the jury would have reached a different conclusion with regard to Mr. Charles' guilt of the Bail Jumping charge had the instruction been more explicit. Any error with regard to the instructions is therefore harmless.

4. There was no violation of Mr. Charles' Sixth and Fourteenth Amendment right to trial by jury because the testimony submitted by the State's witnesses was permissible and did not include opinion evidence.

Whether testimony "is an impermissible opinion on guilt or a permissible opinion pertaining to an ultimate issue requires the consideration of: (1) the particular circumstances of the case, (2) the type of witnesses called, (3) the nature of the testimony and the charges, (4) defenses invoked, and (5) the other evidence presented to the trier of fact." *Seattle v. Heatley*, 70 Wn. App. 573, 579; 854 P.2d 658 (1993). "Significantly, opinion testimony as to guilt does not necessarily implicate a constitutional right." *Id.* at 585-86.

"Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence it is not improper opinion testimony." *State v. Sanders*, 66 Wn. App. 380, 832 P.2d 1326 (1992). Admission of expert opinions is a matter left to the

sound discretion of the trial judge. *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990). Appellate courts reverse only in the instance of abuse of that discretion. *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

“Abuse requires a showing that the trial judge's decision is based on untenable grounds or untenable reasons.” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). Given this standard, the State takes the position that the trial judge properly exercised his discretion in admitting the police officers' testimony.

Mr. Charles paraphrases Sergeant Martin's testimony as stating that “the driver had successfully ‘eluded’ Officer Howson and the driver was clearly trying to get away from law enforcement. (Appellant's Brief at 26, citing 01/27-8/09 RP at 64). This characterization takes Sergeant Martin's testimony out of context. At this point in his testimony, Sergeant Martin describes police action taken in securing the parameter during the police pursuit of the suspect. (01/27-8/10 RP at 64). When questioned as to the purpose of setting up a parameter, Sergeant Martin responded “because *typically* in a pursued situation, they're trying to get away from us.” (*Id.*, emphasis added).

In general, testimony deemed to be an opinion as to a defendant's guilt must relate directly to the defendant. *State v. Wilber*, 55 Wn. App. 294, 777 P.2d 36 (1989). Sergeant Martin's statement, based both on the context in which he made it, and the language he used, was a more general description of events which often or "typically" occur in circumstances of police pursuit, rather than a specific opinion as to the defendant's actions in this particular case.

Analogously in *State v. Madison*, the Appellate court found no constitutional error in a social worker's testimony that the complaining witness exhibited behavior "typical of a sex abuse victim." *State v. Madison*, 53 Wn. App. 754, 760; 770 P.2d 662 (1989). The basis for the court's conclusion was that the testimony was not an opinion on the guilt or innocence of the defendant, nor did it offer an opinion on the credibility of the victim. *Id.*

Mr. Charles also challenges Officer Howson's testimony he saw "reckless driving." Officer Howson described the audio/visual equipment in his patrol car as "recording the pursuit, the traffic violations, the reckless driving, the speeds [. . .] of the pursuit." (01/27-8/10 CP at 37). Mr. Charles was facing one charge of Attempting to Elude a Pursuing Police Vehicle, under *RCW*

46.61.024. The statute states that "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." *RCW 46.61.024*.

ER 704 provides that "testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *ER 704, see Seattle v. Heatly, 70 Wn. App. 573; 854 P.2d 658 (1993)*.

In this instance, it is the State's position that merely because the statement in question touches upon "ultimate issues," past case law demonstrates that there is a realm of permissible opinion, and Officer Howson's statement in this case fall within this realm. Officer Howson's statements were based on his own experience and observation as a participant in the police pursuit. Apart from Officer Howson's testimony, there was video footage of the pursuit, allowing the jury to make an independent determination as to the recklessness of the driving. Washington courts have been less inclined to find an improper opinion in those instances where the evidentiary foundation "directly and logically" supported the officer's

conclusion. *State v. Allen*, 50 Wn. App. 412, 418, 749 P.2d 702 (1988), *see also State v. Sanders*, 66 Wn. App. 380, 832 P.2d 1326 (1992).

For example, in *State v. Jones*, the court held that expert testimony as to the cause of death in a manslaughter trial did not constitute an opinion on the guilt of the defendant and therefore did not invade the jury's function, even though it dealt with an issue for the trier of fact (*i.e.* credibility). *State v. Jones*, 59 Wn. App. 744, 801 P.2d 263 (1990). "In so holding, the court noted that the expert's opinion was based on inferences from the evidence, not on an opinion of a witness' credibility, and the jury was still left to decide whether it was Jones who actually inflicted the injury." *Id.* at 749-51.

In the present case, while recklessness was a requisite element of the charge, Mr. Charles' defense at trial focused on disputing the identity of the driver, and did not dispute whether the driving was reckless. In closing arguments, defense counsel acknowledged the car which Officer Howson pursued was indeed driving recklessly:

"Ladies and gentlemen, I'm not going to stand before you and tell you that there was not a car that drove recklessly away from Trooper Howson that night. That

. . . fact has been clearly proven. You've seen the video . . . the driver of that car was eluding the police. That is clear.”

[01/27-8/10 RP at 127].

While closing arguments are not evidence, the State submits that the videotape evidence of reckless driving was so overwhelming that the defense counsel could not reasonably deny it.

Opinion evidence which does not meet the threshold of manifest constitutional error cannot be raised on appeal. *Madison*, 53 Wn. App. at 762. Should this court find any of the testimony to be improper, the State submits that the judgment of the trial court be affirmed because the admission of the officers' testimony was harmless error. The erroneous admission of expert testimony is not prejudicial unless, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Huynh*, 49 Wn. App. 192, 198, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988). *Huynh*, 49 Wn. App. at 198.

While the Appellant argues that this testimony materially affected the outcome of the trial, he does not point to any particular evidence which might have persuaded the jury of his defense of mistaken identity. By contrast, the State submits there was

sufficient evidence before the trier of fact to convict Mr. Charles of Attempting to Elude. The State points specifically to Officer Howson's testimony in which he identifies Mr. Charles as the driver of the eluding truck, Sgt. Martin's testimony that he found Mr. Charles in the vicinity of the truck once they had secured the perimeter of the area, and that Mr. Charles was sweaty and breathing hard, and finally, the police videotape which recorded the reckless driving and portions of the pursuit. (01/27-8/09 RP at 24-5, 33, 61, 38).

5. The testimony of the Deputy Prosecutor was not a constitutional violation.

Mr. Charles further contests the testimony of the State's witness Scott Jackson, who testified both to general procedure surrounding court appearances and hearings, and to the personal observations he made at the hearing of November 25, 2009. On appeal, Mr. Charles argues that because Mr. Jackson is a deputy prosecutor, his statements attesting to the fact that Mr. Jackson did not see Mr. Charles in court at the hearing might be construed as explicit expert opinion as to Mr. Charles' guilt on the charge of Bail Jumping. However, Mr. Charles offers no precedent or case law to support this assertion.

The State's position is that because an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. This argument is supported by the case law. "It is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." *State v. Wilber*, 55 Wn. App. 294, 298, 777 P.2d 36 (1989). The State submits that Mr. Jackson's testimony was both relevant and admissible, and the trial court properly exercised discretion in allowing him to testify to his observations made on November 25, 2009. The trial court must be accorded broad discretion to determine the admissibility of ultimate issue testimony, *State v. Jones*, 59 Wn. App. 744, 751, 801 P.2d 263, (1990), and the Washington Supreme Court has expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt. *See State v. Wilber*, 55 Wn. App. 294, 298, 777 P.2d 36 (1989). On this basis, Mr. Charles' claim fails.

6. Defense counsel's decision not to object was proper as it was consistent with the overall defense strategy at trial.

The State's response to Mr. Charles' claim of ineffective counsel is two-fold. First, the State maintains that the trial record

demonstrates a comprehensive defense strategy presented at trial, namely to dispute the identity of the driver and not the recklessness of the driving. Therefore failure to object to opinion testimony, especially in light of supporting video evidence, was both reasonable and consistent with the overall defense presented at trial. Second, any finding of error made by the defense was harmless because the evidence presented at trial was overwhelming proof of guilt on both charges.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. *In the Matter of the Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593

(1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. See *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

Mr. Charles contends there was no legitimate strategy to explain defense counsel's failure to object to those statements made by the State's witnesses which are characterized in the Appellate Brief as "opinion evidence." Mr. Charles argues that "a reasonable jury could have decided that the driver of the pickup had driven unsafely but not recklessly, or that his driving did not relate to an effort to evade the law." (Appellate Brief at 29). The State points to defense counsel's closing statements, which demonstrate a strategy centered upon mistaken identity rather than a challenge to the driver's conduct (01/27-8/09 RP at 129). This approach is consistent with the video/audio recording of the pursuit, which the jury viewed (01/27-8/09 RP at 38-41).

The appellant argues again that a reasonable jury could have found Mr. Charles not guilty of Bail Jumping but for defense counsel's failure to object to the alleged opinion evidence of Scott Jackson. The State reiterates its argument, described in detail in

the second argument of Section C of this brief, beginning at page 6, that no reasonable jury could have found Mr. Charles not guilty of Bail Jumping based upon the assertion that he was in the vicinity of the courthouse. The State again reiterates that Mr. Charles interpretation of the legal requirement “to appear” is inconsistent with the context, wording and purpose of the statute, as well as inconsistent with standard court procedure, and thus falls beyond the scope of reasonable argument. As this argument fails to find any support in the facts of the case, and defense closing arguments advanced an argument that was consistent and rational given the videotaped evidence presented to the jury, Mr. Charles failed to establish ineffective assistance of counsel.

7. The 2008 Legislative amendments were constitutional and as such, the Prosecuting Attorney’s Statement of Criminal History was prima facie evidence of the Appellant’s criminal history.

Mr. Charles disputes the constitutionality of the process by which he was sentenced, specifically *RCW 9.94A.500(1)* and *RCW 9.94A.530(2)*. By extension, Mr. Charles also challenges the validity of the statement of prior offenses submitted by the prosecuting attorney, thus disputing the sentencing court’s calculation. The State maintains the constitutionality of the 2008 amendments and on this basis submits that the State met its

burden at sentencing. The State further submits the calculation of Charles' offender score was correct and that defense counsel acknowledged this by explicitly requesting a sentence within the standard range of the convicted offenses. Therefore, the right to challenge this statement was waived at sentencing, as the Appellant acknowledged the prior offenses and the court's calculation per *RCW 9.94A.530(2)*.

For sentencing proceedings conducted on or after June 12, 2008, the state Legislature amended the *Sentencing Reform Act (SRA)* in response to *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999) and other recent sentencing cases "in order to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history" *Laws of 2008*, ch. 231, § 1. It amended *RCW 9.94A.500(1)* to allow a prosecutor to prove a defendant's criminal history by submitting a "criminal history summary," which "shall be prima facie evidence of the existence and validity of the convictions listed therein." *RCW 9.94A.500(1)*. And it amended *RCW 9.94A.530(2)* to allow a sentencing court to rely on this summary if not objected to by the defendant, just as the court is allowed to rely on information contained in a presentence

report. *RCW 9.94A.530(2)*. Mr. Charles' sentencing proceedings took place on Feb. 3, 2010.

First, Mr. Charles claims his right to due process was violated by the 2008 amendment. Mr. Charles argues that because the right of protection against acknowledgment "is constitutionally based . . . [it] cannot be altered by statute," meaning that requiring the offender to object when the State presents the summary of criminal history would be an unconstitutional shifting of the burden. (Appellate Brief at 31). Importantly, however, the court in *Ford* bases its holding on the validity of the *SRA*'s requirements rather than constitutional protections of due process, suggesting that when the State's evidence is consistent with *SRA* requirements, it is sufficient to prove criminal history at sentencing.

In *Ford*, the issue was whether the State's bare assertion that the defendant's out-of-state convictions would be classified as felonies in Washington, combined with the defendant's failure to specifically object to that assertion, was sufficient under the *SRA* to authorize the sentence imposed. *Ford*, 137 Wn.2d at 476. Relying on *SRA* procedural requirements for analyzing comparability, the court held that it was not sufficient. *Ford*, 137 Wn.2d at 482. While the court in *Ford* discussed the minimal requirements of due

process at sentencing, it also emphasized that its conclusion should not be construed to place a heavier burden on the State than was required by the *SRA*. *Id.* This reasoning supports the argument that the holding in *Ford* was thus based on the *SRA* rather than the principle of due process. On this basis, the State submits these amendments to be constitutionally valid.

The State's criminal history summary was prima facie evidence of the defendants' prior convictions. *RCW 9.94A.500(1)*. As the State met the evidentiary requirements set out by the 2008 amendments, the burden of proof at sentencing was met by the State in this case. The State calculated, based upon seven prior felony convictions, an offender score of ten for Count I, Attempting to Elude and an offender score of seven for Count II, Bail Jumping. (CP at 8).

Mr. Charles challenges these calculations on appeal. He disputes the inclusion of additional points for two prior violent traffic convictions, and the inclusion of one point because he was on community custody at the time he committed the offense of Attempting to Elude. Charles argues these two offenses were not listed on the Statement of Criminal History. *See attached*, CP at 8. In fact, these specifications are listed on the Offender Scoring sheet

for Attempting to Elude, which was presented to the court and to the defense at sentencing. (03/03/09 RP at 4; see Adult Sentencing Guidelines Manual, Offender Scoring sheet, "Attempting to Elude Pursuing Police Vehicle").

It is the State's position that Charles waived his right to contest this calculation when he failed to object at sentencing, as a failure to object constitutes acknowledgement under *RCW 9.94A.530(2)*. When the State presented the summary to the court, the prosecutor noted that "I'll hand up the defendant's criminal history and *SRA* score sheets, and all of those have been examined by the defense, and I believe those are agreed." (03/03/09 RP at 4). There was no subsequent objection by defense counsel; rather, defense counsel stated, "I have reviewed Mr. Charles' prior convictions, specifically the charges of vehicular assault in 2004 and 2005; I have concluded that those are violent offenses under the *SRA*, and, accordingly despite Mr. Charles' request that I make an argument for a *DOSA* sentence, I have not – my reading of the statute precludes me from doing so". (RP at 7) Defense counsel then explicitly requested the court impose a sentence of 25 months on the Attempting to Elude conviction and 33 months on the Bail Jumping conviction. (03/03/10 RP at 6). Both

requests fell within the standard range based on the calculated offender scores (01/01/10 RP at 5-6; see Adult Sentencing Guidelines Manual).

It is the State's position that a request by defense counsel for a sentence within the standard range is sufficient to constitute acknowledgement and acceptance of the statement of criminal history and the calculated offender score. This is premised upon current law recognizing that if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed. *State v. Bergstrom*, 162 Wn.2d 87, 169 P.3d 816, (2007), citing *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

As Mr. Charles was sentenced in conformity with the SRA, the State cites the general rule that issues not raised in the trial court may not be raised for the first time on appeal. See *RAP 2.5(a)*; *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996).

In *Pers. Restraint of Goodwin*, the Washington Supreme Court held that a sentence is excessive if it is based on a miscalculated offender score, and a defendant cannot agree to

punishment greater than the Legislature has authorized. *Pers. Restraint of Goodwin*, 146 Wn.2d. However, this holding was qualified by the Court:

[I]n general a defendant cannot waive a challenge to a miscalculated offender score. There are limitations on this holding. While waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion. Thus, for example, waiver may be found where a defendant stipulates to incorrect facts [constituting an element of the charge].

Id at 874 (citing *State v. Majors*, 94 Wn.2d 354, 616 P.2d 1237 (1980)).

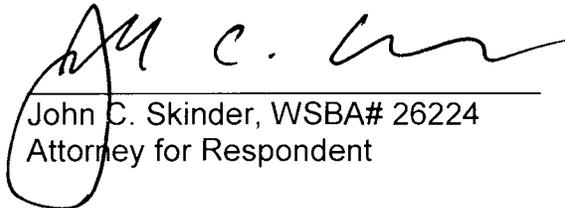
There was no miscalculation of Mr. Charles' offender score in this case. For Count I, Attempting to Elude, the Offender Scoring sheet required the State to double the number of Vehicular Homicide or Vehicular Assault convictions. As Mr. Charles had two prior Vehicular Assault convictions, this resulted in four points. He also had five other felony convictions, giving him a total of nine points for Adult Criminal History. It was further stipulated by *RCW 9.94A.525(19)* that "if the present conviction is for an offense committed while the offender was under community custody, add one point." This resulted in a total of ten points for Count I. See

Judgment and Sentence; see Adult Sentencing Guidelines Manual. The State did not add one point for community custody for Bail Jumping (as he was not under community custody at the time of the Bail Jumping offense), counting only Mr. Charles' seven previous convictions, and thus reached a total of seven points for Count II. *Id.*

D. CONCLUSION.

For the above reasons, the State respectfully requests this appeal be dismissed and the conviction affirmed.

Respectfully submitted this 9th day of JUNE, 2010.



John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

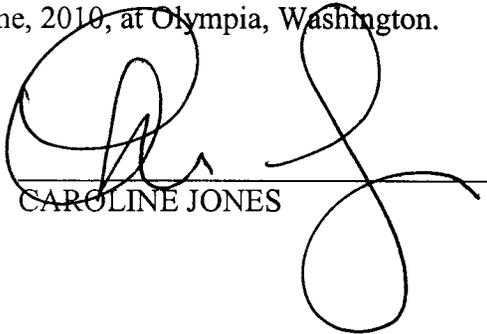
- US Mail Postage Prepaid
- ABC/Legal Messenger
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TO: JODI R. BACKLUND
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BY _____
DEPUTY

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

Dated this 9 day of June, 2010, at Olympia, Washington.


CAROLINE JONES