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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS QUACKENBUSH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 10-1-02467-2

Brief of Respondent

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the trial court abuse its discretion by allowing non-custodial out of court statements made by defendant into evidence for the purpose of assessing defendant's credibility? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts 2

C. ARGUMENT..... 7

 1. THE TRIAL COURT DID NOT ERR IN ADMITTING DEFENDANT'S OUT OF COURT STATEMENT WHERE IT WAS NOT A PRODUCT OF A CUSTODIAL INTERROGATION, AND WAS RELEVANT TO ASSESS DEFENDANT'S CREDIBILITY 7

D. CONCLUSION..... 17

Table of Authorities

State Cases

<i>State v. Boot</i> , 89 Wn. App. 780, 788, 950 P.2d 964 (1998)	8
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)	15
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	11
<i>State v. Chase</i> , 59 Wn. App. 501, 507, 799 P.2d 272 (1990).....	13, 14
<i>State v. Freeburg</i> , 105 Wn. App 492, 500, 20 P.3d 984 (2001)	14, 15
<i>State v. Grant</i> , 83 Wn. App. 98, 105, 920 P.2d 60 (1996)	8, 12
<i>State v. Hernandez</i> , 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), <i>review denied</i> , 140 Wn.2d 1015 (2000).....	8
<i>State v. Johnson</i> , 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).....	10
<i>State v. Lane</i> , 125 Wn.2d 825, 831, 889 P.2d 929 (1995)	8
<i>State v. Lillard</i> , 122 Wn. App. 422, 432, 93 P.3d 969 (2004), <i>review denied</i> 154 Wn.2d 1002 (2005).....	11
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	8
<i>State v. Olson</i> , 126 Wn.2d 315, 321, 893 P.2d 629 (1995)	10
<i>State v. Rehak</i> , 67 Wn. App. 157, 162, 843 P.2d 651 (1992)	7
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 362, 655 P.2d 697 (1982).....	8
<i>State v. Swan</i> , 114 Wn.2d 613, 658, 790 P.2d 610 (1990).....	7
<i>State v. Tharp</i> , 27 Wn. App. 198, 205, 616 P.2d 693 (1980) <i>affirmed</i> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	11
<i>State v. Wilson</i> , 60 Wn. App 877, 890, 808 P.2d 754 (1991)	12

Federal and Other Jurisdictions

Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602,
16 L.Ed.2d 694 (1966)..... 11

Rules and Regulations

CrR 3.5..... 8, 9, 10
ER 404(b)..... 7, 8, 9, 11, 12, 13, 15

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion by allowing non-custodial out of court statements made by defendant into evidence for the purpose of assessing defendant's credibility?

B. STATEMENT OF THE CASE.

1. Procedure

On June 8, 2010, the State charged defendant, Thomas Quackenbush, with one count of attempting to elude a pursuing police vehicle with an enhancement for endangering one or more people other than himself and the pursuing officer, and one count of driving while in suspended or revoked status in the third degree. CP 1-2. The State requested that the court dismiss the count of driving while license suspended on October 6, 2010. RP¹ 4-5. The State entered an amended information on October 22, 2010, reflecting the earlier dismissal. CP 66.

¹ Because the transcripts in this case are not all consecutively numbered, the state will refer to the consecutively numbered volumes for the pre-trial proceedings held on October 6, 2010, and October 7, 2010, and the return of the jury verdict on October 8, 2010 as RP, the transcript of the jury trial from the afternoon session of October 7, 2010 as RP(trial), and the transcript of the sentencing proceedings held on October 22, 2010 as RP(sentencing).

In a motion in limine, defendant's attorney moved to exclude defendant's statements to the arresting officer regarding having drugs in his system. RP 6. The trial court reserved ruling on the admissibility of those statements until after the CrR 3.5 hearing. RP 8. During the CrR 3.5 hearing, the court heard testimony from the two Pierce County Sheriff's deputies who were involved in defendant's arrest. RP 14, 27. The court held that defendant had been advised of and understood his rights, and that his statements regarding drug use were admissible for credibility and as an indicia of guilt. CP 60-65; RP 39-40.

Jury trial began before the Honorable Stephanie Arend on October 7, 2010. RP(trial) 1, 5. Defendant did not testify. RP(trial) 68. On October 8, 2010, the jury returned a guilty verdict, and answered yes on the special verdict. CP 54-55; RP 73, 75-76. Defendant's offender score was determined to be eight. CP 67-79; RP(sentencing) 5. The court sentenced defendant to a high end sentence of 22 months plus 366 days for the enhancement. CP 67-79; RP(sentencing) 5, 7. Defendant entered a timely notice of appeal on October 22, 2010. CP 80.

2. Facts

On May 29, 2010, Washington State Patrol Sergeant John Lizama, Trooper Albert Havenner and the rest of their detachment were performing seatbelt emphasis patrols. RP(trial) 9-10, 21. Just before 5:00 p.m., Trooper Havenner was traveling northbound on State Route 7 near the 10400 Block in Pierce County, Washington. RP(trial) 23. He noticed a

blue 1983 Chevy Monte Carlo approaching him going South. RP(trial) 23-24, 27. Trooper Havenner's car was separated from the blue vehicle by the center turn lane. RP(trial) 24. The trooper described the driver as "a white male probably in his mid-20s, dark hair, short hair, kind of a goatee." RP(trial) 25. The trooper noticed that the driver of the blue Chevy Monte Carlo was not wearing his seatbelt. *Id.* Trooper Havenner made a U-turn and caught up with the vehicle. RP(trial) 25. The trooper noted the license plate number of the vehicle. RP(trial) 26-27. The vehicle began to accelerate, and made a left turn without using the turn lane. RP(trial) 30. There was a red light for the left turn lane at the time the vehicle turned, and traffic coming northbound to "had to stop to avoid a collision with the Chevy." RP(trial) 29. Trooper Havenner activated the lights on his marked patrol car. RP(trial) 30. The driver of the vehicle did not pull over, despite the availability of areas safely do so. RP(trial) 30-31. The trooper then activated his emergency siren, at which point the driver of the Chevy got onto State Route 512 and accelerated up to 80 miles per hour. RP(trial) 31.

When the vehicle that Trooper Havenner was pursuing did not yield, the trooper radioed to Sergeant Lizama, and the Sergeant left his location in order to provide back up to Trooper Havenner. RP(trial) 12-13. Trooper Anderson also provided back up. RP(trial) 13. The three

troopers caught up to the Chevy on State Route 512 just before the exit to Steele Street. RP(trial) 13. All three vehicles had their lights and sirens activated as they pursued the vehicle. RP(trial) 14.

The vehicle ran through a second red light as it exited off 512 onto Steele Street. RP(trial) 32. The Chevy drove into oncoming traffic “causing that traffic to swerve out of the way.” RP(trial) 33. Other vehicles on the road pulled off to the right shoulder, and some “took evasive measures... to avoid the suspect vehicle from colliding into them.” RP(trial) 15. Because the driver of the Chevy continued to drive “erratically,” and because he had “run that red light at such a high speed,” through a residential area, Sergeant Lizama terminated the pursuit out of concern for public safety. RP(trial) 17, 35.

The following afternoon, May 30, 2010, Officer Chad Dickerson of the Pierce County Sheriff’s Department noticed a blue Monte Carlo at the 14200 block of “C” Street. RP(trial) 50-51. The Monte Carlo matched the description of, and had the same license plate number as, the Monte Carlo involved in the chase. RP(trial) 50-51. As the Monte Carlo turned into the parking lot of an apartment complex, Officer Dickerson activated his overhead lights and pulled in behind the vehicle. RP(trial) 50. He then got out of his car, approached the driver’s side door, and asked the sole occupant of the car for his license and registration. RP(trial) 50. Defendant handed the officer his Washington I.D. card. RP(trial) 50. The officer asked defendant if he had any warrants, and

defendant said, "No." RP(trial) 50. Officer Dickerson told the defendant to remain where he was, and returned to his patrol car to run the defendant's I.D. and license plate number through his computer. RP(trial) 52. The search showed that the defendant did have a warrant for his arrest. RP(trial) 55. Officer Dickerson radioed for backup and as he radioed the records department to verify the warrant, defendant got out of his car and ran away. RP(trial) 55-56. Officer Dickerson chased him around a building, and caught up with him as the defendant tried to climb over a fence. RP(trial) 56. Defendant did not obey Officer Dickerson's order to stop until the officer unholstered his taser. RP(trial) 57. Defendant got off the fence, and turned toward the officer but looked like he might fight or run again. RP(trial) 57. Officer Dickerson tasered the defendant, at which point defendant complied. RP(trial) 57.

After placing defendant in handcuffs and advising him of his rights, Officer Dickerson asked if he had run because he had a warrant. RP(trial) 57. Defendant answered, "Yes." RP(trial) 57. Officer Dickerson then asked defendant if that was why he had run from the State Patrol the day before, and defendant denied having run from the State Patrol. RP(trial) 58. The officer also asked defendant who the Monte Carlo belonged to, to which defendant replied that the car was his girlfriend's. RP(trial) 58. The car had not been reported stolen. RP(trial) 61.

Deputy DosRemedios arrived at the scene shortly after Officer Dickerson had taken defendant into custody. RP(trial) 58, 64. Deputy DosRemedios transported defendant because he had been on his way to the jail prior to the call. RP(trial) 65. During the trip to the jail, defendant told the deputy that he “might need to go to the hospital,” that he was thirsty, and that he was having difficulty breathing. RP(trial) 66. In order to determine if defendant had a medical condition Deputy DosRemedios asked him if he was on any drugs. RP(trial) 66. Defendant answered that he was not. RP(trial) 66. Defendant then began to vomit. RP(trial) 66. The deputy called for Tacoma Fire to meet them at the jail to provide medical attention. RP(trial) 67. Deputy DosRemedios asked defendant again “if anything was going on,” and defendant told him that he had used drugs that day. RP(trial) 67. Upon arriving at the jail, defendant was evaluated by Tacoma Fire, and transported to the hospital. RP(trial) 67.

On June 1, 2010, Trooper Havenner learned that the Pierce County Sheriff's Department had arrested defendant driving the same car that had eluded them the previous night. RP(trial) 36. The trooper looked at a photograph of defendant, and defendant's Washington Identification Card. RP(trial) 36-37. “After looking at the photo, there was no doubt in [his] mind that Thomas Quackenbush was driving the Chevy that [he] was chasing [the previous day].” RP(trial) 38.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN ADMITTING DEFENDANT'S OUT OF COURT STATEMENT WHERE IT WAS NOT A PRODUCT OF A CUSTODIAL INTERROGATION, AND WAS RELEVANT TO ASSESS DEFENDANT'S CREDIBILITY.

Defendant challenges the trial court's admission of testimony that after his arrest he told the arresting officer that he had used drugs prior to his arrest. Appellant's brief at 9. The admission or exclusion of relevant evidence falls within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 843 P.2d 651 (1992). The appellate court will not reverse the trial court's decision absent an abuse of discretion, which occurs only when no reasonable person would have taken the position adopted by the trial court. *Id.* at 162.

Otherwise admissible evidence may be excluded under ER 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) establish by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is

sought to be introduced; (3) determine the evidence is relevant to that purpose; and (4) find that its probative value outweighs its prejudicial effect. *State v. Hernandez*, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000), *citing State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). The court can admit bad acts if the evidence logically relates to a material issue before the jury and the probative value of the evidence outweighs the prejudicial effect. *State v. Boot*, 89 Wn. App. 780, 788, 950 P.2d 964 (1998), *citing State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

“The list of other purposes for which evidence of a defendant’s prior misconduct may be introduced is not exclusive.” *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 60 (1996) *citing State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). If the evidence is being admitted for other purposes, the court must determine whether the evidence is “relevant and necessary to prove an essential ingredient of the crime charged.” *Id.*

In the case at hand, the court held a CrR 3.5 hearing, at which time the judge also conducted analysis required for 404(b). RP 38. The court ruled that the officer had reasonable suspicion to stop defendant and ask for identification because he recognized the car and the license plate from the Washington State Patrol announcement from the previous day. CP 60-65; RP 38. Defendant’s statement that he did not have warrants was admissible because it was not a product of custodial interrogation. CP 60-65; RP 38.

When defendant fled from the officer and was caught, the officer immediately informed him of his *Miranda* rights. CP 60-65; RP 39. The court determined that because defendant affirmatively acknowledged that he understood his rights, and voluntarily answered the officer's questions, defendant had not invoked any of his rights, and the statements were admissible under CrR 3.5. CP 60-65; RP 39.

After being placed in the patrol car, defendant initiated the discussion with the deputy about his health. CP 60-65; RP 39. Defendant complained that he was having trouble breathing, and the deputy asked questions in order to assess defendant's medical condition. RP 30. Because the deputy was not seeking incriminating statements, and defendant initiated the conversation, defendant's statement that he had not taken any drugs, and his subsequent admission that he had taken drugs, were admissible under CrR 3.5. CP 60-65; RP 39.

In assessing the admissibility of the defendant's statement that he had taken drugs prior to his arrest under 404(b), the court weighed the probative value against the prejudicial effect. RP 40, 61. Defendant denied having eluded state troopers. RP 61. For that reason, the credibility of defendant was material to the questions before the jury both of whether the crime had occurred, and whether it was defendant who had committed it. RP 61. The court admitted the defendant's contradictory statements because they were relevant to the jury's determination of defendant's credibility. RP 40. The court offered to give a limiting

instruction to inform the jury that the statements were admitted only for the purpose of assessing defendant's credibility, but defendant declined. RP 40, 62-63.

- a. Defendant's statements were not subject to exclusion under *Miranda*.²

Defendant assigns error to the trial court's determination that the questions asked after defendant was in the patrol car were for the purpose of assessment of the defendant's medical needs. Appellant's brief at 1. An issue raised on appeal that is unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Defendant provides no argument or authority to support his claim, and therefore this Court should decline to review the issue.

The statement defendant made that he had taken drugs was properly admitted under *Miranda*, because defendant was advised of his rights as soon as he was arrested, and his statements were voluntary and defendant waived his rights. CP 60-65; RP 38-39. The defendant initiated the conversation about his medical condition. *Id.* The deputy testified that the questions the deputy asked leading to defendant's statement that he had taken drugs were asked for the purposes of medical diagnosis and treatment, not for the purposes of investigation or to elicit incriminating information. *Id.* The court found the deputies' testimony at the CrR 3.5

hearing credible. CP 60-65. Determinations of credibility are not reviewable on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The statements defendant made in the patrol car are admissible evidence.

- b. Defendant's statements were admissible under the 'same transaction' exception of ER 404(b).

“Under the res gestae or ‘same transaction’ exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004) *review denied* 154 Wn.2d 1002 (2005). The prosecution is entitled to use defendant’s acts to show the complete picture, and defendant may not insulate himself by committing a series of bad acts, the evidence of which cannot be used in the prosecution of any other. *Id. citing State v. Tharp*, 27 Wn. App. 198, 205, 616 P.2d 693 (1980) *affirmed*, 96 Wn.2d 591, 637 P.2d 961 (1981). Defendant first denied drug use then subsequently admitted drug use. These statements were close in time to defendant’s denial of having a warrant, running from police, subsequently acknowledging his warrant, and being stopped in the same car that had eluded police the previous night. Defendant’s

² *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

statements were necessary to complete the picture of events. The denial and the acknowledgement show a pattern of behavior in a short period of time. The statements were necessary to complete the picture.

- c. Defendant's statements were admissible under ER 404(b) to assess defendant's credibility.

Courts have found that a witness' credibility is a valid reason to admit evidence which may otherwise have been excluded under ER 404. In *Grant*, the court allowed evidence of Grant's prior assaults against his wife under 404(b) because that evidence was relevant and necessary for the assessment of the victim's credibility "and accordingly to prove that the charged assault actually occurred." 83 Wn. App at 106. The court noted that evidence presented that the crime had not occurred "would have gained unwarranted credibility" if the evidence of prior assaults was excluded. *Id.* quoting *State v. Wilson*, 60 Wn. App 877, 890, 808 P.2d 754 (1991). In the case at hand, Deputy DosRemedios would have told the jury that defendant stated he had not run from the State Patrol, and the jury would have no additional information from which to determine defendant's credibility. Because the statements would have been uncontested, they would have gained unwarranted credibility if the defendant's other statements had been excluded.

Evidence is also admissible under ER 404(b) if it tends to prove the identity of the perpetrator. ER 404(b). Courts have determined that evidence has a tendency to show identity where it shows a consciousness of guilt. *State v. Chase*, 59 Wn. App. 501, 507, 799 P.2d 272 (1990). In *Chase*, the court held that defendant's use of a false name was admissible to show a consciousness of guilt, which bolstered inferences of identity. 59 Wn. App. at 507. Defendant in this case denied that it was he who had eluded police the night prior to his arrest. RP(trial) 57. His credibility was therefore relevant to the issue of identity. The evidence presented was not presented to show that defendant was a bad person, and was therefore the person who had eluded police. RP(trial) 81-82; RP 39, 41-42. It was presented to allow the jury to determine whether defendant's statement that he was not the person who eluded police was credible. *Id.* Whether defendant's statement was credible is directly related to the issue of identity because the statement was a denial of his involvement. Statements allowing the jury to determine the defendant's credibility allowed the jury to assess whether it was he who had been involved in the police chase the previous evening.

Defendant argues that the evidence could be used to draw the impermissible conclusion defendant was a person who would lie and therefore, he must have eluded police, and for that reason the trial court's admission of that evidence ran afoul of the decision in *Chase*. Appellant's brief at 9-10. However, as in *Chase*, the fact that evidence could be used

to draw an impermissible conclusion in addition to its permissible uses does not make the evidence impermissible if the probative value outweighed the prejudicial effect. 59 Wn. App. at 507. That defendant had not been truthful in the past is relevant, not to the question of whether he eluded police, but to the question of whether he was truthful when he stated he had not eluded police. The trial court concluded that the probative value of the evidence outweighed its prejudicial effect because the defendant's other statements would gain undue credibility if the jury were not permitted to hear his inconsistent statements. CP 60-65; RP 61. Therefore, the Court's decision here does not run afoul of the decision in *Chase*.

Defendant cites *State v. Freeburg* as a case analogous to the one at hand. 105 Wn. App 492, 500, 20 P.3d 984 (2001); Appellant's brief at 7. There, the court held that evidence that Freeburg had a gun in his possession at the time of his arrest was not admissible. The court noted that the evidence did not tend to show a consciousness of guilt of the murder he was charged with because he was arrested over two years after the shooting, the gun he was arrested with was not the gun used in the shooting, the defendant did not resist arrest, and he readily admitted to the arresting officer that he possessed the gun. 105 Wn. App at 500.

Here there is no two year gap between defendant's challenged statements and the crime charged. Instead, defendant made his statements the day following the charged flight, and minutes after he attempted to run

from police after being pulled over. Unlike in *Freeburg*, defendant here ran from police when he was pulled over, and Officer Dickerson had to deploy his taser in order to gain compliance from him. Further, while the gun in *Freeburg* was not directly related to the purpose for which it was admitted, defendant's false statements to police were directly relevant to the jury's determination of his credibility.

Because defendant's statements were admissible under ER 404(b) to allow the jury to assess the credibility of his denial of eluding police and to complete the picture of the charged crime for the jury, the court did not err in admitting the statements.

- d. If there was error in admitting defendant's statements, such error is harmless.

The "improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Here, the evidence overwhelmingly supported the conclusion that defendant had eluded police on May 29, 2010. Trooper Havenner identified defendant after viewing two different photographs of him. RP(trial) 36-38. He testified that there "was no doubt in [his] mind" that the defendant was the man who had eluded him the previous night. RP(trial) 38. The trooper described the man who had eluded him as "a white male probably in his mid-20s, dark hair, short hair, kind of a goatee." RP(trial) 29. This description matched the description

of the defendant. RP(trial) 38. Defendant explained to the officer at the time of his arrest that the car belonged to his girlfriend. RP(trial) 58, 61. Trooper Havenner did not see a woman driving the vehicle when it eluded him. RP(trial) 29. He saw a man matching defendant's description. *Id.* The jury could easily infer that the female registered owner was not driving the vehicle when it eluded police. The arresting deputy noted that the license plate was the same as the car that had eluded police the previous evening. RP(trial) 50-51. When Officer Dickerson pulled defendant over, defendant told the officer that he did not have any warrants for his arrest. RP(trial) 51. When the officer went to verify this information, defendant took off running. RP(trial) 55-56. After chasing defendant on foot and having to taser him in order to gain compliance, Officer Dickerson arrested defendant. RP(trial) 56-57. Defendant admitted he had run because he had a warrant. RP(trial) 57. The evidence overwhelmingly supports the conclusion that defendant was guilty of attempting to elude police.

Defendant argues that admission of defendant's statement that he had taken drugs was not harmless because the trooper's description in his police report did not include defendant's goatee, and defendant was not the registered owner of the car. Appellant's Brief at 11. However, on the stand the officer testified that the driver he was pursuing had a goatee, and the entirety of the rest of the description also matched defendant. RP(trial) 25. That defendant was not the registered owner of the vehicle does not

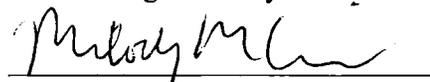
overcome the overwhelming evidence that it was defendant who had eluded police. The car belonged to his girlfriend, had not been reported stolen, and was being driven by a male matching defendant's description. RP(trial) 25, 58, 61. Further, that Trooper Havenner only saw the driver of the vehicle for only a few seconds does not negate his identification of the defendant. The trooper was able to describe the driver in his report, and recognized defendant as the driver after he had been arrested the following day. RP(trial) 38, 41-42. Defendant, therefore, cannot meet the burden of showing that any error in admitting evidence was so prejudicial as to deny defendant a fair trial.

D. CONCLUSION.

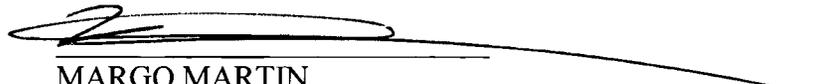
For the aforementioned reasons, the State respectfully requests that defendant's conviction and be upheld.

DATED: July 20, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



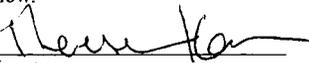
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MARGO MARTIN
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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