

NO. 41426-1-II

COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY   c    
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

KAMARA KAM CHOUAP, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frederick W. Fleming

No. 10-1-01024-8

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**Brief of Respondent**

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**Table of Contents**

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

1. Are the two charges of attempting to elude a pursuing police vehicle separate units of prosecution, respecting defendant’s right against double jeopardy? ..... 1

2. Should this Court refuse to review defendant’s claim of jury instruction error as he failed to object at trial and thus failed to preserve the error? Is any potential error harmless?..... 1

3. Is defendant’s maximum term sentence plus community custody consistent with the Supreme Court’s holding in *Brooks*, which allowed such a sentence when the judgment includes appropriate language limiting the total sentence to the statutory limit? ..... 1

4. Considering this Court’s controlling opinion in *Smith* and *Stockwell*, in which a trial court did not need to conduct *Bone-Club* analysis when sealing a jury questionnaire, should the trial court’s sealing of jury questionnaires without associated *Bone-Club* analysis be affirmed? ..... 1

5. Since statute allows a sentencing court to impose an exceptional sentence when a defendant’s high offender score results in no punishment for some convictions, should the sentencing court’s imposition of consecutive sentences for assault and attempted elude be affirmed? ..... 2

B. STATEMENT OF THE CASE..... 2

1. Procedure ..... 2

2. Facts..... 4

C.	<u>ARGUMENT</u> .....	7
1.	THE COURT DID NOT VIOLATE DEFENDANT’S RIGHT AGAINST DOUBLE JEOPARDY WHEN IT SEPARATELY CONVICTED DEFENDANT OF BOTH CHARGES OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE. ....	7
2.	AS DEFENDANT FAILED TO OBJECT TO THE JURY INSTRUCTION HE CHALLENGES ON APPEAL, HE HAS FAILED TO PRESERVE THIS NONCONSTITUTIONAL CLAIM FOR REVIEW. EVEN IF CONSIDERED AS A MERITORIOUS APPEAL, ANY ERROR WAS HARMLESS.....	14
3.	THE TRIAL COURT DID NOT ERR WHEN IT SENTENCED DEFENDANT TO THE STATUTORY MAXIMUM AND COMMUNITY CUSTODY WITH SPECIFIC LANGUAGE CONSISTENT WITH <i>IN RE</i> <b>BROOKS</b> .....	21
4.	THE TRIAL COURT DID NOT DENY THE PUBLIC’S RIGHT TO AN OPEN TRIAL WHEN IT SEALED THE JURY QUESTIONNAIRES WITH CONDUCTING A <b>BONE-CLUB</b> ANALYSIS .....	23
5.	THE TRIAL COURT APPROPRIATELY SENTENCED DEFENDANT TO CONSECUTIVE SENTENCES BASED ON DEFENDANT’S HIGH OFFENDER SCORE.....	26
D.	<u>CONCLUSION</u> .....	29

## Table of Authorities

### State Cases

<i>Federated Publications, Inc. v. Kurtz</i> , 94 Wn.2d 51, 615 P.2d 440 (1980).....	23
<i>In re Brooks</i> , 166 Wn.2d 664, 673, 211 P.3d 1023 (2009).....	1, 21, 22, 29
<i>In Re Pers. Restraint of Borrero</i> , 161 Wn.2d 532, 536, 167 P.3d 1106 (2007).....	8
<i>In re Pers. Restraint of Hegney</i> , 138 Wn. App. 511, 158 P.3d 1193 (2007).....	14
<i>In re Stockwell</i> , 160 Wn. App. 172, 248 P.3d 576 (2011).....	1, 23, 24, 25, 26
<i>State v. Adel</i> , 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) .....	8, 9
<i>State v. Alvarado</i> , 164 Wn.2d 556, 560-61, 192 P.3d 345 (2008) .....	26
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010).....	16, 18, 20
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	1, 23, 24, 25, 26, 29
<i>State v. Brewer</i> , 148 Wn. App. 666, 673, 205 P.3d 900 (2009).....	16
<i>State v. Brown</i> , 147 Wn.2d 330, 341, 58 P.3d 889 (2002).....	14, 18
<i>State v. Calle</i> , 125 Wn.2d 769, 776, 888 P.2d 155 (1995) .....	8
<i>State v. Coleman</i> , 151 Wn. App. 614, 214 P.3d 158 (2009) .....	25
<i>State v. Coleman</i> , 152 Wn. App. 552, 216 P.3d 479 (2009) .....	19, 20
<i>State v. Colwash</i> , 88 Wn.2d 468, 470, 564 P.2d 781 (1977).....	15
<i>State v. Dana</i> , 73 Wn.2d 533, 537, 439 P.2d 403 (1968).....	14
<i>State v. Durrett</i> , 150 Wn. App. 402, 406, 208 P.3d 1174 (2009).....	9

<i>State v. Gamble</i> , 168 Wn.2d 161 at 178, 225 P.3d 973 (2010).....	18
<i>State v. Gocken</i> , 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).....	8
<i>State v. Goldberg</i> , 149 Wn.2d 888, 895, 72 P.3d 1083 (2003).....	19, 20
<i>State v. Green</i> , 156 Wn. App. 96, 98, 230 P.3d 654 (2010).....	8, 9
<i>State v. Hames</i> , 74 Wn.2d 721, 725, 446 P.2d 344 (1968).....	16
<i>State v. Harris</i> , 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963).....	16
<i>State v. Hickman</i> , 135 Wn.2d 97, 102, 954 P.2d 900 (1998).....	16, 17
<i>State v. Hughes</i> , 166 Wn.2d 675, 681, 212 P.3d 558 (2009).....	7
<i>State v. Jackson</i> , 70 Wn.2d 498, 424 P.2d 313 (1967).....	15
<i>State v. Kelley</i> , 168 Wn.2d 72, 76, 226 P.3d 773 (2010).....	7, 8
<i>State v. Law</i> , 154 Wn.2d 85, 93, 110 P.3d 717 (2005).....	26
<i>State v. Lee</i> , 128 Wn.2d 151, 159, 904 P.2d 1143 (1995).....	17
<i>State v. O’Hara</i> , 167 Wn.2d 91, 98, 217 P.3d 756 (2009).....	17
<i>State v. Rahier</i> , 37 Wn. App. 571, 575, 681 P.2d 1299 (1984).....	15
<i>State v. Sloan</i> , 121 Wn. App. 220, 224, 87 P.3d 1214 (2004).....	21
<i>State v. Smith</i> , --- P.3d ---, 2011 WL 3107820, *7 (2011).....	1, 23, 24, 25
<i>State v. Tarhan</i> , 159 Wn. App. 819, 246 P.3d 580 (2011).....	23, 25
<i>State v. Watkin</i> , 136 Wn. App. 240, 244, 148 P.3d 1112 (2006).....	16
<i>State v. Weber</i> , 159 Wn.2d 252, 265, 149 P.3d 646 (2006).....	8

**Federal and Other Jurisdictions**

*Bell v. United States*, 349 U.S. 81, 84, 75 S. Ct. 620,  
99 L. Ed. 905 (1955)..... 9

*Gannett Co. v. DePasquale*, 443 U.S. 368, 379, 99 S. Ct. 2898,  
61 L. Ed. 2d 608 (1999)..... 23

*Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673,  
74 L. Ed. 2d 535 (1983)..... 8

*N. Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072,  
23 L. Ed. 2d 656 (1969)..... 8

*Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827,  
144 L.Ed.2d 25 (1999)..... 18

*Press-Enterprise v. Superior Court of California*, 464 U.S. 501,  
104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)..... 23

**Constitutional Provisions**

Article I, section 9 of the Washington Constitution ..... 7

Const. art. I, § 10..... 23

Fifth Amendment to the United States Constitution..... 7

**Statutes**

RCW 46.61.021(3)..... 10

RCW 46.61.022 ..... 10

RCW 46.61.024 ..... 10

RCW 46.61.024(1)..... 10, 12, 13

RCW 9.94A.505(5)..... 21

RCW 9.94A.535..... 27, 28

RCW 9.94A.535(2)..... 27

RCW 9.94A.535(2)(c) ..... 27  
RCW 9.94A.585(4)..... 26  
RCW 9.94A.701(9)..... 22  
RCW 9A.20.21..... 22

**Rules and Regulations**

CrR 6.15 ..... 15  
RAP 2.5(a) ..... 16

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

1. Are the two charges of attempting to elude a pursuing police vehicle separate units of prosecution, respecting defendant's right against double jeopardy?
2. Should this Court refuse to review defendant's claim of jury instruction error as he failed to object at trial and thus failed to preserve the error? Is any potential error harmless?
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5. Since statute allows a sentencing court to impose an exceptional sentence when a defendant's high offender score results in no punishment for some convictions, should the sentencing court's imposition of consecutive sentences for assault and attempted elude be affirmed?

B. STATEMENT OF THE CASE.

1. Procedure

On March 8, 2010, the State charged Kamara Kam Chouap (hereinafter "defendant") with assault in the first degree (count I), and attempting to elude a pursuing police vehicle (count II). CP 1-2.

On May 13, 2010, the State amended the charges, adding a second count of attempting to elude a pursuing police vehicle (re-numbering them as counts I and II), adding a special enhancement to count II of endangering one or more persons other than pursuing police officers, and changing the assault charge (now count III) to assault in the second degree with the special aggravator of assaulting a uniformed police officer in the line of duty. CP 6-7.

On September 2, 2010, defense counsel and the prosecutor agreed to use a confidential jury questionnaire to aid in the voir dire process.

7RP<sup>1</sup> 74-75. Based on the results of the questionnaire, defense counsel and the prosecutor privately spoke with several potential jurors in open court with the rest of the venire excused. 5RP 71-73; 76-127.

The court impaneled the jury on September 8, 2010. 6RP 21. Trial began later that afternoon. 7RP 81.

On September 10, 2010, the jury found defendant guilty on all three counts. CP 78-80. Regarding the special verdicts, the jury returned a “yes” for both. CP 81-82.

On September 14, 2010, the court ordered to seal the jury questionnaires. CP 106. Both the State and defense counsel agreed with the order. CP 106.

The court held a sentencing hearing on November 5, 2010. 10RP 1-25. The court sentenced defendant to 120 months, a sentence outside of the standard range of 63-84 months, for assault in the second degree. CP 86-89. The court cited the special aggravator as justification for the exceptional sentence on the assault conviction. CP 107-112. For count I, attempting to elude a pursuing police vehicle, the court sentenced defendant to the maximum standard sentence of 29 months. CP 86, 89. For count II, attempting to elude a pursuing police vehicle with a special

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<sup>1</sup> In order to maintain consistency with defendant’s citation of the Verbatim Report of Proceedings, this brief will utilize the same abbreviations to refer to the various volumes. 1RP – 07/19/2010; 2RP – 07/20/2010; 3RP – 08/23/2010; 4P – 09/01/2010; 5RP – 09/07/2010; 6RP – 09/08/2010 a.m.; 7RP – 09/02/2010, 09/08/10 p.m.; 8RP – 09/09/2010; 9RP 9/10/2010; 10RP – 11/05/2010.

enhancement for endangering others, the court sentenced defendant to 29 months, plus 12 months due to the special enhancement, totaling 41 months. CP 89; CP 107-112. Citing defendant's high offender score, the court made the sentences for counts I and II consecutive to the sentence for count III, yielding a total confinement period of 161 months. CP 107-112.

## 2. Facts

Tacoma Police Officers Joshua Rasmussen and Donald

Walkinshaw testified that on March 5, 2010, at approximately 2:46 am, they observed defendant drive west on South 56<sup>th</sup> Street in a black Cadillac. 7RP 86-89; 98; 108-110. Officer Walkinshaw testified that they pulled behind the vehicle in an attempt to contact the driver. 7RP 109-111. The officers gave different accounts as to when defendant rapidly accelerated away from their vehicle. Officer Rasmussen testified that defendant sped away from them prior to activating their emergency lights, while Officer Walkinshaw testified that defendant attempted to elude after the emergency lights had been activated. 7RP 89-90; 111-112. Both officers testified that they activated the audible siren and that defendant accelerated rapidly away from them, reaching speeds in excess of the post speed limit of 30 or 35 miles per hour. 7RP 91; 112-113. Officer Walkinshaw estimated defendant's speed at 70 miles per hour. 7RP 112.

Both officers testified that they observed defendant proceed northbound onto Alameda Ave, and hit a speed bump at such excessive speed as to have the automobile become airborne. 7RP 92; 113. Due to the danger involved, Officers Rasmussen and Walkinshaw terminated the pursuit shortly thereafter. 7RP 93; 114.

Officers Walkinshaw and Rasmussen saw defendant's vehicle a short time later turning southbound onto Orchard St. 7RP 95; 117. The officers testified that they restarted the pursuit; defendant accelerated at a high rate of speed down Orchard St and turned right onto Emerson or 40th, exceeding the posted speed limit, swerving back and forth in the lane, and fishtailing the automobile. 7RP 96-97; 117-18. The officers attempted to follow him but soon lost sight of defendant's vehicle. 7RP 103.

Shortly after 3:00am on March 5, 2010, Lakewood Police Officer James Sylar testified that he first observed defendant driving his vehicle southbound on Bridgeport Way. 8RP 171-75. Defendant drove at normal road speed and exhibited no reckless or out-of-the-ordinary driving behavior associated with eluding a pursuing vehicle. 8RP 174-75. Officer Sylar had received notification of a similar vehicle eluding Tacoma Police Officers earlier that night; he came up behind the vehicle to identify it and check its license number. 8RP 176. Defendant accelerated away from Officer Sylar, reaching a speed of approximately 80 miles per hour in a 35

mile per hour zone. 8RP 176-77. Officer Sylar activated his overhead lights and attempted to stop the vehicle. 8RP 177. Defendant did not stop his vehicle at that time and instead accelerated to elude Officer Sylar. 8RP 177.

Officer Sylar testified that defendant turned southbound onto Gravelly Lake Drive, continuing to flee. 8RP 180. At this time, Officer McGettigan joined the pursuit in another vehicle. 8RP 181. Officer Sylar testified that at the intersection of Nyanza and Gravelly Lake Drive, defendant attempted to overrun another vehicle, forcing the driver to take evasive action and placing the motorist in danger. 8RP 181-82.

Soon after, defendant proceeded onto Garfield Street. 8RP 190. Officer Sylar testified that a Pierce County Sheriff's Deputy had positioned a police vehicle partially in the roadway. 8RP 190. Deputy Jeffrey Jorgenson testified that he and his partner intended to deploy stop sticks on the road in order to stop defendant's vehicle. 7RP 131. Deputy Jorgenson went to the trunk of his vehicle to retrieve the stop sticks. 7RP 131-32. Defendant, departing the normal lane of travel on the roadway, accelerated directly towards Deputy Jorgenson at the rear of the vehicle. 8RP 191. Deputy Jorgenson testified that defendant drove directly at him and that this caused him concern for his safety. 7RP 134-35. Deputy Jorgenson quickly leapt into his vehicle and his partner accelerated rapidly to avoid defendant's incoming vehicle. 7RP 135-36; 8RP 191-93.

After defendant narrowly missed Deputy Jorgenson, Officer Sylar attempted a Pursuit Intervention Technique (P.I.T.) to stop defendant. 8RP 193. He slowed defendant's vehicle, causing defendant to drive off the road and slow to a stop. 8RP 194.

Officer Sylar testified that defendant exited the vehicle and tried to flee on foot. 8RP 194. Officer Sylar directed defendant to stop running. 8RP 195. When defendant failed to comply, Officer Sylar released his police dog to apprehend defendant. 8RP 195. The officers then took defendant into custody. 8RP 196.

The defense presented no witnesses at trial. 8RP 258.

C. ARGUMENT.

1. THE COURT DID NOT VIOLATE DEFENDANT'S RIGHT AGAINST DOUBLE JEOPARDY WHEN IT SEPARATELY CONVICTED DEFENDANT OF BOTH CHARGES OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

Claims of double jeopardy are questions of law that are reviewed *de novo*. ***State v. Kelley***, 168 Wn.2d 72, 76, 226 P.3d 773 (2010) (citing ***State v. Hughes***, 166 Wn.2d 675, 681, 212 P.3d 558 (2009)). The double jeopardy clauses of the Fifth Amendment to the United States Constitution and the double jeopardy clause of Article I, section 9 of the Washington Constitution provide the same protection. ***Kelley***, 168 Wn.2d at 76 (citing

*In Re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006)).

The double jeopardy clause bars multiple punishments for the same offense. *Kelley*, 168 Wn.2d at 76 (citing *Borrereo*, 161 Wn.2d at 536; *N. Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Kelley*, 168 Wn.2d at 77 (quoting *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)). The legislature has authority to enact statutes that in a single proceeding impose cumulative punishments for the same conduct. *Kelley*, 168 Wn.2d. at 77. Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

To determine whether a defendant has received multiple punishments for the same offense, the court must determine the unit of prosecution that the legislature intended to constitute the prohibited act. *State v. Green*, 156 Wn. App. 96, 98, 230 P.3d 654 (2010) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). “The ‘unit of

prosecution’ refers to the scope of the criminal act.” *Green*, 156 Wn. App. at p. 98 (quoting *Adel*, 136 Wn.2d at 634). This analysis requires that the court look to the statute’s plain text meaning. *State v. Durrett*, 150 Wn. App. 402, 406, 208 P.3d 1174 (2009). When the legislature’s intent is unclear, any ambiguities must be construed in favor of lenity such that the court should avoid “turning a single transaction into multiple offenses”. *Adel*, 136 Wn.2d at 634-35 (quoting *Bell v. United States*, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955)).

In *Adel*, the Supreme Court found that 0.3 grams of marijuana distributed between the defendant’s nearby automobile and his immediate person only constituted one prosecutorial unit of unlawful possession of a controlled substance. *Adel*, 136 Wn.2d at 636-38. The Supreme Court interpreted that the prosecutorial unit consisted of the actual possession of a controlled substance, independent of the location in which the offender kept the substance. In *Green*, the court held that failing to report every 90 days as a sex offender did not open the door to multiple prosecutions for failing to report during two different charging periods since it was a continuous act to fail to register, not two distinct acts. *Green*, 156 Wn. App. at 100-01.

Attempting to elude a pursuing police officer is defined by statute to mean:

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

RCW 46.61.024(1). Thus, the substantive elements of the crime are: (1) a driver receives a visual or audible signal to stop his vehicle; (2) the driver willfully fails or refuses to stop the vehicle; and (3) the driver drives his vehicle recklessly in order to elude the pursuing police vehicle. RCW 46.61.024(1). Attempting to elude a pursuing police vehicle can be compared to failing to obey a police officer, which states: “Any person who wilfully [sic] fails to stop when requested or signaled to do so by a person reasonably identifiable as a law enforcement officer or to comply with RCW 46.61.021(3), is guilty of a misdemeanor.” RCW 46.61.022. For this misdemeanor, the substantive elements are: (1) a person receives a signal from an identified law enforcement officer; and (2) the person fails to stop. RCW 46.61.022. Where failure to obey constitutes a misdemeanor, attempting to elude a pursuing police vehicle constitutes a class C felony. RCW 46.61.022; RCW 46.61.024.

The significant elemental difference between the two statutes is the reckless escape necessary for an attempt to elude a pursuing police vehicle. Given the existence of both criminal statutes, the legislature clearly demonstrated intent to make the reckless evasion of a police vehicle significant enough to constitute a felony instead of a misdemeanor. Thus, driving recklessly after being given a signal to stop in order to elude a police vehicle constitutes the relevant prosecutorial unit for which the defendant can be charged. If the driver ceases driving recklessly, the continuous element of the crime is no longer in progress. The driver would no longer be attempting to elude a pursuing police vehicle. Thus, if another officer attempts to stop the driver, the driver fails to stop, and the driver begins driving recklessly to escape the officer, the driver will have committed an additional act of attempting to elude a pursuing police officer. Under this analysis, the number of pursuing police vehicles does not affect the unit of prosecution nor does it matter if vehicles from multiple law enforcement agencies pursue the driver.

On March 5, 2010, at approximately 2:46am, Tacoma Police Officers Joshua Rasmussen and Donald Walkinshaw observed defendant drive west on South 56<sup>th</sup> Street in a black Cadillac. 7RP 86-89; 98; 108-110. They pulled behind the vehicle in an attempt to contact the driver. 7RP 109-110. Either before or when they initiated the traffic stop,

defendant accelerated away from the police vehicle. 7RP 89-90; 111-112. He attempted to elude Officers Rasmussen and Walkinshaw at speeds far in excess of the posted speed limit of 30 or 35 miles per hour. 7RP 91; 112-113. Officer Walkinshaw estimated his speed at 70 miles per hour. 7RP 112. Proceeding northbound onto Alameda Ave, defendant hit a speed bump at excessive speed and the automobile came off the roadway. 7RP 92; 113. Due to the danger involved, Officers Rasmussen and Walkinshaw terminated the pursuit shortly thereafter. 7RP 93; 114.

Officers Walkinshaw and Rasmussen saw defendant's vehicle a few moments later turning southbound onto Orchard St. 7RP 95; 117. The officers restarted the pursuit; defendant accelerated at a high rate of speed down Orchard St and turned right onto Emerson or 40th, still exceeding the posted speed limit and driving recklessly. 7RP 96-97; 117-118. The officers attempted to follow him but soon lost sight of defendant's vehicle. 7RP 103. Pursuant to RCW 46.61.024(1), defendant had committed one act of attempting to elude a pursuing police officer.

Shortly after 3:00am on March 5, 2010, Lakewood Police Officer James Sylar testified that he first observed defendant driving his vehicle southbound on Bridgeport Way. 8RP 171-75. Defendant drove at normal road speed and exhibited no reckless or out-of-the-ordinary driving behavior associated with eluding a pursuing vehicle. 8RP 174-75. Having

received notification of a vehicle having previously eluded Tacoma Police Officers, Officer Sylar came up behind the vehicle to check its license number. 8RP 176. Defendant accelerated away from Officer Sylar, exceeding the speed limit of 35 miles per hour, reaching approximately 80 miles per hour. 8RP 176-77. Officer Sylar activated his overhead lights and attempted to stop the vehicle. 8RP 177. Defendant did not stop his vehicle at that time, and instead accelerated rapidly in an attempt to elude Officer Sylar. 8RP 177. Defendant had failed to stop his vehicle and began driving recklessly in an attempt to elude a pursuing police officer. Pursuant to RCW 46.61.024(1), he had committed another distinct act of attempting to elude a pursuing police officer.

When analyzing defendant's actions with respect to the unit of prosecution for attempting to elude a pursuing police officer, defendant committed two separate prosecutorial units of the charged offense. RCW 46.61.024(1). As indicated by defendant's behavior when Officer Sylar observed him, defendant had resumed driving normally after having successfully eluded Officers Rasmussen and Walkinshaw. 8RP 174-75. When he failed to stop for Officer Sylar and began driving recklessly in order to elude, defendant committed a separate act of attempting to elude that constitutes a separate prosecutorial unit.

The trial court, in sentencing defendant for two separate charges of attempting to elude a pursuing police officer, did not violate defendant's right against double jeopardy because the two charges consisted of two separable prosecutorial units. Since the court did not infringe upon his right against double jeopardy, the sentence of the trial court should be affirmed.

2. AS DEFENDANT FAILED TO OBJECT TO THE JURY INSTRUCTION HE CHALLENGES ON APPEAL, HE HAS FAILED TO PRESERVE THIS NONCONSTITUTIONAL CLAIM FOR REVIEW. EVEN IF CONSIDERED AS A MERITORIOUS APPEAL, ANY ERROR WAS HARMLESS.

Jury instructions are proper where, read together, they correctly inform the jury of the applicable law, do not mislead the jury, and allow both parties to argue their theories of the case. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Claimed errors of law in a jury instruction are reviewed *de novo*. *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521 158 P.3d 1193 (2007). Errors in jury instructions are subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Defendant challenges jury instruction number 22, which instructed the jury on how to enter a special verdict. App. Br. at 12-17; CP 75-76 (Instruction No. 22). Jury instruction no. 22 states:

You will also be given a special verdict form for the crime of Attempting to Elude a Pursuing Police Vehicle as charged in count II and Assault in the Second Degree as charged in count III. If you find the defendant not guilty of count II do not use special verdict form. If you find the defendant guilty of count II, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. If you find the defendant not guilty of count III do not use special verdict form. If you find the defendant guilty of count III, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer “no.”

CP 76.

- a. Defendant cannot raise a challenge to the special verdict jury instruction for the first time on appeal.

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984) (citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967)). Only those exceptions to instructions that are sufficiently particular to call the court’s attention to the claimed

error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963). The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); *See State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009).

Defendant relies on *State v. Bashaw* for its claim that the special verdict instruction was erroneous. App. Br. at 9 (citing *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010)). However, the rule adopted in *Bashaw* is not a constitutional rule. *Bashaw*, 169 Wn.2d at 146 n. 7. Rather, the court clearly emphasizes that it is a common law rule. *Bashaw*, 169 Wn.2d at 146 n. 7. As such, this challenge cannot be raised for the first time on appeal.

In order to challenge this instruction, it must have been objected to below because a defendant may not object to an instructional error where it was not objected to below unless the error invades a fundamental right of the accused. *State v. Watkin*, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006). Furthermore, “jury instructions not objected to become the law of the case.” *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citing *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968)). In *Hickman*, the State “assume[d] the burden of proving otherwise unnecessary elements of the offense when such added elements are

included without objection in the ‘to convict’ instruction.” 135 Wn.2d at 102 (citing *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)). Thus, a party who fails to object to an erroneous instruction accepts the error as the “law of the case.”

In the instant case, no objection to this jury instruction regarding the special verdict was raised by either party. *See* 8RP 250-54, 255-57. Since defendant made no objection at trial, there is no ruling from the trial court to be considered on appeal. As such, this Court should decline to address defendant’s challenge to the special verdict instruction as it is not of a constitutional nature and is raised for the first time on appeal.

b. Even if the trial court erred in giving the jury instruction, the error was harmless.

Even if this Court were to determine that the jury instruction regarding the special verdict forms contained an error, it is subject to a harmless error analysis. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Regarding harmless error, the Supreme Court has held that “[w]hen applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by

uncontroverted evidence.” *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L.Ed.2d 25 (1999)).

In this case, the instruction to the jury clearly stated that a vote of “yes” on the special verdict forms required unanimity on the part of the jurors. CP 75-76 (jury instruction no. 22). Further, jury instruction no. 2 stated in part:

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.

CP 55. Unless something in the records suggests otherwise, a jury is presumed to have followed the instructions given. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010).

Defendant concedes that regarding the special verdict for count III, assault in the second degree, the “error was harmless beyond a reasonable doubt as to this special finding given the overwhelming evidence.” App. Br. at 15 n.3. However, highlighting portions of a quote from *Bashaw*, the defendant argues that it is not possible to tell what result the jury would have reached if it had been given a correct instruction regarding the special verdict regarding count II, the attempted elude. App. Br. at 14 (quoting *Bashaw*, 169 Wn.2d at 147-48).

Under the particular facts of this case, it is unlikely that the outcome of the trial would have been different if the jury had been instructed differently. Defendant provided no evidence in response to the State's testimony by Officer Sylar that defendant's reckless driving forced another driver to take evasive action, pulling to the side of the road. 8RP 182. Concerning the instruction itself, the prosecutor stated during closing argument that "[r]egarding the [special] verdict form, all 12 of you have to agree it is yes. ... If it is eleven yes and one no, then the answer you fill in here is no. All 12 of you have to agree. If all 12 of you don't agree, then you will have to answer no." 8RP RP 286. Defendant did not object to the State's characterization of the instruction. 8RP 286. The jury answered "yes" to both special verdicts with no question, confusion, or misunderstanding regarding unanimity, unlike *State v. Goldberg*, 149 Wn.2d 888, 895, 72 P.3d 1083 (2003), or *State v. Coleman*, 152 Wn. App. 552, 216 P.3d 479 (2009). CP 81, 82; 8RP 309-311; 9RP 316-319. Furthermore, after the court read the verdict, the court polled the jury; all jurors stated that the verdict was their verdict individually and as a whole. 9RP 319-321. Given that the jury had uncontroverted evidence of defendant's endangering of others, appropriate instructions instructing them not to change their decision merely for conformity, the appropriate interpretation of the instruction given to them by the prosecutor, the

expectation that the jury follows the instructions, the fact that the jury exhibited no confusion over unanimity such as was present in *Goldberg* and *Coleman*, combined with the resulting “yes” result, the court can conclude beyond a reasonable doubt that the outcome would not have been different given the more accurate instruction. As stated in Justice Madsen’s dissent in *Bashaw*:

The majority suggests that a different outcome might have resulted under proper instructions. The majority is therefore either suggesting that the jury might not have followed the jury instructions when it returned its unanimous finding – which would be antithetical to the presumption that juries follow the instructions they are given, or the majority is suggesting that the jury was coerced or influenced by the unanimity instruction into reaching a conclusion it would not otherwise have reached – which is equally unacceptable given that unanimity is required for guilty verdicts. We certainly do not infer from a unanimous verdict on guilt that the jury was coerced or improperly influenced by an instruction on unanimity. Why does the majority doubt the unanimous verdict here?

*Bashaw*, 169 Wn.2d at 151 (Madsen, J., dissenting).

Defendant is unable to show that the jury’s finding on the special verdict would have been different under a different instruction that explicitly instructed the jury on what action to take when unanimous agreement on a special verdict cannot be reached. Because defendant is unable to demonstrate prejudice, any error in the jury instruction was harmless.

3. THE TRIAL COURT DID NOT ERR WHEN IT SENTENCED DEFENDANT TO THE STATUTORY MAXIMUM AND COMMUNITY CUSTODY WITH SPECIFIC LANGUAGE CONSISTENT WITH *IN RE BROOKS*.

When imposing sentences that include both confinement and community custody, “a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime.” RCW 9.94A.505(5). When a sentence exceeds the statutory maximum due to a combination of confinement and community custody, the court must include language to specify that the total time for which the sentence may be imposed cannot exceed the maximum. *In re Brooks*, 166 Wn.2d 664, 673, 211 P.3d 1023 (2009); *State v. Sloan*, 121 Wn. App. 220, 224, 87 P.3d 1214 (2004).

In *Brooks*, the court held that a sentence of the statutory maximum confinement, coupled with community custody post-release, did not violate RCW 9.94A.505(5) when the judgment contained language clearly specifying that the community custody combined with confinement time cannot exceed the statutory maximum for the crime. 166 Wn.2d at 673. The specific language in *Brooks* was “The total of the term of incarceration and the term of community custody for each counts I, II, and III shall not exceed the statutory maximum of 120 months.” Defendant’s Judgment and Sentence lists the maximum sentence for each conviction

and contains the language: “That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.” CP 86; 91. Thus, consistent with the holding of *Brooks*, defendant’s sentence does not exceed the statutory maximum.

Defendant cites RCW 9.94A.701(9), which states that “[t]he term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.” This statute specifically addresses standard range sentences, and thus does not control when the court imposes an exceptional sentence. Defendant’s standard range sentence for count III was 63-84 months. CP 83-96. RCW 9.94A.701(9) did not require the court to reduce the community custody on the exceptional sentence in order to abide by RCW 9A.20.21. Here, the court complied with the requirements of RCW 9A.20.21 through language on the judgment and sentence consistent with *Brooks*.

Since the statutory language added in RCW 9.94A.701(9) does not control when the court imposes exceptional sentences, the court could abide by RCW 9A.20.21 by utilizing the language of *Brooks*. Therefore, remand for resentencing is not required.

4. THE TRIAL COURT DID NOT DENY THE PUBLIC'S RIGHT TO AN OPEN TRIAL WHEN IT SEALED THE JURY QUESTIONNAIRES WITH CONDUCTING A **BONE-CLUB** ANALYSIS.

The Washington State constitution guarantees to the public that trials will be conducted openly. Const. art. I, § 10. "Justice in all cases shall be administered openly, and without unnecessary delay." Const. art. I, § 10. The right to a public trial applies not only to the evidentiary phase of a criminal trial, but also to other proceedings such as jury *voir dire*. **Gannett Co. v. DePasquale**, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1999); **Press-Enterprise v. Superior Court of California**, 464 U.S. 501, 509-10, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) ("Press-Enterprise I"); **Federated Publications, Inc. v. Kurtz**, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). When considering whether or not to grant a closure motion, the trial court must conduct a five-step analysis. **State v. Bone-Club**, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

The Court of Appeals has found that a trial court's sealing of juror questionnaires after *voir dire* does not constitute a "structural error" warranting reversal. **In re Stockwell**, 160 Wn. App. 172, 181, 248 P.3d 576 (2011); **State v. Tarhan**, 159 Wn. App. 819, 835, 246 P.3d 580 (2011). "[S]ealing juror questionnaires after *voir dire*, at most, affects only the public's right to 'open' information connected to the trial." **State v. Smith**, --- P.3d ---, 2011 WL 3107820, \*7 (2011) (citing **Stockwell**, 160 Wn. App. at 181). Furthermore, sealing the questionnaires does "not

affect the public's right to open information because [the defendants] used the 'content of the questionnaires' to question the jurors 'in open court, where the public could observe.'" *Smith*, WL 3107820 at \*7.

Here, the jury questionnaire had been written and agreed on by both the State and defendant. 7RP 74-75. The second paragraph of the questionnaire clearly stated: "This questionnaire will be part of the sealed Court file and will not be available for inspection publicly or privately. The questionnaires will remain sealed unless the Court signs an order directing that they be unsealed." Supp. CP (Blank Jury Questionnaire). Furthermore, the entire *voir dire* process remained open to the public. Even when speaking to individual jurors confidentially about answers to the questionnaire, the prosecutor emphasized the courtroom status:

Just for the – I think it is the *Bone Club* analysis – I believe that's the case – the courtroom is open to the public. Nobody has been excluded to be here. Anyone that wanted to be here, could be here. The record should reflect there is nobody present in the gallery at all, but they could be, it is an open courtroom. Nobody has excluded anyone from being here during the jury selection process.

5RP 76. Thus, the court only sealed the filled-out questionnaires, leaving the rest of the trial open to the public.

As with *Stockwell* and *Smith*, defendant here agreed to the use of a jury questionnaire. 7RP 74-75. Furthermore, defense counsel utilized information from the jury questionnaires during the *voir dire* process. 5RP 4-160. The court commented in *Stockwell* that "the questionnaire's

promise of confidentiality made it more likely jurors would candidly reveal incidents of sexual assault or abuse, providing critical information for [the defendant] to use in challenging a juror for cause.” 160 Wn. App. at 180. Here, as with *Stockwell*, defendant did not object to the use of the questionnaire and benefited from the confidential nature of it. Thus, as with *Stockwell* and *Smith*, the trial court did not err when it sealed the jury questionnaires without conducting a *Bone-Club* analysis.

Defendant cites a single Division 1 case in which the Court of Appeals requires courts to conduct a *Bone-Club* analysis prior to sealing confidential jury questionnaires. *State v. Tarhan*, 159 Wn. App. 819, 246 P.3d 580 (2011); *see also State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009). However, Division 2 has explicitly declined to follow the analysis of Division 1. *Smith*, WL 3107820 at \*15 n. 9. Furthermore, even following the guidance of *Tarhan*, the response would merely require remanding for *Bone-Club* analysis; since both parties approved of the use of confidential jury questionnaires and the order to seal them, any error would be non-prejudicial.

“Because the error here, if any, was not structural, affected only the public’s right to ‘open’ justice, and because [the defendant] does not argue that he was actually prejudiced, his argument that the trial court violated his public trial rights by sealing the juror questionnaires fails.”

*Stockwell*, 160 Wn. App. at 181. The trial court did not err in sealing the confidential jury questionnaires without conducting a *Bone-Club* analysis. Thus, the decision of the trial court should be affirmed.

5. THE TRIAL COURT APPROPRIATELY SENTENCED DEFENDANT TO CONSECUTIVE SENTENCES BASED ON DEFENDANT'S HIGH OFFENDER SCORE.

“To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.” RCW 9.94A.585(4). The Supreme Court later clarified the review of exceptional sentences: “An appellate court analyzes the appropriateness of an exceptional sentence by asking: (1) Are the reasons given by the sentencing judge supported by the record under the clearly erroneous standard? (2) Do the reasons justify a departure from the standard range under the de novo review standard? and (3) Is the sentence clearly too excessive or too lenient under the abuse of discretion standard?” *State v. Alvarado*, 164 Wn.2d 556, 560-61, 192 P.3d 345 (2008) (citing *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005)).

RCW 9.94A.535 provides guidance to the court for imposing an exceptional sentence. Some aggravating circumstances may be found by the court. RCW 9.94A.535(2) lists those factors. The court may impose an exceptional sentence when a defendant's high offender score "results in some current offenses going unpunished." RCW 9.94A.535(2)(c). Here, defendant had an offender score of ten for the assault charge even before adding points to his score for the two current convictions of attempting to elude a pursuing police vehicle. CP 83-96; 10RP 16. Under a standard range sentence, defendant's punishment for the assault would not be increased because he also committed the two eludes. Additionally, defendant's punishment for the attempted eludes would run concurrent with the sentence on the more serious assault. Thus, under a standard range sentence, defendant receives no punishment for committing the two attempted eludes.

The sentencing court sentenced defendant to two separate exceptional sentences: a maximum sentence for the assault charge and making the sentence for the two attempted eludes consecutive to the assault sentence. CP 107-112. The court entered Findings of Fact and Conclusions of Law regarding both exceptional sentences. CP 107-112. However, on appeal defendant only raises issue with the court's decision to make the sentence for the assault consecutive to the sentence for the two attempted eludes. App. Br. at 19-20. The court observed that "[i]f the court only imposed a standard range sentence and allowed all of these

offenses to be served concurrently the defendant would receive no punishment for his criminal activity of Attempting to Elude the Tacoma Police Department and the Lakewood Police Department.” CP 107-112 (Finding of Fact III); see 10RP 14-15. Furthermore, the court specifically concludes that “[t]he sentence for count III shall be served consecutively to the sentence imposed for counts I and II... This is also an exceptional sentence and is imposed to assure the defendant is punished for each of these crimes.” CP 107-112 (Conclusion of Law III). Thus, since statute specifically allows an exceptional sentence based on a defendant being insufficiently punished due to a high offender score, the court properly imposed consecutive sentences on defendant. Furthermore, the court did not abuse its discretion as it did not impose a clearly excessive sentence.

The sentencing court appropriately imposed the exceptional consecutive sentences based on the defendant’s high offender score resulting in no additional punishments for multiple crimes. This is consistent with the requirements of RCW 9.94A.535. Thus, the court’s determination of an exceptional sentence did not exceed the bounds of statute. Furthermore, the court did not abuse its discretion when it imposed the exceptional sentence on defendant. Therefore, given that the exceptional sentence lawfully fell within the limits of statute, the sentence of the court should be affirmed.

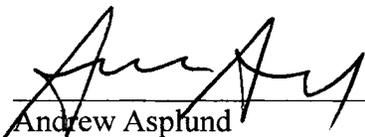
D. CONCLUSION.

The court did not violate defendant's right against double jeopardy when it separately sentenced him for two distinct crimes. The special verdict jury instruction did not erroneously state the law nor did it mislead the jury as their requirement in answering it. Consistent with *Brooks*, defendant's sentence does not violate the maximum sentences when community custody is taken into account. Furthermore, court precedent does not require a court to conduct *Bone-Club* analysis prior to confidential sealing jury questionnaires. Finally, the court did not violate statute nor abuse its discretion when it imposed an exceptional sentence on defendant. For reasons argued above, the State asks that the Court affirm the judgment of the trial court below.

DATED: August 29, 2011.

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail of 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.

8.29.11 [Signature]  
Date Signature