

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 42144-5-II

STATE OF WASHINGTON,

Respondent,

vs.

MARY UPTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00356-3

BRIEF OF RESPONDENT

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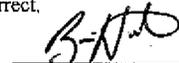
SERVICE	<p>Ms. Jodi Backlund PO Box 6490 Olympia, WA 98507</p>	<p>This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: February 17, 2012, at Port Angeles, WA </p>
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I. COUNTERSTATEMENT OF THE ISSUES.

1. Did the State introduce sufficient evidence to satisfy each element of “attempting to elude a police officer” when (1) the officer was dressed in uniform and driving a marked patrol car; (2) the officer positioned his vehicle where the defendant could see him; (3) the officer pursued the defendant for 45 seconds, approximately 1 mile, with his lights and siren activated; (4) the defendant drove her vehicle in a manner that forced traffic to take evasive action; (5) the defendant crossed the fog line twice while the officer was in pursuit; (6) the defendant’s passenger repeatedly told her that she was being pulled over; (7) the defendant only stopped her vehicle when the passenger forcibly removed the keys from the ignition; and (8) immediately after the vehicle came to a stop, the defendant yelled at the officer “what do you want with me”?

2. Did the trial court improperly comment on the evidence when (1) the defense alleged the State had mischaracterized the arresting officer’s testimony during its closing argument; (2) the trial judge restated the period of time the officer testified he pursued the defendant; (3) the trial judge never instructed the jury that this time period had been established as a matter of law; (4) the trial judge instructed the jury to disregard any statement that appeared to be a judicial comment on the evidence; and (5) the restatement did not influence the jury verdict?

3. Did the arresting officer unreasonably interfere with the defendant’s right to obtain a blood test when (1) the officer informed the defendant that she had the right to obtain a blood test at her own expense, (2) the defendant made repeated requests for a blood test, (3) pursuant to these requests the officer transported the defendant to the hospital for a blood test, (4) the officer and hospital staff informed the defendant that her status as a Medicaid recipient would not preclude any test, and (5) the defendant ultimately refused a blood test at the hospital?

4. Did the trial court err when it imposed certain legal financial obligations without considering on the record whether the defendant had the present or future ability to pay such costs and fees?

II. STATEMENT OF THE CASE.

In August 2009, Alison Seamands was living in Carlsborg, Washington. RP (3/14/2011) at 105. Seamands had recently been through a contested dissolution and had to vacate the trailer where she lived. RP (3/14/2011) at 105.

On August 22, 2009, at approximately 5:30 p.m., Seamands phoned Mary Upton (the defendant) and asked if she would help her move certain possessions to a nearby storage facility. RP (3/14/2011) at 104-05. Upton agreed and told Seamands she would bring a bottle of vodka.¹ RP (3/14/2011) at 106.

Upton stopped at a liquor store and purchased 1.75 liters (approximately 59 ounces) of vodka. RP (3/14/2011) at 106; RP (3/15/2011) at 7, 99. When Upton arrived at Seamands' home, she immediately filled a large mug (approximately 32 ounces) with vodka, adding some ice and sugar-free grape flavoring.² RP (3/14/2011) at 107-

¹ Upton testified that Seamands asked her to stop by the liquor store and buy a bottle of alcohol. RP (3/15/2011) at 78. Seamands disputed this claim. RP (3/15/2011) at 165-66.

² According to Upton, the mug contained mostly water and she only added 2-3 ounces of alcohol. RP (3/15/2011) at 79-80.

08, 115, 120; RP (3/15/2011) at 8, 102, 166, 169. From this cocktail, Seamands consumed one ounce. RP (3/14/2011) at 107-08, 120; RP (3/15/2011) at 169. While Upton claimed she only tasted the beverage, Seamands observed her taking several sips from the mug that evening. RP (3/15/2011) at 80, 92, 171.

Despite having Type 1 diabetes, Upton consumed alcohol and engaged in moderate physical activity – helping Seamands with her move. RP (3/15/2011) at 75, 81, 96, 133. Unfortunately, physical activity lowers an individual's blood sugar. RP (3/15/2011) at 81-82, 140-41. Additionally, the American Diabetes Association (ADA) does not advise women with Type 1 diabetes to consume more than one alcoholic beverage per day because alcohol may cause a precipitous drop in blood sugar.³ RP (3/14/2011) at 117-19; RP (3/15/2011) at 149, 152. Despite consuming alcohol and performing a modest level of activity, Upton never checked her blood sugar. RP (3/15/2011) at 82, 84, 93.

Around 7:30 p.m., Upton drove Seamands to the Walmart in Sequim, Washington. RP (3/14/2011) at 109. Several patrons observed the two women and were concerned by their apparent level of intoxication. RP (3/14/2011) at 91-92, 95, 99-100, 102. When the two women climbed into

³ If a diabetic's blood sugar drops too low, he/she may appear intoxicated. RP (3/15/2011) at 136.

a bluish-teal pickup, Donald and Winnie Palm called 911. RP (3/14/2011) at 91-93, 95, 100. Sequim Police Officer Richard Larsen responded to the call.⁴ RP (3/14/2011) at 131.

Upton drove along River Road, exiting onto Highway 101. RP (3/14/2011) at 111, 132. As the pickup traveled down the on-ramp, Seamands noticed that a police officer appeared to be following them. RP (3/14/2011) at 111-112; RP (3/15/2011) at 170.

I wasn't comfortable leaving Walmart to begin with, but we did anyway and I kind of had a gut feeling when I saw the police officer that we were probably gonna be the ones pulled over and so as he got closer I continued to repeat to [Upton], you know, I think you're being pulled over, I think you're being pulled over.

RP (3/14/2011) at 112. Officer Larsen activated his emergency lights and siren when he observed Upton's pickup swerve across the fog line, throwing road debris into the air. RP (3/14/2011) at 132-34, 136-37; RP (3/15/2011) at 36, 158. At this point, Officer Larsen was approximately eight vehicles behind Upton's truck. RP (3/15/2011) at 36-37, 161.

Just before the Dungeness Bridge, where Gilbert Road intersects the highway, Officer Larsen caught up with Upton's vehicle. RP (3/15/2011) at 161-62. Officer Larsen positioned his vehicle directly behind the defendant's truck. RP (3/14/2011) at 137; RP (3/15/2011) at

⁴ Officer Larsen was dressed in his police uniform and driving a marked patrol vehicle. RP (3/14/2011) at 138-39.

157-158. From this position, Upton could see the officer in her side mirrors. *See* RP (3/14/2011) at 111, 117, 121; RP (3/15/2011) at 106-07, 114, 158, 170. However, Upton never slowed down or attempted to yield to the officer's signal.

Upton's driving scared Officer Larsen. RP (3/14/2011) at 136. The traffic was heavy and congested in the area around the Dungeness Bridge. RP (3/14/2011) at 135-36; RP (3/15/2011) at 38. Additionally, highway traffic was forced to break and move away from Upton's pickup, which was making erratic jerking movements. RP (3/14/2011) at 135-37; RP (3/15/2011) at 163. On three occasions, the pickup swerved halfway across the fog line.⁵ RP (3/14/2011) at 137-38. *See also* RP (3/14/2011) at 128-29; RP (3/15/2011) at 86, 103-04, 117.

At the Dungeness Bridge, Seamands knew the pursuing officer was trying to stop Upton. RP (3/15/2011) at 111. Through the side mirror, Seamands could see that the police officer was directly behind them with his lights on.⁶ RP (3/14/2011) at 111, 117, 121; RP (3/15/2011) at 170.

⁵ Upton admitted that her vehicle repeatedly swerved over the fog line. RP (3/15/2011) at 117-18, 123-24. However, she claimed Seamands caused these erratic movements when she repeatedly reached over and grabbed the steering wheel. RP (3/15/2011) at 86, 103-05, 117, 123. Seamands denied this accusation. RP (3/15/2011) at 170.

⁶ Upton testified she never saw the police officer because her rearview mirror was obstructed by moving boxes and the side mirrors were not positioned properly. RP (3/15/2011) at 105-06, 113. However, she later admitted that she actually could see two car lengths behind her through the side mirrors. RP (3/15/2011) at 106.

[B]y the time he was right behind us, I said, “You are being pulled over, you need to stop now[.]”

RP (3/14/2011) at 112. In response, Upton only said, “[w]hy would I be [] pulled over[?] I’m not being pulled over.”⁷ RP (3/14/2011) at 112. Thus, Upton continued down the highway. RP (3/14/2011) at 112.

Inside the pickup, Seamands was scared and frantic because Upton refused to stop the truck. RP (3/14/2011) at 113, 128-29. While Upton never exceeded the speed limit, her driving made Seamands “extremely nervous.” RP (3/14/2011) at 113, 121, 134; RP (3/15/2011) at 37. Seamands repeatedly begged Upton to yield to the officer:

Toward the end I was screaming “Please stop, you need to stop. You’re being pulled over.”

RP (3/14/2011) at 113. Nonetheless, Upton maintained that she was not doing anything wrong. RP (3/14/2011) at 113.

When Upton slowed to turn onto Carlsborg Road, Seamands forcibly removed the keys from the truck’s ignition.⁸ RP (3/14/2011) at 114, 124. The vehicle came to a sudden stop 30 to 45 seconds, approximately 1 mile, after the Dungeness Bridge. RP (3/15/2011) at 158, 162.

⁷ Upton testified that she did not believe the officer was pursuing her because she was not traveling over the speed limit. RP (3/15/2011) at 86.

⁸ Upton testified she started to stop the vehicle herself because she was “surprised” the officer had followed her onto Carlsborg Road. RP (3/15/2011) at 115.

Officer Larsen exited his patrol vehicle and ordered Upton to put her hands out the window. RP (3/14/2011) at 140. Upton immediately yelled back, “[w]hat do you want with me?” RP (3/14/2011) at 140.

After Officer Larsen removed the defendant from the truck, he could detect the strong odor of intoxicants coming from her person. RP (3/14/2011) at 142; RP (3/15/2011) at 36, 52, 57. Upton was emotional, loud, and uncooperative. RP (3/14/2011) at 142; RP (3/15/2011) at 6, 53. Moreover, she exhibited physical signs of impairment: watery, blood shot eyes; poor balance; and slurred speech. RP (3/14/2011) at 142; RP (3/15/2011) at 6, 35-36, 53, 57. A subsequent search of Upton’s vehicle produced a half-full bottle of vodka and a mug containing 20 ounces of an alcoholic beverage. RP (3/14/2011) at 116; RP (3/15/2011) at 7, 14-16. Officer Larsen concluded Upton was intoxicated. RP (3/15/2011) at 35, 53, 57.

After Upton was placed under arrest, she stated she was a diabetic and demanded a blood test. RP (3/15/2011) at 18, 42, 53, 58. *See also* RP (4/8/2010) at 21. Officer Larsen noticed a device was physically attached to the defendant. RP (3/15/2011) at 6-7, 42, 54. Initially, Upton refused to explain what function this imbedded device served as she repeatedly pushed its buttons. RP (3/15/2011) at 6, 18, 42, 54. Officers at the scene asked Upton to stop pressing the buttons out of concern that she might

hurt herself. RP (3/15/2011) at 18, 42, 54-55, 58. Officers then asked paramedics to respond to their location. RP (3/15/2011) at 18, 54.

Medics evaluated Upton and confirmed the device was an insulin pump to control her diabetes. RP (3/15/2011) at 18-19, 43. Additionally, the attending medics informed Officer Larsen that Upton's blood sugar was low, but confirmed she could be transported safely to the Clallam County Jail. RP (3/15/2011) at 19, 22, 43-44.

Officer Larsen then drove Upton to the county jail. RP (3/15/2011) at 23. In the jail parking lot, Upton refused to exit the patrol vehicle. RP (3/15/2011) at 23. *See also* (4/8/2010) at 7, 19. Again, Upton demanded a blood test. RP (3/15/2011) at 23, 42. *See also* (4/8/2010) at 19-20. Only after Officer Larsen requested assistance to extract Upton from his patrol car, did the defendant exit the vehicle. RP (3/15/2011) at 23.

As the two walked toward the jail, Upton asserted she would not enter the building. RP (3/15/2011) at 23. Again, Upton demanded a blood test. RP (3/15/2011) at 43. Officer Larsen controlled Upton's movements and directed her inside the jail. RP (3/15/2011) at 24. When Officer Larsen placed the defendant on a bench near the breathalyzer (BAC) machine, she fell to the floor. RP (3/15/2011) at 24.

After Upton was repositioned on the bench, Officer Larsen advised the defendant of her constitutional rights and implied consent warnings as

part of his driving under the influence (DUI) investigation. RP (3/15/2011) at 25-28, 32, 48. *See also* RP (4/8/2010) at 8-10, 12-13. Upton said she understood her rights and signed a form affirming this understanding. RP (3/15/2011) at 28. *See also* RP (4/8/2010) at 10.

After Upton had an opportunity to speak with her attorney, she refused to submit two breath samples that would determine the alcohol concentration in her body.⁹ RP (3/15/2011) at 31-32. *See also* (4/8/2010) at 13. Again, Upton demanded a blood test. RP (3/15/2011) at 32-33. *See also* RP (4/8/2010) at 13. Officer Larsen informed Upton she had a right to have additional tests done by a person of her choosing, but she would have to pay for the test herself. RP (3/15/2011) at 33, 159. *See also* RP (4/8/2010) at 13, 25-26. Upton replied: "I'm going to pay for it, I'm on Medicaid[.]" RP (3/15/2011) at 33. *See also* RP (4/8/2010) at 19, 25. Officer Larsen then transported her to Olympic Medical Center (OMC). RP (3/15/2011) at 32. *See also* RP (4/8/2010) at 13-15.

Around 9:20 p.m., Officer Larsen and Upton arrived at the local hospital. RP (4/8/2010) at 15. Officer Larsen escorted Upton to an observation room and explained to hospital staff that they needed a blood

⁹ According to Upton, she refused the breath test because diabetics breathe acetone. RP (3/15/2011) at 90. However, the defense expert testified that low blood sugar would not produce ketones that create the strong odor of intoxicants. RP (3/15/2011) at 143-44, 146, 148.

test. RP (4/8/2010) at 16-17, 22-23. While at the hospital, Upton was emotional and her mood constantly fluctuated. RP (4/8/2010) at 16-17, 25. Officer Larsen and medical personnel repeatedly tried to calm Upton in order to facilitate the blood draw. RP (4/8/2010) at 25-26.

After using the washroom, Upton debated whether she actually wanted a blood test. RP (4/8/2010) at 17. Officer Larsen and hospital staff informed Upton that her status as a Medicaid recipient did not present any obstacle to a blood draw. RP (4/8/2010) at 25-26. Ultimately, Upton refused to submit to the test she had requested.¹⁰ RP (3/15/2011) at 33, 45, 48. *See also* RP (4/8/2010) at 17, 23-26. After spending more than 20 minutes at the hospital, Officer Larsen transported Upton back to the county jail. RP (4/8/2010) at 15, 22.

The State charged Upton with attempting to elude a pursuing police vehicle and driving under the influence (DUI). CP 20-21. The defense moved to dismiss the DUI charge, arguing (1) Upton never retracted her demand for a blood test, and (2) Officer Larsen's conclusion

¹⁰ According to Upton, Officer Larsen suddenly escorted her to the patrol car after she used the washroom, stating the county would not pay for her requested blood test. RP (3/15/2011) at 92. *See also* RP (4/8/2010) at 39. Upton claimed she protested, stating Medicaid would pay for the test. RP (3/15/2011) at 98, 116. Officer Larsen allegedly replied that she needed to pay for the exam herself. RP (3/15/2011) at 115. Upton maintained she never refused the blood draw. RP (4/8/2010) at 39. Offer Larsen disputed this account. RP (3/15/2011) at 159-60.

the defendant refused a test prevented her from obtaining exculpatory evidence.¹¹ RP (4/8/2010) at 4, 45-46.

The trial court denied the motion to dismiss:

There's obviously an issue that goes to credibility.

Officer Larsen testified the Defendant was very intoxicated on the evening in question. He -- she acknowledge having only a sip of alcohol. She also acknowledges that she has Type one brittle diabetes and that cause her to go up and down very fast. ...

Ultimately, testimony about whether or not the hospital logged her in is sort of irrelevant in that both parties admit she went to the emergency room and was driven there by Officer Larsen and was in fact put in a room and given an opportunity to go to the bathroom, all of which is consistent with Officer Larsen's testimony as well as her own.

What was interesting is the comments made by Ms. Upton that at the time and at the hospital that she became incoherent and was very confused about what was going on. I think that's probably more telling than anything else.

It does not make sense to the Court that Officer Larsen would drive her to the hospital, take her in the room in the hospital, have the nurses contact her and sort of

¹¹ While the brief to dismiss suggested Officer Larsen had incorrectly advised Upton regarding who would pay/reimburse the costs of the blood draw, *see* CP 46-47, the defense never challenged the adequacy of the implied consent warnings at the CrR 3.6 hearing. *See* RP (4/8/2010) at 1-53. In fact, the defense expressly withdrew such an argument: "There's some discussion about who [was] going to pay for this, I'm not really going to hypothesize about what actually happened, but I think the evidence supports what Ms. Upton is claiming, she had always been consistent in her demand for a blood test. For some reason -- and I don't know why [Officer Larsen] decided -- that something she said constituted a refusal and took her back to the jail and booked her." RP (4/8/2010) at 46.

willy nilly say let's go, we're done here. I think it's more credible and reasonable to believe she indicated she was not going to do the blood test.

One of the reasons that supports that as being reasonable is she refused to get out of the car at the Sally port, refused to take the BAC the evening in question, there were lots of refusals that were going on, and it would make more sense to believe that she refused to do the blood test at the hospital when the officer said okay, if you are not going to do you this then I'll take you back. I think the officer fulfilled whatever duties are necessary under the circumstances and it was the Defendant that caused the lack of blood draw rather than the officer.

RP (4/8/2010) at 50-51. As a result, the court permitted the State to introduce the refusal at trial.

Before closing arguments, the trial court instructed the jury on the applicable law. CP 25-43; RP (3/15/2011) at 177. These instructions included an explicit direction that the jury must disregard any statement the judge may have made that appeared to be a comment on the evidence. CP 27-28.

During closing arguments, the State sought to emphasize how long Upton drove with Officer Larsen directly behind her with his lights and siren activated:

MR. ESPINOZA: ... Ladies and gentlemen, I'm going to show you just how long this occurred. From this point right here when the officer was finally behind, we're talking about Gilbert Road which

Officer Larsen testified to. We're looking at approximately .77 miles. Officer Larsen said roughly 45 seconds to a minute. Let's see how long that is. Take a look at the second hand right there, it's on the nine.

MR. STALKER: Objection, counsel's misstating the testimony.

THE COURT: It was 30 to 45 second[s], I believe.

MR. ESPINOZA: Forty five seconds.

THE COURT: Correct.

MR. ESPINOZA: Let's take a look when the second hand is on the twelve. ... That's quite a long time to claim that you didn't notice an officer with his lights and his siren and your passenger yelling at you to pull over, you're being pulled over. Now, that 45 seconds was just when Officer Larsen was behind her.

RP (3/15/2011) at 180-81. A jury convicted Upton as charged. RP (3/16/2010) at 3-4. Additionally, the jury returned a special verdict, finding the defendant refused a test to determine her level of alcohol concentration. RP (3/16/2010) at 4.

The court imposed two concurrent 90-day sentences for both the eluding and DUI convictions. CP 8; RP (5/18/2011) at 39. However, the court ordered Upton to serve only 45 days in confinement, permitting her

to serve the remainder on electronic home monitoring (EHM). CP 8, 14; RP (5/18/2011) at 39, 41, 45, 48.

Additionally, the court imposed standard legal financial obligations (LFO).¹² CP 11-12. In order to help the defendant pay the costs related to her EHM, the court did not require Upton to pay attorney fees. CP 11; RP (5/18/2011) at 41. While the court entered a finding on the judgment and sentence that read “[t]he defendant has the ability or likely future ability to pay the legal financial obligations imposed herein[,]”*see* CP 8, the verbatim record of proceedings does not show the judge conducted the necessary evaluation on the record. RP (5/18/2011) at 41.

Upton appeals.

III. ARGUMENT.

A. SUFFICIENT EVIDENCE SUPPORTS THE ELUDING CONVICTION.

Ms. Upton contends the evidence does not support her conviction for attempting to elude a pursuing police vehicle. *See* Brief of Appellant at 11-13. She believes the State failed to prove (1) she willfully failed or refused to stop, and (2) she drove in a reckless manner. *See* Brief of Appellant at 12-13. The argument is without merit.

¹² In the present case, the sentencing court imposed both mandatory and discretionary fees and costs. *See* CP 11-12. *See e.g.* RCW 7.68.035, 43.43.7541, 46.61.0555.

A sufficiency of the evidence claim requires this Court to review the evidence in a light most favorable to the State and decide whether any rational trier of fact could have found the essential elements of eluding. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010); *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Such a challenge admits the truth of the evidence that the State introduced at trial. *Kintz*, 169 Wn.2d at 551; *Salinas*, 119 Wn.2d at 201. As a result, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Salinas*, 119 Wn.2d at 201. The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Consistent with RCW 46.61.024 (2009),^{13, 14} the trial court properly defined the crime of “attempting to elude a police vehicle.” Jury Instruction 6 reads:

¹³ The state legislature amended the statute in 2010 to include gender-neutral terms. See Laws of Washington 2010 c. 8 § 9065.

¹⁴ RCW 46.61.024(1) (2009) provides, in pertinent part:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal

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

A signal to stop given by a police officer may be by hand, voice, emergency light, or siren. The police officer giving such a signal must be in uniform and the officer's vehicle must be equipped with lights and siren.¹⁵

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.

¹⁵ The "to convict" jury instruction also reads:

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

- (1) That on or about the 22nd day of August, 2009, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
- (3) That the signaling police officer's vehicle was equipped with the lights and siren;
- (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove the vehicle in a reckless manner; and
- (6) That the acts occurred in the State of Washington.

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

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 7. *See also* WPIC 94.02

CP 33. *See also* WPIC 94.01. The evidence introduced at trial, and all reasonable drawn inferences in favor of the prosecution, support the conviction.

1. Ms. Upton willfully failed/refused to bring her vehicle to an immediate stop.

A person acts willfully as to a particular fact when he or she acts knowingly as to that fact. WPIC 10.05 (citing RCW 9A.08.010(4)).

Here, the record shows Upton willfully failed or refused to stop her vehicle. Officer Larsen positioned his vehicle directly behind Upton's pickup at the Dungeness Bridge. RP (3/14/2011) at 111, 117, 121, 132; RP (3/15/2011) at 157, 161-62. At that point, Officer Larsen had already activated his emergency lights and siren. RP (3/14/2011) at 132-33, 138-39; RP (3/15/2011) at 36, 158. The defendant and her passenger were able to see the officer in the side mirrors. RP (3/15/2011) at 106-07, 114, 170. After the Dungeness Bridge, with his lights and siren already activated, Officer Larsen pursued Upton for 30-45 additional seconds, traversing almost a mile. RP (3/15/2011) at 158, 162.

Moreover, Seamands begged Upton to pull over, repeatedly telling her an officer was behind her. RP (3/14/2011) at 112-13. When Upton showed no intention of pulling over, Seamands was forced to remove the keys from the truck's ignition. RP (3/14/2011) at 114, 123-24. When

Seamands finally managed to stop the vehicle, Upton immediately yelled at the officer: “[w]hat do you want with me?” RP (3/14/2011) at 140; RP (3/15/2011) at 39.

Based on these facts, and reviewing the evidence in a light most favorable to the State, a rational juror could find that (1) the defendant knew an officer was behind her, (2) the defendant knew the officer was attempting to pull her vehicle over, and (3) the defendant willfully failed/refused to bring her vehicle to an immediate stop (deciding, instead, to drive another mile down the highway until her passenger forced the truck to come to an abrupt halt). The jury was entitled to disbelieve Upton’s testimony to the contrary. *See Thomas*, 150 Wn.2d at 874-75. This Court should affirm.

2. Ms. Upton drove her vehicle in a reckless manner.

A “reckless manner,” as used in RCW 46.61.024(1), means “driving in a rash or heedless manner, indifferent of the consequences.” *State v. Ridgley*, 141 Wn. App. 771, 781, 174 P.3d 105 (2007) (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005)).¹⁶ This standard does not incorporate any requirement that there be, or that

¹⁶ When the legislature amended RCW 46.61.024 in 2003 to substitute “in a reckless manner” it incorporated a lesser mental state than the previous “wanton or willful disregard” standard. *See Ridgley*, 141 Wn. App. at 781.

the defendant foresee, a “probability of harm.” *See State v. Whitcomb*, 51 Wn. App. 322, 327, 753 P.2d 565 (1988) (even under the old “wilful and wanton” standard the State was not required to prove that anyone else was endangered by the defendant’s conduct or that a high probability of harm actually existed).

Here, the evidence allowed a rational juror to find Upton drove in a reckless manner, indifferent to the consequences. The testimony established there was heavy traffic on the highway. RP (3/14/2011) at 135-36; RP (3/15/2011) at 38. This traffic was forced to brake to avoid Upton’s pickup. RP (3/14/2011) at 136-37; RP (3/15/2011) at 163. The pickup traveled at 45 m.p.h., swerved across the fog line three times, and threw debris into the air. RP (3/14/2011) at 128-29, 132-34, 137-38; RP (3/15/2011) at 37. The defendant ignored her passenger’s repeated pleas to stop and pull over. RP (3/14/2011) at 112-13. The defendant’s driving scared both the officer and her passenger. RP (3/14/2011) at 113, 128-29, 136. From this evidence, a rational juror could find that Upton drove in a rash and heedless manner, indifferent to the consequences.

Moreover, the jury could reasonably conclude Upton drove in a reckless manner, indifferent to the consequences, when she decided to get behind the wheel after she had consumed alcohol, exercised, and knew her

blood sugar was low. RP (3/15/2011) at 84, 93. *See also* RP (5/18/2011) at 32. Accordingly, her insufficiency claim fails.

B. THE JUDGE DID NOT IMPROPERLY COMMENT ON THE EVIDENCE.

Ms. Upton claims the trial judge committed reversible error by commenting on the evidence introduced at trial. *See* Brief of Appellant at 14-15. Specifically, she faults the judge for “correcting the prosecutor’s misstatement” during closing arguments. *See* Brief of Appellant at 15. In her opinion, this isolated event “left the jury with the impression that he agreed with the remainder of the prosecutor’s argument” *See* Brief of Appellant at 15. The argument is without merit.

Article IV, section 16 of the Washington State Constitution reads: “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” This provision “forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at trial.” *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). *See also State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (a judge is prohibited from conveying to the jury his/her personal opinion about the merits of the case or from instructing the jury that a fact at issue has been established). The

fundamental question that underlies the present analysis is “whether the mere mention of a fact ... conveys the idea that the fact has been accepted by the court as true.” *Levy*, 156 Wn.2d at 726. *See also State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (“The touchstone of error in a trial court’s comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.”).

During the State’s closing remarks, the deputy prosecutor sought to demonstrate how long Officer Larsen pursued the defendant with his lights and siren activated:

MR. ESPINOZA: ... Ladies and gentlemen, I’m going to show you just how long this occurred. From this point right here when the officer was finally behind, we’re talking about Gilbert Road which Officer Larsen testified to. We’re looking at approximately .77 miles. Officer Larsen said roughly 45 seconds to a minute. Let’s see how long that is. Take a look at the second hand right there, it’s on the nine.

MR. STALKER: Objection, counsel’s misstating the testimony.

THE COURT: It was 30 to 45 second[s], I believe.

MR. ESPINOZA: Forty five seconds.

THE COURT: Correct.

MR. ESPINOZA: Let's take a look when the second hand is on the twelve. ... That's quite a long time to claim that you didn't notice an officer with his lights and his siren and your passenger yelling at you to pull over, you're being pulled over. Now, that 45 seconds was just when Officer Larsen was behind her.

RP (3/15/2011) at 180-81. The trial judge corrected the deputy as to what the officer actually testified. However, he did not assign any "truth value" to the officer's testimony. The judge did not convey a belief as to the credibility, weight, or sufficiency of the evidence against the defendant. Moreover, he did not affirm this statement had been conclusively established. There was no error.

Additionally, the trial judge specifically instructed the jury that he could not comment on the evidence, that if he had he had done so it was unintentional, and that the jury should disregard any statement, it believed was a comment on the evidence. CP 27-28. Such an instruction cures any judicial comment on the evidence. *See State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999) (this instruction cured any article IV, section 16 violation where the defendant appeared in shackles on the first day of voir dire); *accord State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988) (this instruction indicated the trial court did not convey any personal attitude toward the merits of the case). There is no error.

Assuming, the trial judge erred when he corrected the deputy's recitation of the facts, the error was harmless. A judicial comment on the evidence is presumed to be prejudicial. *State v. Hartzell*, 156 Wn. App. 918, 937, 237 P.3d 928 (2010). However, reversal is not required if the record affirmatively shows no prejudice could have resulted. *Hartzell*, 156 Wn. App. at 937 (citing *Levy*, 156 Wn.2d at 723).

Here, the record affirmatively shows no prejudice followed the trial judge's corrective statement. First, the officer actually testified that he drove directly behind the defendant with his emergency lights and siren activated for 30 to 45 seconds. RP (3/15/2011) at 161-62. Thus, the judge's statement was supported by the undisputed testimony at trial.

Second, the judge prevented the State from making an argument that was unsupported by the record. *See* RP (3/15/2011) at 180-81. This arguably benefited the defense, otherwise the jury would have felt/experienced a longer period than the officer actually pursued the defendant down the highway. *See* RP (3/15/2011) at 181.

Finally, the jury heard testimony regarding the distance that Officer Larsen pursued Upton with his lights and sirens activated – approximately 1 mile. *See* RP (3/15/2011) at 46, 158. Whether it was 30 seconds, 45 seconds, or 1 minute, no one can claim that Upton's decision to drive at highway speeds for nearly a mile – while her passenger

repeatedly begged her to pull over after seeing emergency lights in the side mirror – does not constitute a failure to come to an immediate stop. There was no prejudice.

This Court should affirm because (1) the judge merely restated a single statement that was not in dispute, (2) the judge did not convey a belief as to the credibility, weight, or sufficiency of the evidence against the defendant, (3) the judge did not suggest to the jury that a particular element of the crime had been satisfied, (4) the court instructed the jury to disregard any statement it perceived as a comment on the evidence, and (5) the comment did not influence the jury's verdict.

C. THE COURT PROPERLY FOUND THE DEFENDANT REFUSED TO PROVIDE A TEST TO DETERMINE THE CONCENTRATION OF ALCOHOL IN HER BODY.

Ms. Upton argues the State unreasonably interfered with her efforts to obtain an independent blood test to determine the alcohol concentration in her body. *See* Brief of Appellant at 16-20. Thus, she argues the trial court erred when it refused to dismiss the charge of DUI. *See* Brief of Appellant at 17, 20. The argument is without merit.

In Washington, any person who drives a motor vehicle consents to a test of his/her breath or blood if he/she commits an offense that involves driving a motor vehicle under the influence of alcohol or drugs. RCW

46.20.308(1). If the defendant refuses to submit to a test of his/her breath or blood, then that refusal is admissible as evidence of guilt. RCW 46.20.308(2)(b); RCW 46.61.517; *State v. Long*, 113 Wn.2d 266, 272, 778 P.2d 1027 (1989); *State v. Baldwin*, 109 Wn. App. 516, 518, 37 P.3d 1220 (2001).

Whether a driver has refused a breath or blood test is a question of fact. *Rockwell v. State, Department of Licensing*, 94 Wn. App. 531, 534-35, 972 P.2d 1276 (1999). This Court reviews factual determinations by looking to the record to see if substantial evidence supports them:

Our review is limited to determining whether the trial court's findings are supported by substantial evidence, and, if so, whether the findings in turn supported the conclusions of law. (citation omitted). We need determine only whether the evidence most favorable to the prevailing party supports the challenged findings, even if the evidence is in conflict. (citation omitted). Findings of fact supported by substantial evidence will not be reversed on appeal. (citation omitted).

Shelden v. Department of Licensing, 68 Wn. App. 681, 684-85, 845 P.2d 341 (1993). Substantial evidence is that which would "convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *Shelden*, 68 Wn. App. at 685.

The testimony of the arresting officer constitutes substantial evidence, and findings based on such testimony must not be disturbed on appeal. *McCarthy v. Department of Licensing*, 44 Wn. App. 848, 850, 723

P.2d 34, (1986). Additionally, where a party's defense comes down to a swearing contest with another witness, the appellate court cannot substitute its judgment for that of the trier of fact. *McCarthy*, 44 Wn. App. at 850.

Here, the trial court was confronted with conflicting testimony. Upton testified that (1) she repeatedly demanded a blood test, (2) she never refused a blood test, and (3) Officer Larsen summarily transported her back to the jail before anyone could perform a blood test only because he believed the county would not pay for the test she requested. RP (4/8/2010) at 39-40.

In contrast, Officer Larsen testified Upton exhibited erratic behavior and constant mood swings during their three hours together. RP (4/8/2010) at 17, 19, 25-26. Officer Larsen advised the defendant of her implied consent warnings, and affirmed she had the right to a blood test at her own expense. RP (4/8/2010) at 8-10, 12-13, 25-26. *See also* RP (3/15/2011) at 33, 159. After noting Upton refused to submit a breath sample, Officer Larsen transported her to the local hospital where she could obtain a blood test. RP (4/8/2010) at 13-14.

At the hospital, Upton continued to display erratic behavior. RP (4/8/2010) at 17. Officer Larsen explained to medical staff that they needed a blood draw. RP (4/8/2010) at 17. After Upton relieved herself in

the washroom, she refused to take a blood test. RP (4/8/2010) at 17, 24-25. Officer Larsen and medical staff tried to persuade the defendant that they could obtain a blood draw despite her status as a Medicaid recipient. RP (4/8/2010) at 23, 25-26. When Upton persisted in her refusal, Officer Larsen transported her back to the jail. RP (4/8/2010) at 17-18, 25. The defendant spent a total of 23 minutes at the hospital. RP (4/8/2010) at 15, 22.

The trial court correctly made its ruling based on the evidence it found most credible. In his oral opinion, the judge stated:

There's obviously an issue that goes to credibility.

Officer Larsen testified the Defendant was very intoxicated on the evening in question. He -- she acknowledge having only a sip of alcohol. She also acknowledges that she has Type one brittle diabetes and that cause her to go up and down very fast. ...

Ultimately, testimony about whether or not the hospital logged her in is sort of irrelevant in that both parties admit she went to the emergency room and was driven there by Officer Larsen and was in fact put in a room and given an opportunity to go to the bathroom, all of which is consistent with Officer Larsen's testimony as well as her own.

What was interesting is the comments made by Ms. Upton that at the time and at the hospital that she became incoherent and was very confused about what was going on. I think that's probably more telling than anything else.

It does not make sense to the Court that Officer Larsen would drive her to the hospital, take her in the room in the hospital, have the nurses contact her and sort of willy nilly say let's go, we're done here. I think it's more credible and reasonable to believe she indicated she was not going to do the blood test.

One of the reasons that supports that as being reasonable is she refused to get out of the car at the Sally port, refused to take the BAC the evening in question, there were lots of refusals that were going on, and it would make more sense to believe that she refused to do the blood test at the hospital when the officer said okay, if you are not going to do you this then I'll take you back. I think the officer fulfilled whatever duties are necessary under the circumstances and it was the Defendant that caused the lack of blood draw rather than the officer.

RP (4/8/2010) at 50-51. It is evident the trial court did not believe Upton on the issue of whether she refused the blood test. The trial court's findings/conclusions are supported by substantial evidence in the form of Officer Larsen's testimony. As such, they may not be disturbed on appeal. *See Wolf v. State, Department of Motor Vehicles*, 27 Wn. App. 214, 218, 616 P.2d 688 (1980).

Moreover, the state introduced overwhelming evidence that the defendant was intoxicated aside from her refusal to produce a sample of her breath or blood. Both the defendant and her passenger testified they consumed alcohol before driving. RP (3/14/2011) at 107-08, 120; RP (3/15/2011) at 80, 92, 169, 171. Witnesses at the Walmart observed the

defendant exhibiting signs of intoxication before driving toward the highway. RP (3/14/2011) at 91-92, 95, 99-100, 102. Officer Larsen testified he watched the defendant's pickup swerve over the fog line three separate times. RP (3/14/2011) at 132-34, 137-38; RP (3/15/2011) at 36.

Inside the truck's passenger cabin, officers discovered a vodka bottle that was half-full. RP (3/14/2011) at 116; RP (3/15/2011) at 7, 16. Seamands testified the defendant filled a 32-ounce mug with vodka. RP (3/14/2011) at 107-08, 115, 120; RP (3/15/2011) at 8, 166, 169. From this mug, Seamands estimated she consumed only one ounce. RP (3/14/2011) at 107-08, 120; RP (3/15/2011) at 169. However, at the time of the arrest, the mug contained only 20 ounces of the alcoholic beverage. RP (3/14/2011) at 116; RP (3/15/2011) at 14-15.

Outside the vehicle, the officers smelled the strong odor of intoxicants coming from the defendant. RP (3/14/2011) at 142; RP (3/15/2011) at 36, 52, 57. Additionally, the defendant exhibited other physical symptoms of intoxication: watery, bloodshot eyes; poor balance; and slurred speech. RP (3/14/2011) at 142; RP (3/15/2011) at 6, 35-36, 53, 57. There is no evidence that the defendant's refusal to submit to a test influenced the jury verdict. This Court should affirm.

The argument that Officer Larsen failed to adequately advise Upton regarding who would pay/reimburse the cost of a blood test is not

properly before this Court. Generally, appellate courts will not address issues raised for the first time on appeal, unless the claimed error affects a constitutional right and prejudices the defendant. *State v. Williams*, 137 Wn.2d 746, 749, 975 P.2d 963 (1999). “The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace.” *State v. Elkins*, 152 Wn. App. 871, 876, 220 P.3d 211 (2009) (quoting *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995)). At trial, the defense withdrew its challenge to the adequacy of the implied consent warnings. *See* RP (4/8/2010) at 46. As such, this argument cannot be raised for the first time on appeal. RAP 2.5(a).

Additionally, Upton never made a statement that she could not pay for a blood draw at her own expense. In Washington, “an indigent driver may in the appropriate case obtain reimbursement for the costs of an additional test.” *Gonzalez v. Department of Licensing*, 112 Wn.2d 890, 898, 774 P.2d 1187 (1989) (citing *State v. Bartels*, 112 Wn.2d 882, 888-89, 774 P.2d 1183 (1989)). However, where a driver makes no claim of indigency, the State has no obligation to pay for additional tests and the advisement that a driver can only obtain said tests at his/her expense is entirely accurate. *Gonzalez*, 112 Wn.2d at 899. Here, Upton never asserted that she could not afford the test she requested. Thus, the advisement she

received was sufficient. *See* RP (4/8/2010) at 12-13; RP (3/15/2011) at 33, 159.

Assuming Upton's statement that she was on Medicaid imposed an obligation on the State to advise her that the county would cover the costs of the blood draw, the absence of such an advisement did not impact her decision to refuse the test at the hospital. Upton clearly believed Medicaid would cover costs of the blood test that she repeatedly demanded. RP (3/15/2011) at 33, 98, 116. Based on this belief, she insisted that the officer transport her to the local hospital. RP (3/15/2011) at 33, 159.

However, at the hospital, and after the officer informed the medical staff that the defendant required a blood draw, Upton refused to go forward with the test. RP (4/8/2010) at 17, 22-26; RP (3/15/2010) at 33, 45. Upton persisted in this refusal despite assurances that her Medicaid status would not preclude a blood draw. RP (4/8/2010) at 25-26. Thus, the information (or lack thereof) that Upton received did not affect her decision to refuse the a blood test.

The trial court found Officer Larsen's testimony that Upton refused a blood test to be the most credible. This testimony provided substantial evidence to support the trial court's findings and conclusions. The trial court correctly found/concluded that Upton refused to submit a

breath/blood sample to determine the alcohol concentration in her body.

There is no error.

D. THE RECORD DOES NOT SUPPORT A FINDING THAT THE DEFENDANT HAS THE FUTURE ABILITY TO PAY HER LEGAL FINANCIAL OBLIGATIONS.

Ms. Upton argues the trial court's finding that she has the present and future ability to pay legal financial obligations is not supported by the record. *See* Brief of Appellant at 20-21. The State concedes. This Court should vacate the contested finding and remand for a new sentencing hearing.

This Court applies a clearly erroneous standard when reviewing the sentencing court's determination regarding the defendant's ability to pay legal financial obligations. *State v. Bertrand*, -- Wn. App. --, 267 P.3d 511, 517 (2011); *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). The decision to impose discretionary costs/fees requires the sentencing court to balance the defendant's ability to pay against the burden of his obligation. *Baldwin*, 63 Wn. App. at 312. This determination requires discretion and, thus, is reviewed for an abuse of discretion. *Baldwin*, 63 Wn. App. at 312.

Here, the sentencing court found Upton had "the ability or likely future ability to pay the legal financial obligations" imposed pursuant to

RCW 9.94A.753. CP 8. However, the record does not show the trial court took into account Upton's financial resources or the burden her LFO's might present in the future. *See* RP (5/18/2011) at 41. Thus, the sentencing court's written finding that the defendant has the present or future ability to pay LFO's was erroneous. *See Bertrand*, 267 P.3d at 517.

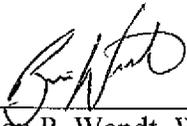
This Court should vacate the challenged finding and remand for a new sentencing hearing, during which the sentencing court should determine, on the record, whether Upton has the ability to pay her LFO's after taking into account her financial resources and any burden the fees/costs may present in the future. *See Bertrand*, 267 P.3d at 517 n. 16.

IV. CONCLUSION.

For the reasons stated above, the State respectfully asks this Court to affirm Ms. Upton's two convictions and remand for a new sentencing hearing.

Respectfully submitted: February 17th, 2012.

DEBORAH S. KELLY, Prosecuting Attorney



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CLALLAM COUNTY PROSECUTOR

February 17, 2012 - 4:00 PM

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