

NO. 44116-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ASLAN JEFFERY,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAR 18 PM 2:38

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

APPELLANT'S OPENING BRIEF

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
COURT OF APPEALS
DIVISION II
2013 MAR 19 AM 10:34
STATE OF WASHINGTON
BY  DEPUTY

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 6

 1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE
 ATTEMPTING TO ELUDE VERDICT 6

 a. The State must prove each element of the crime charged
 beyond a reasonable doubt 6

 b. The State failed to prove Mr. Jeffery was the driver of the
 truck that eluded the officers 7

 c. The appropriate remedy is to reverse the attempting to
 elude conviction 8

 2. THE SPECIAL VERDICT LANGUAGE RELIEVED THE
 STATE OF ITS BURDEN TO PROVE THAT OTHER
 PERSONS “WERE ENDANGERED” DURING MR.
 JEFFERY’S COMMISSION OF THE CRIME OF ATTEMPT
 TO ELUDE A POLICE VEHICLE. 9

 a. Manifest constitutional error. 9

 b. The special verdict language relieved the State of its
 burden to prove every fact necessary to the imposition of
 the sentence enhancement authorized by RCW 9.94A.834,
 which requires proof that persons were “endangered”
 during the crime..... 11

 c. Constitutional error in omitting an element is not harmless
 if any trial evidence on the missing element was
 “controverted.” 15

3. REVERSAL IS REQUIRED WHERE THE CHARGING DOCUMENT OMITTED THE ESSENTIAL "ENDANGERED" ELEMENT.....	17
a. No prejudice showing required.....	18
b. Prejudice shown.....	19
E. CONCLUSION	20

TABLE OF AUTHORITIES

Washington Supreme Court

<u>In re Hinton</u> , 152 Wn.2d 853, 100 P.3d 801 (2004)	6
<u>State v. Aver</u> , 109 Wn.2d 303, 745 P.2d 479 (1987).....	11
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007)	14
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	12, 14, 15, 16
<u>State v. Brown</u> , 169 Wn.2d 195, 234 P.3d 212 (2010).....	18, 19
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995).....	6
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	15
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	6
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	17, 18, 19
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005)	10
<u>State v. Randhawa</u> , 133 Wn.2d 67, 941 P.2d 661 (1997).....	14
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008)	11, 17
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	10
<u>State v. Simms</u> , 171 Wn.2d 244, 250 P.3d 107 (2011).....	12
<u>State v. Simon</u> , 120 Wn.2d 196, 840 P.2d 172 (1992)	19
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	15
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001).....	10, 12
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980)	10, 15
<u>State v. Tongate</u> , 93 Wn.2d 751, 613 P.2d 121 (1980).....	9, 11

<u>State v. Williams-Walker</u> , 167 Wn.2d 889, 225 P.3d 913 (2010)	11, 17
<u>State v. Zillyette</u> , 173 Wn.2d 784, 270 P.3d 589 (2012)	19

Washington Court of Appeals

<u>State v. Guzman</u> , 119 Wn. App. 176, 79 P.3d 990 (2003)	19
<u>State v. Harris</u> , 164 Wn. App. 377, 385, 263 P.3d 1276 (2011)	10
<u>State v. Hennessey</u> , 80 Wn. App. 190, 907 P.2d 331 (1995)	12
<u>State v. Lua</u> , 62 Wn. App. 34, 813 P.2d 588 (1991)	11
<u>State v. Marcum</u> , 116 Wn. App. 526, 66 P.3d 690 (2003)	18, 19, 20
<u>State v. Pierce</u> , 155 Wn. App. 701, 230 P.3d 237 (2010)	17

United States Supreme Court

<u>American Tobacco Co. v. United States</u> , 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946)	8
<u>Burks v. United States</u> , 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)	8, 9
<u>County Court of Ulster County v. Allen</u> , 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)	14
<u>Fiore v. White</u> , 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001)	6
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	6
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	6, 12, 14
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)	15, 16, 17

Washington Constitution

Article I, sections 21 and 22 11, 12, 17

United States Constitution

U.S. Const. amend 5 9

U.S. Const. amend. 6 17

U.S. Const. amend. 14 9, 11, 12

Statutes

RCW 10.37.050(6)..... 19

RCW 46.61.024 7

RCW 9.94A.533(11)..... 13, 14

RCW 9.94A.834..... 9, 11, 12, 13, 14, 15, 16, 19

Rules

CrR 2.1(a)(1)..... 17

RAP 2.5(a) 10

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support a conviction of attempting to elude a pursuing police vehicle, in violation of Mr. Jeffery's right to due process of law.

2. The language of the special verdict relieved the State of its Fourteenth Amendment and Washington Constitution Due Process burden to prove the "endangerment" element to the jury.

3. The trial court erred in entering judgment and sentence on the 12+ month enhancement of RCW 9.94A.533(11) as required to be authorized under RCW 9.94A.834.

4. The information failed to charge the essential element that the defendant "endangered" others, requiring reversal for failure of notice.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An attempting to elude a pursuing police vehicle verdict requires proof beyond a reasonable doubt that the defendant was driving a motor vehicle and refused to stop the vehicle after being signaled to do so by a uniformed police officer pursuing the defendant in a police vehicle equipped with lights and sirens. In this case, where the State failed to produce sufficient evidence that Mr. Jeffery was the driver of the motor vehicle being pursued, does the lack of evidence require the attempting to elude verdict be reversed?

2. The special allegation of RCW 9.94A.834 authorizes a 12+ month sentence enhancement, and may be filed as a charge by the prosecutor whenever there is evidence that the defendant's actions in committing the crime of eluding "threatened" any person (except for the defendant or pursuing officer) with injury or harm.

However, the pertinent statutes explicitly provide that, in order for the sentencing court to impose the 12+ month enhancement, the jury must have found, beyond a reasonable doubt, that other person(s) were actually "endangered" by the defendant's driving actions during the offense.

In this case, the language of the special verdict only asked the jury if the defendant caused others to be "threatened with physical injury or harm." The instructions were missing the essential element of RCW 9.94A.834(2) that persons were endangered by the defendant's actions in eluding. The State was relieved of its burden of proof, creating appealable manifest constitutional error. Should this Court order reversal of the judgment entered on the jury's special verdict and vacate the enhancement?

3. The charging information entirely omitted the essential element of RCW 9.94A.834(2) of "endangerment," instead merely alleging that the defendant's actions "threatened" others. The defendant did not have notice of the endangerment element. Prejudice need not be shown in such instance, but prejudice nonetheless appears in the record where the defense

did not defend the case at trial in accordance with the “endangerment” standard. Should this Court reverse the judgment entered on the jury’s verdict for lack of constitutionally-required notice?

C. STATEMENT OF THE CASE

Aslan Jeffery was charged with Attempting to Elude a Police Vehicle, as a result of events occurring on December 14, 2011. CP 40-41. The Eluding charge was accompanied in the third amended information by a special allegation that he threatened physical injury or harm. CP 40-41.

At trial, Shelton police officer Auderer testified that shortly after midnight on December 14th, he observed an individual driving a dark-colored pick-up truck in a manner that he deemed reckless. RP 107. He was not able to ascertain a description of the driver, or even to identify his or her race. RP 144. A high-speed chase ensued, during which Officer Auderer was joined by two deputies from Mason County, once the pursuit entered the Mason County border. RP 158-62, 189-92.

The pursuit ended close to 30 miles later in Mason County at the end of a dirt road, when the truck came to a stop and three individuals jumped out of the truck and fled on foot – two from the driver’s side and one from the passenger’s side. RP 121-22. Officer Auderer stated that he was again unable to tell whether these individuals were male or female, their races, their clothing, or any other identifying characteristics at the time they exited

their vehicle. RP 144-45. He also stated that his dashboard camera was broken and thus did not record the events of that evening. Id.

A few moments later, Mason County Deputy Sargent, with the assistance of Officer Auderer, apprehended the suspect that had exited from the passenger-side door; this individual was later identified as Josiah Martin. RP 121-22. Deputy Gray, who was a trained K9 handler, went in pursuit of the two remaining suspects who had exited from the driver-side door. RP 156. Deputy Gray testified that although he had seen the two remaining suspects “bail out” of the car, one after the other, he, too, was not unable to see what either of the two was wearing when he unleashed his dog on them. RP 164. As the two men fled into the heavily wooded area, down a steep embankment, Gray briefly turned his back on the suspects to release his dog from the patrol car. RP 165-67. As he did so, he lost his line-of-sight on the two suspects. RP 165-67. Deputy Gray’s dog apprehended one of the men, who identified himself as Joseph Tindall. RP 168.

After securing this individual, Deputy Gray then put a harness on his dog and returned to the woods to search for the remaining suspect. RP 169. Soon thereafter, Gray heard a male voice yelling; Gray ran to catch up with his dog and apprehended and handcuffed Mr. Jeffery. RP 170. At trial, Deputy Gray initially testified that he had no recollection of what Mr. Jeffery was wearing, and that the dog did not bite Mr. Jeffery. RP 170-71.

The State, however, recalled Officer Auderer to testify that Mr. Tindall – the other suspect fleeing from the driver’s side door – was wearing a tan jacket, and that Mr. Jeffery was wearing a black jacket. RP 212-14. Deputy Gray proceeded to testify in great detail, also on recall, concerning Mr. Jeffery’s black leather jacket. RP 248-49. Deputy Gray also testified on recall that Mr. Jeffery had been bitten by the dog, although he had written in sections of his report that it was Mr. Tindall that was bitten. *Id.* The deputy had no explanation for the whereabouts of the photographs he claimed to have taken. RP 250.

The jury found Mr. Jeffery guilty of attempting to elude, and also answered “yes” to the RCW 9.94A.834 special verdict language, which asked:

Was any person, other than the defendant or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of the defendant during his commission of the crime of attempting to elude a police vehicle?

CP 17; compare RCW 9.94A.834 (requiring jury finding that persons “were endangered during the commission of the crime.”).

The court imposed the consecutive 12+ month sentence enhancement of RCW 9.94A.834, for a total sentence of incarceration of 24+ months. CP 6-16; RP 321-23.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE ATTEMPTING TO ELUDE VERDICT.

a. The State must prove each element of the crime charged beyond a reasonable doubt. Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). In a criminal case, the jury must unanimously find the prosecution proved every necessary element of the crime charged. Fiore v. White, 531 U.S. 225, 228-29, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001), In re Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004). For a sufficiency of the evidence claim, the appellate court must determine “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 442 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In order to support a conviction for attempting to elude, the State must prove beyond a reasonable doubt (1) while driving a motor vehicle (2) and having been given a visual and audible signal by a uniformed police officer to bring the vehicle to a stop, (3) the defendant willfully failed and

refused to immediately stop the vehicle and drove the vehicle in a reckless manner, (4) while attempting to elude a pursuing police vehicle equipped with lights and sirens. RCW 46.61.024. In the case at bar, the State failed to produce sufficient evidence to prove beyond a reasonable doubt that Mr. Jeffery was the driver of the pick-up truck that eluded the law enforcement officers.

b. The State failed to prove Mr. Jeffery was the driver of the truck that eluded the officers. The evidence produced at trial overwhelmingly supported Mr. Jeffery's argument that the jury had insufficient proof of who was driving the truck that night. First, Officer Auderer, the only witness who actually saw the truck within Shelton city limits, testified that he was unable to see the driver when he observed what he termed "reckless" driving in his jurisdiction. RP 144. The officer was unable to make an identification of any of the individuals in the truck – even as to whether they were male or female, or of their races, much less whether Mr. Jeffery was the driver or merely a passenger. RP 144. Later, following the pursuit, Officer Auderer was still unable to distinguish the driver from the passengers when describing how they were "fleeing" from the truck cab, explaining it all happened in a matter of seconds. RP 121, 145. Deputy Gray similarly testified that the two suspects who had exited the driver's-side door quickly "bailed out" and headed for the

tree-line, and that the deputy lost his line-of-sight while he turned to release his dog from the patrol car. RP 165-67.¹

Because of this entirely flawed identification, this evidence is insufficient to prove beyond a reasonable doubt that Mr. Jeffery was in fact the driver who eluded the officers.

c. The appropriate remedy is to reverse the attempting to elude conviction. When an appellate court determines there was insufficient evidence to support a conviction, it has essentially found that the prosecution failed to prove the defendant was guilty beyond a reasonable doubt. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978), citing American Tobacco Co. v. United States, 328 U.S. 781, 787 n.4, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946). Thus:

...the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Burks, 437 U.S. 16 (citations omitted) (emphasis in original).

¹ Several State witnesses agree that Mr. Jeffery was wearing a black jacket at the time of his arrest, and at the time he was released from jail several months later. RP 153, 202-03, 212-14, 228-29, 236-38. This is irrelevant, of course, to his clothing at the time he was either a passenger or the driver of the truck in question.

Accordingly, in cases where the appellate court determines there is insufficient evidence to support a conviction, the “only ‘just’ remedy available” is for the appellate court to reverse the conviction and direct a judgment of acquittal on the charge. Burks, 437 U.S. 16-17. Moreover, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, precludes a second trial once the reviewing court has found the evidence legally insufficient. Burks, 437 U.S. 16-17; U.S. Const. amend 5, 14.

In the case at bar, the State failed to produce sufficient evidence to support a conviction on the attempting to elude charge. As such, that conviction must be reversed and the State cannot retry Mr. Jeffery on that charge.

2. THE SPECIAL VERDICT LANGUAGE RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT OTHER PERSONS “WERE ENDANGERED” DURING MR. JEFFERY’S COMMISSION OF THE CRIME OF ATTEMPT TO ELUDE A POLICE VEHICLE.

a. Manifest constitutional error. The State must prove a special allegation beyond a reasonable doubt. State v. Tongate, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). The State was relieved of its burden to prove the “endangerment” special allegation beyond a reasonable doubt because the language of the special verdict form did not require proof of endangerment, as required by RCW 9.94A.834. The alleged error is

constitutional. See State v. Harris, 164 Wn. App. 377, 383, 385, 263 P.3d 1276 (2011) (erroneous definition of recklessness element relieved State of burden of proving every element and was constitutional error); State v. Stein, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001) (where trial court's instructions to jury could be construed as omitting element of charged offense, defendant could challenge error as constitutional).

The error is also manifest, having “practical and identifiable consequences in the trial of the case.” Stein, 144 Wn.2d at 240; see State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) (constitutional error of failure to properly require proof of an element was “manifest” because jury employs instructional language to measure guilt or innocence on the included elements, and review was therefore proper despite absence of objection below); State v. Roggenkamp, 153 Wn.2d 614, 620, 106 P.3d 196 (2005) (failure to properly instruct on an element of a charged crime is manifest constitutional error which may be raised for the first time on appeal under RAP 2.5(a)). In addition, reversal is the presumed outcome. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

Review may be taken by this Court. RAP 2.5(a)(3).

b. The special verdict language relieved the State of its burden to prove every fact necessary to the imposition of the sentence enhancement authorized by RCW 9.94A.834, which requires proof that persons were “endangered” during the crime. When the term “sentence enhancement” describes an increase beyond the authorized sentence for the offense, the special allegation becomes the equivalent of an element of a greater offense, which must be proved beyond a reasonable doubt. U.S. Const. amend. 14; State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). See also State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010) (“under both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 ... the jury trial right requires that a sentence be authorized by the jury's verdict.”).

Due process is the source of the requirement the State of Washington must prove all elements of the crime charged beyond a reasonable doubt. State v. Aver, 109 Wn.2d 303, 310, 745 P.2d 479 (1987); U.S. Const. amend. 14. The same standard applies to prove a sentencing enhancement. State v. Tongate, *supra*, at 754 (“Our cases involving other enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty”); see also State v. Recuenco, *supra*; State v. Lua, 62 Wn. App. 34, 42, 813 P.2d 588 (1991); see, e.g., State v. Hennessey, 80 Wn. App. 190, 194, 907

P.2d 331 (1995) (school zone enhancement); State v. Simms, 171 Wn.2d 244, 250, 250 P.3d 107 (2011) (any fact that increases the penalty beyond that prescribed for the criminal offense must be properly proved to jury before imposition of punishment).

Accordingly, due process, under both the United States and Washington Constitutions, requires that the jury be instructed on every essential element. U.S. Const. amend. 14; Wash. Const. art 1, § 22; Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (a conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden). A defendant cannot be said to have had a constitutionally fair trial if the jury might assume that an essential element need not be proved. Stein, 144 Wn.2d at 241.

In the present case, the trial court imposed a sentence enhancement of 12+ months incarceration, at sentencing following the jury's verdicts. CP 17; RP 309. The court cited the special allegation of RCW 9.94A.834 and the jury's special verdict as authority for the enhancement. RP at 321-23.

The special allegation of RCW 9.94A.834 may be filed as a charge by the prosecutor whenever there is evidence that the defendant's actions in committing a crime of attempting to elude "threatened" any person (except for the defendant or officer) with physical injury or harm.

RCW 9.94A.834 Special allegation--Endangerment by eluding a police vehicle—Procedures

(1) The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

(Emphasis added.) RCW 9.94A.834, subsection (1).² However, the statute explicitly provides that, in order for the sentencing court to impose the 12+ months enhancement, the jury must find, beyond a reasonable doubt, that other person(s) actually were “endangered” by the defendant’s driving actions during the crime.

(2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons

² RCW 9.94A.533(11) authorizes the 12+ month enhancement where the jury has found the endangerment allegation:

(11) An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

(Emphasis added.) RCW 9.94A.533(11).

other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.

(Emphasis added.) RCW 9.94A.834 (2).

In this case, the trial court did not have authority to impose the sentence enhancement of 12+ months incarceration. CP 17; RP 309; RCW 9.94A.533(11). The jury in Mr. Jeffery's trial had been asked,

Was any person, other than the defendant or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of the defendant during his commission of the crime of attempting to elude a police vehicle?

CP 17 (Special Verdict Form). However, the plain language of the applicable statutes requires proof of "endangerment" of others beyond a reasonable doubt before the prescribed sentence enhancement may be imposed. RCW 9.94A.834; RCW 9.94A.533(11).

The jury instructions therefore relieved the State of its burden of proof in this case. Jackson, 443 U.S. at 316; Brown, 147 Wn.2d at 339; see also State v. Randhawa, 133 Wn.2d 67, 76, 941 P.2d 661 (1997) (instructions that relieve the State's burden of proof violate due process); State v. Bennett, 161 Wn.2d 303, 306-07, 165 P.3d 1241 (2007) (instructions that diminish State's burden of proof violate due process); County Court of Ulster County v. Allen, 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

The State was entirely relieved of its burden of proving beyond a reasonable doubt that other persons were “endangered.” RCW 9.94A.834(2). Neither the special verdict form, nor any other instruction, informed the jury that it must find endangerment. Cf. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (failure of to-convict instruction to specify the degree of rape attempted was harmless because another instruction did so; therefore, the State was not relieved of its burden of proof). Constitutional error occurred.

c. Constitutional error in omitting an element is not harmless if any trial evidence on the missing element was “controverted.” Constitutional error is presumed to be prejudicial, requiring reversal. Stephens, 93 Wn.2d at 190-91 (violation of a defendant's constitutional rights is presumed to be prejudicial.”); cf. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997) (“[F]ailure to instruct on an element of an offense is automatic reversible error.”).

Under the Neder and Brown decisions, constitutional instructional error as to essential elements requires reversal unless it affirmatively appears that the error was harmless, beyond a reasonable doubt. Brown, 147 Wn.2d at 341 (citing Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). In the context of a jury instruction that is missing or has misstated an essential element, the error is harmless only where the

element is supported by uncontroverted evidence at trial below. Brown, 147 Wn.2d at 341, citing Neder, 527 U.S. at 18.

The record establishes that any evidence pertinent to the missing element was controverted below. It was evident during Officer Auderer's testimony that no other persons or vehicles were put at risk by the suspect vehicle's conduct during the incident; no accident or near-miss was discussed in his testimony on either direct or cross-examination. RP 108-15, 128-39. Officer Auderer also noted his surprise to see a single pedestrian standing near a car in Shelton at the beginning of the evening, noting he "found it particularly odd why there was a pedestrian out at that hour." RP 111. This testimony alone indicates the overall lack of pedestrian traffic that evening, and the alleged pass of the truck "within four feet" of the pedestrian was insufficient to support the special allegation. There was no testimony that this lone pedestrian had to move quickly to get out of the path of the truck, nor that the pedestrian felt either "endangered" or "threatened with physical injury or harm." RCW 9.94A.834; CP 17.³

The error was not harmless where the missing element was not supported by uncontroverted evidence. Brown, 147 Wn.2d at 341 (reversal required unless uncontroverted evidence supported missing element and error was shown to be harmless beyond a reasonable doubt) (citing Neder,

³ The State in this case had no dash-cam videos to support the special verdict. RP 145.

527 U.S. at 18). The dictated remedy is reversal, and additionally Mr. Jeffery argues that the sentencing enhancement must be vacated and dismissed. State v. Pierce, 155 Wn. App. 701, 714-15, 230 P.3d 237 (2010) (reversing and dismissing firearm enhancement where, *inter alia*, jury was relieved of its burden to prove an operable firearm) (citing Williams-Walker, supra) (sentencing court violates defendant's right to jury trial if it imposes a firearm enhancement without a jury authorizing the enhancement by explicitly finding that, beyond a reasonable doubt, the defendant committed the offense while so armed).

3. REVERSAL IS REQUIRED WHERE THE CHARGING DOCUMENT OMITTED THE ESSENTIAL "ENDANGERED" ELEMENT.

All essential elements of a crime, including sentencing enhancements, must be alleged in the information. State v. Recuenco, supra, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); CrR 2.1(a)(1); U.S. Const. amend. 6; Wash. Const. art. I, § 22. "The purpose of the essential elements rule is to provide defendants with notice of the crime charged and to allow defendants to prepare a defense." Recuenco, 163 Wn.2d at 434 .

Because Mr. Jeffery is challenging the sufficiency of the information for the first time on appeal, this Court construes the document liberally in favor of validity. Kjorsvik, 117 Wn.2d at 102. Even under this standard,

the endangerment element was not charged in the information. The information in this case completely omitted the essential element that persons other than the defendant or the pursuing officer were “endangered,” instead alleging that others were threatened with harm. CP 65-67 (amended information); RCW 9.94A.834, subsection (2) (“the jury shall [find whether] persons other than the defendant or the pursuing law enforcement officer were endangered”) (emphasis added).

a. No prejudice showing required. Where even a liberal reading of the information indicates that an essential element is wholly missing, reversal of the conviction is required, without any requirement that the defendant must show he was prejudiced in his defense by the absence of the element in the charging document. State v. Marcum, 116 Wn. App. 526, 536, 66 P.3d 690 (2003) (prejudice need not be shown if charge cannot be saved by liberal construction). As the Supreme Court recently said:

While the second Kjorsvik prong requires the defendant to show actual prejudice as a result of vague charging language, courts do not reach that part of the analysis unless the necessary elements can be fairly found on the face of the information. As we reiterated in State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010), if the necessary elements are not found explicitly or by fair construction in the charging document, prejudice is presumed and reversal is required[.]

State v. Zillyette, 173 Wn.2d 784, 786, 270 P.3d 589 (2012) (citing Brown, 169 Wn.2d at 198 (omission of term “knowledge” necessitated reversal

without prejudice showing, and reference to the statute did not sufficiently allege the essential elements)).

Using correct language and simple rules of grammar, the information must be written in such a manner as to enable persons of common understanding to know what elements are charged. State v. Simon, 120 Wn.2d 196, 198-99, 840 P.2d 172 (1992) (citing Kjorsvik, 117 Wn.2d at 110; and RCW 10.37.050(6)) (to be sufficient, information must clearly and distinctly set forth the acts charged as the crime “in such a manner as to enable a person of common understanding to know what is intended”).

Here, the information entirely failed to apprise Mr. Jeffery of the essential element of endangerment of RCW 9.94A.834(2). When an information fails to charge an essential element, the remedy is to reverse the conviction without prejudice to the State refiling the charge. State v. Marcum, 116 Wn. App. 526, 536, 66 P.3d 690 (2003), State v. Guzman, 119 Wn. App. 176, 186, 79 P.3d 990 (2003).

b. Prejudice shown. In any event, Mr. Jeffery was plainly prejudiced. The defense did not defend the case at trial by cross-examination of witnesses or presentation of a defense accordant with the statutory “endangered” language. Counsel necessarily proceeded with Mr. Jeffery’s defense in reliance on the State’s “threatened” allegation.

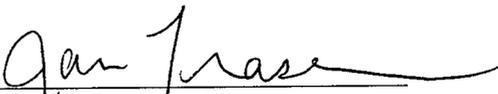
The essential “endangered” element enacted by the Legislature does not, at all, appear in the language of the charging document, and reversal is thus required without necessity of showing prejudice. However, if the statutorily-required “endangered” language *were* somehow deemed to be present in the information, by some fair construction, reversal is nonetheless still required, because Mr. Jeffery was prejudiced in his defense from the commencement of the criminal case, through to its conclusion. Marcum, 116 Wn. App. at 536.

E. CONCLUSION

For the foregoing reasons, Mr. Jeffery respectfully requests this Court reverse his attempting to elude conviction.

DATED this 18th day of March, 2013.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorneys for Appellant

