No. 44116-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ASLAN JEFFERY

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 11-1-00443-1

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The evidence at trial is sufficient to sustain the jury's verdict of guilty beyond a reasonable doubt.

2. The charging document correctly used the word "endangered" and correctly informed Rivera of the elements of the special allegation under RCW 9.94A.834 that "one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm" due to his act of eluding.

B. FACTS AND STATEMENT OF THE CASE

On December 14, 2011, at about 12:51 a.m., Officer Robert Andrew Auderer, of the Shelton Police Department, was on patrol, in uniform, and in a fully marked patrol car. RP 105-106. Officer Auderer was sitting in his patrol car, observing traffic, when he heard tires screeching, a loud bang, and the sound of a revving engine. RP 107. Officer Auderer looked toward the noise and saw a small, dark-colored pickup truck with its tires spinning as it accelerated quickly. RP 107. The truck cut in front of some traffic, tires still spinning, and sped off. RP 108.

Officer Auderer followed the truck as it sped away. RP 108-109. As Officer Auderer followed, the truck increased its acceleration. RP 109.

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Because the truck was speeding away from his pursuing patrol car, Officer Auderer knew that the truck was speeding at more than 70 miles per hour. RP 109, 152.

After seeing the truck come within about four feet of a pedestrian who was in the road, Officer Auderer turned on his lights and siren. RP 111-12, 119-20. After Officer Auderer turned on his lights and siren, the truck continued to speed away, toward Boundary (Street), then toward University (Street), then turned from Pioneer Ave., onto 2nd Street. RP 112. As Officer Auderer pursued with lights and siren, the truck, still traveling at a high rate of speed, turned off Bellevue Street, crossed Boundary, drove into a curve while straddling the centerline, and drove through a stop sign. RP 113.

While Officer Auderer pursued with lights and siren, the truck meandered through city streets at a high rate of speed, running at least three stop signs, and then headed out of town into the county. RP 113-14. Officer Auderer continued to pursue the truck into the county, as the truck meandered from road to road, sometimes at speeds in excess of 85 miles per hour. RP 116.

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Other officers, including Deputy Sargent of the Mason County Sheriff's Office, joined the pursuit. RP 117-18, 187-88. Deputy Sargent, also, was in uniform and was driving a marked patrol car with lights and siren. RP 189-91. As the truck fled the pursing police cars, it straddled the centerline of the undivided two-lane highway, drove through stop signs, swerved back and forth, and sometimes drove in the oncoming lane of traffic. RP 116, 192-194. The truck drove 75-85 miles an hour through a 45 mile per hour speed zone while straddling the center-line. RP 193.

Deputy Gray of the Sheriff's Office positioned himself ahead of the fleeing truck and put out a spike strip. RP 118, 156, 160. The truck struck the spike strip, but continued to flee. RP 118-119, 161, 163, 200. Deputy Gray joined the pursuit, and he too was in uniform and was driving a marked patrol car. RP 120, 158, 162.

The truck fled down Salsman Road, where the pursuit ended when the road ended. RP 119, 163. Officer Auderer was the third officer to arrive after the truck reached the end of the dead-end road. RP 140, 163. Deputy Sargent was first, and Deputy Gray and his K-9 were second. RP 163.

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Three people fled from the truck after it came to a stop at the end of the dead-end road. RP 121. Two of them fled from the driver's door of the truck, and one fled from the passenger's side. RP 121, 164.

The first suspect to flee the truck from the driver's door was the driver, who was wearing a black jacket and ran into the woods and briefly escaped while Deputy Gray was getting his dog out of his patrol car. RP 165, 167, 195, 203-204. The second person out the driver's door was wearing a tannish or light brown jacket, and he was half-out of the car and running for the trees after Deputy Gray and the K-9 were in position; so, Deputy Gray yelled for the second person to stop, and when he kept running, Deputy Gray released his K-9. RP 165-66, 195. The second running suspect was within line-of-sight of the dog; so, the dog ran directly to the second suspect and captured him. RP 167. The second person out of the driver's seat was Joseph Tindall. RP 123, 168, 203.

While Deputy Gray and his K-9 were capturing Joseph Tindall, Deputy Sargent and Officer Auderer captured Josiah Martin, who was the suspect who had fled from the passenger side of the truck. RP 122, 169, 195.

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Deputy Gray then redeployed his K-9; he sent the dog into thick brush in the woods to locate the first person who had fled from the driver's side, who was then captured and was identified as Aslan Jeffery. RP 123-24, 156, 169-171, 178-79, 183, 196-97.

Jeffery was wearing a black jacket when he was captured. RP 153-54, 213. Tindall was wearing a tan or light brown jacket when he was captured. RP 212-13.

After receiving this evidence, the jury found Jeffery guilty of attempting to elude a police vehicle, and the jury answered affirmatively a special interrogatory regarding the special allegation of endangerment, as charged in the information. CP 17, 18, 40-41.

C. ARGUMENT

1. The evidence at trial is sufficient to sustain the jury's verdict of guilty beyond a reasonable doubt.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable

inferences from the evidence must be drawn in favor of the State and interpreted strongly against the defendant. *Id.* at 201. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn" from it. *Id.* Circumstantial evidence and direct evidence is equally reliable for purposes of drawing inferences. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The trier of fact is the sole and exclusive judge of the evidence. *State v. Bencivenga,* 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Credibility determinations are for the trier of fact and are not subject to review. *State v. Cantu,* 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

RCW 46.61.024 describes the crime of attempting to elude a police vehicle, as follows:

> (1) 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).

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The facts outlined in the facts section of the State's brief, above, supports a finding that there was sufficient evidence to sustain the jury's verdict of guilty for the crime of attempting to elude a police vehicle in violation of RCW 46.61.024. The evidence shows that uniformed police officers, with police lights and sirens activated, pursued the fleeing pickup truck, which refused to stop. RP 111-20, 158, 187-94. And the evidence shows that the driver of the fleeing pickup truck operated the truck in a reckless manner as he fled from pursing officers. RP 111-20, 162, 187-94.

Jeffery argues that the evidence is insufficient to convict him, apparently because he believes there is no direct evidence that he was the driver. But circumstantial evidence has no less weight than direct evidence. *State v. Thomas,* 150 Wn.2d 821, 874, 83 P.3d 970 (2004). There is evidence that Jeffery was the first person to flee from the driver's door of the pickup truck. RP 165, 167, 195, 203-204. There is evidence that the first person to flee the truck from the driver's door was wearing a black jacket. RP 203. Jeffery was wearing a black jacket when he was captured. RP 153-54, 213. It is reasonable to infer that the first person to flee the driver's door of the pickup truck was the driver and that the second person to flee the driver's door was the person who was sitting

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between the driver and the person who fled from the passenger door. *Salinas,* 119 Wn.2d at 201.

Thus, when viewed in light of the standard of review of the sufficiency of the evidence on appeal, there is sufficient evidence in this case to sustain the jury's verdict of guilty. *Id.*

2. The charging document correctly used the word "endangered" and correctly informed Rivera of the elements of the special allegation under RCW 9.94A.834 that "one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm" due to his act of eluding.

Rivera's second, third, and fourth assignments of error are each premised upon his underlying assertion that in the context of the instant case the words "threatened" and "endangered" cannot have interchangeable meanings or that one cannot encompass the other. Rivera's reading of the word "threatened" appears to be limited to a single possible meaning, which is to use the word as a verb that means to utter, say, or announce something. But, the Merriam Webster Dictionary also defines the word "threaten" to mean to "portend" or "menace," or to "give signs or warning of" or "to hang over dangerously."

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<http://www.merriam-webster.com/dictionary/threaten>. In this context, the word threatened can be used as follows:

1. Civil war has been *threatening* the country for years.
2. a marriage *threatened* by financial problems
3. Overfishing *threatens* the survival of certain fish species.
4. The latest news *threatens* trouble for the economy

Id.

This use of the word "threatened" is not unusual or exceptional. A few examples of contexts where the word is used for this meaning include Supreme Court cases. *State v. Momah*, 167 Wash. 2d 140, 149, 217 P.3d 321, 326 (2009) ("least restrictive means available for protecting the threatened interests"); *State v. Ivie*, 136 Wn. 2d 173, 184, 961 P.2d 941, 947 (1998) ("a proceeding which threatens to impose imprisonment"); *Andrews v. Del Guzzi*, 56 Wn.2d 381, 391-92, 353 P.2d 422, 429 (1960) ("Webster's New International Dictionary defines the word 'imminent' as 'Threatening to occur immediately; near at hand; impending.'"); *Parke v. City of Seattle*, 5 Wash. 1, 7, 31 P. 310, 312 (1892) ("to resist the threatened calamity").

No Washington case was located that defines the word "endanger," but the following quote from a foreign case is instructive:

> The meaning of "endanger" is not disputed. Case law and dictionary definition agree that endanger means something less

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> than actual harm. [Footnote omitted]. When one is endangered, harm is threatened; no actual injury need ever occur. Thus, for example, a town may be "endangered" by a threatening plague or hurricane and yet emerge from the danger completely unscathed.

Ethyl Corp. v. Envtl. Prot. Agency, 541 F.2d 1, 13 (D.C. Cir. 1976).

In the context of the instant case, RCW 9.94A.834(1) provides that a special allegation of "endangerment" may be filed by the prosecution whenever there is evidence "that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm...." Proof of the special allegation requires proof beyond a reasonable doubt that "one or more persons other than the defendant or the pursuing law enforcement officer were endangered...." RCW 9.94A.834(2). Hence, in this context, the kind of endangerment that constitutes the special allegation of endangerment under RCW 9.94A.834 is limited to endangerment that is derived from conduct (by the defendant) that threatens physical harm or injury to another person. Other kinds of endangerment, such as endangerment to property, or endangerment to commerce due to blocked roadways, etc., would not constitute the special allegation of endangerment under RCW 9.94A.834.

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Jeffery was charged with the special allegation of endangerment by the third amended information, which read as follows:

> ... and furthermore at the time of the commission of the crime the Defendant endangered (i.e. threatened by physical injury or harm by the Defendant's actions) one or more persons other than the defendant or the pursuing law enforcement officers, contrary to RCW 9.94A.834 and 9.94A.533.

CP 40-41. By way of a special verdict form, the jury was asked to answer the following question:

> 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. Thus, the jury instruction and the charging document narrowed the universe of facts that would constitute "endangerment" and limited those facts to those that "threatened" to cause "physical injury or harm." This construction is a correct application of RCW 9.94A.834, which by its language limits the endangerment that gives rise to the special allegation of endangerment to endangerment that is derived from conduct that "threatened" specified people with "physical injury or harm."

Notwithstanding Jeffery's assertion to the contrary, use of the limiting language "threatened" and "physical injury or harm" benefited

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Jeffery rather than prejudiced him, and use of this language was a correct interpretation and application of RCW 9.94A.834. Jeffery did not object to this language in the trial court, and he now raises this issue for the first time on appeal. RP 266-67.

"To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Additionally, Jeffery must show that the error he alleges actually affected his rights at trial. *Id.* "To demonstrate actual prejudice, there must be a '"plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case."'" *Id.* at 99, quoting *State v. Kirkman,* 159 Wn.2d 918, 935, 155 P.3d 125 (2012) (internal quotation marks omitted) (quoting *State v. WWJ Corp.,* 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). And even if the error is constitutional, harmless error analysis may apply. *O'Hara* at 98.

In the instant case, there was abundant, overwhelming evidence at trial that the two passengers in the truck Jeffery was driving were threatened with personal injury or harm due to Jeffery's dangerous driving as he fled from pursuing police vehicles. RP 111-18, 156-63, 187-94.

There was no evidence that controverted this evidence. Jeffery's trial attorney freely conceded that "the driving would meet almost any of -- any definition of reckless that I've ever seen in the law." RP 263. Defense counsel accepted the special verdict form and offered no corrections, exceptions or additional instructions. RP 266-67.

Now, on appeal, Jeffery claims that he was prejudiced at trial because he was duped into not pursuing a defense that was based upon the State's burden to prove that he "endangered" others. Appellant's Opening Brief at pp. 19-20. But Jeffery has not made a *plausible showing* that he was prejudiced by the use of statutory language that limited the universe of circumstances that constitute endangerment and that required the State to prove beyond a reasonable doubt that he engaged in actions that threatened others with physical injury or harm -- rather than the more inclusive showing that he merely "endangered" others. Accordingly, Jeffery should not be permitted to raise this issue for the first time on appeal. *State v. O'Hara,* 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009); *State v. Kirkman,* 159 Wn.2d 918, 935, 155 P.3d 125 (2012).

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D. CONCLUSION

For the reasons state above, the State asks the court to deny Jeffery's appeal and to affirm his conviction and sentence.

DATED: June 10, 2013.

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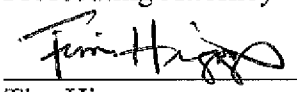

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