

64149-2

64149-2

No. 64149-2-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

JAMES FLORA,

Appellant.

---

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2008 APR 16 PM 4:48 #1

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

---

BRIEF OF APPELLANT

---

ELAINE L. WINTERS  
Attorney for Appellant

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

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR..... 1

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

C. STATEMENT OF THE CASE .....4

D. ARGUMENT .....6

    1. MR. FLORA DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS .....6

        a. Mr. Flora had the constitutional right to effective assistance of counsel.....7

        b. Defense counsel was ineffective for failing to offer an instruction on the statutory affirmative defense .....9

            i. *An instruction concerning the statutory defense instruction would have been given if offered*..... 11

            ii. *Mr. Flora’s trial attorney did not offer a necessity defense because she did not thoroughly investigat the law* ..... 13

            iii. *Mr. Flora was prejudiced by the failure of his attorney to propose a reasonable belief instruction* ..... 17

        c. Mr. Flora’s conviction must be reversed ..... 18

    2. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF THE TERM “WILLFULLY” ..... 18

        a. Mr. Flora asked the court to instruct the jury on the definition of willfully found at WPIC 10.05 ..... 19

        b. The trial court erred by not instructing the jury on the legal definition of willfully requested by the defense.....21

c. Mr. Flora’s conviction must be reversed and remanded for a new trial.....	26
3. THE TRIAL COURT’S REFUSAL TO GIVE MR. FLORA’S PROPOSED MISSING WITNESSS INSTRUCTION VIOLATED HIS CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE.....	27
a. The accused is entitled to have the jury instructed on his theory of the case .....	27
b. Mr. Flora requested the court instruct the jury on the missing witness doctrine .....	29
c. The trial court erred by not giving Mr. Flora’s proposed missing witness instruction.....	30
d. Mr. Flora’s conviction must be reversed .....	32
4. THE TRIAL COURT ADMITTED PREJUDICIAL EVIDENCE THAT LACKED PROBATIVE VALUE.....	33
E. CONCLUSION .....	37

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>In re Personal Restraint of Brett</u> , 142 Wn.2d 868, 142 P.3d 601 (2001) .....	13
<u>In re Personal Restraint of Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004) .....	13
<u>State v. A.N.J.</u> , 168 Wn.2d 91, 225 P.3d 956 (2010).....	7, 8
<u>State v. Allen</u> , 101 Wn.2d 355, 678 P.2d 798 (1984) .....	22, 25, 26
<u>State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991) .....	29, 30
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997), <u>cert. denied</u> , 523 U.S. 1007 (1998).....	22
<u>State v. Davis</u> , 73 Wn.2d 271, 438 P.2d 185 (1968) .....	29, 31
<u>State v. Hall</u> , 104 Wn.2d 486, 706 P.2d 1074 (1985) .....	23
<u>State v. Jones</u> , ___ Wn.2d ___ (No. 82613-7, 4/15/10) .....	28
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005) .....	21
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	28
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	9
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988) .....	22
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001) .....	21
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997) .....	36
<u>State v. Tandeckj</u> , 153 Wn.2d 842, 109 P.3d 398 (2005).....	18
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	8, 11, 14, 18, 26

State v. Williams, 132 Wn.2d 248, 937 P.2d 1062 (1997) ..... 28

### **Washington Court of Appeals Decisions**

In re Personal Restraint of Hubert, 138 Wn.App. 924,  
158 P.3d 1282 (2007) ..... 14, 15

Spokane v. White, 102 Wn.App. 955, 10 P.3d 1095 (2000),  
rev. denied, 143 Wn.2d 1011 (2001) ..... 24

State v. Acosta, 123 Wn.App. 424, 98 P.3d 503 (2004) ..... 36

State v. Ginn, 128 Wn.App. 872, 117 P.3d 1155 (2005),  
rev. denied, 157 Wn.2d 1010 (2006) ..... 12

State v. Hanson, 59 Wn.App. 651, 800 P.2d 1124 (1990) ..... 28

State v. Harris, 97 Wn.App. 865, 989 P.2d 553 (1999),  
rev. denied, 140 Wn.2d 1017 (2000) ..... 33

State v. Kruger, 116 Wn.App. 685, 67 P.3d 1147,  
rev. denied, 150 Wn.2d 1024 (2003) ..... 11, 14

State v. Powell, 150 Wn.App. 139, 206 P.3d 703  
(2009) ..... 11, 13, 15, 18

State v. Snapp, 119 Wn.App. 614, 82 P.3d 252, rev. denied,  
152 Wn.2d 1028 (2004) ..... 24

State v. Stayton, 39 Wn.App. 46, 691 P.2d 596 (1984),  
rev. denied, 103 Wn.2d 1026 (1985) ..... 19

State v. Trowbridge, 49 Wn.App. 360, 742 P.2d 1254 (1987) ..... 19

State v. Vandiver, 21 Wn.App. 269, 584 P.2d 978 (1978),  
rev. denied, 91 Wn.2d 1011 (1979) ..... 24

State v. Ware, 111 Wn.App. 738, 46 P.3d 280 (2002) ..... 23

<u>State v. White</u> , 137 Wn.App. 227, 152 P.3d 364 (2007).....	28
---	----

**United States Supreme Court Decisions**

<u>Crane v. Kentucky</u> , 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).....	27
<u>Herring v. New York</u> , 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).....	8
<u>Holmes v. South Carolina</u> , 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).....	27
<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).....	8, 13
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	7, 8
<u>United States v. Cronin</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	7

**United States Constitution**

U.S. Const. amend. VI.....	7, 27
U.S. Const. amend. XIV .....	7, 27

**Washington Constitution**

Const. art. I, § 3.....	27
Const. art. I, § 22.....	7, 27

### Washington Statutes

RCW 46.61.024.....	1, 9, 10, 18, 24
RCW 9A.08.010 .....	2, 22, 23, 24, 25

### Evidence Rules

ER 401 .....	33
ER 402 .....	33
ER 403 .....	33, 35

### Other Authorities

11A <u>Washington Practice: Washington Pattern Jury Instructions: Criminal</u> (2008) .....	10, 20, 24
American Bar Association, <u>Standards for Criminal Justice: Prosecution and Defense Function</u> (3 <sup>rd</sup> ed. 1993) .....	13
Brian A. Garner, ed., <u>Black's Law Dictionary</u> (2 <sup>nd</sup> pocket ed. 2001) .....	24
Dictionary.com Unabridged .....	23
<u>Oxford American Dictionary</u> (1980) .....	23
<u>Webster's Third New International Dictionary</u> (1993) .....	23

## A. ASSIGNMENTS OF ERROR

1. Mr. Flora did not receive the effective assistance of counsel required by the federal and state constitutions because his attorney did not request a jury instruction on a statutory affirmative defense supported by facts elicited at trial.

2. The trial court erred by refusing to instruct the jury on the definition of “willfully,” the mens rea of the charged offense.

3. The trial court erred by refusing to give Mr. Flora’s proposed missing witness instruction.

4. The trial court erred by admitting Mr. Flora’s irrelevant statement to the police officer made 13 months after the incident without evaluating the prejudice to the defense.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has the constitutional right to effective assistance of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case. Mr. Flora’s defense was that he did not know he was signaled to stop by a police officer. Mr. Flora, however, did not testify, and defense counsel therefore elicited evidence on cross-examination showing a person in Mr. Flora’s position might not have known Officer Radley was a police officer in a police vehicle. RCW 46.61.024(2) provides a

statutory defense that a reasonable person would not have believed the signal to stop was given by a police officer and that driving after the signal to stop was reasonable under the circumstances. Was Mr. Flora's constitutional right to counsel violated when his attorney did not offer an instruction on the statutory defense?

2. A defendant is entitled to have the jury instructed on every element of the charged crime, and it is reversible error for the court fail to provide the jury with the definition of a technical term in the "to convict" instruction when requested by the defense.

Attempting to elude a pursuing police vehicle includes the mens rea of "willfully." RCW 9A.08.010(4) states willfully is the same as knowingly, but this definition differs from the common understanding of the word. Where the trial court refused to give the pattern jury instruction defining "willfully" when requested by Mr. Flora, must his conviction be reversed and remanded for a new trial?

3. The court's failure to give a missing witness instruction when the State fails to call an important witness may violate a defendant's constitutional right to present his defense. The State called only one witness, Officer Radley, to testify that Mr. Flora

committed the elements of attempting to elude a pursuing police vehicle, but the officer was accompanied that evening by a civilian observer. Where the government hid the existence of the witness from Mr. Flora by not including her in the police reports or other discovery and defense counsel was unable to locate the missing witness, did the trial court err by finding the witness was not peculiarly available to the State and refusing to instruct the jury on the missing witness doctrine?

4. Relevant evidence is not admissible if the court finds the prejudicial effect of the evidence outweighs its probative value. After the charged offense was alleged to have occurred, Mr. Flora was stopped by Officer Radley, and the officer testified Mr. Flora asked him if he was the same officer driving the same car who had chased him before. The trial court admitted the statement finding it was relevant but did not consider the prejudicial effect. Over 13 months separated the two incidents, Mr. Flora had been charged with this offense and reviewed the police reports, and there are numerous ways Mr. Flora could have learned the officer's name or identity. Did the trial court abuse its discretion in admitting the statement without addressing the prejudicial impact on Mr. Flora of

the jury learning the officer had subsequent contact with him while on duty?

C. STATEMENT OF THE CASE

After a jury trial before the Honorable Susan Cook, James Flora was convicted of attempting to elude a pursuing police vehicle. CP 112. The sole witness was Swinomish Tribal Police Traffic Officer Martin Radley. Officer Radley testified that he was driving on State Route 20 near Reservation Road on the evening of December 27, 2007, with three cars in front of him.<sup>1</sup> RP 19-20, 22. It was dark, cold, and the road was wet. RP 6. When the traffic light changed to red, one of the cars, a Camero, did not stop as quickly as the others and drove into the right turn lane. RP 20. When the light turned green, the Camero drove onto the shoulder of the road, and Officer Radley pulled behind it to make sure everything was all right. RP 25-26. He did not activate his lights or siren. RP 57.

According to Officer Radley, Mr. Flora got out of the Camero and walked aggressively towards the patrol car; his fists were clenched and he was saying something the officer could not hear.

---

<sup>1</sup> The verbatim report of proceedings includes five separate volumes. The volume for August 18, 19, and September 16, 2009, which contains most of Mr. Flora's jury trial, is referred to as RP. Other volumes are referred to by date.

RP 26-27, 45-46. Officer Radley yelled and gestured at Mr. Flora to get back in his car. RP 28, 58-59. Mr. Flora turned, retreated to his vehicle, and quickly drove away. RP 29-30.

Officer Radley was in a marked patrol car, but there are no markings on the front of the car. RP 11-12, 15, 17-18; Ex. 4, 5.<sup>2</sup> The patrol car had blue and white lights and a siren, but the lights were not on the hood. RP 12, 14, 49, 61-62; Ex. 8. It had exempt federal license plates instead of Washington plates. RP 19; Ex. 4. Officer Radley was wearing a uniform, but he did not get out of his car. RP 7-9. The vehicle was equipped with a dashboard camera, but the officer did not use it. RP 54-55. Also, there was a woman in the passenger seat of the car who was not an officer and not in uniform. RP 52.

Officer Radley followed the Camero as it drove rapidly down SR 20, and he flipped on the car's emergency lights and siren. RP 30-31. He estimated the Camero was traveling at 70 miles per hour in a 55 mile per hour zone. RP 31-32. After traveling less than eight-tenths of a mile, the Camero entered the left turn lane

---

<sup>2</sup> The Skagit County Clerk provided appellate counsel with a copy of Exhibits 2-10, but the numbers on the exhibits do not appear to correlate with the numbers and descriptions of the exhibits on the Exhibit List. Counsel has therefore designated all nine photographs, and asks the court to look at other exhibits if the exhibits mentioned in the brief do not appear to support the proposition for which they are cited.

onto Hoffman road and signaled for a left turn. RP 32-33, 60. The Camero turned left without coming to a complete stop despite a red left turn arrow. RP 34-35. Officer Radley felt it was unsafe to follow due to oncoming traffic, so he turned off his lights and siren and remained at the signal. RP 35-36.

Officer Radley saw the Camero turn into a church parking lot and saw the driver get out of the car and run behind the church. RP 36. When the light changed the officer parked behind the Camero and searched it, finding the car keys. RP 40. He yelled "stop police," and looked briefly, but did not find the driver. RP 40. Officers from other law enforcement agencies searched the area without success. RP 41-43.

Mr. Flora received a three-month standard range sentence. CP 120-28. He appeals. CP 129-30.

#### D. ARGUMENT

##### 1. MR. FLORA DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS

RCW 46.61.024 contains a statutory defense that a reasonable person would not have believed he was signaled to stop by a police officer and his driving was reasonable under the circumstances. Mr. Flora's attorney presented the defense that Mr.

Flora did not know that he was being signaled to stop by a law enforcement officer. Because Mr. Flora did not testify, the defense actually tracked the statutory affirmative defense. Defense counsel, however, did not offer a jury instruction on the statutory defense and the jury thus never had the opportunity to consider it. Mr. Flora's conviction must be reversed because counsel violated his constitutional right to effective assistance of counsel.

a. Mr. Flora had the constitutional right to effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel.<sup>3</sup> U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of

---

<sup>3</sup> The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment states in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Article I, Section 22 provides in part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney’s performance below objective standards of reasonable representation, and, if so, (2) did counsel’s deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.W., 225 P.3d at 965.

A lawyer’s strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. Strickland, 466 U.S. at 690. In reviewing the first prong of the Strickland test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted

if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

b. Defense counsel was ineffective for failing to offer an instruction on the statutory affirmative defense. Mr. Flora was charged with attempting to elude a pursuing police vehicle, RCW 46.61.024.<sup>4</sup> CP 1, 6-7. The statute reads:

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 give by the police officer may be by hand, voice, emergency light, or siren. The officer giving the signal shall be in uniform and his vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1).

Our legislature has provided a statutory defense to a charge of attempting to elude. RCW 46.61.024(2) provides an affirmative defense that a reasonable person in the defendant's position would

---

<sup>4</sup> A subsequent amendment to the statute, effective June 10, 2010, simply adds a pronoun to make the statute gender inclusive. Laws of 2010, ch. 8, § 9065.

not have believed a police officer had given him a signal to stop and the driving after the signal to stop was reasonable. The statute reads:

It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.

RCW 46.61.024(2). A pattern jury instruction, WPIC 94.10, mirrors the statute. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal, 94.10 at 339 (2008) (WPIC). The pattern instruction provides:

It is a defense to the charge of attempting to elude a police vehicle that a reasonable person would not have believed that the signal to stop was given by a police officer and that the defendant's driving after the signal to stop was reasonable under the circumstances.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [on this charge].

Id.

The defendant in a criminal case has the right to a correct statement of the law and to have the jury instructed on a defense that is supported by substantial evidence. Thomas, 109 Wn.2d at 228; State v. Powell, 150 Wn.App. 139, 154, 206 P.3d 703 (2009). To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily review three questions: (1) was the defendant entitled to the instruction; (2) was the failure to request the instruction tactical, and (3) did the failure to offer the instruction prejudice the defendant. Powell, 150 Wn.App. at 154-58; State v. Kruger, 116 Wn.App. 685, 691, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003).

i. An instruction concerning the statutory defense instruction would have been given if offered. To warrant the statutory reasonable person instruction, Mr. Flora simply had to produce some evidence to support it. Powell, 150 Wn.App. at 154. In determining if the defendant has met this burden, the court must review the entire record in the light most favorable to the defendant, keeping in mind that the jury, not the court, weighs the evidence and determines witness credibility. State v. Ginn, 128 Wn.App.

872, 879, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006).

Mr. Flora's counsel elicited ample evidence on cross-examination that supported an instruction on the reasonable belief defense. The evidence established that, when viewed from the front, the vehicle Officer Radley was driving did not look like a police car in many respects. The special traffic patrol vehicle had no markings on its hood, federal license plates instead of Washington State plates, no lights on the car roof, and the internal lights were blue and white, not red. RP 48-50, 61-62; Ex. 4-5. The car and the officer's uniform also differed from those of the Anacortes Police Department and Skagit County Sheriff's Department, the law enforcement agencies with jurisdiction over the area where the incident occurred. RP 50-51, 59-60. Additionally, Officer Radley was accompanied by a woman civilian ride-along who was seated in the front passenger seat and was not wearing a police uniform. RP 52-53.

Even the prosecutor recognized the defense. When asking to admit testimony relevant to Mr. Flora's knowledge that Radley was a police officer, the prosecutor argued he could tell from the cross-examination that defense counsel was going to argue that a

reasonable person would not have known Officer Radley was a uniformed officer in an official police vehicle. RP 67. The trial court agreed. RP 70. The evidence presented at trial supported the reasonable belief defense, and the trial court would have given the instruction if it had been offered.

ii. Mr. Flora's trial attorney did not offer a necessity defense because she did not thoroughly investigate the law.

Defense counsel must, "at a minimum, conduct a reasonable investigation" in order to make informed decisions about how to best represent his client. In re Personal Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (emphasis deleted) (quoting In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 142 P.3d 601 (2001)). "This includes investigating all reasonable lines of defense," including the relevant law. Davis, 152 Wn.2d at 721 (citing Morrison, 477 U.S. at 384); Powell, 150 Wn.App. at 155. See American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3<sup>rd</sup> ed. 1993).

Defense counsel is ineffective if she fails to propose an instruction that assists the jury in understanding a critical component of the defense. "Where counsel in a criminal case fails

to advance a defense authorized by statute, and there is evidence to support the defense, defense counsel's performance is deficient." In re Personal Restraint of Hubert, 138 Wn.App. 924, 926, 158 P.3d 1282 (2007).

The Washington Supreme Court thus found trial counsel was ineffective in a prosecution for attempting to elude a pursuing police vehicle when counsel did not proposed a diminished capacity instruction, despite ample evidence the defendant had been drinking. Thomas, 109 Wn.2d at 226-27. The Thomas Court reasoned the defendant was entitled to jury instructions that correctly state the law and "a reasonably competent attorney would have been sufficiently aware of the relevant legal principles to enable him or her to propose an instruction based on pertinent cases." Id. at 229. Similarly, the failure to propose an instruction defining diminished capacity was found to be deficient performance where the defendant's intent was the focus of the defense in a prosecution for assaulting a police officer. Kruger, 116 Wn.App. at 693-95 (although the issue of the defendant's intoxication was before the jury, the jury was not apprised of the law and thus the defense was "impotent").

This Court has also found trial counsels' performances were deficient for not proposing a defense on a similar defense, the statutory "reasonable belief" defense, in prosecutions for rape of a person who was mentally incapacitated when there was evidence to support the instruction. Powell, 150 Wn.App. at 154-55; Hubert, 138 Wn.App. at 929-30. In Hubert, there was evidence to show the complaining witness was awake during the sexual encounter and the defendant agreed to end the encounter as soon as the complainant requested. Id. at 926-27, 929. Defense counsel confessed he was not familiar with the statutory defense, and this Court granted Hubert's personal restraint petition because there was no legitimate tactical reason for defense counsel to fail to propose the instruction. Id. at 929, 932. "An attorney's failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic." Id. at 929-30.

Similarly, this Court found on direct appeal that trial counsel's failure to request a reasonable belief instruction was deficient performance because, with the exception of the complaining witness, the State's witnesses did not testify she appeared too drunk or otherwise incapacitated to make decisions. Powell, 150 Wn.App. at 154. Defense counsel's closing argument

indicated he may have been aware of the reasonable belief defense, but this Court found no reasonable tactical basis not to propose the instruction. Id. at 155.

But we are aware of no objectively reasonable tactical basis for failing to request a “reasonable belief” instruction when (1) the evidence supported such an instruction,(2) defense counsel, in effect, argued the statutory defense, and (3) the statutory defense was entirely consistent with the defendant’s theory of the case. Thus, as in Hubert, we hold that failure to request such an instruction under these circumstances was deficient performance.

Id.

Here, the prosecutor mentioned the reasonable belief defense, but it is unclear if Mr. Flora’s counsel was aware of it. While counsel did not specifically argue the statutory defense in closing, she did argue Mr. Flora did not willfully fail to stop because he did not know he was being followed by a police officer. RP 107, 108-13, 117-19. Given that Mr. Flora did not testify as to his knowledge or lack of knowledge, the affirmative defense was entirely consistent with Mr. Flora’s defense and would have given the jury the tool it needed to evaluate the evidence. A reasonably competent attorney would have read the eluding statute prior to trial, reviewed the pattern jury instruction, and been sufficiently aware of the statutory defense to enable her to propose a

reasonable belief instruction. Given the facts of this case and defense presented, defense counsel's failure to propose an instruction on the statutory defense was deficient performance.

iii. Mr. Flora was prejudiced by the failure of his attorney to propose a reasonable belief instruction. Mr. Flora was entitled to a reasonable belief instruction, as there was evidence that a reasonable person in his position might not have understood a police officer had given him a signal to stop, and his driving was not unreasonable given the circumstances.

The jury, however, did not have the opportunity to determine if a reasonable person in Mr. Flora's shoes would not have understood a law enforcement officer had signaled him to stop because they were not provided with instructions on the statutory defense. Although defense counsel argued Mr. Flora did not know he was being followed by a law enforcement officer, the jury did not have the affirmative defense that (1) allowed them to weigh the legal significance of the evidence, and (2) allowed them to acquit Mr. Flora if they concluded a reasonable person would not have understood he was being signaled to stop by a police. Thus, the jury had no alternative but to convict Mr. Flora if it found beyond a reasonable doubt that Officer Radley was in uniform and gave a

signal to stop, regardless of whether it also found Mr. Flora reasonably did not believe that he was. See, Powell, 150 Wn.App. at 156. Mr. Flora was thus prejudiced by his lawyer's deficient performance.

c. Mr. Flora's conviction must be reversed. Mr. Flora did not receive a fair trial because his attorney did not propose an instruction concerning the statutory defense that he reasonably believed he had not been signaled to stop by a law enforcement officer. This Court should reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 229, 232; Powell, 150 Wn.App. at 157-58.

2. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF THE TERM "WILLFULLY"

Mr. Flora was charged with attempting to elude a pursuing police vehicle, an element of which is that the defendant willfully failed to bring his vehicle to a stop after being given a signal to stop by a uniformed police officer. CP 106-07 (Instructions 5, 6); RCW 46.61.024(1); see State v. Tandecki, 153 Wn.2d 842, 848, 109 P.3d 398 (2005) (listing elements of prior version of statute). The trial court, however, refused to give an instruction defining willfully that was requested by the defense. Because Washington law provides

a definition of willfulness that differs from the common dictionary definition of the word, the trial court erred by failing to instruct the jury on the definition of willfulness.

a. Mr. Flora asked the court to instruct the jury on the definition of willfully found at WPIC 10.05. The eluding statute requires knowledge the pursuing vehicle is a police vehicle. State v. Trowbridge, 49 Wn.App. 360, 363, 742 P.2d 1254 (1987); State v. Stayton, 39 Wn.App. 46, 49, 691 P.2d 596 (1984), rev. denied, 103 Wn.2d 1026 (1985). Mr. Flora asked the court to instruct the jury that to convict him of attempting to elude a pursuing police vehicle, it had to find he had knowledge he (1) was given a signal to stop by a uniformed police officer, and (2) was being pursued by a police vehicle. CP 97 (citing comment to WPIC 94.02 and cases cited therein). The proposed instruction read:

For the purposes of element (4) in Instruction No. \_\_\_\_, a willful failure to stop requires that the defendant have knowledge that a statutorily appropriate signal was given by a statutorily appropriate officer.

For the purposes of element (5) in Instruction No. \_\_\_\_, an attempt to elude requires knowledge that there is a pursuing police vehicle.

Id.

The trial court declined to give the proposed instruction. RP 88. Defense counsel then orally suggested an instruction stating, “An attempt to elude requires knowledge there is a pursuing police vehicle. For purposes of this statute, willful means knowingly.” RP 88-89. The court also declined to give that instruction, but suggested the WPIC definition of willfully. RP 89-90.

Defense counsel agreed. She pointed out willfulness was an element of the crime and a definition was needed so that she could argue her theory of the case. RP 90-92. The pattern instruction in question, WPIC 10.05, states, “A person acts willfully [as to a particular fact] when he or she acts knowingly [as to that fact]. 11 Wash. Pract., WPIC 10.05 at 214 (2008).

Eventually the court decided not to provide the jury with the WPIC definition of willfully. The court reasoned that the WPIC comments did not mention the possibility of defining willfully and that the definition would actually reduce the State’s burden of proof. RP 93.

I’m just a little worried about exceeding what the WPIC requires. If, in fact, this was something that – I mean this is an issue in every eluding case. And clearly the drafters of the WPIC don’t feel it’s appropriate to give supplemental instructions on the knowing portion of this and believe that the word willful takes care of the problem without the definition

because they don't suggest that you give the definition. I'm going to leave the instructions the way they are, Ms. Bonkoski.

RP 93. Defense counsel then asked if the court would at least give the WPIC defining willfully, but the court declined. RP 93.

Defense counsel: Your Honor, you're not even giving the willful WPIC?

The Court: No, I'm not. I'm afraid by defining willful as knowing what I've done is reduced the burden of proof that the State is held to by requiring that they only show that this was knowing as opposed to showing that it was willful. Because I don't know, frankly, whether willful in this context means intentional or whether it means knowing.

RP 93. Defense counsel excepted to the court's failure to give the instruction. RP 94.

b. The trial court erred by not instructing the jury on the legal definition of willfully requested by the defense. It is well settled that the State must prove every element of the charge offense beyond a reasonable doubt, and the jury must therefore be instructed that it must find every element of the charged offense in order to convict the defendant. State v. Mills, 154 Wn.2d 1, 7-8, 10, 109 P.3d 415 (2005); State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). Thus, failure to inform the jury of the mens rea of the crime is a "fatal defect" requiring reversal. State v. Allen, 101 Wn.2d 355,

358, 678 P.2d 798 (1984). In addition to instructing the jury as to the elements of the charged offense, the court should define any technical words or expressions. State v. Scott, 110 Wn.2d 682, 689-90, 757 P.2d 492 (1988) (referring to the “long-recognized” technical term rule). A term is technical if its meaning differs from common usage. State v. Brown, 132 Wn.2d 529, 611, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

The Washington legislature has created a hierarchy of four levels of culpability – intent, knowledge, recklessness, and criminal negligence -- and provided technical definitions of the culpable mental states. RCW 9A.08.010(3); Allen, 101 Wn.2d at 359-60. When intent is an element of an offense, it is reversible error for the court to fail to instruct the jury on the statutory definition of intent if the instruction is requested by the defense.<sup>5</sup> Allen, 101 Wn.2d at 362.

Willfully is a mental element not specifically defined at RCW 9A.08.010. Instead, the statute equates “wilfully” with “knowingly.”

---

<sup>5</sup> On the other hand, the failure to instruct the jury as to the statutory definition of knowledge is not a manifest constitutional issue that may raised for the first time on appeal. State v. Scott, 110 Wn.2d at 682. While the trial court should not refuse to define knowledge when requested, the definition is not constitutionally required because the statutory definition merely reiterates the term’s plain meaning. Id. at 691-92.

RCW 9A.08.010(4); State v. Ware, 111 Wn.App. 738, 743, 46 P.3d 280 (2002). The statute states:

A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

RCW 9A.08.010(4).<sup>6</sup>

This definition – that willfulness is satisfied if the defendant acted knowingly - is different from the common understanding of the word willfully. Dictionaries define willful as deliberate, voluntary, or intention, not knowingly. Dictionary.com Unabridged (based on Random House Dictionary (2010))<sup>7</sup>; Webster's Third New International Dictionary at 2617 (1993); Oxford American Dictionary at 1068 (1980).

Washington's statutory definition of willfulness is also different than the previous definition at common law, which equated willfully with intentionally. State v. Hall, 104 Wn.2d 486, 494-97, 706 P.2d 1074 (1985) (Durham, J., dissenting); State v. Vandiver, 21 Wn.App. 269, 275 n.4, 584 P.2d 978 (1978), rev. denied, 91

---

<sup>6</sup> RCW 9A.08.010(4) uses the spelling "willfully," but the pattern instruction and eluding statute use "willfully."

<sup>7</sup> Available at [www.dictionary.reference.com/brower/willful](http://www.dictionary.reference.com/brower/willful) (last viewed April 14, 2010).

Wn.2d 1011 (1979). Black's Law Dictionary, for example, defines "willfulness" as requiring more than knowledge.

**Willfulness.** 1. The fact or quality of acting purposely or by design; deliberateness; intention. Willfulness does not necessarily imply malice, but in involves more than just knowledge. 2. The voluntary, intentional violation or disregard of a known legal duty.

Brian A. Garner, ed., Black's Law Dictionary, at 768 (2<sup>nd</sup> pocket ed. 2001). As the WPIC comment notes, Washington cases provide conflicting definitions of the term. 11 Wash. Pract., Comment to WPIC 10.05 at 214 (comparing Spokane v. White, 102 Wn.App. 955, 961, 10 P.3d 1095 (2000), rev. denied, 143 Wn.2d 1011 (2001) with State v. Snapp, 119 Wn.App. 614, 82 P.3d 252, rev. denied, 152 Wn.2d 1028 (2004)).

The trial court's reasoning for not giving the instruction was incorrect. RCW 9A.08.010(4) specifically provides it is the definition of willfully unless the term is otherwise defined in a specific statute. The eluding statute has no such individual definition, so the instruction is correct. RCW 46.61.024. The WPIC comments do not suggest otherwise. 11 Wash. Pract. Note on Use for WPIC 10.05 at 214 (do not use instruction if statute requires willfulness to have greater meaning than knowledge). Thus, the

instruction does not lower the burden of proof, but would have provided the jury with a correct statement of the law.

Although appellant did not locate any cases addressing whether the trial court must give a definition of the term “willfully” when requested by the defense, the logic of Allen dictates that it is reversible error not to do so. Trial courts must define technical words and expressions in jury instructions. Allen, 101 Wn.2d at 358. The Allen Court held that “intent” is a technical term of art and therefore the trial court must provide the jury with an instruction defining that term when intent is the relevant mens rea of the crime and the instruction is requested by the defendant. Allen, 101 Wn.2d at 359-62. While there is a common understanding of the word “willfully,” that common understanding is different than the definition provided by Washington’s criminal code at RCW 9A.08.010(5). Without an instruction defining “willfully,” this Court has no idea what definition the jurors used. See Allen, 101 Wn.2d at 361-62. The trial court therefore erred by refusing to instruct the jury on the definition of “willfully” as requested by the defense. Id. at 362.

c. Mr. Flora's conviction must be reversed and remanded for a new trial. "Defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is." Thomas, 109 Wn.2d at 228. The trial court's refusal to define the mental element of a crime when requested by defense counsel requires reversal of a conviction if the term has a technical definition. Because Washington's definition of "willfully" is different from the common understanding of the word, Mr. Flora's conviction must be reversed and remanded for a new trial. Allen, 101 Wn.2d at 362.

No showing of prejudice is required, but Mr. Flora was prejudiced by the error. Defense counsel's closing argument focused on evidence showing Mr. Flora did not know he was being signaled to stop by a law enforcement officer, and she argued that the term "willfully" meant intentionally or knowingly. RP 113, 117-21, 125-26. Defense counsel's statement of the law, however, could only have confused the jury as there was no such definition in their instructions and they were instructed to use the law in the instructions, not that stated by the lawyers. CP 100-01, 106-08 (Instructions 1, 5-7). Knowledge was never mentioned in the instructions, making it impossible for defense counsel to argue her

theory of the case and prejudicing Mr. Flora's defense. Mr. Flora's conviction must be reversed and remanded for a new trial.

3. THE TRIAL COURT'S REFUSAL TO GIVE MR. FLORA'S PROPOSED MISSING WITNESS INSTRUCTION VIOLATED HIS CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE

a. The accused is entitled to have the jury instructed on his theory of the case. The federal and state constitutions provide the accused the right to present a defense.<sup>8</sup> U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). "Whether rooted in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes, 547 U.S. at 324 (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)).

---

<sup>8</sup> The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Article I, section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel. . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have speedy and public trial by an impartial jury . . ."

As part of this constitutional right, the defendant is entitled to have the jury instructed on his theory of the case, and the trial court's failure to do so is reversible error. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1062 (1997). If supported by evidence, a proposed instruction should be given if it properly states the law, is not misleading, and allows the party to argue his theory of the case. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw reasonable inferences in the light most favorable to the requesting party. State v. Hanson, 59 Wn.App. 651, 656-57, 800 P.2d 1124 (1990).

This Court reviews a trial court's decision not to give a defendant's proposed instruction de novo if the refusal is based on a ruling of law, but reviews for an abuse of discretion if the decision is based upon factual reasons. State v. White, 137 Wn.App. 227, 230, 152 P.3d 364 (2007). A denial of the right to present a defense, however, is reviewed under the constitutional harmless error rule. State v. Jones, \_\_\_ Wn.2d \_\_\_ (No. 82613-7, 4/15/10), Slip Op. at 12. The State must demonstrate a constitutional error is harmless beyond a reasonable doubt. Id.

b. Mr. Flora requested the court instruct the jury on the missing witness doctrine. In Washington, the court may instruct the jury that it may draw the inference that a missing witness's testimony would be unfavorable to a party who did not call a witness if the witness is within that party's control and the testimony would logically support that party's position. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). The Blair Court described the "missing witness" or "empty chair" doctrine as follows:

[W]here evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and . . . he fails to do so, -- the jury may draw an inference that it would be unfavorable to him.

Id. (quoting State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)).

Mr. Flora proposed a missing witness instruction because, while Officer Radley had a civilian passenger in the front seat of his patrol car throughout the incident, the State did not call the passenger as a witness or explain her absence. The proposed instruction, identical to WPIC 5.20, reads:

If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been

unfavorable to party in the case. You may draw this inference only if you find that:

- (1) The witness is within the control of, or peculiarly available to, that party;
- (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
- (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
- (4) There is not satisfactory explanation of why the party did not call the person as a witness; and
- (5) The inference is reasonable in light of all the circumstances.

The parties in this case are the State of Washington and Mr. James Flora.

CP 95.

c. The trial court erred by not giving Mr. Flora's proposed missing witness instruction. Three requirements must be met before a party may utilize the missing witness doctrine: (1) the witness must be peculiarly available to the party against whom the inference is to be drawn, (2) the testimony must be important and not cumulative, and (3) there must not be an explanation for the witness's absence, such as a testimonial privilege or incompetence. Blair, 117 Wn.2d at 489-91.

The trial court refused to give the jury a missing witness instruction, finding that the missing witness was not peculiarly available to the State. RP 84. For a witness to be "particularly

available” to the State, the State must have such a superior opportunity for knowledge of a witness that there is a reasonable probability that the witness would have been called if her testimony was not damaging or there must be a community interest between the party and the State. Davis, 73 Wn.2d at 277. While the missing witness doctrine does not apply if the witness is equally available to both parties, a witness is not equally available simply because she is physically present or subject to subpoena power. Id. at 276. Rather, the witness’s availability may depend, among other things, upon her relationship to one of the parties or the nature of the testimony she might be expected to provide. Id. at 277.

In the police report he prepared for this case, Officer Radley never mentioned that there was a passenger in this patrol car that evening. RP 53, 83. After interviewing Officer Radley and learning the passenger’s name, defense counsel was unable to locate the witness and incorrectly believed she was dead. RP 83-84. The police department, however, had information about the passenger, who was participating in the department’s ride-along program. RP 81, 84. Officer Radley essentially hid the existence of the ride-along passenger from the defense. When the prosecutor learned

defense counsel was trying to find the witness, he had the resources to locate her within 24 hours. RP 84. Given these facts, the trial court erred by finding the missing witness was available to both parties.

d. Mr. Flora's conviction must be reversed. Officer Radley had a ride-along passenger who witnessed the entire alleged eluding incident, yet the State did not call her as a witness and offered no explanation for its failure to do so. The witness was initially concealed from the defense, and later counsel could not find the witness. The State's failure to call this witness was critical, but Mr. Flora was unable to have the jury instructed so that it could infer this failure meant the witness's testimony was likely to help Mr. Flora and not the State.

In a case where the State called only one witness, this Court cannot be convinced beyond a reasonable doubt that a reasonable jury would not have reached a different verdict if it had been instructed on the missing witness doctrine's permissive inference. The court's refusal to give a missing witness instruction thus denied Mr. Flora his constitutional right to present a defense, and his conviction must be reversed and remanded for a new trial.

#### 4. THE TRIAL COURT ADMITTED PREJUDICIAL EVIDENCE THAT LACKED PROBATIVE VALUE

Only relevant evidence is admissible in Washington. ER 402; State v. Harris, 97 Wn.App. 865, 868, 989 P.2d 553 (1999), rev. denied, 140 Wn.2d 1017 (2000). Evidence is relevant if it tends to “make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This Court reviews the admission of irrelevant evidence for abuse of discretion. Harris, 97 Wn.App. at 869.

Mr. Flora was charged with two counts of attempting to elude a pursuing police vehicle, the present case occurring on December 27, 2007, and a subsequent incident occurring on January 13, 2009. CP 6-7. Both cases involved Officer Radley, and the officer claimed that when he arrested Mr. Flora in January 2009, Mr. Flora asked if he was the same officer driving the vehicle that had chased him in December 2007. 8/12/09RP 7-8. Prior to trial, the Honorable John Meyer found this custodial statement was admissible. CP 131-32; 8/12/09RP 17-18. Judge Meyer also

granted Mr. Flora's motion to sever the two counts, in part because the statement would not be admissible in the trial for the first incident but not in the second. CP 136-37; 8/12/09RP 27-28.

Prior to trial, Judge Cook granted Mr. Flora's motion in limine to exclude Mr. Flora's 2009 statement to the officer, but indicated the statement might be admissible in rebuttal if Mr. Flora testified he did not know he was being followed by a police officer. The court also agreed the State could revisit the issue at the close of cross-examination of the officer.<sup>9</sup> 8/18/09RP(motions) 11-14.

The morning after defense counsel completed her cross-examination of Officer Radley, the State renewed its request to admit Mr. Flora's 2009 statement, pointing out the defense was going to argue a reasonable person would not have known he was ordered to stop by a police officer. RP 66-67. The court reversed its ruling and admitted the statement, finding it relevant. RP 70-71. In making its ruling, the court did not address the possible prejudice to Mr. Flora, although the prosecutor stated he would present the evidence in such a manner that the jury would not know Mr. Flora had been arrested for a second eluding charge. RP 68, 70-71.

---

<sup>9</sup> Two volumes of the verbatim report of proceedings are dated August 18, 2009; one is labeled motions and the other labeled jury voire dire.

Officer Radley testified he came into contact with Mr. Flora on January 16, 2009, driving the same vehicle as in 2007. The officer stated Mr. Flora “asked me if I was the same officer, driving the same vehicle as the same vehicle who [sic] had chased him on December 27, 2007.” RP 75. The State rested almost immediately thereafter. RP 77. Mr. Flora had only a brief recess during which to decide whether or not to testify in light of the changed ruling. RP 77-79.

The trial court improperly admitted evidence that 13 months after the incident upon which the eluding charge was based, Mr. Flora asked Officer Radley if he was the same officer in the same vehicle who had chased him before.

By the time Officer Radley arrested Mr. Flora in 2009, Mr. Flora had been arraigned on the current offense and reviewed the police reports with his attorney. CP 98; RP 79-80. Thus, his familiarity with Officer Radley’s name or badge number was not relevant to his knowledge that a uniformed officer gave him a signal to stop.<sup>10</sup> Further, any possible probative value of the evidence was outweighed by its great potential to prejudice the jury. ER 403. The jury could easily assume Officer Radley had stopped Mr. Flora

---

<sup>10</sup> Officer Radley testified his uniform included his badge and name tag. RP 8.

for a traffic infraction or even another eluding case, thus tending to show other misconduct. The trial court, however, did not undergo the ER 404(b) analysis and did not weigh the prejudice to Mr. Flora required by ER 403.

When an evidentiary error is not of constitutional magnitude, this Court will reverse if, within a reasonable possibility, the error materially affected the outcome of the case. State v. Acosta, 123 Wn.App. 424, 438, 98 P.3d 503 (2004) (quoting State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997)). The State emphasized Mr. Flora's 2009 question to Officer Radley, eliciting it at the end of the State's case and mentioning it again at the very end of the prosecutor's closing argument. RP 75, 133. The use of Mr. Flora's question to Officer Radley permitted the State to create the false impression that Mr. Flora knew Officer Radley because he saw him on the highway that night even though 13 months had passed and Mr. Flora could have obtained information about the officer in a multitude of ways. Given the evidence in this case, there is a reasonable possibility the introduction of Mr. Flora's 2009 question to Officer Radley affected the jury verdict, and his conviction should therefore be reversed.

E. CONCLUSION

Mr. Flora's conviction should be reversed and remanded for a new trial because (1) his attorney provided ineffective assistance of counsel by failing to propose a jury instruction on the statutory defense, (2) the trial court failed to instruct the jury on the statutory definition of "willfully" as requested by the defense, (3) the trial court failed to give Mr. Flora's proposed missing witness instruction, and (4) the trial court admitted Mr. Flora's statement to the police officer over a year after the incident without addressing the prejudice to the defense.

DATED this 16<sup>th</sup> day of April 2010.

Respectfully submitted,



---

Elaine L. Winters – WSBA # 7780  
Washington Appellate Project  
Attorneys for Appellant