COURT OF APPEALS FOR THE STATE OF WASHINGTON
Division III
NO 31702-1-III

STATE OF WASHINGTON, Plaintiff/Respondent, v. CHARLES LELAND TOTUS, JR., Defendant/Appellant.	)	MOTION ON THE MERITS

1. IDENTITY OF MOVING PARTY

Respondent, State of Washington.

2. STATEMENT OF RELIEF SOUGHT

The Respondent requests that the court deny the requested review, dismiss the appeal, and enter an order affirming Charles Leland Totus, Jr.'s conviction for felony DUI under Yakima County Superior Court cause number 12-1-01504-5. Respondent requests that the court grant the motion on the merits based on the fact that the issues on review from the above-entitled action are clearly controlled by settled law, are factual and supported by the evidence, and are matters of judicial discretion and the decision is clearly within the decision of the trial court. RAP 18.4(e).

3. STATEMENT OF FACTS

The Defendant, Charles Leland Totus, Jr., was charged with Felony DUI in Yakima County Superior Court cause number 12-1-01504-5 based on four prior offenses within ten years. Prior to trial, he challenged the four prior offenses. Two of those priors involved crimes of physical control of a vehicle while under the influence, in violation of RCW 46.61.504. Both were in Yakima District Court. One prior was in 2005, citation 33493, and the other one was in 2008, citation 25860. One argument, amongst others, was that at the time Totus pled guilty, he was not advised of all the elements of the crime. CP 7. A hearing was held in Totus's felony DUI case when he challenged the predicate convictions from 2005 and 2008 and moved to suppress evidence of the convictions in his felony DUI trial.

At the hearing, the State presented evidence of each citation and Statement of Defendant on Plea of Guilty for both the 2005 and 2008 offenses. The 2005 citation lists the offense as RCW 46.61.504, "physical control." CP 65. The Statement of Defendant on Plea of Guilty indicates on page 1: "I have been informed and fully understand that....(b) I am charged with Physical Control. The elements are being in physical control of motor vehicle while ability to drive was affected by alcohol he had drank." CP 66. The 2008 citation lists the offense as RCW 46.61.504, "physical control." CP 48. The Statement of Defendant on Plea of Guilty indicates on page 1: "I have been informed and fully understand that....(b) I am charged with Physical Control. The elements are being in physical control of motor vehicle while affected by alcohol." CP 49.

In both cases, the Defendant indicated: " I plead guilty to the crime of physical control as charged in the complaint or citation and notice. I have received a copy of that complaint or citation and notice." CP 51, 68. Also, in both cases, the defendant made a statement in his own words about what he did that makes him guilty. Id. In the 2005 case, he wrote: "[o]n or about 8-14-05 in Yakima County I had physical control over a motor vehicle while my ability to drive was affected by alcohol I had drank." CP 68. In the 2008 case, he wrote: "[o]n or about 11-8-08 I was in physical control of a motor vehicle while ability to drive was affected by alcohol..." CP 51.

And in both cases, the court found that the plea was knowingly, intelligently, and voluntarily made. CP 51, 68. The Court specifically found that the "[d]efendant understands the charges and the consequences of the plea." Id.

Based on the evidence presented at the hearing, the trial court found that Totus was sufficiently advised of the elements of physical control and that both prior convictions were constitutionally valid. CP 233-35. Accordingly, the defense motion to suppress was denied. Id.

Trial was commenced and the Defendant was found guilty of felony DUI. CP 191. After trial, a separate hearing was held on whether Totus had four prior offenses within the past ten years. 3 RP 215-53. For each prior, the State admitted the citation, statement of defendant on plea of guilty, and judgment and sentence. RP 205. The jury was instructed on the special verdict. CP 199. The special verdict presented the following question to the jury: "On or before September 26, 2012, did the defendant have four or more prior offenses within ten

years for Driving Under the Influence of Intoxicating Liquor and/or Physical Control?" CP 202. The jury answered the special verdict in the affirmative. CP 202.

The Defendant's appeal followed.

4. ARGUMENT

A. Predicate Offenses

1. The trial court did not error in finding that the predicate offenses were constitutionally sound.

The defendant bears the initial burden of offering a "colorable, fact-specific argument" supporting the claim of error in the predicate conviction. State v. Summers, 120 Wn.2d 801, 812, 846 P.2d 490 (1993). Having called attention to the issue, the burden then shifts to the State to prove beyond a reasonable doubt that the predicate conviction is constitutionally sound. Summers, 120 Wn.2d at 812; State v. Holsworth, 93 Wn.2d 158, 159, 607 P.2d 845 (1980). The State can use extrinsic evidence to meet its burden. State v. Chervenell, 99 Wn.2d 309, 313-14, 662 P.2d 836 (1983).

The validity of a predicate offense is a question of law. State v. Miller, 156 Wn.2d 23, 24, 123 P.3d 827 (2005). The trial court cannot permit the State to admit an invalid, vague, or otherwise inapplicable conviction. Miller, 156 Wn.2d at 24. Courts review de novo the validity of a predicate offense. Carmen, 118 Wn. App. at 663, 665.

A guilty plea is constitutionally valid if made knowingly, voluntarily, and intelligently. State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Courts look at the totality of the circumstances to determine whether the guilty

plea meets constitutional requirements. Id. A guilty plea cannot be voluntary unless the defendant is apprised of the nature of the charge. State v. Keene, 95 Wn.2d 203, 207, 622 P.2d 360 (1980) (citing Henderson v. Morgan, 426 U.S. 637, 645, 96 S. Ct. 2253, 2257, 49 L. Ed. 2d 108 (1976)). Apprising the defendant of the nature of the defense need not "always require a description of every element of the offense." Holsworth, 93 Wn.2d at 153 n.3 (quoting Henderson, 426 U.S. at 647 n.18).

Totus argues essentially that his Physical Control guilty pleas were involuntary because the citations did not list all the essential elements of the crime. However, the cases cited by Totus do not involve any challenges to *predicate* offenses. The cases cited merely stand for the proposition that if an information is defective, the remedy is dismissal without prejudice and refilling of the information. See e.g., State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). None of his cited cases address the situation where the citation is challenged as a *predicate* offense of another charge.

In State v. Keene, the defendant argued that he did not plead guilty knowingly, intelligently, and voluntarily because the plea statement did not list the requisite specific intent. Keene, 95 Wn.2d at 208. The Washington Supreme Court rejected that argument and concluded that Keene knew the requisite intent because: (1) the information included the specific intent; (2) Keene pleaded guilty to the crime "as charged in the information" and acknowledged receiving a copy of the information; and (3) Keene assured the trial court judge that he had thoroughly read the plea statement. 95 Wn.2d at 208.

As explained in State v. Leach, 113 Wn.2d 679, 696, 782 P.2d 552 (1989), "technical defects not affecting the substance of the charged offense do not prejudice the defendant..." In Leach, the citation used the acronym "DWI." Id. at 695. The court noted the letters "DWI" have come into common usage as referring to "driving while intoxicated." Id. Similarly, the citation here included a shorthand way of referring to "physical control of a motor vehicle while under the influence." The phrase "physical control" has come into common usage just as the acronym DWI has become part of everyday vernacular.

As in Leach, the citation here complied with CrRLJ 2.1(b)(3)(iii), which requires a citation to contain, among other things, a "description of the offense charged." 113 Wn.2d at 699. Any criminal charging document must sufficiently and completely state an offense. Id. at 697. This requirement is satisfied by a more simplified procedure in courts of limited jurisdiction. Id.

So, while Totus's citation may not have included the full name of the offense in the citation, it did correctly indicate the RCW number and abbreviated name of the crime. In addition, it complied with CrRLJ 2.1. Furthermore, the Statement of Defendant on Plea of Guilty in both cases accurately listed out all the elements. CP 49, 66. And further, Totus gave a factual summary of what happened in his own words that provided a factual basis for all the elements of the crimes. CP 51, 68. From this, there is sufficient evidence that Totus knew the elements he was charged with and, therefore, knowingly, intelligently, and voluntarily pled guilty to the two predicate offenses in question. As such, the trial

court did not err in finding his prior convictions constitutionally valid and admissible.

B. Jury Instruction

1. Totus has not shown manifest constitutional error and actual prejudice that would warrant review.

First, Totus did not object to the special verdict form that was given to his jury. RP 256-7. Generally, failure to object to an instruction precludes challenge on appeal. State v. Bailey, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990). "[D]efects in instructions not called to the trial court's attention will not be considered when raised for the first time on appeal." State v. Theroff, 95 Wn.2d 385, 391, 622 P.2d 1240 (1980). CrR 6.15 requires timely and well stated objections to jury instructions, so that the "trial court may have the opportunity to correct any error." City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976). Totus can only raise the issue for the first time on appeal if the error is manifest constitutional error and he can show actual prejudice from the error. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); RAP 2.5(a). 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." State v. O'hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2008)).

In the instant case, Totus's jury was correctly instructed. RCW 46.61.5055 (4) provides that "A person who is convicted of a violation of RCW 46.61.502 or 46.61.504 shall be punished under chapter 9.94A RCW if: (a) The person has four or more prior offenses within ten years." "Prior offense" includes

a "conviction for a violation of RCW 46.61.504..." RCW 46.61.5055. RCW 46.61.504 is the section on physical control while under the influence. While the existence of a prior is an essential element that must be proved to the jury, whether it qualifies as a predicate offense for elevating a crime to a felony is a question of law. State v. Chambers, 157 Wn.App. 465, 237 P.3d 352 (2010). Whether a prior conviction meets the statutory definition is not an element of the crime. Id. at 479.

On review, jury instructions are reviewed de novo, while "examining the effect of a particular phrase in an instruction by considering the instruction as a whole and reading the challenged portions in the context of all the instructions given." State v. Harris, 164 Wn. App. 377; 263 P.3d 1276 (2011) (citing State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

In Harris, there was a reasonable question whether the defendant was aware of the risk of great bodily harm when shaking a baby. Id. at 387. Thus, instructing the jury in Harris that the defendant need only be aware that his assault created the risk of a "wrongful act" was error because there was demonstrated prejudice to the defendant. In addition, the defendant in Harris actively sought to advance the theory that he did not act recklessly because he was unaware of the risk of great bodily harm. Id. at 385. But both the jury instruction and the court, in response to objections from the State, prohibited the defendant from arguing his theory of the case to the jury. Id. He was, therefore, expressly precluded from arguing in closing that he did not act recklessly. Id. at 386.

In the instant case, however, Totus was not preventing from arguing against any of the prior convictions by the language in the special verdict form. Rather, in closing argument, Totus's counsel focused on showing discrepancies in case numbers and inferred that the fingerprint evidence was limited in value because it came from arrests rather than convictions. 3 RP 289. Counsel never addressed the language of "physical control" found in the special verdict form. The phrase was simply never mentioned by him.

On the facts of this case, Totus cannot show that any actual prejudice resulted from the instruction at issue. "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." State v. Bland, 128 Wn. App. 511, 515, 116 P.3d 428 (2005) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). Thus, the court should deny review of this issue because it was not preserved by an objection at trial. State v. McFarland, 127 Wn.2d at 333; RAP 2.5(a). See also, State v. Grimes, 165 Wn. App. 172, 267 P.3d 454 (2011).

2. Assuming *arguendo* that there was error, any error was harmless on the facts of this case.

"[A]n erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis." State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 907, 982 (2004) (citing Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L. Ed. 2d 35 (1999)). "To find an error harmless beyond a reasonable doubt, an appellate court must find that the alleged instructional error did not contribute to the verdict obtained." Id. at 845. When applied to an element omitted from, or misstated in, a jury instruction, the error is

harmless if that element is supported by uncontroverted evidence. Id. (citing Neder, 527 U.S. at 18). In order to hold the error harmless, the court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Neder, 527 U.S. at 19.

Assuming *arguendo* that there was error, if the prosecutor would have argued to the jury that physical control might include something other than "physical control of a motor vehicle while under the influence of intoxicating liquor or any drug," then the error would not have been harmless. See, e.g., State v. Peters, 163 Wn.App. 836, 851, 261 P.3d 199, 207 (2011). But in the instant case, the prosecutor correctly stated the law in closing arguments of the second phase of the trial. The prosecutor argued the following: "The evidence has proved beyond a reasonable doubt that, in fact, the defendant, Mr. Totus, on or before September 26, 2012, did have 4 or more prior offenses within 10 years for driving under the influence of intoxicating liquor and/or convictions for physical control of a vehicle while under the influence of intoxicating liquor." RP 270 (emphasis added). In Peters, the State expressly relied on an erroneous definition of "reckless" in the jury instruction to argue in closing that "reckless" meant that Peters knew "something really bad could happen." 163 Wn. App. at 851. This is dissimilar from the case at hand, in which the prosecutor did not use the instruction to his advantage in arguing his case.

Furthermore, Totus was not prohibited by either the court or the instructions from arguing that he did not have four prior offenses. In fact, the defense attorney never referred to the phrase "physical control" or the specific

language of the special verdict form. Defense counsel simply pointed to scrivener's errors in case numbers and the fact that the fingerprints cards were from arrests, not convictions. 3 RP 289.

In Harris, the defendant was prevented from arguing his theory of the case. 164 Wn. App. at 385. In fact, defense counsel's closing arguments drew a sustained objection from the State when counsel appeared to argue that the State had to prove that Harris knew his actions could cause great bodily harm. Id. Here, there was no argument to the jury that the defendant did not actually have the specific type of conviction that fell within the definition of "prior offense" in RCW 46.61.5055. His argument instead suggested that they did not have the right person because they did not have the fingerprint evidence from the convictions. His other argument went to some minor scrivener's errors in the paperwork, which would only go to the argument of whether or not Mr. Totus committed these prior offenses, not to any sort of argument that the prior was not the type of prior listed in RCW 46.61.5055.

Here, the entire record and evidence overwhelmingly show that the Defendant had four prior offenses that meet the definition in RCW 46.61.5055. Based on this uncontroverted evidence, the jury's answer to the special verdict would have been the same even had the Defendant's proposed language been included. Therefore, if there was any error, it was harmless beyond a reasonable doubt.

5. CONCLUSION

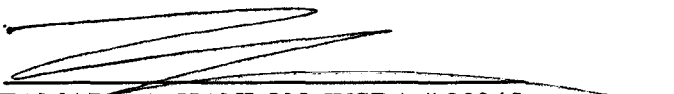
Totus's prior physical control convictions were constitutionally valid. He was sufficiently apprised of all the elements to which he was pleading guilty to. As such, his prior convictions were properly admitted at trial.

Totus did not object to the special verdict form and he has not shown actual prejudice from any errors. Therefore, Totus has not preserved the issue and on these facts he should be prohibited from raising the issue for the first time on appeal.

Finally, assuming *arguendo* that there was error, any error was harmless based on the facts of this case. Totus has failed to show that the instruction had any practical and identifiable consequences at trial.

The State respectfully requests that this court grant the State's motion and affirm the conviction in this matter.

DATED: February 26, 2014.



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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on February 26, 2014, by agreement of the parties, I emailed a copy of the State's Motion on the Merits to Janet G. Gemberling at: admin@gemberlaw.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 26th day of February, 2014 at Yakima, Washington.

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Comments:

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