No. 99866-3

THE SUPREME COURT OF WASHINGTON

COURT OF APPEALS, DIVISION THREE, CASE NO. 37080-1-III

STATE OF WASHINGTON,

Petitioner/Respondent,

vs.

Kevin Ray Edgar,

Respondent/Appellant.

State's Petition for Discretionary Review

GREGORY L. ZEMPEL
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TABLE OF AUTHORITIES

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Other Authorities

I. IDENTITY OF MOVING PARTY

The State of Washington asks this Court to accept review of the Court of Appeals decision designated below in Section II.

II. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is *State v. Kevin Ray Edgar*, No. 37080-1-III, filed May 6, 2021 (published decision). Originally unpublished and filed March 9, 2021, on May 6, 2021, the Court of Appeals denied the State's motion for reconsideration and granted Defendant's motion to publish. The Court of Appeals held that a rational trier of fact could not have found that the defendant "failed to prove the affirmative defense of 'safely-off-the-roadway' by a preponderance of the evidence." *State v. Edgar,* No. 37080-1-III at 4.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Court of Appeals erred by conflating the two prongs of the affirmative defense of "safely off the roadway," by holding that "off the roadway" was in effect, synonymous with "safely off the roadway," and whether the Court's ruling implied an added requirement that the State prove "an indication to return to the roadway" in order to overcome Defendant's affirmative defense?

IV. STATEMENT OF THE CASE

On August 16, 2018, at approximately 2:30 a.m., Michael Grimshaw, a graveyard cashier at the Broadway Flying J Conoco on Canyon Road in Ellensburg, was outside smoking a cigarette, when he saw three vehicles pull in, two of which parked at a nearby restaurant, and one which pulled up to the pumps and was later determined to be solely occupied by Mr. Edgar. RP 147-149, 160, 164. Mr. Grimshaw saw Mr. Edgar's vehicle remain at the pumps for a few minutes, but noticed some five to ten minutes later that it had pulled forward, still remaining in the proximity of the pumps. RP 149-150.

Approximately 20-25 minutes later a customer came into the store and told Mr. Grimshaw that there was someone sleeping in a vehicle in front of the pumps. RP 150. Mr. Grimshaw observed that it was the same vehicle, and an employee who went to check, told Mr. Grimshaw that there was someone inside with his head against the window. RP 150-151. Mr. Grimshaw called for law enforcement and testified that he estimated that the vehicle had been at the Conoco for about 30 minutes before law enforcement got there. RP 154.

Ellensburg Police Department Sergeant Brett Koss was the first to arrive. RP 159-160. His dash cam video, admitted at trial, showed where Mr. Edgar's vehicle was in relation to the store, the pumps, and Canyon Road. (Plaintiff's Exhibit No. Four, Video One). RP 166-176, 222, Sergeant Koss testified that Mr. Edgar's vehicle had not been in a parking spot, but was sitting just north of the fuel pumps, approximately a vehicle to a vehicle and a half away from them. RP 160-161. Sergeant Koss testified that there was also a vehicle southbound in the same lane for the fuel pumps, which had "obviously needed to maneuver around that (Mr. Edgar's) vehicle." *Id.*

Mr. Edgar's vehicle was running, and Sergeant Koss was able to observe Mr. Edgar in the driver's seat slumped with his head against the window. RP 161-162. Sergeant Koss began knocking on the window to try to get Mr. Edgar to wake up and engage with him. RP 162. According to Sergeant Koss, "[w]hat I observed is that the driver would – would wake up, kind of look at me, appear to reach for the controls on the driver's door, and then fall back asleep. And that happened a couple of times. RP

162.[1] Initially Mr. Edgar rolled down the back-seat window on the driver's side, but ultimately was able to roll down the driver's window. RP 162, 164. When Sergeant Koss was finally able to make contact with Mr. Edgar, he noticed a strong smell of intoxicants, observed that Mr. Edgar remained slouched in his seat, and had "slow and kind of mumbly" speech. RP 163, 173. Mr. Edgar's vehicle was not in gear, and he turned the vehicle off and removed the keys from the ignition during his interaction with Sergeant Koss. RP 163-164.

Mr. Edgar admitted to consuming alcohol. RP 165. Ellensburg Officer Joe Tirey who administered the field sobriety tests (FSTs) concluded based on both his observations of Mr. Edgar, as well as Mr. Edgar's performance of the FSTs, that Mr. Edgar was impaired. RP 165-166, 194, 210, 227, 230, 242. Mr. Edgar exhibited many of the well-recognized effects of inebriation, *e.g.,* slurred speech, odor, and bloodshot eyes, as well as a lack of coordination. RP 179-180, 190-191, 193.

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[1] Plaintiff's Exhibit number four, video one which showed where Mr. Edgar's vehicle was in relation to the store, gas pumps, and Canyon Road, also showed the actions Sergeant Koss took in his efforts to rouse Mr. Edgar, to include repeated knockings on the driver side window, the directing of his flashlight beam into the vehicle, and his verbal attempts to make contact. Plaintiff's Exhibit number four, video one is listed in the Supplemental Designation of Clerk's Papers and Exhibits dated June 18, 2020.

There were no open containers in Mr. Edgar's vehicle and his testimony was that he had not consumed any beer for "at least a couple of hours before (he had) left (his house)." RP 241, 300. A breath test taken at the jail showed sample readings of .098, and .101. RP 286.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. STANDARD FOR ACCEPTANCE OF DISCRETIONARY REVIEW

A petition for review will be accepted by the Supreme Court if the petition "is in conflict with a published decision of the Court of Appeals," or "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(2)(4). Review is warranted here because the decision below erroneously conflates the two prongs of the affirmative defense of "safely off the roadway," and implies that the State must also show that a defendant intended to return to the roadway in order to negate the defense.

B. ARGUMENT

> It is a defense to physical control while under the influence if, prior to being pursued by a law enforcement officer, the person causes the vehicle to be moved safely off the roadway.

> In determining whether a vehicle is safely off the roadway, you may consider the location of the vehicle, the extent to which the defendant maintained control over the vehicle, and any other evidence bearing on the question.
>
> 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. WPIC 92.15, RCW 46.61.504(2).

In its ruling, the Court of Appeals states that having heard the evidence in this case, "a reasonable jury could not have found that he failed to prove the affirmative defense of 'safely-off-the-roadway,' by a preponderance of the evidence. *State v. Edgar,* No. 37080-1-III at 4.

In order to qualify for the affirmative defense, a defendant must first show evidence that they moved or directed the vehicle to be moved "safely off the roadway," otherwise the affirmative defense is not available. *City of Yakima v. Godoy*, 175 Wn.App. 233, 305 P.3d 1100 (2013); *review denied* 178 Wn.2d 1019 (2013). The defendant has the burden of proving this defense by a preponderance of the evidence. *State v. Votava*, 149 Wn.2d 178, 66 P.3d 1050 (2003). This affirmative defense

should not be treated differently than any other. *City of Spokane v. Beck,* 130 Wn.App. 481, 486-489, 123 P.3d 854 (2005). "The initial burden is on the defendant to produce exculpatory evidence. Then, the burden falls upon the State to rebut that evidence." *State v. Reid*, 98 Wn.App. 152, 163, 988 P.2d 1038 (1999).

The second prong of the affirmative defense is whether the defendant is or is not *safely* off the roadway. Most of the published opinions quite clearly contemplate the issue of public safety when assessing the evidence in support of the affirmative defense. The burden is still on the defendant to present evidence that the defendant was safely off the roadway by a preponderance of the evidence. *See Beck*, 130 Wn.App. at 481, 486.

In *Beck* 130 Wn.App. at 481, 486, the Court found that the defendant had proven the affirmative defense by a preponderance when she was found in her vehicle parked in two parking spots about 20-30 yards from the roadway. Although given short shrift by the *Edgar* Court, the Court in *Beck* stressed that the officer in Ms. Beck's case specifically testified that the defendant was off the roadway and posed no danger.

Beck 130 Wn.App. at 484. Instead, the Court in *Edgar* noted that the reason that Ms. Beck posed no danger was because "she was asleep in her vehicle with the engine running and there was no other indication that she intended to return to the roadway." *State v. Edgar,* No. 37080-1-III at 5. It may be that the Court derived this last inference from the fact that as Ms. Beck was being arrested, another person showed up. *Beck*, 130 Wn.App. at 484. The *Beck* opinion gives no details as to whether or not Ms. Beck had contacted this person. Otherwise, the *Beck* opinion is devoid of any statements which touch upon Ms. Beck's intentions.

Similarly, the Court cites to *State v. Votava*, 149 Wn.2d 178, 184, 66 P.3d 1050 (2003) for the proposition that "the physical control statute protects the public from the threat posed by a person who controls a vehicle while under the influence of alcohol or drugs and could choose to get back on the roadway." While the statement is an accurate one, the gist of the Appellate Court's argument is that "off the roadway" is synonymous with "safely off the roadway." If the Court of Appeals logic were to be extended, there would be no purpose to the second prong of the affirmative defense.

The Court of Appeals also seeks to distinguish *City of Edmonds v. Ostby*, 48 Wn.App. 867, 740 P.2d 916 (1987), by finding that Mr. Edgar's vehicle was "not blocking traffic." *State v. Edgar,* No. 37080-1-III at 6. Simply not blocking traffic does not make one safe. In *State v. Reid*, the court held that this defense had not been established as a matter of law where the defendant was asleep behind the wheel of car with its engine running, parked three feet off the highway. *State v. Reid,* 98 Wn. App. at 152, 155, 164. In *State v. Nguyen*, the safely off the roadway defense was not established where most of the defendant's car was off the road, but part of it was in the lane of travel. 165 Wn.2d 428, 431-32, 197 P.3d 673 (2008). In *Ostby*, 48 Wn.App. 867, 870-871, the court held that this defense had not been established as a matter of law where the defendant had passed out behind the wheel of a car, with the engine running and transmission in drive, in an apartment parking lot. Even though Ostby's car was stopped in a parking lot, it still was not safely off the roadway. *Id.* The instant case is strikingly similar to *Ostby, Nguyen,* and *Reid*. While Mr. Edgar may have been off the roadway, he was not safe.

It was estimated that Mr. Edgar was passed out approximately a "vehicle to a vehicle and a half" away from the gas pumps at the Flying J Conoco, in an area with a nearby late-night restaurant.[2] Sergeant Koss testified that it was evident that another car had to have driven around Mr. Edgar's vehicle to access the pumps. The jury saw the video which showed the relative position of Mr. Edgar's vehicle and its proximity to the Conoco, the gas pumps, and Canyon Road.[3] Being in the middle of a pathway area where individuals would directly travel in approaching the gas pumps, the convenience store, and/or the restaurant, while off the roadway, is not safely off the roadway. The evidence in this case showed that Mr. Edgar drove some "vehicle to vehicle and a half away from the gas pumps," and then passed out. The purpose of the Physical Control statute is to deter anyone who is intoxicated from getting into a car except as a passenger and to enable law enforcement

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[2] This can be inferred by Mr. Grimshaw's testimony that Mr. Edgar's vehicle was one of three he saw pull in at 2:30 in the morning, and that the other two proceeded to park at the restaurant.

[3] It appears that the Court of Appeals relied solely upon a single still from the Officer's dash cam rather than watch the first four minutes of video that the jury saw of Sergeant Koss's approach to the Conoco, and the position of Mr. Edgar's vehicle in relation to the Conoco, gas pumps, and Canyon Road. *State v. Edgar,* No. 37080-1-III at 2.

to arrest an intoxicated person before that person strikes. *Votava*, 149 Wn.2d at 184. A reasonable jury could and did find that Mr. Edgar was not safely off of the roadway, and not entitled to the affirmative defense.

VI. CONCLUSION

It is clear that that Court of Appeals conflates the two prongs of the safely off the roadway defense, and implies an additional requirement that the State prove that a defendant intended to return to the roadway. Neither of these positions is supported by existing case law and RAP 13.4(b)(2) and (4) require that this Court grant discretionary review.

Respectfully submitted this 7th day of June, 2021.

Carole L. Highland, WSBA #20504
(Deputy) Prosecuting Attorney

PROOF OF SERVICE

I, Carole L. Highland, do hereby certify under penalty of perjury that on June 7, 2021, I had mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of State's Petition for Discretionary Review:

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STATE V. KEVIN RAY EDGAR

COURT OF APPEALS DIVISION THREE, CASE NO. 37080-1-III

APPENDIX A	**COURT OPINION FILED MARCH 9, 2021**
APPENDIX B	**ORDER DENYING MOTION FOR RECONSIDERATION AND PUBLISHING OPINION FILED MAY 6, 2021**
APPENDIX C	**WPIC 92.15**
APPENDIX D	**RCW 46.61.504**

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March 9, 2021

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CASE # 370801
State of Washington v. Kevin Ray Edgar
KITTITAS COUNTY SUPERIOR COURT No. 181002922

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. Scott R. Sparks
c: Kevin Ray Edgar
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FILED
MARCH 9, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 37080-1-III
Respondent,	)	
	)	
v.	)	
	)	
KEVIN RAY EDGAR,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

STAAB, J. — Kevin Ray Edgar appeals his conviction for felony physical control, arguing that a reasonable jury could not have found that he failed to prove the affirmative defense of "safely-off-the-roadway" by a preponderance of the evidence. We agree and dismiss with prejudice.

FACTS

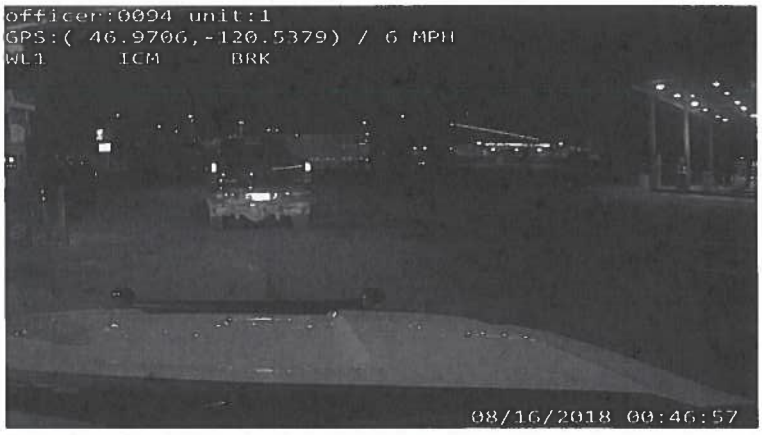
Kevin Ray Edgar was arrested for being in physical control of a vehicle while under the influence of alcohol. Because he had a prior conviction for vehicular assault involving alcohol, he was charged with a felony.

At trial, it was undisputed that Mr. Edgar had been drinking and his blood alcohol was above the legal limit at the time he was found parked at a gas station. The main issue

was whether Mr. Edgar was safely off the roadway, an affirmative defense provided by RCW 46.61.504.

Mr. Edgar testified that he pulled off the road into a gas station in Ellensburg between 2:00 and 3:00 am on August 16, 2018. He testified that he was on his way to help his son when he realized that he should not be driving. A gas station employee initially saw Mr. Edgar's truck parked at the gas pumps. A few minutes later, the employee realized that the truck had pulled forward about 20 feet and stopped in the parking lot. While the truck was not in a parking stall, it was not blocking traffic. Instead, Mr. Edgar had put his truck in park and had fallen asleep with the engine running and the lights on while parked inside a nearly empty five-acre parking lot.

A photograph from the officer's dash camera provides reference:



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Approximately 20 minutes later, the gas station employee called law enforcement after a customer mentioned that someone was sleeping in the truck. The employee estimated that Mr. Edgar sat in his car 25 to 30 minutes before law enforcement arrived.

During closing arguments, the prosecutor conceded that Mr. Edgar was off the roadway and then argued:

> If he had parked, if he had turned the car off, if he had taken the keys out of the ignition, the State wouldn't have (inaudible). That would be safely off the roadway. —he is a person who is passed out in a running vehicle.
>
> So what's the natural inclination when you come to—if the officers hadn't been persons that had awakened him. The natural inclination would be to put the gear—the car in gear, the truck in gear—
>
> [DEFENSE COUNSEL]: Judge, I'm going to object to this line of—statement. There's no evidence to that.
>
> THE COURT: Very well. Please continue.
>
> [PROSECUTOR]: Thank you.
>
> --put the car in gear, and move it three times from park to reverse to neutral to drive and you're off.
>
> The reason something terrible didn't happen in this case is because it was stopped before it happened.

Report of Proceedings (RP) at 327-28.

Later in rebuttal, the prosecutor again emphasized, "[Mr. Edgar] should not be allowed to utilize . . . a defense that is available to those people who, as [defense counsel] says, do the right thing—they actually park in a parking spot, take the keys out of the

ignition, and are not behind the wheel passed out—behind a running—in a running vehicle." RP at 337-38.

The jury returned a verdict of guilty, and Mr. Edgar was sentenced. He appeals his conviction, arguing that the evidence was sufficient to support the defense of safely-off-the-roadway.

ANALYSIS

In Washington State, it is a crime to be in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs. RCW 46.61.504. The statute also provides that "[n]o person may be convicted under this section . . . if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway." RCW 46.61.504(2). The defendant must prove this affirmative defense by a preponderance of the evidence. *See State v. Votava*, 149 Wn.2d 178, 187, 66 P.3d 1050 (2003).

When reviewing a challenge to the sufficiency of evidence based on an affirmative defense, the inquiry is whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found the accused failed to prove the defense by a preponderance of the evidence. *City of Spokane v. Beck*, 130 Wn. App. 481, 486, 123 P.3d 854 (2005) (citing *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996)).

In *Beck*, the defendant was found in a convenience store parking lot, "taking up two parking places on the north side of the parking lot about 20 to 30 yards from the

roadway." *Id.* at 484. The defendant was sleeping inside the car with the engine running. As she was being arrested, another person arrived to pick her up. The arresting officer testified that the defendant was off the roadway and there was no danger. *Id.*

The *Beck* court noted that the defense of safely-off-the-roadway should be treated as any other affirmative defense, susceptible to appellate review for sufficiency of the evidence. *Id.* at 488. In applying the standard of review of an affirmative defense, the *Beck* court held that the evidence was insufficient for a jury to conclude that the defendant did not prove she was, more probably than not, safely off the roadway. *Id.* In reaching this conclusion, the court found the most compelling evidence to be the concession by the officer that the vehicle did not pose a danger. *Id.*

Here, the State argues that *Beck* is distinguishable because the officer in this case did not testify to a lack of danger. Indeed, while such opinion testimony by an officer is undoubtedly compelling, it is also conclusory. The reason that the defendant in *Beck* did not pose a danger is that she was asleep in her vehicle with the engine running and there was no other indication that she intended to return to the roadway.

The State also relies on *City of Edmonds v. Ostby*, 48 Wn. App. 867, 740 P.2d 916 (1987), to argue that whether a vehicle is safely off the roadway is a factual issue to be determined by the trier of fact. Brief of Resp't at 12. In *Ostby*, police found the defendant's vehicle in an apartment complex parking lot. The defendant was asleep in the vehicle with its engine running, lights on, and the transmission in drive. "The vehicle

was not in a parking stall, but was situated in the middle of the roadway, blocking access to adjoining parking areas and buildings." *Id.* at 868. The *Ostby* court found this evidence sufficient to support the finding that the defendant was not safely off the roadway. *Id.* at 870-71.

The *Ostby* case is distinguishable legally and factually. As noted in *Beck*, *Ostby* was decided before the Supreme Court decision in *Lively* that changed the standard of reviewing affirmative defenses for sufficiency of evidence. *Beck*, 130 Wn. App. at 487. While the affirmative defense is a question of fact, *Lively* made it clear that it was also subject to review for legal sufficiency. *Lively*, 130 Wn.2d at 18.

Moreover, the facts in *Ostby* are also distinguishable. Whereas in *Ostby*, the defendant's vehicle was in drive, and the vehicle was in the middle of a parking lot roadway blocking access, in this case, the vehicle was in park and not blocking traffic.

We also consider the sufficiency of evidence in light of the nature of the offense and the defense. The physical control statute protects the public from the threat posed by a person who controls a vehicle while under the influence of alcohol or drugs and could choose to get back on the roadway. *See Votava*, 149 Wn.2d at 184. The legislature balanced this threat with providing an incentive for intoxicated drivers to get off the roadway. The affirmative defense of "safely off the roadway" only applies when the State can prove every element of the offense. *Votava*, 149 Wn.2d at 187 (citing *State v. Riker*, 123 Wn.2d 351, 367–68, 869 P.2d 43 (1994)).

In this case, the prosecutor argued that Mr. Edgar was not safely off the roadway because he could return to the roadway. By definition, this is true in almost every physical control case: an intoxicated person in physical control of a vehicle is not dangerous in-and-of-itself, but rather poses a danger because they could choose to get back on the roadway. In rejecting a similar argument, the *Votava* court noted:

> This argument fails to dispose of the issue. It goes to the elements of the charge, rather than the defense. The very nature of this affirmative defense is that, although the State can prove every element of the actual physical control charge, acquittal is appropriate if the defendant can show, by a preponderance of the evidence, that the defendant moved the vehicle safely off the roadway.

Votava, 149 Wn.2d at 187.

In this case, the State argued in closing that the defense of safely-off-the-roadway should not be available to Mr. Edgar because he was sleeping in the driver's seat with the engine running. RP at 337-38. This argument comes dangerously close to shifting the burden of proving an essential element. In other words, if the State argues that the only way a defendant can prove that he is safely off the roadway is by showing that he is no longer in physical control of a vehicle, then the burden has shifted to the defendant to disprove a necessary element.

When he realized that he should not be driving, Mr. Edgar pulled off the roadway, parked in a large parking lot, and fell asleep. While we do not condone the danger he posed to the public by getting behind the wheel in the first place, he did exactly what the

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legislature asked him to do: he pulled safely off the roadway. Our analysis of the evidence in this case convinces us that a rational trier of fact could not have found that Mr. Edgar failed to prove the defense by a preponderance of the evidence.

Because we dismiss with prejudice, we do not address Mr. Edgar's other issues on appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Lawrence-Berrey, J.

Siddoway, A.C.J.

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Renee S. Townsley
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May 6, 2021

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CASE # 370801
State of Washington v. Kevin Ray Edgar
KITTITAS COUNTY SUPERIOR COURT No. 181002922

Dear Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration and Publishing Opinion Filed April 19, 2016.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed. RAP 13.4(a). Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:
Attachment

APPENDIX B PG 1 OF 2

FILED
MAY 6, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN RAY EDGAR, Appellant.	)	No. 37080-1-III ORDER DENYING MOTION FOR RECONSIDERATION AND GRANTING MOTION TO PUBLISH

THE COURT has considered respondent State of Washington's motion for reconsideration and appellant Kevin Ray Edgar's motion to publish the court's opinion of March 9, 2021, and is of the opinion the motion for reconsideration should be denied and the motion to publish should be granted. Therefore,

IT IS ORDERED, the motion for reconsideration is denied.

IT IS FURTHER ORDERED, the motion to publish is granted. The opinion filed by the court on March 9, 2021 shall be modified on page one to designate it is a published opinion and on page eight by deletion of the following language:

> A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

PANEL: Judges Staab, Lawrence-Berrey, Siddoway

FOR THE COURT:

REBECCA PENNELL
Chief Judge

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Washington Practice Series

TM
Washington Pattern Jury Instructions—Criminal
11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 92.15 (5th Ed)

Washington Practice Series TM

Washington Pattern Jury Instructions--Criminal
April 2021 Update

Washington State Supreme Court Committee on Jury Instructions

Part XI. Crimes Involving Operation of Motor Vehicles

WPIC CHAPTER 92. Driving Under the Influence

WPIC 92.15 Physical Control While Under the Influence—Defense—Safely Off the Roadway

It is a defense to physical control while under the influence if, prior to being pursued by a law enforcement officer, the person causes the vehicle to be moved safely off the roadway.

In determining whether a vehicle is safely off the roadway, you may consider the location of the vehicle, the extent to which the defendant maintained control over the vehicle, and any other evidence bearing on the question.

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.

NOTE ON USE

Use this instruction when the defense of safely off the roadway is before the jury. If there is a dispute as to whether the vehicle is within the roadway, then a definition of "roadway" may be added based on RCW 46.04.500 or other applicable law.

Do not give this instruction unless proposed by the defense.

COMMENT

RCW 46.61.504(2); RCW 46.61.503. It has long been a defense to the charge of physical control of a vehicle while under the influence if, prior to being pursued by a law enforcement officer, a person has moved the vehicle safely off the roadway. Effective September 26, 2015, pursuant to RCW 46.61.503(3), it is also a defense to the charge of being a minor in physical control of a motor vehicle under the influence of alcohol or drugs.

Right of defendant to forgo an affirmative defense. This instruction should be given if requested by the defendant and supported by the evidence. The defense of "safely off the roadway" is an affirmative defense to be raised by the defendant. A court should not instruct the jury on an affirmative defense over the objection of the defendant. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975); State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013) (a defendant's right to control his or her defense prohibits the giving of instructions concerning defenses over the defendant's objections); State v. Coristine, 177 Wn.2d 370, 376, 300 P.3d 400 (2013). For additional discussion, see WPIC 14.00 (Defenses—Introduction). A defendant is entitled to this instruction if any evidence presented at trial supports the defense, regardless of the party who presented it. A defendant is not, however, entitled to this instruction solely based upon an absence of evidence. State v. Fisher, 185 Wn.2d 836, 851–52, 374 P.2d 1185 (2016) (jury should be instructed on the defense even if the evidence in support is weak, inconsistent, or of doubtful credibility).

In State v. Votava, 149 Wn.2d 178, 184, 66 P.3d 1050 (2003), the court held that the safely off the roadway defense is available to a defendant regardless of whether the defendant personally drove the vehicle safely off the roadway or directed another to do so, because "a person may move a vehicle without driving it" by directing another to move the vehicle. The court rejected a requirement that the defendant must personally drive the vehicle off the roadway in order to be eligible for the defense, so long as the evidence shows that the defendant caused the vehicle to be moved off the roadway. See also City of Yakima v. Godoy, 175 Wn.App. 233, 305 P.3d 1100 (2013) (trial court properly refused to instruct the jury on the safely off the roadway defense where there was no evidence that the defendant moved or caused the vehicle to be moved off the roadway).

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Even if the State can prove every element of the actual physical control charge, acquittal is appropriate if the defendant can show, by a preponderance of the evidence, that the defendant moved the vehicle safely off the roadway. State v. Votava, 149 Wn.2d at 187–

88. The defendant has the burden of proving by a preponderance of the evidence that the vehicle was moved safely off the roadway. State v. Votava, 149 Wn.2d at 187–88.

The safely off the roadway defense only applies to prosecutions for being in physical control, not to DUI. Effective September 26, 2015, pursuant to RCW 46.61.503(3), the defense of safely off the roadway also applies to the charge of being a minor in physical control under the influence of alcohol or drugs. A trial court's refusal to instruct the jury on the defense in a DUI prosecution does not deny the defendant equal protection of the law. State v. Beck, 42 Wn.App. 12, 707 P.2d 1380 (1985); State v. Hazzard, 43 Wn.App. 335, 716 P.2d 977 (1986).

In City of Edmonds v. Ostby, 48 Wn.App. 867, 740 P.2d 916 (1987), the court held that although the defendant's vehicle was in a private parking lot, the defendant was not "safely off the roadway" because the evidence indicated that the defendant's vehicle was not in a parking stall and that the defendant had passed out behind the wheel of his vehicle due to intoxication with the motor running and the transmission in drive. The *Ostby* court refused to extend to physical control prosecutions the holding in State v. Day, 96 Wn.2d 646, 638 P.2d 546 (1981), which interpreted the "elsewhere throughout the State" language of RCW 46.61.005 under the unique facts of the case to disallow a DUI prosecution for acts occurring on private property where Day was posing no threat to the public.

The term "roadway" is defined in RCW 46.04.500: "Roadway means that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles. ..."

A vehicle is "safely off the roadway" when the situation no longer poses a danger to the public. See City of Edmonds v. Ostby, 48 Wn.App. at 870–71 ("Whether the vehicle was 'safely off the roadway' is a factual issue to be decided by the trier of fact ... Ostby had passed out behind the wheel of his vehicle due to his intoxication; the motor was running and the transmission was in drive. This situation posed a danger to the public. Ostby did not comply with the defense to the statute that he pull his vehicle safely off the roadway."); and State v. Votava, 149 Wn.2d at 185, which says:

> This court's only statement regarding the purposes for the defense contains no driving requirement: "Once the person [in actual physical control of a vehicle] is safely off the roadway he is no longer posing a threat to the public ..." State v. Day, 96 Wash.2d 646, 649 n. 4, 638 P.2d 546 (1981) (footnote omitted).

[Current as of February 2020.]

END OF DOCUMENT

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RCW 46.61.504

Physical control of vehicle under the influence.

(1) A person is guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if the person has actual physical control of a vehicle within this state:

(a) And the person has, within two hours after being in actual physical control of the vehicle, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW **46.61.506**; or

(b) The person has, within two hours after being in actual physical control of a vehicle, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW **46.61.506**; or

(c) While the person is under the influence of or affected by intoxicating liquor or any drug; or

(d) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

(2) The fact that a person charged with a violation of this section is or has been entitled to use a drug under the laws of this state does not constitute a defense against any charge of violating this section. No person may be convicted under this section and it is an affirmative defense to any action pursuant to RCW **46.20.308** to suspend, revoke, or deny the privilege to drive if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway.

(3)(a) It is an affirmative defense to a violation of subsection (1)(a) of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of being in actual physical control of the vehicle and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after being in such control. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(b) It is an affirmative defense to a violation of subsection (1)(b) of this section, which the defendant must prove by a preponderance of the evidence, that the defendant consumed a sufficient quantity of marijuana after the time of being in actual physical control of the vehicle and before the administration of an analysis of the person's blood to cause the defendant's THC concentration to be 5.00 or more within two hours after being in control of the vehicle. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(4)(a) Analyses of blood or breath samples obtained more than two hours after the alleged being in actual physical control of a vehicle may be used as evidence that within two hours of the alleged being in such control, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(c) or (d) of this section.

(b) Analyses of blood samples obtained more than two hours after the alleged being in actual physical control of a vehicle may be used as evidence that within two hours of the alleged being in control of the vehicle, a person had a THC concentration of 5.00 or more in violation of subsection (1)(b) of this section, and in any case in which the analysis shows a THC concentration above 0.00 may be used as evidence that a person was under the influence of or affected by marijuana in violation of subsection (1)(c) or (d) of this section.

(5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

(6) It is a class C felony punishable under chapter **9.94A** RCW, or chapter **13.40** RCW if the person is a juvenile, if:

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(a) The person has three or more prior offenses within ten years as defined in RCW **46.61.5055**; or

(b) The person has ever previously been convicted of:

(i) Vehicular homicide while under the influence of intoxicating liquor or any drug, RCW **46.61.520**(1)(a);

(ii) Vehicular assault while under the influence of intoxicating liquor or any drug, RCW **46.61.522**(1)(b);

(iii) An out-of-state offense comparable to the offense specified in (b)(i) or (ii) of this subsection; or

(iv) A violation of this subsection (6) or RCW **46.61.502**(6).

[**2017 c 335 § 2**; **2015 2nd sp.s. c 3 § 24**; **2013 c 3 § 35** (Initiative Measure No. 502, approved November 6, 2012); **2011 c 293 § 3**; **2008 c 282 § 21**; **2006 c 73 § 2**; **1998 c 213 § 5**; **1994 c 275 § 3**; **1993 c 328 § 2**; **1987 c 373 § 3**; **1986 c 153 § 3**; **1979 ex.s. c 176 § 2**.]

NOTES:

Rules of court: *Bail in criminal traffic offense cases—Mandatory appearance—CrRLJ 3.2.*

Finding—Intent—2015 2nd sp.s. c 3: See note following RCW **10.21.055**.

Intent—2013 c 3 (Initiative Measure No. 502): See note following RCW **69.50.101**.

Effective date—2011 c 293 §§ 1-9: See note following RCW **46.20.385**.

Effective date—2006 c 73: See note following RCW **46.61.502**.

Effective date—1998 c 213: See note following RCW **46.20.308**.

Short title—Effective date—1994 c 275: See notes following RCW **46.04.015**.

Legislative finding, purpose—Severability—1987 c 373: See notes following RCW **46.61.502**.

Severability—1979 ex.s. c 176: See note following RCW **46.61.502**.

Criminal history and driving record: RCW ***46.61.513****.*

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KITTITAS COUNTY PROSECUTOR'S OFFICE

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