

65047-5

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NO. 65047-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT W. LOVE, Jr.,

Appellant.

BRIEF OF RESPONDENT

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A handwritten signature in black ink is written over a circular stamp. The signature appears to be "J. Juhl". The stamp is partially obscured by the signature.

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I. ISSUES

1. Whether the State presented sufficient evidence to prove the factual comparability of Defendant's Alaska DWI conviction to Washington's DUI statute and to support Defendant's conviction for felony DUI?

2. Whether the court's instructions viewed as a whole provided an accurate statement of the law and allowed Defendant to argue his theory of the case in the context of the evidence?

3. Whether the court's failure to give an instruction that was proposed by Defense lowered the State's burden of proof?

4. Whether the State presented sufficient evidence to prove that Defendant's Alaska DWI conviction was comparable to a Washington DUI conviction to include that conviction in Defendant's offender score?

5. Whether the sentence imposed by the trial court exceeded the statutory maximum for the offense?

II. STATEMENT OF THE CASE

The State charge Defendant, Robert Love, with felony Driving while Under the Influence of Intoxicating Liquor (DUI), alleging;

That the defendant, on or about the 1st day of December, 2008, did drive a vehicle while the

defendant was under the influence of or affected by intoxicating liquor or any drug; and the defendant had previously incurred four or more prior offenses within ten years as defined in RCW 46.61.505[5]; proscribed by RCW 46.61.502(1) and (6), a felony.

CP 71.

The State presented the testimony of Jason Geveshausen, a commercial truck driver, and Trooper Jeffrey Leonard. On December 1, 2008, around 5:00 p.m., Geveshausen observed a green Plymouth in front of him on I-5. Geveshausen observed the Plymouth swerving for approximately one mile and called 911. Geveshausen continued following the Plymouth and observed it continue swerving, leaving its lane of travel by half a car width, and straddling the lane line. On a couple of occasions the Plymouth came within inches of hitting other vehicles. Report of Proceedings Volume 1 (1RP) 15–23.

On December 1, 2008, Trooper Leonard was notified by communications that a 911 caller reported that he was following a possible DUI traveling northbound on I-5 in a green Plymouth. Trooper Leonard responded and observed the green Plymouth around 41st Street in Everett. Trooper Leonard followed the Plymouth to the State Route 2 exit and observed that the Plymouth was having problems staying within its lane, weaving from side to

side and crossing out of the lane four times, straddling the lane line and following too close to the vehicle in front. Trooper Leonard signaled the Plymouth to pull over just past the State Route 2 exit. The Plymouth almost struck the Jersey barrier as it pulled to the side of the road. Trooper Leonard contacted Defendant, the driver of the Plymouth, and obtained Defendant's temporary driver's license. Based on his observations and training, Trooper Leonard determined that Defendant was under the influence of intoxicating liquor and placed Defendant under arrest. Defendant refused the Breathalyzer. 1RP 24–55.

At trial the State offered and the court admitted without objection from Defense Exhibit 1, a certified copy of Defendant's driver's license status and a copy of Defendant's temporary license. Trooper Leonard testified that the information on Exhibit 1 matched the information on the temporary license he obtained from Defendant. The State offered and the court admitted without objection from Defense Exhibit 2, a copy of the Breathalyzer ticket showing Defendant refused the test. The State offered Exhibits 3 – 10; certified copies of Defendant's prior Alaska Driving While Intoxicated (DWI) conviction and three prior King County DUI convictions. Defense objected to Exhibits 3 and 4. The court

reserved ruling on Exhibits 3 and 4, allowing the State time to research the issue and respond to the objection. 1RP 55–68; Exhibits (EX) 1–10.

The State then offered Exhibit 3A and the Defense objected. The court heard argument from counsel, examined Exhibits 3, 3A and 4, and compared the Alaska Statute (AS) Defendant was charged and convicted under to Washington's DUI statute. The court found that Exhibit 3A contained a factual basis to support finding a criminal violation of RCW 46.61.502. The court found that Exhibit 3A contained a clear statement that Defendant was driving a Jeep Cherokee¹ and that a Jeep Cherokee is a vehicle under Washington law. Report of Proceedings Volume 2 (2RP) 2–10; EX 3A.

The court also found that Exhibits 3, 3A and 4 established that Defendant was charged with DWI under AS 28.35.030, there was nothing in the judgment or court docket that indicated Defendant pled to a lesser or reduced charge, and that the factual basis considered by the Wrangell District Court was the facts

¹ While the court was checking the type of vehicle in the Alaska criminal complaint, Defendant volunteered that he was driving a Jeep Waggoner. 2RP 9.

contained in Exhibit 3A. The court found that read together, Exhibits 3, 3A and 4 establish a basis for a jury to conclude that Defendant was convicted of driving under the influence in Alaska on facts that would have led to a conviction of the same in Washington. 2RP 10–11; EX 3, 3A, 4.

The court admitted Exhibits 3, 3A and 4 and found that the documents related to Defendant's Alaska conviction were admissible for the jury to consider as a potential predicate offense. The court then found that because the Alaska documents were admissible the King County documents were also relevant. The court then admitted Exhibits 5–10. 2RP 11; EX 1–10, 3A.

The State proposed and the court gave Instruction No. 6, listing the elements the State had to prove beyond a reasonable doubt for the jury to find Defendant guilty of felony DUI, and Instruction No. 8, defining prior offense. CP 56, 58.

Defense proposed the following instruction:

An out-of-state conviction is a prior offense if it is proven that if the out-of-state violation had occurred here that it would be a violation of the law in Washington.

CP 65; 2RP 21. The Stated objected to giving the proposed instruction on the following grounds: 1) the jury did not have the

“framework with which to analyze this instruction” since they were not being given a book of Washington statutes; 2) the instruction would invite jury speculation regarding Washington law; and 3) the instruction was confusing. 2RP 21–22.

Defense responded that another way to deal with the issue would be to submit the lesser included misdemeanor DUI instruction. The State had no objection and the court gave Instructions No. 9, 10 and 12 regarding the lesser included misdemeanor DUI. CP 59, 60, 62–63; 2RP 23–24.

The court gave the following reasons for declining to give the Defense proposed instruction: 1) the proposed instruction does not add anything to the instructions; 2) a prior offense must be a DUI offense and prior DUI offense are defined in the State’s instructions correctly according to Washington law; 3) the State’s instructions define DUI and it would be superfluous and confusing to say “Washington law applies”; 4) the State’s instructions affords the Defense the ability to argue that the Wrangell complaint does not set forth facts that would be a crime in Washington; and 5) adding more would provide a basis for confusion. 2RP 28.

The court inquired whether Defense could argue its case with the State’s proposed instructions. Defense replied that he

could argue his case based on the instructions and the lesser included instructions, but thought “further clarity is always better than less clarity.” Defense stated it had no exceptions or objections to the court’s proposed instructions. CP 48–63; 2RP 24, 35, 39–40.

During closing Defense argued that the State had the burden to prove Defendant had been convicted of four or more offenses within ten years and that the evidence was insufficient to prove the Alaska conviction beyond a reasonable doubt. Defense also argued the lesser included misdemeanor DUI. 2RP 56–57, 59–60.

The jury found Defendant guilty of the charge of felony DUI. At sentencing on February 25, 2010, the State presented the certified copies of Defendant’s prior convictions with no objection from Defense. The court found and parties agreed that Defendant’s offender score was seven with a standard range of 51 to 60 months and that the statutory maximum for the crime was 60 months. CP 26–29, 47; Report of Proceedings Sentencing (RPS) 2–4, 14.

The court determined that since Defendant had been incarcerated from the date of violation, December 1, 2009, 60 months would end on December 1, 2014. The court imposed a sentence of 55 months confinement and 12 months community

custody with the following proviso: “but in no wise shall the term of community custody extend past December 1, 2014, so that community custody shall be and the same is, hereby reduced by any time by which which (sic) it would otherwise extend beyond that date.” CP 15–25; RPS 14–16

III. ARGUMENT

A. SUFFICIENCY OF THE EVIDENCE.

1. Legal Standards.

When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable.

State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) *citing* State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). The court reviews the trial court's findings of fact for substantial evidence and its conclusions of law *de novo*. State v. Santacruz, 132 Wn. App. 615, 618, 133 P.3d 484 (2006); State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

2. Comparability Of Out-of-State Conviction.

To be convicted of the felony offense of DUI, the State must prove the Defendant (1) drove a vehicle within this state, (2) was under the influence of intoxicants, and (3) had four or more convictions for qualifying prior offenses. State v. Castle, 156 Wn. App. 539, 543, 234 P.3d 260 (2010); State v. Chambers, ___ P.3d ___, 2010 WL 3213614 page 1 (2010).

The fact that a person has four prior DUI offenses is an essential element of the crime of felony DUI under RCW 46.61.502(6), and must be proved to the jury beyond a reasonable doubt. State v. Chambers, at page 1. However, whether a prior offense meets the statutory definition in RCW 46.61.5055(14) and

qualifies as a predicate offense that elevates a DUI to a felony under RCW 46.61.502(6) is not an essential element of the crime. State v. Chambers, at page 7. Rather, the question of whether a prior offense meets the statutory definition is a threshold question of law to be decided by the court before admitting a prior offense into evidence at trial. Id.

In the present case, Defendant challenges the sufficiency of the evidence to prove the factual comparability of Defendant's prior Alaska DWI conviction under Alaska Statute 28.35.030. That statute is broader than Washington's definition of DUI; in addition to operating or driving motor vehicle the Alaska statute includes operating an aircraft or a watercraft. "[I]f the foreign statute is broader than the Washington definition of the particular crime, the ... court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute." State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). This is the same comparability analysis used to determine whether an out-of-state conviction qualifies as a most serious offense and to determine whether a foreign conviction is included in a defendant's

offender score. State v. Berry, 141 Wn.2d 1212, 131, 5 P.3d 658 (2000).

To prove Defendant's prior Alaska DWI conviction, the State's offered certified copies of the following documents from the Wrangell District Court of Alaska cause number 01-59 CR: the judgment from Defendant's guilty plea to DWI, AS 28.35.030; the criminal complaint charging Defendant with DWI, AS 28.35.030; and the court docket. EX 3, 3A, 4; 1RP 57–59; 2RP 3–4.

As part of its gate-keeping function, the trial court made a threshold determination as to whether the prior conviction was applicable to support the crime charged. State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005); State v. Chambers, 2010 WL 3213614. The trial court determined that State's evidence was sufficient to prove factual comparability of Defendant's Alaska DWI conviction to Washington's DUI statute. The trial court found that the criminal complaint stated that Defendant was driving a Jeep Cherokee and that a Jeep Cherokee is a motor vehicle under Washington law. The court found that the other elements of the Alaska statute were the same as or narrower than Washington's DUI statute. The court ruled that the evidence was sufficient to find

a violation of RCW 46.61.502 if the offense had been committed in Washington. 2RP 8–11.

When comparing the elements of a foreign conviction to a comparable Washington offense the court may look to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant, or some comparable judicial record of that information. Shepard v. U.S., 544 U.S. 13, 26, 125 S.Ct. 1254, 1263, 161 L.Ed.2d 205 (2005), State v. Moncrief, 137 Wn. App. 729, 154 P.3d 314 (2007), State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). To determine whether a defendant's conduct would have violated a comparable Washington criminal statute when an out-of-state statute is broader, the court may inquire into the record of the out-of-state conviction. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The court can look at the statement of defendant on plea of guilty or the judgment and sentence if they contain the elements of the foreign offense. Ford, 137 Wn.2d at 480; State v. Labarbera, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005). Furthermore, the court may scrutinize an indictment or information in order to determine if the underlying prior conviction satisfies elements of the Washington offense. Morley, 134 Wn.2d at 606.

There is no basis to conclude that, where a defendant enters a plea of guilty at a point in time and in a foreign jurisdiction where such a plea constitutes an admission of the facts alleged by the government in the charging document, such an admission cannot be later relied upon to prove factual comparability. State v. Releford, 148 Wn. App. 478, 488, 200 P.3d 729 (2009).

To the contrary, the appropriate analysis is that which was implicitly utilized by the trial court herein: the facts supporting a prior conviction must either be proved beyond a reasonable doubt *or* admitted by the defendant. Put another way, if the defendant admitted facts in a prior proceeding, then they need not be independently proved by the State to establish factual comparability. In order to determine that which was admitted by the defendant as a result of the entry of a guilty plea, it is necessary to look to the law of the state in which the defendant entered the plea *as that law existed at the time of the plea*—that is, the law from which the defendant could reasonably expect the consequences of the guilty plea to flow.

State v. Releford, 148 Wn. App. at 489 (emphasis in original). In Releford the State offered two Oklahoma informations to which the defendant had previously entered guilty pleas to prove the predicate offense for a charge of unlawful possession of firearm. The court in Releford held the informations were sufficient to establish comparability since under the law in Oklahoma a plea

constituted an admission of the facts alleged in the charging document.

Here, at the time of Defendant's guilty plea in the Wrangell District Court, Alaska law required judges to ascertain the factual basis of a guilty plea. Alaska Criminal Rule 11(f)²; Jones v. State, 215 P.3d 1091, 1095 (AK 2009). It is, therefore, clear that the facts alleged in the criminal complaint were established as the facts supporting Defendant's plea in the Wrangell District Court.

The trial court engaged in a legal analysis and concluded that Defendant's prior Alaska DWI conviction was applicable to support the crime charged and ruled the evidence was admissible. The State introduced sufficient evidence to prove factual comparability of Defendant's Wrangell District Court conviction. There was no error. The jury considered the same evidence and found Defendant guilty of felony DUI. The evidence was sufficient to support Defendant's conviction for felony DUI.

B. JURY INSTRUCTION.

1. The Court's Jury Instructions Accurately Defined The Prior Conviction Element Of The Crime Charged.

At trial Defendant proposed the following jury instruction:

² Alaska Criminal Rule 11 was enacted prior to 1994 and section (f) has not been amended since enactment.

An out-of-state conviction is a prior offense if it is proven that if the out-of-state violation had occurred here that it would be a violation of the law in Washington.

2RP 21. Defendant challenges the trial court's failure to give this proposed jury instruction.

Due process requires the State to prove each essential element of the crime beyond a reasonable doubt. U.S. Const. amend XIV; Wash. Const. art. I, Section 22; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 268 (1970); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Accordingly, the trial court must accurately instruct the jury as to each essential element of a charged crime and the State's burden of proving the elements beyond a reasonable doubt. State v. Williams, 136 Wn. App. 486, 493, 150 P.3d 111 (2007).

State v. Chambers, ___ P.3d ___, 2010 WL 3213614 (2010).

Defendant argues that the trial court's refusal to give his proposed jury instruction, defining the prior offense element of felony DUI, relieved the State of its burden to prove the Defendant's prior Alaska conviction beyond a reasonable doubt. Jury instructions are evaluated in the context of the instructions as a whole. In re Hegney, 138 Wn. App. 511, 521, 158 P.3d 1193 (2007). Claimed errors of law in a jury instruction are reviewed *de novo*. Id. Jury instructions as a whole must provide an accurate statement of the law and must allow each party to argue its theory of the case to the extent supported by the evidence. State v. Benn,

120 Wn.2d 631, 654, 845 P.2d 289 (1993). Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary mind. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

The trial court refused to give the proposed instruction after Defense offered and the court agreed to give instructions regarding the lesser included offense of misdemeanor DUI. Instruction No. 10 listed the elements necessary to prove DUI under Washington law. The court also gave Instruction No. 6 which included the following regarding the element of prior offenses: "That at the time the defendant drove the motor vehicle he had been convicted of four or more prior offenses within ten years"; and Instruction No. 8 defining prior offense: "Prior offense means a conviction for driving under the influence of intoxicating liquor for which the date of arrest is within ten years of the date of arrest for the current charge." Viewed as a whole, the court's instructions provide an accurate statement of the law regarding the element of prior convictions.

The court's instructions were sufficient; they were readily understandable and not misleading to the ordinary mind. The court's instructions viewed as a whole provided an accurate

statement of the law and allowed Defendant to argue his theory of the case in the context of the evidence.

2. The State's Burden Of Proof Was Not Lowered By The Court's Instructions.

Defendant argues that the trial court's refusal to give his proposed jury instruction defining the prior offense element of felony DUI lowered the State's burden of proof. As shown above, in B.1, when viewed as a whole the court's instructions were an accurate statement of the law. However, even if the failure to give Defendant's instruction is reviewed as an error, not every omission or misstatement in a jury instruction relieves the State of its burden. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

Both the United States Supreme Court and the Washington Supreme Court have incorporated harmless error analyses regarding jury instructions. The United States Supreme Court held that an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis:

Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

Neder v. U.S., 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). In State v. Brown, the Washington Supreme Court found no compelling reason why it should not follow the United States Supreme Court's holding in Neder. State v. Brown, 147 Wn.2d at 340.

[A]n erroneous jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has not relieved the State of its burden to prove each element of the case. To determine whether an erroneous instruction is harmless in a given case, an analysis must be completed as to each defendant and each count charged. From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

State v. Brown, 147 Wn.2d at 343. The question is whether the conviction can stand because the error was harmless.

In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Court set forth the test for determining whether a constitutional error is harmless. That test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id., at 24. "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."

Neder, 527 U.S. at 15-16, *citing* Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

In the present case, the trial court found Defendant's Wrangell District Court DWI conviction was factually comparable to a Washington DUI conviction and admitted State's exhibits 3, 3A and 4. This was a proper question of law for the court to decide. State v. Chambers, at page 6; State v. Miller, 156 Wn.2d at 31; State v. Gray, 134 Wn. App. 547, 549-50, 138 P.3d 1123 (2006); State v. Carmen, 118 Wn. App. 655, 663-64, 77 P.3d 368 (2003).

When evaluated in the context of the instructions as a whole, not giving Defendant's proposed instruction was harmless in the present case. "The court instructed the jury in the to-convict instruction that the State had the burden of proving the existence of the four prior DUI offenses." State v. Chambers, at page 7.

The jury received the same documentary evidence the trial court reviewed in its threshold determination regarding the factual comparability of Defendant's prior Alaska DWI conviction. The jury was instructed that it had to find beyond a reasonable doubt "that at the time the defendant drove the motor vehicle he had been convicted of four or more prior offenses within ten years." The jury was also instructed that a prior offense meant "a conviction for

driving under the influence of intoxicating liquor,” and on the elements for the misdemeanor crime of DUI. The instructions did not lower or relieve the State of its burden of proof for the element of the Defendant’s prior convictions.

C. SCORING.

Defendant argues that the State failed to prove that his Alaska DWI conviction was comparable to a Washington DUI conviction. “[A] challenge to the classification of out-of-state convictions, like other sentencing errors resulting in unlawful sentences, may be raised for the first time on appeal.” State v. Ford, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999). Offender score calculations are reviewed *de novo*. State v. Birch, 151 Wn. App. 504, 515, 213 P.3d 63 (2009); State v. O’Connell, 137 Wn. App. 81, 87, 152 P.3d 349, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Here, the trial court made a determination that Defendant’s Alaska DWI conviction was factual comparable to a Washington DUI conviction. See A.2 above. Additionally, the jury’s guilty verdict for felony DUI required the jury to find beyond a reasonable doubt that Defendant’s Alaska DWI conviction was factually comparable to a Washington DUI conviction. See B.1 and 2 above.

A sentencing court need only find that the prior conviction exists by a preponderance of the evidence. State v. Thomas, 135 Wn. App. 474, 480, 144 P.3d 1178 (2006). There is sufficient evidence in the record to support the trial court finding by a preponderance of the evidence the factual comparability of Defendant's Alaska DWI conviction.

To determine if a foreign crime is comparable to a Washington offense, the court must first look to the elements of the crime, then if the foreign statute is broader than the Washington definition of the particular crime, the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute. State v. Morley, 134 Wn.2d 588, 605-606, 952 P.2d 167 (1998).

To determine whether a defendant's conduct would have violated a comparable Washington criminal statute when an out-of-state statute is broader, the court may inquire into the record of the out-of-state conviction. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). When comparing the elements of a foreign conviction to a comparable Washington offense the court may look to the terms of the charging document, the terms of a plea

agreement or transcript of colloquy between judge and defendant, or some comparable judicial record of that information. Shepard v. U.S., 544 U.S. 13, 26, 125 S.Ct. 1254, 1263, 161 L.Ed.2d 205 (2005), State v. Moncrief, 137 Wn. App. 729, 154 P.3d 314 (2007), State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). Furthermore, the court may scrutinize an indictment or information in order to determine if the underlying prior conviction satisfies elements of the Washington offense. Morley, 134 Wn.2d at 606. Additionally, the court may look to the law of the state where the defendant entered a guilty plea to determine what facts were admitted or proved to support the conviction. State v. Releford, 148 Wn. App. 478, 489, 200 P.3d 729 (2009).

State's exhibits 3, 3A and 4 provide sufficient evidence to prove the factual comparability of Defendant's Alaska DWI conviction out of Wrangell District Court to Washington's DUI statute.

D. SENTENCING ERROR.

The State concedes that the trial court erred when it imposed 55 months of confinement and 12 months of community custody "not to extend past December 1, 2014," when the statutory maximum for the offense is 60 months.

Prior law allowed for the imposition of community custody during a period of earned early release. The legislature changed the law by enacting Laws of 2009, ch. 375 (effective August 1, 2009). The Court has acknowledged the change. In Re Brooks, 166 Wn.2d 664, 672 n.4, 211 P.3d 1023 (2009). The present case should be remanded for sentencing within the statutory maximum.

IV. CONCLUSION

As stated above, there was sufficient evidence to prove factual comparability of Defendant's Wrangell District Court conviction and to support Defendant's conviction for felony DUI; the jury instructions viewed as a whole provided an accurate statement of the law and did not lower the State's burden of proof; and there was sufficient evidence of factual comparability to include Defendant's Alaska DWI conviction in his offender score. For those reasons Defendant's conviction should be affirmed.

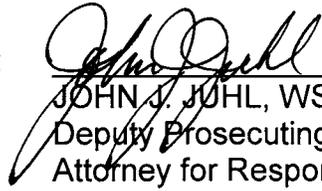
Because the court erred in sentencing Defendant beyond the

statutory maximum, the case should be remanded for sentencing within the statutory limit.

Respectfully submitted on August 23, 2010.

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