

NO. 47153-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RAYMOND L. CHANNEL,

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	PAGE
A. REPLY TO ASSIGNMENTS OF ERROR.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	3
1. There is sufficient evidence to convict the defendant of driving under the influence.....	3
2. The defendant was not deprived of his right to a fair trial when Officer Hardy mentioned a PBT sample.....	6
3. The trial court did not abuse its discretion when it found the defendant's statements to be admissible.....	8
1. <i>The defendant was not under custodial arrest when the officer requested his license and registration and asked how much he had had to drink.....</i>	<i>8</i>
2. <i>The defendant did not unequivocally invoke his right to remain silent during the questioning from the standard DUI arrest report.</i>	<i>9</i>
3. <i>Should the court find a constitutional violation, it was harmless error due to the overwhelming evidence of guilt.</i>	<i>12</i>

4.	Any error in the court’s failure to enter written findings and conclusions after the 3.5 hearing was harmless, as the oral findings were sufficient to allow for appellate review.	13
5.	The trial court did not err by not giving the defendant’s proposed instruction.	15
6.	Trial counsel was not ineffective.....	17
	<i>a. The defendant cannot show that his counsel failed to exercise the customary skills and diligence of a reasonably competent attorney by not requesting a limiting instruction; nor can the defendant show prejudice.</i>	<i>19</i>
	<i>b. The defendant cannot show that his counsel failed to exercise the customary skills and diligence of a reasonably competent attorney by not moving for a mistrial; nor can the defendant show prejudice.</i>	<i>20</i>
7.	The State concedes that the trial court erroneously sentenced the defendant to a term that exceeds the statutory maximum.....	22
8.	The defendant waived a claim of error regarding legal financial obligations by not challenging their imposition at sentencing.	22
D.	CONCLUSION	23

TABLE OF CONTENTS

	Page
Cases	
<i>Berkemer v. McCarty</i> , 468 U.S. 420, 439 (1984)	8
<i>City of Seattle v. Stakbrotten</i> , 138 Wn.2d 227, 978 P.2d 1059 (1999)	5
<i>Davis v. U.S.</i> , 512 U.S. 452, 114 S.Ct. 2350 (1994)	10
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602 (1966)	8, 9, 10, 11, 12, 15
<i>South Dakota v. Neville</i> , 459 U.S. 553, 103 S. Ct. 916 (1983)	19
<i>State v. Barragan</i> , 102 Wn. App. 754, 9 P.3d 942 (2000)	18
<i>State v. Beard</i> , 74 Wn.2d 335, 444 P.2d 651 (1968)	6
<i>State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997)	15
<i>State v. Blazina</i> , 174 Wn. App. 906, 301 P.3d 492 (2013), remanded 182 Wn.2d 827, 344 P.3d 680 (2015)	22, 23
<i>State v. Boggs</i> , 16 Wn. App. 682, 559 P.2d 11 (Div. 2, 1977)	12
<i>State v. Boyd</i> , 174 Wn.2d 470, 275 P.3d 321 (2012)	22
<i>State v. Bradfield</i> , 29 Wn. App. 679, 630 P.2d 494 (1981)	10
<i>State v. Camarilla</i> , 115 Wn.2d 60, 794 P.2d 850 (1990)	3
<i>State v. Hansen</i> , 15 Wn. App. 95, 546 P.2d 1242 (1976)	4
<i>State v. Haynes</i> , 16 Wn. App. 778, 559 P.2d 583(1977)	13
<i>State v. Heritage</i> , 152 Wn.2d 210, 95 P.3d 345 (2004)	8

<i>State v. Hodges</i> , 118 Wn. App. 668, 77 P.3d 375 (2003).....	11, 12
<i>State v. Jury</i> , 19 Wn. App. 256, 576 P.2d 1302.....	18
<i>State v. Koslowski</i> , 166 Wn.2d 409, 209 P.3d 479 (2009).....	12
<i>State v. Latham</i> , 30 Wn. App. 776, 638 P.2d 592 (1981).....	6
<i>State v. Long</i> , 113 Wn.2d 266, 778 P.2d 1027 (1989).....	19
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007)	15
<i>State v. Lucky</i> , 128 Wn.2d 727, 912 P.2d 483 (1996).....	15
<i>State v. Lyle</i> , COA No. 46101-3-II (July 10, 2015).....	22
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	18, 20, 21
<i>State v. Miller</i> , 92 Wn. App. 693, 964 P.2d 1196 (1998)	13
<i>State v. Myers</i> , 86 Wn.2d 419, 545 P.2d 538 (1976)	18
<i>State v. Piatnitsky</i> , 180 Wn.2d 407, 325 P.3d 167 (2014).....	10
<i>State v. Price</i> , 127 Wn. App. 193, 110 P.3d 1171 (Div. II 2005).....	3
<i>State v. Radcliffe</i> , 164 Wn.2d 900, 194 P.3d 250 (2008).....	10
<i>State v. Rodriguez</i> , 146 Wn.2d 260, 45 P.3d 541 (2002).....	21
<i>State v. Smith</i> , 104 Wn.2d 497, 707 P.2d 1306 (1985).....	3
<i>State v. Solomon</i> , 114 Wn. App. 781, 60 P.3d 1215 (2009)	8
<i>State v. Stearns</i> , 61 Wn. App. 224, 810 P.2d 41 (1991)	3
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	17
<i>State v. Valentine</i> , 75 Wn. App. 611, 879 P.2d 313 (1994).....	16

<i>State v. Visitacion</i> , 55 Wn. App. 166, 776 P.2d 986 (1989).....	18
<i>State v. Walton</i> , 67 Wn. App. 127, 834 P.2d 624 (1992).....	9
<i>State v. Weber</i> , 99 Wn.2d 158, 659 P.2d 1102 (1983).....	7
<i>State v. Young</i> , 89 Wn.2d 613, 574 P.2d 1171 (1978).....	11
<i>State v. Zwicker</i> , 105 Wn.2d 228, 713 P.2d 1101 (1986)	19
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984) .	17, 18, 20

Statutes

RCW 9.94A.701(9).....	22, 23
RCW 9A.20.021.....	22

Other Authorities

WPIC 1.02.....	1
WPIC 6.41	16

A. REPLY TO ASSIGNMENTS OF ERROR

1. There was sufficient evidence for a rational jury to find that the defendant was guilty of driving under the influence.
2. The defendant was not deprived of his right to fair trial when Officer Hardy mentioned a PBT sample.
3. The trial court did not err in finding that the defendant's statements were admissible as he was not under custodial arrest and did not unequivocally invoke his right to remain silent.
4. Any error by the court in not entering written findings of fact and conclusions of law after the 3.5 hearing was harmless.
5. The trial court did not err in declining to give the defendant's proposed jury instruction.
6. Trial counsel was not ineffective either by not requesting a limiting instruction or by not moving for mistrial.
7. The State concedes that the trial court erroneously sentenced the defendant to a term that exceeds the statutory maximum.
8. The defendant waived a claim of error regarding legal financial obligations by not challenging their imposition at sentencing.

B. STATEMENT OF THE CASE

On July 16, 2014, Officer Timothy Huycke was on patrol in Longview, Washington, when he saw a pickup truck with only one working headlight and a cracked taillight. RP (12/9/14) 85. Officer Huycke stopped the vehicle for these infractions. When the driver pulled over, he jerked his vehicle to the right and slammed on his brakes. RP (12/9/14) 87. The driver was Raymond Channel. Upon contacting the defendant, Officer Huycke

noticed that he fumbled with his license, had bloodshot, watery eyes, a flushed face, and slurred and repetitive speech. RP (12/9/14) 88–89; 104; 105. The officer also noticed a strong and obvious odor of alcoholic beverages. RP (12/9/14) 88; 89. When Officer Huycke asked the defendant had had to drink, he replied, “Too much.” RP (12/9/14) 89.

Officer Huycke asked the defendant to get out of his vehicle and once he did, he swayed while walking. RP (12/9/14) 90. The defendant performed field sobriety tests, which he failed. RP (12/9/14) 96, 99, 103. He was then arrested for DUI and taken to the jail. RP (12/9/14) 105. He was read his Miranda rights, which he indicated he understood and agreed to speak with the officer. (RP 12/9/14) 40. He was asked a series of questions which appear on the DUI arrest report. *Id.* He stated he would “rather not answer” questions 26 through 29, but answered question 30. *Id.* at 40–41. He then refused to take a breath test. RP (12/9/14) 113.

Prior to trial, a 3.5 hearing was held and the court found that the defendant invoked his right to remain silent by stating he would “rather not answer” but that the remaining statements were admissible. RP (12/9/14) 53, 54. At trial, defense counsel moved in limine to exclude reference to the defendant’s refusal to take a portable breath test. CP 47. The State did not oppose that motion. RP (12/9/14) 31. During the State’s case, one witness stated, “I believe he was taking a PBT sample.” RP (12/9/14) 170.

Defense counsel objected, the objection was sustained, and the statement was stricken. RP (12/9/14) 173, 174. The jury was instructed to disregard the statement. Defense counsel did not move for a mistrial. RP (12/9/14) 175. RP (12/9/14) 173.

The jury found the defendant guilty of felony DUI. RP (12/10/14) 105; CP 66. He was sentenced to 60 months of confinement and 12 months of community custody. RP (1/6/15) 120.

C. ARGUMENT

1. There is sufficient evidence to convict the defendant of driving under the influence.

The standard of review for a claim of insufficient evidence is, after viewing the evidence in the light most favorable to the State, whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Smith*, 104 Wn.2d 497, 509, 707 P.2d 1306 (1985). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See State v. Price*, 127 Wn. App. 193, 202, 110 P.3d 1171 (Div. II 2005); *State v. Camarilla*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (appellate court will not review credibility determinations). Finally, circumstantial evidence is considered no less reliable than direct evidence. *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991). In this case, in

order for the jury to have reached a verdict of guilty, they had to find that the State proved that the defendant drove while under the influence or affected by intoxicating liquor. CP 61; RCW 46.61.502. In a DUI case, evidence of erratic driving is not required for a jury to find that a person was under the influence. *State v. Hansen*, 15 Wn. App. 95, 96, 546 P.2d 1242 (1976)

The testimony from the State's witnesses was sufficient for a rational fact-finder to find that the State proved the defendant was driving under the influence. First, Officer Huycke testified that as the defendant was pulling over, he quickly jerked his vehicle to the right and slammed on his brakes. RP (12/9/14) 87. No other "bad" driving was observed, but erratic driving is not required under the law. Upon contacting the defendant, Officer Huycke noticed that he fumbled with his license, had bloodshot, watery eyes, a flushed face, and slurred and repetitive speech. RP (12/9/14) 88–89; 104; 105. The officer also noticed a strong and obvious odor of alcoholic beverages. RP (12/9/14) 88; 89.

Officer Huycke went on to testify that, when he was asked out of his vehicle, the defendant swayed while walking and was not able to walk exactly straight. RP (12/9/14) 90. Then, he completed three field sobriety tests – the horizontal gaze nystagmus (HGN) test, the one-legged stand test, and the walk and turn test. On the HGN test, the defendant exhibits six out

of a possible six clues, and swayed during the test. RP (12/9/14) 96. On the one-legged stand test, the defendant exhibited four out of four clues – he put his foot down, swayed, used his arms for balance, and shuffled his feet. RP (12/9/14) 99. Office Huycke testified that two out of the four clues is consistent with impairment. RP (12/9/14) 99. On the walk and turn test, the defendant exhibited eight of eight clues, including not maintaining his balance in the starting position, starting too soon, not taking the correct number of steps, raising his arms for balance, missing heel to toe, stepping off the line, and doing the turn incorrectly. RP 102–103. Office Huycke testified that four out of the eight clues is consistent with impairment. RP (12/9/14) 101. These test can indicate whether a person is safe to drive a vehicle because they are divided attention tasks, as is driving a vehicle. RP (12/9/14) 90–91. The defendant also refused to take a breath test. RP (12/9/14) 113. The most reasonable inference to be drawn from his refusal is that he refused because he was intoxicated. *See City of Seattle v. Stakbrotten*, 138 Wn.2d 227, 234, 978 P.2d 1059 (1999).

Asa Louis from the Washington State Patrol Toxicology Laboratory went on to testify that drinking alcohol can hamper a person's cognitive skills, including their ability to drive a car. RP (12/9/14) 149. Also, alcohol can affect a person's speech because the fine motor skills needed to speak can be hampered by alcohol. One way that a person's speech can be

affected is that it can sound slurred. (12/9/14) 153. Additionally, Mr. Louis testified that alcohol is a vasodilator as well as a desiccant, which means it opens up the blood vessels and causes dryness, which can present as bloodshot, watery eyes. RP (12/9/14) 154.

Finally, there was beer in the defendant's vehicle – a twelve-pack of Natural Light with three cans missing. RP (12/10/14) 28. The defendant also testified that he had three or four beers. RP (12/10/14) 46. Given this substantial amount of evidence, a rational jury could find the defendant drove while under the influence, especially when taken in the light most favorable to the State.

2. The defendant was not deprived of his right to a fair trial when Officer Hardy mentioned a PBT sample.

A jury's verdict in a criminal case will be set aside only if an error was prejudicial. *State v. Latham*, 30 Wn. App. 776, 781, 638 P.2d 592 (1981). An error is prejudicial when it affects the final result of the trial. *Id.* If the defendant's guilt is consistently proven by competent evidence and no other rational conclusion can be reached, then the conviction should not be set aside. *Id.*; *State v. Beard*, 74 Wn.2d 335, 342, 444 P.2d 651 (1968). In this case, the officer's statement was not prejudicial for two reasons. First, it was not a violation of the motion in limine and second,

there was a multitude of other competent evidence to prove the defendant's guilt.

Defense counsel moved in limine to exclude reference to the defendant's refusal to take a portable breath test. CP 47. The State did not oppose that motion. RP (12/9/14) 31. During the State's case, one witness stated, "I believe he was taking a PBT sample." RP (12/9/14) 170. As the State pointed out at trial, the statement did not reference a refusal to take the PBT. RP (12/9/14) 171. It was therefore not a violation of the motion in limine. Furthermore, defense counsel immediately objected, the comment was stricken, and the jury was instructed to ignore it. RP (12/9/14) 170, 174-74. Juries are presumed to follow the instructions they are given. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Presuming the jury followed the instruction to ignore the remark about the PBT, there is no prejudice shown. Finally, as explained above in section one, the defendant's guilt was proven consistently by other competent evidence. Therefore, the conviction should be upheld.

3. The trial court did not abuse its discretion when it found the defendant's statements to be admissible.

1. *The defendant was not under custodial arrest when the officer requested his license and registration and asked how much he had had to drink.*

The defendant was not in custody for purposes of *Miranda* when he was first contacted by Officer Huycke. An officer must give a suspect *Miranda* warnings when the questioning constitutes custodial interrogation. *State v. Solomon*, 114 Wn. App. 781, 787, 60 P.3d 1215 (2009). A person is in custody for purposes of *Miranda* when "his or her freedom of action is curtailed to a degree associated with formal arrest." *Id.* The test is an objective one, focusing on whether a reasonable person in the suspect's position would have felt that his freedom was curtailed to the requisite degree. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

A person subject to a routine traffic stop, or *Terry* stop, is not custody for *Miranda* purposes because *Terry* stops are brief, occur in public, and are less police-dominated than a formal arrest. *Id.*; *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). Therefore, an officer may ask a moderate amount of questions during a *Terry* stop to "determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for purposes of *Miranda*." *Id.* An officer

may even ask questions that are designed to elicit an incriminating response as part of a valid *Terry* stop. *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). The stop in this case was a *Terry* stop, so Officer Huycke could appropriately ask how much the defendant had had to drink.

In this case, Officer Huycke testified that he stopped the defendant's vehicle for two traffic infractions – having a headlight out and having a cracked taillight. RP (12/9/14) 36. He asked for the defendant's license, insurance, and registration. *Id.* He observed the defendant had bloodshot, watery eyes and that his speech was slurred, so he asked the defendant how much he had had to drink. *Id.* at 37. At this point the defendant was not under arrest, he was not in custody, and he was not handcuffed. *Id.* There were no other officers present. *Id.* at 38. Though the officer had the defendant's license and registration, a reasonable person in the defendant's situation would not have felt that his freedom of action was curtailed to the level of a formal arrest. This was a routine traffic stop, and therefore the court did not err in allowing the defendant's statement that he had had "too much" to drink.

2. *The defendant did not unequivocally invoke his right to remain silent during the questioning from the standard DUI arrest report.*

Prior to any custodial interrogation, a suspect must be advised of his *Miranda* rights – the right to remain silent, that anything he says can be used

against him, and that he has the right to an attorney. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602 (1966). A suspect may waive this rights but, even if waived, may invoke them at any point during an interview and the interrogation must stop. *State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008).

A suspect's invocation of his or her *Miranda* rights must be unambiguous and unequivocal. *Davis v. U.S.*, 512 U.S. 452, 459, 114 S.Ct. 2350 (1994); *Radcliffe*, 164 Wn.2 at 906. An invocation must be sufficiently clear "that a reasonable police officer in the circumstances would understand the statement to be an invocation of *Miranda* rights." *Davis*, 512 U.S. at 459. A suspect must express an objective intent to cease communication with the officer. *State v. Piatnitsky*, 180 Wn.2d 407, 412, 325 P.3d 167 (2014).

In *State v. Bradfield*, the defendant was woken in jail at 3:30 in the morning and interrogated after waiving his *Miranda* rights. 29 Wn. App. 679, 684, 630 P.2d 494 (1981). After answering some questions, the defendant stated he had nothing more to say and would not talk more about evidence of stolen property or the murder he was suspected of. *Id.* However, he continued the conversation, talking about his relatives, the morality of murder, and other things. *Id.* He said a few more times that he did not want to speak about the murder, but continued to talk to the officers.

Id. The Court of Appeals found that the refusal to talk about the murder was not an unequivocal right to remain silent, stating, “The defendant cannot be permitted to rely upon *Miranda* when he attempts to toy with the police by telling only facts which he wants them to hear.” *Id.* at 685; *State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978).

Additionally, in *State v. Hodges*, the suspect began talking with the officer, then did not respond to the question “What happened next?” 118 Wn. App. 668, 671, 77 P.3d 375 (2003). Shortly thereafter, the defendant answered a question from a different officer without hesitation. *Id.* at 673. The Court found that the defendant’s failure to respond to the first officer’s question was therefore not a clear and unequivocal invocation of his right to remain silent. *Id.*

Similarly here, the defendant’s responses that he would “rather not answer” certain questions on the DUI arrest interview were not an unequivocal invocation of his right to remain silent. The defendant was properly read and appeared to understand his *Miranda* warnings, and indicated that he would speak to the officer. RP (12/9/14) 40. He answered all the questions on the standard DUI arrest report form, though his answers to question 26 through question 29 were “Rather not answer.” Question 30 was whether he thought his ability to drive was affected by alcohol, to which he answered “no.” RP (12/9/14) 41, 110. The defendant did not ask to

speaking to an attorney at any point. RP (12/9/14) 41. Officer Huycke believed his answers to questions 26 through 29 to be an indication that the defendant did not wish to answer those specific questions, not that he was done answering questions altogether. RP (12/9/14) 41. *Bradfield* and *Hodges* are directly on point – there was no unequivocal invocation of *Miranda* rights in either of those cases, nor is there here. The defendant did not ask for an attorney or state that he was done answering all questions. As in *Bradfield* and *Hodges*, the defendant here cannot rely on *Miranda* and attempt to toy with police by telling them only what facts he wants them to hear.

3. *Should the court find a constitutional violation, it was harmless error due to the overwhelming evidence of guilt.*

Constitutional violations are subject to harmless error analysis. If a constitutional violation is found, the court then considers whether there is overwhelming untainted evidence of the defendant's guilt beyond a reasonable doubt. *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009); *State v. Boggs*, 16 Wn. App. 682, 689, 559 P.2d 11 (Div. 2, 1977). The only statement that the defendant asserts was introduced in error was his response to question 30 on the DUI arrest interview form, which was that he did not believe his ability to drive was impaired by alcohol. RP (12/9/14) 41, 110. As discussed at length in section one, there was

overwhelming untainted evidence that the defendant was under the influence while he was driving. This evidence includes the defendant jerking his vehicle to the shoulder and slamming on his brakes, the defendant's bloodshot, watery eyes, flushed face, and slurred and repetitive speech, and the strong and obvious odor of intoxicants that was coming from the vehicle. RP (12/9/14) 87–89, 104–105. The defendant also swayed while walking and failed all three field sobriety tests. RP (12/9/14) 90, 96, 99. There was overwhelming evidence of guilt in this case, so any error in admitting the defendant's statement was harmless beyond a reasonable doubt.

4. Any error in the court's failure to enter written findings and conclusions after the 3.5 hearing was harmless, as the oral findings were sufficient to allow for appellate review.

Criminal Rule 3.5 requires a trial court to enter written findings of fact and conclusions of law after a hearing regarding the admissibility of a defendant's statements. The failure to do so constitutes error, but "the error is harmless if the court's oral findings are sufficient to allow appellate review." *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998), *citations omitted*. Furthermore, the absence of written findings is not grounds for reversal unless there is prejudice to the defendant. *State v. Haynes*, 16 Wn. App. 778, 788, 559 P.2d 583(1977). When there are

adequate oral findings, there is no prejudice. *Id.* Here, the trial court made adequate oral findings and conclusions, and the defendant was not prejudiced.

The trial court made the following oral findings and conclusions on the record. First, Officer Huycke stopped the defendant at 11:30 pm for two infractions. RP (12/9/2014) 49. The officer was in uniform and driving a fully marked police car with its emergency lights activated. RP (12/9/2014) 49–50. The officer asked for the defendant’s driver’s license and registration, then saw indicators of possible intoxication and asked how much the defendant had had to drink. *Id.* No more questions were asked, though field sobriety tests were done. *Id.* The defendant was arrested and read his constitutional rights. *Id.* He indicated he understood those rights and waived them, agreeing to speak with the officer. *Id.* As part of the DUI investigation questionnaire, the defendant stated he would rather not answer questions 26 through 29. RP (12/9/2014) 51.

The court concluded that the appropriate question regarding statements made at the roadside is whether a person’s freedom was curtailed to a degree associated with formal arrest, and that the defendant’s freedom was not so curtailed. RP (12/9/2014) 51–52. When the specific statement was made, the defendant had been stopped for a traffic infraction; such a traffic stop is not akin to formal arrest. RP (12/9/2014) 53. The findings

and conclusions on that issue were sufficient for appellate review, so there is no prejudice to the defendant.

The court then went on to make findings and conclusions regarding the statements made as part of the DUI investigation questionnaire. The court found that *Miranda* warnings were appropriately given and held that the defendant's answers to questions 26 through 29 were an exercise of his right to remain silent and excluded them from the trial. RP (12/9/2014) 53. However, there was no coercion, threats, or promises by the officer. RP (12/9/2014) 54. Then the defendant went on to give voluntary statements after refusing to answer some other questions. RP (12/9/2014) 54. The oral findings and conclusions in this case were sufficient for appellate review; therefore, reversal is not warranted.

5. The trial court did not err by not giving the defendant's proposed instruction.

A trial court's refusal to give a requested jury instruction, when based on the facts of the case (as opposed to the law) is reviewed for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). A reviewing court will only find an abuse of discretion when the trial court's decision was manifestly unreasonable or based on untenable grounds. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). "Jury

instructions must not be misleading, must permit a party to argue his or her theory of the case and, when read as a whole, must properly inform the trier of fact on the law.” *State v. Valentine*, 75 Wn. App. 611, 616, 879 P.2d 313 (1994).

In this case, the trial court did not abuse its discretion by not giving the defendant’s proposed instruction because the instructions that were given allowed the parties to argue their theories of the case and properly informed the jury of the law. First, the court did give instruction number one, which mimics WPIC 1.02. CP 51; WPIC 1.02. This instruction tells the jury that they are the sole judges of credibility of the witnesses and the value or weight to be given to the testimony. It also states that, when considering a witness’s testimony, the jury may consider

...the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness’s memory while testifying; the manner of the witness while testifying; and personal interest that the witness might have in the outcome or the issues; any bias or prejudice the witness may have shown; the reasonableness of the witness’s statements in the context of all the other evidence; and any other factors that affect your evaluation or belief of a witness.

CP 51; WPIC 1.02. The court found that WPIC 6.41, the defendant’s proposed instruction, was somewhat duplicative of instruction number one,

as they both discuss credibility and the weight to be given to evidence and testimony. RP (12/10/14) 38.

Second, the court found that giving the defendant's proposed instruction would place extra emphasis, or a special weight, on the defendant's statements. RP (12/10/14) 38. This emphasis could conceivably take away from the jury's understanding that they are the sole judges of credibility. Finally, the court found that the other instructions that were given were sufficient for the parties to argue their theories of the case. RP (12/10/14) 38. In this case, the defendant testified about the out-of-court statement that the proposed jury instruction was meant to address, so the jury could make a credibility determination based solely on the testimony. RP (12/10/14) 46. Given the testimony and the instructions that were given, not giving the defendant's proposed instruction was not an abuse of discretion.

6. Trial counsel was not ineffective.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. To prove that counsel was deficient,

“the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.*; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995).

The Washington Court of Appeals has devised the following test to determine whether counsel was ineffective: “After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302, *citing State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Like the *Strickland* test, this test requires the defendant to prove that he was denied effective representation, given the entire record, and that he suffered prejudice as a result. *Id.* at 263. The first prong of this two-part test requires the defendant to show that his lawyer “failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.”

Id. Therefore, even if a defendant can show that counsel was deficient, he or she also must show that the deficiency caused prejudice.

- a. The defendant cannot show that his counsel failed to exercise the customary skills and diligence of a reasonably competent attorney by not requesting a limiting instruction; nor can the defendant show prejudice.*

Looking at the entire record in this case, trial counsel gave effective representation. First, not requesting a limiting instruction regarding the defendant's refusal to take a breath test was not ineffective. There are no federal or state Constitutional barriers against the prosecution using refusal evidence in its case in chief. *South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916 (1983); *State v. Zwicker*, 105 Wn.2d 228, 713 P.2d 1101 (1986). Nor are there statutory barriers to refusal evidence or the use of a refusal to argue consciousness of guilt. *State v. Long*, 113 Wn.2d 266, 272, 778 P.2d 1027 (1989). The right to refuse to submit a breath test is "a matter of legislative grace," so the legislature may put conditions on that right – including a condition that a refusal may be used as evidence in a criminal proceeding. *Id.* Because the law on refusal evidence is clear, it is not a foregone conclusion that the court would have given a limiting instruction in this case. Failing to request such an instruction does not constitute conduct falling below that of a reasonably competent attorney, given the law regarding refusal evidence.

In addition to overcoming the strong presumption of effective assistance, the defendant must also show that he was prejudiced. Prejudice is not established unless it can be shown that “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *McFarland*, 127 Wn.2d at 335. A reasonable probability is one that is “sufficient to undermine confidence in the outcome of the trial.” *Strickland*, 466 U.S. at 694. The defendant here cannot show that the outcome of the trial would have been different but for his attorney’s failure to request a limiting instruction. As discussed above in Section One, the State presented ample evidence to show the defendant was driving under the influence, even without the fact of the defendant’s refusal to submit to a breath test. Therefore, ineffective assistance of counsel is not shown here.

b. The defendant cannot show that his counsel failed to exercise the customary skills and diligence of a reasonably competent attorney by not moving for a mistrial; nor can the defendant show prejudice.

First, the defense attorney’s conduct did not fall below that of a reasonably competent attorney in his situation by not moving for a mistrial. The record shows that the court granted a recess so the defense attorney could discuss potential motions with the defendant. RP (10/9/14) 172. After approximately five minutes, the defense attorney stated he had had

sufficient time to talk to his client and decided to not make any motions at that time. RP (10/9/14) 173. The attorney and the defendant therefore had a conversation about the pros and cons involved in moving for a mistrial and decided together not to pursue it. Trial counsel exercised the customary skills and diligence of a reasonably competent attorney by conferring with his client and deciding together that the “cons” of a mistrial motion outweighed the “pros.” Therefore, trial counsel’s decision was a tactical one.

Second, the defendant cannot show that he was prejudiced by his attorney’s failure to move for a mistrial. To show prejudice based on a failure to move for mistrial, the defendant must show that the outcome would have been different – that is, the motion for mistrial would have been granted. *McFarland*, 127 Wn.2d at 335. That is not shown here. All the jury heard was an acronym (“PBT”) with no further explanation. RP (10/9/14) 170. There was no evidence of its refusal, which is specifically what the defendant’s motion in limine sought to exclude. *See* RP (10/9/14) 171. A trial court will order a mistrial when there is sufficient prejudice that nothing short of a new trial will ensure the defendant a fair trial. *State v. Rodriguez*, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). Here, any prejudice could be cured by an objection and an instruction that jury disregard the statement. That is what happened here. RP (10/9/14) 175. Therefore, the

defendant cannot show that a mistrial would have been granted, and cannot show ineffective assistance of counsel.

7. The State concedes that the trial court erroneously sentenced the defendant to a term that exceeds the statutory maximum.

RCW 9.94A.701(9) requires that the community custody term specified by that section be reduced “whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime.” RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). The maximum sentence for felony Driving under the Influence, a Class C felony, is five years. RCW 9A.20.021. The defendant in this case was sentenced to five years of confinement plus twelve months of community custody, making his total confinement 72 months. This exceeds the statutory maximum, and the State concedes that the case must be remanded for resentencing on this issue.

8. The defendant waived a claim of error regarding legal financial obligations by not challenging their imposition at sentencing.

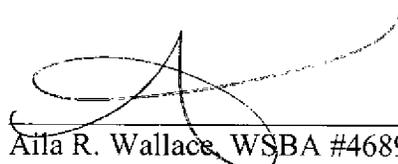
The Washington Supreme Court’s decision in *Blazina*, which was issued before the sentencing occurred in this case, “provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal.” *State v. Lyle*, COA No. 46101-3-II (July 10, 2015); *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), *remanded* 182 Wn.2d

827, 344 P.3d 680 (2015). Whether to reach unpreserved claims of error is within the discretion of the appellate court. *Id.* The defendant here was sentenced on January 6, 2015, well after *Blazina* was issued. CP 70. Because the defendant here did not object to the imposition of LFOs at sentencing, he has waived that issue on appeal and this court should decline to review it.

D. CONCLUSION

For the foregoing reasons, the defendant's conviction for felony Driving under the Influence should be affirmed, and the case should be remanded for resentencing in accordance with RCW 9.94A.701(9).

Respectfully submitted this 28th day of September, 2015.


Aila R. Wallace, WSBA #46898
Attorney for the State

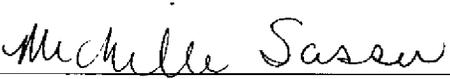
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 28th, 2015.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

September 28, 2015 - 11:34 AM

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