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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE NO. 37080-1-III

KITTITAS COUNTY SUPERIOR COURT NO. 18-1-00292-19

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

Mr. Kevin Ray Edgar,

Defendant/Appellant.

Respondent's Brief

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. There was sufficient evidence for the jury to find that Appellant Kevin Edgar committed the crime of Physical Control, and that he had failed to establish, by a preponderance, the affirmative defense of Safely Off the Roadway.
2. Appellant's prior conviction was an element of his current offense which the State was required to prove beyond a reasonable doubt. By his decision to decline to enter into an "*Old Chief*" stipulation, admission of Mr. Edgar's prior judgment and sentence was both necessary and appropriate.
3. The Trial Court erred by not conducting a sufficient inquiry into Mr. Edgar's future ability to pay, and this matter should be remanded for the Trial Court to both engage in that analysis, as well as to strike inapplicably imposed legal assessments.

II. ISSUES PRESENTED

- A. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT APPELLANT WITH A BLOOD ALCOHOL CONTENT READING OVER THE LEGAL LIMIT WAS IN PHYSICAL CONTROL OF A MOTOR VEHICLE, AND THAT HIS POSITION WITHIN A GAS STATION/RESTAURANT PARKING LOT, PASSED OUT WITH THE VEHICLE RUNNING, WHILE OFF THE ROADWAY, WAS NOT SAFELY OFF THE ROADWAY.
- B. APPELLANT'S PRIOR CONVICTION FOR VEHICULAR ASSAULT WHILE UNDER THE INFLUENCE OF ALCOHOL WAS AN ELEMENT OF FELONY PHYSICAL CONTROL AND AS SUCH, NEEDED TO BE PROVEN BEYOND A REASONABLE DOUBT. APPELLANT'S CHOICE TO DECLINE AN "OLD CHIEF" STIPULATION NECESSITATED THE ENTRY OF MR. EDGAR'S

PRIOR JUDGMENT AND SENTENCE, AND ITS ENTRY AND THE INFORMATION IT CONTAINED WAS NOT UNFAIRLY PREJUDICIAL TO APPELLANT.

C. APPELLANT IS CORRECT THAT THE TRIAL COURT DID NOT CONDUCT A SUFFICIENT INQUIRY INTO HIS FUTURE ABILITY TO PAY AND THAT COSTS STATUTORILY LIMITED TO DISTRICT COURT FINDINGS OR INAPPLICABLE TO HIS CHARGE SHOULD BE STRICKEN.

III. STATEMENT OF THE CASE

Appellant, Kevin Edgar, was charged by information with the crime of Physical Control occurring on or about August 16, 2018.

CP 1. Because of an earlier Vehicular Assault conviction which involved alcohol, the offense was charged as a felony.

On August 16, 2018, at approximately 2:30 a.m., Michael Grimshaw, who was working as a graveyard cashier at the Broadway Flying J Conoco on Canyon Road in Ellensburg, was outside smoking a cigarette, when he noticed 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 occupied by Mr. Edgar. RP 147-149, 160, 164. Mr. Grimshaw saw the vehicle remain at the pumps for a few minutes, but noticed some five to ten minutes later that it had pulled forward but still remained in the

proximity of the pumps. RP 149-150. Mr. Grimshaw stated that the vehicle was running, its lights were on, and he neither saw anyone get into, nor out of, the vehicle. RP 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. *Id.* Mr. Grimshaw looked and saw that it was the same vehicle that he had observed earlier. *Id.* Mr. Grimshaw then asked another employee to walk around the vehicle, which he did, returning to tell Mr. Grimshaw that there was someone inside with his head against the window. RP 151. Based on that information, Mr. Grimshaw called KitCom (sic).¹ *Id.* Mr. Grimshaw testified that the vehicle had been at the Conoco for about “30 minutes” before law enforcement arrived. RP 154.

Brett Koss, a sergeant with the City of Ellensburg Police Department was the first to arrive at the Conoco. RP 159-160. 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. RP 160-161. The vehicle was running, and Sergeant Koss was able to observe one individual in the driver’s seat slumped with his head against the

¹ KittCom is Kittitas County 9-1-1.

window. RP 161-162. Sergeant Koss began knocking on the window to try to get the driver to wake up or “to engage with me.” 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 162.² Mr. Edgar initially 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 he was able to actually make contact with Mr. Edgar, Sergeant Koss smelled a strong odor of intoxicants, and 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 the Sergeant. RP 163-164.

Mr. Edgar admitted to having consumed alcohol. RP 165.

Sergeant Koss called for Officer Joe Tirey to respond to the scene in order to administer field sobriety tests (FSTs) and to investigate

² Plaintiff’s Exhibit number four, video one is the video of Sergeant Koss’s travel to and arrival at the Conoco. The first four minutes shows not only where Mr. Edgar’s vehicle was in relation to the store, the pumps, and Canyon Road, but also the actions Sergeant Koss took in his efforts to rouse Mr. Edgar, to include repeated knockings on the driver side window, directing his flashlight beam into the vehicle, and verbally attempting to make contact with Mr. Edgar.

Mr. Edgar for Physical Control. RP 165-166, 170. During his approximately 30-40 minute encounter with Mr. Edgar, Sergeant Koss formed the opinion that Mr. Edgar was impaired. RP 165-166.

Officer Tirey testified that he had arrived at the Conoco around 2:50, 2:55, in the morning. RP 179. He stated that he could smell a very strong odor of intoxicants from the vehicle, and observed that Mr. Edgar had watery, bloodshot eyes, droopy eyelids, flushed face, and was mumbling and slurring his words. RP 179-180.

When he exited his vehicle, Mr. Edgar used the door to maintain his balance. RP 180. Officer Tirey testified that during the Horizontal Gaze Nystagmus (HGN) test, Mr. Edgar's eyes did not track a moving pen smoothly and that condition could be indicative of alcohol impairment. RP 181-182. The officer did not observe any nystagmus as Mr. Edgar sat in court. RP 182. On the nine-step walk and turn test, the officer testified that Mr. Edgar stepped off the "line," missed some of the heel-to-toe maneuvers, and stopped while walking at the turn. RP 190-191. Regarding the one-leg stand, Officer Tirey testified that Mr. Edgar had passed the test although he had swayed while balancing. RP 193.

Based on his observations, Officer Tirey placed Mr. Edgar under arrest. RP 194, 210, 227, 230, 242. Officer Tirey testified that he was certified to perform the breath test, and that once he arrived with Mr. Edgar at the jail, he took the requisite steps to administer one to Mr. Edgar. RP 200-204.

Trooper Mel Sterkel, a trooper/breath test technician for the Washington State Patrol testified in response to a posited hypothetical question that if an hour and 20 minutes to an hour and a half had elapsed between an individual's last drink and the administration of the breath test, the resultant test would show a declining alcohol level. RP 247-248.³ Trooper Sterkel testified to his training and the protocol for the administration of the breath test. RP 249-253, 268-285. Based on his training, education, and experience, Trooper Sterkel opined that the breath test ticket marked as State's Exhibit number one and its results were accurate and reliable. RP 286. Upon admission, Trooper Sterkel testified that the breath test results in Mr. Edgar's first sample was .098, and his second, .101. *Id.*

³ The testimony at trial was that there were no alcohol containers located in Mr. Edgar's truck and no indication that he had had anything to drink while at the Conoco. Mr. Edgar testified that he had not consumed any beer for "at least a couple of hours before (he had) left (his house)." RP 241, 300.

Although Mr. Edgar testified that his friend Harold was going to come to pick him up, no one arrived on scene to do so while the officers were present. RP 169, 198, 293-294, 298.

Trial began on September 4, 2019. As an element of the charge, the State had alleged in both its information and amended information the prior conviction which elevated the physical control to a felony, but had not provided an actual copy of the judgment and sentence to Mr. Edgar. RP 14. In the course of pre-trial discussion, the Court specifically inquired whether or not defense counsel would be seeking an “*Old Chief*”⁴ stipulation regarding Mr. Edgar’s previous conviction, to which counsel responded that his client would not be stipulating, preferring to retain any potential appellate issues regarding discovery. RP 17. At the close of the discussion of an “*Old Chief*” stipulation, the Court stated, “[b]ut I won’t bring it up again unless somebody else does. Okay?” RP 20. There was no further inquiry, reference, or request regarding any stipulation to Mr. Edgar’s prior conviction.

References to Mr. Edgar’s prior conviction throughout the trial were sparse. In the State’s opening, the deputy prosecutor stated,

⁴ *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed. 2d 574 (1997), in which the Court held that it is error for the trial court to reject a defendant’s offer to stipulate to a prior conviction when its evidentiary value is solely to prove an element of the current offense.

“[n]ow the other thing you’re going to hear is that the defendant was convicted in 2015 of vehicular assault involving drugs or alcohol. And you’re going to hear about that just for the limited purpose of it being one of the elements of this crime, felony – physical control of a vehicle.” RP 144, and then, [s]o that’s why the defendant is charged with felony physical control because of – prior conviction.” RP 145.

During the course of trial, the State moved for the admission of Mr. Edgar’s prior judgment and sentence, which had been marked as Plaintiff’s Exhibit number six, and of which, extensive discussion had occurred outside the presence of the jury. RP 256-264.

The following is what occurred in the presence of the jury:
State: “Your Honor, I’m going to move to admit Plaintiff’s 7, which is – RCW that would go along with – Plaintiff’s 6 – previously admitted.”

The Court: “Understood.”⁵

At the conclusion of the trial, the jury heard about Mr. Edgar’s prior conviction four times from three speakers in three contexts.

⁵ Plaintiff’s Exhibit number seven was a copy of the Revised Code of Washington statute for Vehicular Assault, 46.61.522(1)(b), which was admitted without objection. RP 258, 287-288. Plaintiff’s Exhibit number six, the certified copy of Mr. Edgar’s judgment and sentence in 15-1-00009-7 was admitted during the discussion of the parties outside the presence of the jury. RP 264.

Initially, the Court read it aloud in jury instruction number nine, (the elements of the crime instruction) and jury instruction number ten, (the “to convict” instruction). RP 321-322. Then in his closing, defense counsel made the statement, “[l]adies and gentlemen, this is a tough case. It’s a tough case because we all know that he’s got a prior, we all know that he was impaired that night.” RP 335. The fourth reference was made by the State in its rebuttal, when the deputy prosecutor stated, “[s]o, ladies and gentlemen, it is a hard call. And you’re not supposed to be influenced by the fact that he has a prior vehicular assault under the influence of alcohol. That’s just an element.” RP 337. This was the totality of references to Mr. Edgar’s prior conviction and judgment and sentence. There was no dwelling on the issue, no objection to the limited references, no request for a limiting instruction, and no request for trial bifurcation.

However, there had been some disagreement between the parties as to the contents of Plaintiff’s Exhibit number six.⁶ The State proposed a copy of Mr. Edgar’s prior judgment and sentence from cause number 15-1-00009-7, in which Mr. Edgar’s prior

⁶ The discussion regarding Plaintiff’s Exhibit number six was rather lengthy and a verbatim copy of the argument has been attached to this reply as Exhibit “A.” RP 256-264.

criminal history had been redacted. RP 256. Counsel voiced no objection to the manner or method of redaction. RP 257-258. The parties agreed to detaching the appendix to the judgment and sentence. RP 256-257. However, defense counsel also objected to the inclusion of the community custody time period; the requirement that Mr. Edgar consume no alcohol; that he obtain a substance abuse evaluation; and other unspecified DOC conditions. RP 258, 261. The State argued the additional redactions would eviscerate the completeness of the document and seemed somewhat deceptive. RP 260-262. There was no mention of any objection to the imposed sentence of eight months. RP 256-264. There was also no mention made by either party of gun or voting rights, DNA testing, or the Crime Victims' Compensation Act assessment (CVCA), fines, or other costs.⁷

IV. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT APPELLANT WITH A BLOOD ALCOHOL CONTENT READING OVER THE LEGAL LIMIT WAS IN PHYSICAL CONTROL OF A MOTOR VEHICLE, AND THAT HIS POSITION WITHIN A GAS STATION/RESTAURANT PARKING LOT

⁷ Because there was not an agreement between the parties as to what Plaintiff's Exhibit number six should contain, it has been attached as admitted in its entirety to this reply as Exhibit "B."

PASSED OUT WITH THE VEHICLE RUNNING,
WHILE OFF THE ROADWAY, WAS NOT SAFELY
OFF THE ROADWAY.

Defendant was charged with Physical Control as a felony under RCW 46.61.504(6)(b)(ii). Jury Instruction Number Nine read by the Court was as follows:

A person commits the crime of felony being in actual physical control while under the influence when he has actual physical control of a motor vehicle while he is under the influence of or affected by intoxicating liquor or while he has sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after being in actual physical control as shown by an accurate and reliable test of the person's breath and the person has been previously convicted of vehicular assault while under the influence of intoxicating liquor or any drug. RP 321. (WPIC 92.02 modified as applicable).

Also given as requested by the defendant was Jury Instruction Number Eleven:

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. RP 323. (WPIC 92.15 verbatim).

The defense of “safely off the roadway” has two components, one, that the vehicle is off the roadway, and two, that it is “safely” off the roadway, that is, when the situation no longer poses a danger to the public. *City of Edmonds v. Ostby*, 48 Wn.App. 867, 740 P.2d 916 (1987), where the Court held that a vehicle in a private parking lot, while off the roadway, was not “safely off the roadway, when 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.

In this matter, there was no dispute that Mr. Edgar’s vehicle, was in fact, off the roadway. RP 137, 304. The argument was whether or not his vehicle was “safely” off the roadway.

Whether or not a vehicle is “safely off the roadway” is a factual issue to be determined by the trier of fact. *Ostby*, 48 Wn.App. at 870, see also *City of Spokane v. Beck*, 130 Wn.App. 481, 486-489, 123 P.3d 854, (2005), *State v. Reid*, 98 Wn.App. 152, 163-164, 988 P.2d 1038 (1999).

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Moreover, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* See also *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003), *State v. Partin*, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence being equally reliable. In considering the evidence, [c]redibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In determining whether sufficient evidence exists, the reviewing court need not be convinced of the defendant’s guilty

beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Fisher*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

The appropriate standard of review for sufficiency of the evidence when a defendant is required to prove an affirmative defense by a preponderance, is whether considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance. *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996).

In this case, Mr. Edgar was passed out behind the wheel of a running vehicle sitting approximately one to one and half car lengths distance away from the gas pump island. According to Mr. Grimshaw, Mr. Edgar had remained at the pumps for some five to ten minutes before pulling a few yards ahead and remaining for another 20-25. According to Sergeant Koss, and borne out by the video, while shining his flashlight into Mr. Edgar's vehicle, he had to repeatedly knock on Mr. Edgar's window while attempting verbal contact which seemed to have the effect of only temporarily rousing Mr. Edgar. Ultimately, Mr. Edgar initially rolled down the rear

window, and exhibited well recognized effects of inebriation, *e.g.*, slurred speech, odor, bloodshot eyes, lack of coordination. He was then able to roll down the driver's side window to speak with Sergeant Koss. Although by all accounts, Mr. Edgar had not consumed alcohol for some time prior to his contact with law enforcement, his blood alcohol level when tested, was still above the legal limit.

The defense of "safely off the roadway" is a permissible excuse for otherwise culpable conduct afforded to those who, faced with the combination of their own intoxicated state as well as being in control of a motor vehicle, take the necessary steps to protect the general public from that dangerous and potentially fatal combination. *City of Yakima v. Mendoza Godoy*, 175 Wn.App. 233, 305 P.3d 1100 (2013), *State v. Votava*, 149 Wn.2d 178, 66 P.3d 1050 (2003). Being asleep in and of itself is not a defense. *State v. Reid*, 98 Wn.App. 152, 988 P.2d 1038 (1999).

Appellant's reliance on *State v. Day*, 96 Wn.2d 646, 638 P.2d 546 (1981), is misplaced. In *Day*, the Court focused on the unique fact that the defendant was allegedly committing the crime of Driving Under the Influence (DUI) in the middle of a private field. The Court noted that the intent of the DUI statute was to protect the

traveling public from drunk drivers, and found that the defendant posed no threat to the public because his vehicle was not on or near a public road. Where the defendant was driving, the general public had no right to be, and it was not logical to assume that the defendant would leave the private property and drive on a public roadway. *Day*, 96 Wn.2d at 649-650. The Court stated: “[t]he rule is that, to justify any law upon the theory that it constitutes a reasonable and proper exercise of the police power, it must be reasonably necessary in the interest of the health, safety, morals, or welfare of the people.” *Day*, 96 Wn.2d at 649. Noting that the location of the defendant’s conduct posed no danger to the general public, the Court stated, “[w]e expressly limit this determination to the unique facts herein.” *Day*, 96 Wn.2d at 647. In contrast, Mr. Edgar’s vehicle was amidst the travelling public situated in the middle of a gas station lot where numerous vehicles could be expected to come to get gas, visit the convenience store, and/or go to the nearby restaurant. Contrary to appellant’s assertion, the ability to drive around Mr. Edgar’s vehicle did not make its position safe.⁸

⁸ Sergeant Koss, in his testimony, stated that there was also a vehicle southbound in the same lane for the fuel pumps, and so “obviously had to maneuver around that (Mr. Edgar’s) vehicle.” RP 161.

Appellant's reliance on *City of Spokane v. Beck*, 130 Wn.App. 481,123 P.3d 854 (2005), is also misplaced. In *Beck*, the Court overturned the defendant's conviction for physical control, finding that the jury could not have found that the defendant posed a risk of danger to the travelling public when an officer specifically testified that the position of the defendant's vehicle posed no danger. The Court stated:

The most compelling aspect of this case is Officer Storment's acknowledgment at trial that Ms. Beck's car was off the roadway and there was no danger. The city argues that the jury must have ignored the officer's testimony as it was within its province to do. But no reasonable trier of fact would disregard this plain admission that provided the factual basis for the elements of the defense from a trained officer on the scene. Concession testimony of this nature is persuasive. *Beck*, 130 Wn.App. at 488.

The Court found that with Officer Storment's concession, no reasonable jury could find that the defendant had failed to establish the defense of safely off the roadway by a preponderance.

In Mr. Edgar's case, neither of the on-scene officers testified that the defendant had been safely off the roadway, rather they both testified that based on their observations and interactions, they each believed Mr. Edgar to be impaired, and under the influence.

The jury, as fact finder, was in the best position to determine from both video and testimony, as to whether the defendant had established the defense of safety of the roadway by a preponderance.⁹ Their verdict would indicate that they believed that the evidence established beyond a reasonable doubt that he had not. The reviewing court is to defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence. *State v. Walton*, 64 Wn.App. 410, 415-416, 824 P.2d 533 (citing *State v. Longuskie*, 59 Wn.App. 838, 844, 801 P.2d 1004 (1990)), *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

B. APPELLANT'S PRIOR CONVICTION FOR VEHICULAR ASSAULT WHILE UNDER THE INFLUENCE OF ALCOHOL WAS AN ELEMENT OF FELONY PHYSICAL CONTROL AND AS SUCH, NEEDED TO BE PROVEN BEYOND A REASONABLE DOUBT. APPELLANT'S CHOICE TO DECLINE AN "OLD CHIEF" STIPULATION NECESSITATED THE ENTRY OF MR. EDGAR'S PRIOR JUDGMENT AND SENTENCE, AND ITS ENTRY AND THE INFORMATION IT CONTAINED WAS NOT UNFAIRLY PREJUDICIAL TO APPELLANT.

⁹ Plaintiff's Exhibit four, video one at 1:34 shown in BA at page 12, shows only a static view of Appellant's vehicle on the early morning in question, and as such, is somewhat misleading. As previously mentioned in footnote two, the first four minutes of the video shows a much more complete picture of where the Appellant's vehicle was located in relationship to the store, the pumps, and Canyon Road. The jury had the benefit of this contemporaneous evidence of the scene and circumstances in reaching their verdict.

Appellant's prior conviction for the specific crime of Vehicular Assault was an element for his charge of felony Physical Control under 46.61.504(6)(b)(ii). Courts have held that when a prior conviction of a statutorily specified kind of offense elevates a crime from a gross misdemeanor to a felony, the existence of the prior conviction is an element of the felony that the State must prove beyond a reasonable doubt.

Appellant fails to acknowledge the distinction between the statutory requirement to prove a prior conviction as an element of a crime and the use of unfairly prejudicial propensity evidence under ER 404(b). A court must accept a defendant's stipulation regarding the fact of a prior conviction, however, as indicated *supra.*, Mr. Edgar specifically declined the Court's offer of an "*Old Chief*" stipulation.¹⁰ Additionally, references to Mr. Edgar's prior conviction were brief and non-inflammatory, referenced only as an element of his current crime.

¹⁰ In comparison, in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed. 2d 574 (1997), defendant was charged with possession of a firearm by a convicted felon which required only proof of a prior serious offense, rather than any specific prior felony conviction as required in Mr. Edgar's case. Similarly, many of the cases cited by Appellant are unlawful possession of a firearm cases, in which the nature of the prior felony is irrelevant.

The majority of cases relied upon by Appellant are premised on evidentiary admissions under ER 404(b) Other Crimes, Wrongs, or Acts:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Proof of Mr. Edgar's prior conviction was not offered or admitted under ER 404(b), but rather as an element of the crime charged. The items left in the judgment and sentence which were objected to at the time of trial, consisted solely of the community custody conditions of 12 months of supervision, that Mr. Edgar refrain from drinking, that he obtain a drug/alcohol evaluation and follow treatment recommendations, and other unspecified DOC conditions. RP 258, 261. Any jury which received a judgment and sentence would expect to see that some sentence had been imposed, and would only speculate if that information were omitted. And contrary to Appellant's current position, there was no objection to the redaction of the defendant's prior history, to the term

imposed, i.e., eight months,¹¹ no mention of gun or voting rights, no reference to CVCA or other legal financial obligations, and no mention of DNA. A party may assign error in the appellate court only on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Non-specific objections made at trial or objections made without articulating the basis are inadequate to preserve appellate review. *Guloy*, 104 Wn.2d at 422 (citing *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322 (1976)). While Mr. Edgar objected at trial to the term of community custody, the requirement that he obtain a drug/alcohol evaluation and follow treatment recommendations, and that he consume no alcohol, he made no other specific objections which the Court could have considered.

Appellant cites *State v. Smith*, 103 Wash. 267, 174 P.9 (1918), to argue that “[t]here is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of other crimes for which he is on trial.” *Smith*, 103 Wash. at 268. The Court in *Smith* found that the trial court had committed

¹¹ Mr. Edgar faced a sentence of three to nine months for his previous Vehicular Assault. Contrary to Appellant’s argument, the judgement and sentence with its imposed term of eight months did not reflect a “jail term for the lengthiest term permitted,” or “an order for the lengthiest term of imprisonment permitted.” BA 7, 19.

prejudicial error when it admitted evidence of other crimes committed by the defendant when such was not needed to establish intent, motive, or knowledge for the crime charged, logic which would eventually lead to the creation of ER 404(b).

However, it is unfortunate and somewhat disingenuous that Appellant provides only the first half of the quote. To place the quote offered by Appellant in the context of its entirety, the Court in *Smith* made the following statement:

There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of other crimes for which he is on trial, *and such testimony should only be admitted when clearly necessary to establish the essential elements of the crime which is being prosecuted.* *Smith*, 103 Wash. at 268. (emphasis added).

There were very few references to Mr. Edgar's prior conviction other than the fact of its existence necessary to establish an element, and the standard terms which were retained in the exhibit were minimal, and part of the commonsensical terms of the document. Contrary to Appellant's current argument, there was no objection to the either the term of Mr. Edgar's sentence, voting or gun rights, DNA, or of the fines, costs, and imposed CVCA. Nor was there any objection to the format or method of the redaction

of Mr. Edgar's criminal history. Since there were no objections voiced to those items, the Court was unable to address them, and the State would argue that Appellant has waived his ability to object to the inclusion of those specific provisions.

- C. APPELLANT IS CORRECT THAT THE TRIAL COURT DID NOT CONDUCT A SUFFICIENT INQUIRY INTO HIS FUTURE ABILITY TO PAY AND THAT COSTS STATUTORILY LIMITED TO DISTRICT COURT FINDINGS OR INAPPLICABLE TO HIS CHARGE SHOULD BE STRICKEN.

Given that the trial court did not make an individualized inquiry into Mr. Edgar's ability to pay before imposing the LFOs, this matter should be remanded for the trial court to make the proper consideration of Appellant's ability to pay. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), *State v. Duncan*, 185 Wn.2d 430, 437-438, 374 P.3d 83 (2016), *State v. Marks*, 185 Wn.2d 143, 368 P.3d 485 (2016).

Further, Appellant is correct that the \$945.50 in costs imposed under RCW 46.61.5055(1), RCW 3.62.090, and RCW 3.62.085 apply only to district court convictions, and should be stricken in Mr. Edgar's case. Appellant is also correct that RCW 38.52.430 costs of \$135.33 does not apply and should not have been imposed, and that in total, Mr.

Edgar's fines and costs should be reduced by a total of \$1,080.83. The issue of imposition of discretionary costs should be addressed by the Trial Court only after conducting a thorough inquiry.

V. CONCLUSION

For the reasons stated, Appellant's conviction for Physical Control should be affirmed. The evidence was sufficient for the jury to have made its finding, and Mr. Edgar's claim of prejudice for the inclusion of information within his prior judgment and sentence which was necessary to establish an element would be harmless error at best. Finally, this case should be remanded to the Superior Court for consideration of Mr. Edgar's ability to pay legal financial obligations required for a felony Physical Control.

Respectfully submitted this 29th day of July, 2020



Carole L. Highland
WSBA # 20504
Attorney for Respondent

The Court: Hello again. Welcome back. Please be seated. All right. We ready to go?

MS. HIGHLAND (Deputy Prosecutor): Well, your Honor, I think we are, but I have -- I will be submitting an exhibit which is a certified copy of a judgment and sentence for Mr. Edgar. There is some objection by counsel. So I don't know if you want to address that issue now.

THE COURT: Do you want to do it now? It's fine with me.

MS. HIGHLAND: Sure.

THE COURT: We talked about it a little bit yesterday.

MS. HIGHLAND: So I looked at the judgment and sentence, or I thought about it a little bit more, this morning, and the one that I had initially had marked -- with the clerk has the defendant's criminal history. So I've redacted that and provided clean copy -- and this is just may copy -- and that's what I provided to counsel. Counsel has an objection to the appendix--

THE COURT: Okay.

MS. HIGHLAND: --being submitted--

THE COURT: Sure.

MS. HIGHLAND: I don't object to that being taken off.

THE COURT: Okay.

MS. HIGHLAND: But then he has an objection to the contents of the judgment and sentence itself, and I do have an objection -- I would oppose any further -- trimming—

THE COURT: All right.—

MS. HIGHLAND: --judgment and sentence.

THE COURT: Let me take it from there, since I know what's going on now. Mr. Kirkham.

MR. KIRKHAM (Defense Attorney): Judge, first we just ask for a continuance-- continuing objection that it comes in at all,--

THE COURT: Because it wasn't provided to you ahead of time.

MR. KIRKHAM: Correct.

THE COURT: Yeah. I understand.

MR. KIRKHAM: But if the court is going to provide it, I think it needs to be sanitized a little bit more. Counsel proposed offering -- vehicular assault RCW because it's not clear that 46.61.522(1)(b) involves alcohol.¹ I don't really have an objection to that. I think that

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¹ The State also offered Plaintiff's Exhibit number seven which was a copy of the Revised Code of Washington statute for Vehicular Assault, 46.61.522(1)(b), which was admitted without objection. RP 258, 287-288.

(MR. KIRKHAM, cont.) they can, you know, submit that or what-not along with it. Counsel has sanitized it with regards to the criminal history, however there is a community custody provision consume no alcohol as well as a substance abuse evaluation provision and other DOC conditions having to do with -- Those are the ones that I would like sanitized. The -- They have a possibility of confusing the jury as to whether or not he was not supposed to -- consume alcohol on this occasion. There's a risk of prejudice -- Really it's not relevant; what's relevant is the conviction.

THE COURT: Correct.

MR. KIRKHAM: And so I'd just ask that those be sanitized as well.

THE COURT: Okay. Okay. We have the -- state's copy. We have one marked previously, did you say?

MS. HIGHLAND: I have -- the one I had marked previously when began yesterday had the defendant's criminal history.

THE COURT: Yeah.

MS. HIGHLAND: Yeah. And I've -- then that's all I've taken out.

THE COURT: And that was on -- paragraph 2.2.

MS. HIGHLAND: Right.

THE COURT: Okay. Yeah. I see that now. It's all -- cleared off.

MS. HIGHLAND: And the court can see that on page 3 in 2.3, because everything had washed his offender score is zero, so -- no need to change any of that,--

THE COURT: Okay.

MS. HIGHLAND: --top of page 3.

THE COURT: Uh-huh.

MS. HIGHLAND: And -- this is just -- this is the document. And so, as I said, I have no objection to taking the appendix off, because I don't think it's relevant, but the judgment and sentence is clearly relevant to show that -- there was a -- conviction for vehicular assault.

THE COURT: Okay. So, -- in these cases, I mean, it's like Mr. Kirkham and Ms. Highland have said, the -- the only really relevant issue here, it seems to me, is the fact of conviction. And on page 1 of this J&S, findings, current offense, the defendant is guilty. And then it has the description and the statute. You keep going, there's nothing really of any -- on page 2, I (inaudible) nothing of relevance on that page 3, the sentencing data, seriousness level, standard range, the actual sentence -- is that relevant to--

MS. HIGHLAND: It's not particularly prejudicial, and that document-

THE COURT: No. I didn't ask that question.

MS. HIGHLAND: Okay. No—

THE COURT: My first question is is it even relevant, 'cause—

MS. HIGHLAND: Well,--

THE COURT: --that's the standard we use to determine if

(THE COURT, cont.) something goes to the jury is whether it's – relevant. That's the first thing. Not whether it's prejudice.

MS. HIGHLAND: Right. Your Honor, I would just argue that we need the -- we need the last page that has his signature, and it's a rule of completeness -- would -- lean towards admitting to the entire document.

THE COURT: Uh-huh.

MS. HIGHLAND: I mean, there's always evidence that has both relevant and irrelevant -- or non-relevant aspects to it—

THE COURT: Correct. And we try to keep the non-relevant to a -- minimum. All right. Now, Mr. Kirkham. You have no objection to removing the judgment and sentence -- Sorry -- appendix to the judgment and sentence--

MR. KIRKHAM: No. No object, Judge--

THE COURT: So those last three pages can easily come off--

MS. HIGHLAND: Right.

THE COURT: Everybody agrees to that--

MS. HIGHLAND: Yes.

THE COURT: Okay. And then -- you're also thinking, Mr. Kirkham, that the community custody provisions should come off because you don't want to confuse -- you're concerned that they may confused that during the time in question of this case it may have

(THE COURT, cont.) been a violation of this order for him to have been consuming alcohol.

MR. KIRKHAM: In addition, not just confusion, but would they hold him against him that he had to go through -- alcohol treatment program on the case before, in this case. I think you're right; the only page that needs to go back is the first page. But, you know, -- if it's all going to go -- go back I'd request that it be sanitized.

THE COURT: Uh-huh. And, I think the -- Supreme Court has told us we can redact whatever we need to to make sure that there's no -- additional prejudice -- right? 'Cause we know that, like you say, any document that -- tends to show something that is—

MR. KIRKHAM: --wouldn't want it in if it wasn't prejudicial.

MS. HIGHLAND: Well, that's not true, your Honor. Your Honor, I'm trying to -- I'm trying—

THE COURT: You want to convict this man, don't you?

MS. HIGHLAND: Right. But that's—

THE COURT: So that's the prejudice we're talking about.

MS. HIGHLAND: Right. No; I'm trying to submit a complete document.

THE COURT: Sure.

MS. HIGHLAND: I think that it's unfair to -- to Gerry-rig things -- I don't think it's prejudicial to show that he -- he was convict -- I

(MS. HIGHLAND, cont.) mean, the fact that he was convicted of vehicular assault is what's prejudicial. But the fact that he had community custody -- that was in 2015 -- the fact that he had obtain an alcohol evaluation, that's just part and parcel of that judgment and sentence. It's the conviction that the state is seeking to admit. And I guess what I'm objecting to is that we're -- we're excising information that isn't -- it isn't necessary to excise. And it's -- it has a kind of a ring of -- dishonesty is too strong of a word, your Honor, and I don't -- I don't mean anything -- derogatory in that. But it -- it - - it -- the document is what the document is. And the prejudicial information about the defendant having a criminal history (inaudible) time of this, -- that's been excised. And -- and -- I think that—

THE COURT: And that's because you're being nice? Or it's because the—

MS. HIGHLAND: (Inaudible)—

THE COURT: --court rule requires it.

MS. HIGHLAND: --that's because the court requires that.

The court rule does not require that the -- the terms of the judgment and sentence be excised.

THE COURT: No. No. That's true. We'll take off the -- we'll take of the -- appendix, and -- we're going to leave the rest on -- over the objection of the defense.

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MS. HIGHLAND: Your Honor, I'm going to move to admit Plaintiff's 7, which is -- RCW that would go along with -- Plaintiff's 6 -- previously admitted.

THE COURT: Understood. Mr. Kirkham?

MR. KIRKHAM: I do not have an objection to the RCW being admitted.

RP 256-264.



STATE OF WASHINGTON, County of Kittitas:
 I Val Barschaw, Clerk of the above-entitled Court,
 do hereby certify that the ensuing instrument is
 a true and correct copy of the original now on file
 in my office, IN WITNESS THEREOF, I hereunto set
 my hand and the seal of said Court this 4TH
 day of September 2019.
 VAL BARSCHAW
 By: [Signature] Deputy,
 MIRANDA PRATT
 12 pages

FILED
 15 SEP 14 PM 4:04
 KITTITAS COUNTY
 SUPERIOR COURT CLERK

Superior Court of Washington
 County of Kittitas

State of Washington, Plaintiff,

vs.

KEVIN RAY EDGAR, Defendant,
 DOB: 10/28/1980
 PCN: 955397720
 SID: WA19320337

No. 15-1-00009-7 15-9 00492-0
 Felony Judgment and Sentence --
 Jail One Year or Less
 (FJS)
 Clerk's Action Required, 2.1, 4.1, 4.3, 5.2, 5.3,
 5.5, 5.7
 Defendant Used Motor Vehicle
 Juvenile Decline Mandatory Discretionary

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon
 guilty plea (date) 09/14/2015 jury-verdict (date) _____ bench trial (date) _____:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
1	Vehicular Assault	46.61.522(1)(b)	FB	01/10/2015

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C),
 (If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

- The defendant used a firearm in the commission of the offense in Count _____ . RCW 9.94A.602, 9.94A.533.
- The defendant used a deadly weapon other than a firearm in committing the offense in Count _____ . RCW 9.94A.602, 9.94A.533.
- For the crime(s) charged in Count _____ , domestic violence was pled and proved. RCW 10.99.020.
- Count _____ is a criminal street gang-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that minor in the commission of the offense. RCW 9.94A.833.

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- Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a criminal street gang member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.____.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- Count _____ is a felony in the commission of which the defendant used a motor vehicle. RCW 46.20.285.
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):**

	<i>Crime</i>	<i>Cause Number</i>	<i>Court (County & State)</i>	<i>DV* Yes</i>
1.				
2.				

* DV: Domestic Violence was pled and proved.

- Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History:

<i>Crime</i>	<i>Date of Crime</i>	<i>Date of Sentence</i>	<i>Sentencing Court (County & State)</i>	<i>A or J Adult, Juv.</i>	<i>Type of Crime</i>	<i>DV* Yes</i>

* DV: Domestic Violence was pled and proved.

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions listed as numbers _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525).

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
1	0	IV	3 - 9 months		3 - 9 months	5 Years

(F) Firearm , (D) Other deadly weapons, (CSG) criminal street gang involving minor.

Additional current offense sentencing data is attached in Appendix 2.3.

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.

within the standard range for Count(s) _____, but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached.

The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is *guilty* of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 The court *dismisses* Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant as follows:

(a) *Confinement*. RCW 9.94A.589. A term of total confinement in the custody of the county jail:

8 months on Count 1 _____ months on Count _____
 _____ months on Count _____ months on Count _____
 _____ months on Count _____ months on Count _____

Actual number of months of total confinement ordered is: 8

All counts shall be served concurrently, except for the following which shall be served consecutively:

The sentence herein shall run consecutively with the sentence in cause number(s) _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

Partial Confinement. The defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions: 60 days eligible for work release

work crew RCW 9.94A.725

home detention RCW 9.94A.731, .190

work release RCW 9.94A.731

Conversion of Jail Confinement (Nonviolent and Nonsex Offenses). RCW 9.94A.680(3). The county jail is authorized to convert jail confinement to an available county supervised community option, to reduce the time spent in the community option by earned release credit consistent with local correctional facility standards, and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.

The defendant shall receive credit for time served in an available county supervised community option prior to sentencing. The jail shall compute time served.

Alternative Conversion. RCW 9.94A.680. _____ days of total confinement ordered above are hereby converted to _____ hours of community restitution (service) (8 hours = 1 day, nonviolent offenders only, 30 days maximum) under the supervision of the Department of Corrections (DOC) to be completed on a schedule established by the defendant's community corrections officer but not less than _____ hours per month.

Alternatives to total confinement were not used because of: _____

criminal history failure to appear (finding required for nonviolent offenders only) RCW 9.94A.680.

(b) **Credit for Time Served:** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

4.2 Community Custody. RCW 9.94A.505, .702.

(A) The defendant shall serve 12 months (up to 12 months) in community custody.

The court may order community custody under the jurisdiction of DOC for up to 12 months if the defendant is convicted of a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy or solicitation to commit such a crime. For offenses committed on or after June 7, 2006, the court shall impose a term of community custody under RCW 9.94A.701 if the offender is guilty of failure to register (second or subsequent offense) under RCW 9A.44.130(11)(a) and for offenses after June 12, 2008 for unlawful possession of a firearm with a finding that the defendant was a member or associate of a criminal street gang. The defendant shall report to DOC not later than 72 hours after release from custody at the address provided in open court or by separate document.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

consume no alcohol.

have no contact with: _____

remain within outside of a specified geographical boundary, to wit: _____

participate in the following crime-related treatment or counseling services: _____

Undergo an evaluation for, and fully comply with, treatment for domestic violence substance abuse
 mental health anger management.

comply with the following crime-related prohibitions: _____

Other conditions: _____

(C) The conditions of community custody shall begin immediately upon release from confinement unless otherwise set forth here: _____

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

<i>PCV</i>	\$ <u>500.00</u>	Victim assessment	RCW 7.68.035
<i>PDV</i>	\$ _____	Domestic Violence assessment	RCW 10.99.080
<i>FRC</i>	\$ <u>200.00</u>	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ _____	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ _____	SFR/SFS/SFW/WRF
		Jury demand fee \$ _____	JFR
		Extradition costs \$ _____	EXT
		Other \$ _____	
<i>PUB</i>	\$ _____	Fees for court appointed attorney	RCW 9.94A.760
<i>WFR</i>	\$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.760
	\$ _____	DUI fines, fees and assessments	
<i>CLF</i>	\$ <u>100.00</u>	Crime lab fee <input type="checkbox"/> suspended due to indigency	RCW 43.43.690
<i>DNI</i>	\$ <u>100.00</u>	DNA collection fee	RCW 43.43.7541
<i>FPV</i>	\$ _____	Specialized forest products	RCW 76.48.140
<i>CDF/LDI/FCD</i>	\$ _____	Drug enforcement fund of <u>Kittitas County</u>	RCW 9.94A.760
<i>NTF/SAD/SDI</i>			
<i>BKF</i>	\$ <u>50.00</u>	Other fines or costs for: <u>Booking Fee</u>	
<i>RTN/RJN</i>	\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, \$1000 maximum) Agency: _____	RCW 38.52.430
<i>PMI</i>	\$ _____	1 Record Check- Kittitas County Prosecuting Attorney	
<i>RTN/RJN</i>	\$ _____	Restitution to: _____	
	\$ _____	Restitution to: _____	
		(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
	\$ <u>950.00</u>	<i>Total</i>	RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for _____ (date).

The defendant waives any right to be present at any restitution hearing (sign initials): _____.

Restitution Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

<u>Name of other defendant</u>	<u>Cause Number</u>	<u>(Victim's name)</u>	<u>(Amount-\$)</u>
--------------------------------	---------------------	------------------------	--------------------

R/JN

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 100 per month commencing upon release. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

The defendant shall not have contact with _____ (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until _____ (which does not exceed the maximum statutory sentence).

The defendant is excluded or prohibited from coming within _____ (distance) of:
 _____ (name of protected person(s))'s home/ residence
 work place school (other location(s)) _____

other location _____, or
until _____ (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order or Antiharassment No-Contact Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

4.7 **Off-Limits Order.** (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

V. Notices and Signatures

5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **Community Custody Violation.**

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 **Firearms.** You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

FIREARM RIGHTS STATEMENT: RCW 9.41.040. I acknowledge that my right to own, use or possess any firearm has been lost due to felony conviction, or crimes involving domestic violence. My right to own, use, or possess a firearm may only be restored by a court of record. I acknowledge that I must immediately surrender any concealed pistol license. Owning, using, or possessing a firearm before the right is restored is a class C felony, RCW 9.41.040.
Defendant's signature _____

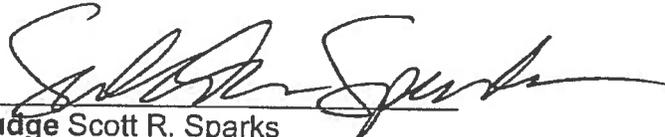
5.6 Reserved.

5.7 **Motor Vehicle:** If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: _____

5.9 ~~BOND IS HEREBY EXONERATED~~ Kittitas County Clerk is hereby authorized to repay cash bail to the payor thereof or his/her designee! 

Done in Open Court and in the presence of the defendant this date: 9-14-15


Judge Scott R. Sparks

Deputy Prosecuting Attorney
WSBA No. 43885
Jodi M. Hammond

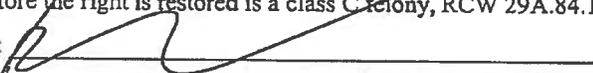
Attorney for Defendant
WSBA No. 7189
Chelsea C. Korte


Defendant
Kevin R. Edgar

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: 

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

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

Signed at (city) _____, (state) _____, on (date) _____.

Interpreter

Print Name

VI. Identification of the Defendant

SID No. _____ Date of Birth _____
 (If no SID complete a separate Applicant card
 (form FD-258) for State Patrol)

FBI No. _____ Local ID No. _____

PCN No. _____ Other _____

Alias name, DOB: _____

Race: Asian/Pacific Islander Black/African-American Caucasian
 Native American Other: _____

Ethnicity: Hispanic Non-Hispanic

Sex: Male Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, Kimberly D. Nuffer Dated: 9/14/15

The defendant's signature: [Handwritten Signature]

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously
			

SUPERIOR COURT—KITITAS COUNTY, WASHINGTON

DATED:

CAUSE #

9/5/19

187-00292-19

PLT/PET

IDENT.

DEF/RSP

EXHIBIT

6 TP's ex. #6

Admitted

APPENDIX B - ST. V KEVIN EDGAR 37080-1-11

PG. 10 OF 10

PROOF OF SERVICE

I, Carole L. Highland, do hereby certify under penalty of perjury that on Thursday, July 30, 2020, 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 Respondent's Brief:

E-Mail: marek@washapp.org

Marek E. Falk

Attorney for Appellant

Washington Appellate Project

1511 Third Avenue, Suite 610

Seattle, WA 98101

(206) 587-2711

wapofficemail@washapp.org



Carole L. Highland, WSBA # 20504

Attorney for Respondent

Kittitas County Prosecuting Attorney's Office

205 W 5th Ave, Suite 213

Ellensburg, WA 98926

509-962-7520

prosecutor@co.kittitas.wa.us

KITTITAS COUNTY PROSECUTOR'S OFFICE

July 30, 2020 - 7:55 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37080-1
Appellate Court Case Title: State of Washington v. Kevin Ray Edgar
Superior Court Case Number: 18-1-00292-2

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