

NO. 68812-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRIS MORTENSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
FILED

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A. ISSUES PRESENTED

1. A trial court's denial of a motion to dismiss the jury venire for taint is reviewed for abuse of discretion. Each case must be considered on its own facts, considering the seriousness of the irregularity, whether the error involved cumulative evidence, and whether the trial court properly provided a curative or limiting instruction to the jury.

At the beginning of jury selection, the trial court properly read the elements of Felony DUI to the jury, including the element that Mortenson had at least four prior convictions pursuant to RCW 46.61.5055(14)(a). At the end of the elements, the trial court also recited the statutory citations for Felony DUI, RCW 46.61.502 and 46.61.5055. Mortenson moved for a new jury venire on the basis that the jury could "link up" the statutory citations and conclude that his prior convictions were also for DUI. The court denied the motion, and later instructed the jury that they were not to speculate about the nature of Mortenson's prior convictions, nor use them for any purpose other than determining whether the State proved the prior conviction element of Felony DUI. Did the trial court properly exercise its discretion in denying Mortenson's motion to dismiss the venire?

2. Jury instructions must make the relevant legal standard manifestly apparent to the average juror. The court's concluding instruction followed the pattern instructions, and informed the jury in what

order they were to assess the charges. The instruction told the jury to deliberate first on count one, which included a lesser offense, and stated that unanimity was required to reach a verdict, and that they were to leave the verdict form blank if they could not reach a decision. Later, when informing the jury how to assess count two, which had no lesser offense, there was no specific reminder regarding unanimity. However, the instruction ended with the court's admonishment that, "Since this is a criminal case, each of you must agree for you to return a verdict." Did the court's instructions make the requirement of unanimity on count two manifestly apparent to the jury?

3. A defendant's refusal to submit to a breath-alcohol content test is admissible in a criminal trial if its probative value outweighs the danger of unfair prejudice. At the scene of his arrest, Mortenson initially appeared willing to take a BAC test. Later at the jail, after reviewing his implied consent warnings in writing, he spoke to a lawyer. He then refused the test. Did the trial court properly admit evidence of Mortenson's refusal as more probative than prejudicial?

Mortenson did not object to the admission of the refusal evidence at trial on the basis that it interfered with his right to counsel. On appeal, he claims that the evidence infringed on his constitutional right to counsel. At the time Mortenson refused to take the BAC test, he had not been

formally charged with a crime, and he had no constitutional right to counsel. Has Mortenson failed to properly preserve this claim?

4. A person drives in a reckless manner for purposes of the eluding statute if he drives in a rash or heedless manner, indifferent to the consequences. Evidence is sufficient to sustain a conviction if, taken in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.

The jury heard that Mortenson drove 15 miles per hour over the speed limit before slowing to make a turn, that he crossed both the centerline and the fog line a number of times, and that he made quick, multiple turns on narrow residential roads, failing to utilize his turn signal and driving down the middle of the streets with no lane dividers. The pursuing police officer characterized Mortenson's driving as "erratic," and testified that Mortenson ultimately stopped his car in the middle of the oncoming lane, blocking the roadway. Mortenson's passenger told the police in a written statement that Mortenson's driving had made her uncomfortable, and that she was "very scared and concerned." Could a rational trier of fact find that Mortenson drove in a rash and heedless manner, indifferent to the consequences?

5. To establish that cumulative error denied him of a fair trial, a defendant must show the presence of multiple trial errors, and that the

accumulated prejudice affected the verdict. Has Mortenson failed to establish that cumulative error deprived him of a fair trial?

6. When scoring a present conviction for a Felony DUI, the SRA dictates the inclusion of a point for each prior adult felony conviction, and a point for each prior “serious traffic offense.” Also, the SRA provides that prior serious traffic offenses count (they do not “wash out”), if they are either within ten years of the arrest date for the current offense, or if the interval between them (as calculated by release from confinement or entry of the judgment) is less than five years. Did the trial court properly include Mortenson’s felony convictions and his prior serious traffic convictions in his offender score for Felony DUI?

7. The State is required to establish a defendant’s prior convictions by a preponderance of the evidence, with reliable information that is supported by the record. Did the State present sufficient evidence for the sentencing court to find Mortenson’s criminal history?

8. When the combined period of confinement and community custody exceed the statutory maximum sentence for the offense, the sentencing court must decrease the term of community custody accordingly. The sentencing court imposed the statutory maximum confinement time, 60 months, on the Felony DUI charge. It also imposed

12 months of community custody. Should the trial court strike the term of community custody?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

In the early morning hours of August 21, 2010, King County Sheriff's Deputy Petrenchak was on duty in south King County. 3/20/12 RP 37, 39.¹ He was wearing his uniform and driving a marked patrol vehicle. 3/20/12 RP 37. At approximately 2:00 a.m., Deputy Petrenchak, who was driving southbound, observed a vehicle approaching him in the northbound lane at a high rate of speed. 3/20/12 RP 39-40. Petrenchak's moving radar indicated that the oncoming vehicle was travelling at 65 miles per hour; the posted speed limit was 45 miles per hour. 3/20/12 RP 40-41. Petrenchak immediately pulled into the shoulder and activated the overhead lights on his patrol vehicle. 3/20/12 RP 43.

As Petrenchak was in the shoulder with his emergency lights flashing, the speeding vehicle passed by his patrol car without slowing down. 3/20/12 RP 43-44. Despite there being plenty of room on the shoulder of the roadway to pull over, the vehicle did not stop. Id. Petrenchak turned and began to follow the vehicle. Id. Accelerating to

¹ The State adopts Appellant Mortenson's designation of the verbatim report of proceedings.

75 miles per hour, it took Petrenchak between six to eight blocks to catch up. Id. Petrenchak also activated his siren, but the car still did not stop. 3/20/12 RP 45.

The vehicle continued to speed until it slowed to make a turn. 3/20/12 RP 50. With Deputy Petrenchak continuing behind the vehicle, the vehicle drove “erratically,” crossing the centerline and the fog line “a number of times.” 3/20/12 RP 46-47. The vehicle made a total of six turns, never yielding to Deputy Petrenchak’s patrol vehicle, which was traveling behind with lights flashing and siren sounding. 3/20/12 RP 51, 53-54. Petrenchak observed that there was an individual in the front passenger seat, who placed both arms and hands out the vehicle at a 45-degree angle. 3/20/12 RP 45. After they had traveled over a mile, the vehicle came to a stop, in the middle of the road, blocking the oncoming lanes. 3/20/12 RP 53-54.

Because the vehicle had failed to stop for over a mile, and because Deputy Petrenchak could see that there were three people in the vehicle, he drew his firearm and ordered the driver to show his hands. 3/20/12 RP 58-60. The driver, appellant Chris Mortenson, did not comply, but rather exited the vehicle and began staggering back toward Deputy Petrenchak’s patrol car. 3/20/12 RP 59. Despite being told repeatedly to get onto the

ground, Mortenson continued to approach Petrenchak, who could see that Mortenson had something in his right hand. 3/20/12 RP 61.

Staggering and stumbling, Mortenson crossed in front of the patrol car, with his back to Petrenchak. 3/20/12 RP 62. As he did so, Petrenchak moved closer to Mortenson, in an effort to prevent himself from being placed in a vulnerable position between Mortenson and the other two individuals, who were still in the vehicle. 3/20/12 RP 62-64. Petrenchak continuously ordered Mortenson on the ground, telling him that he was under arrest. 3/20/12 RP 63. Mortenson refused to comply. Id.

All of a sudden Mortenson turned back toward Petrenchak, who was within a few feet of him. 3/20/12 RP 64. Petrenchak fired his Taser at Mortenson, but one of the probes did not penetrate Mortenson's clothing, vitiating the effect of the Taser. 3/20/12 RP 64-65. As Mortenson turned away again, Petrenchak closed the distance between them and placed the head of the Taser directly on Mortenson's back. 3/20/12 RP 66. Mortenson fell to the ground, but still refused Petrenchak's command to show his hands. Id. It required a second Taser application for Mortenson to comply. 3/20/12 RP 67. Petrenchak determined that Mortenson had been holding his car keys. Id.

King County Sheriff's Deputy Lee arrived to assist Petrenchak. 3/20/12 RP 67, 158. As they escorted Mortenson over to Petrenchak's

patrol vehicle, both officers smelled alcohol on Mortenson's breath. 3/20/12 RP 68, 159. Petrenchak described it as "strong." 3/20/12 RP 87. As Petrenchak spoke to Mortenson, he noticed that Mortenson slurred his speech to the point that it was difficult to understand what Mortenson was saying. 3/20/12 RP 68. Mortenson was belligerent, swearing at Sergeant Williams, who had also arrived on the scene. 3/20/12 RP 69. An aid car arrived to ensure that Mortenson was uninjured. 3/20/12 RP 70.

Mortenson's front seat passenger, Catherine Lowery, told Deputy Lee that Mortenson's driving was "erratic," that she was uncomfortable with his driving, and that she was "scared and concerned." 3/21/12 RP 36-37. Before Mortenson finally stopped the vehicle, Lowery held her arms out the vehicle to let the officers know that she "was in compliance." 3/21/12 RP 40.

When Petrenchak informed Mortenson that he was under arrest for DUI, Mortenson responded, "I haven't been drinking. Besides, I wasn't driving." 3/20/12 RP 78-79. Petrenchak also informed Mortenson of the implied consent warning for a breath test, to which Mortenson replied, "Fuck, let's go. I haven't been drinking." 3/20/12 RP 79-80.

Later, at the Auburn Jail, Deputy Petrenchak presented a written copy of the implied consent warning for a breath test to Mortenson, who signed it. 3/20/12 RP 81. After he signed the form, Mortenson told

Petrenchak that he wanted to speak to an attorney. 1/10/12 RP 61; 1/24/12 (DeCuire) RP 13. Petrenchak put Mortenson in touch with an attorney; after their conversation, Mortenson refused to provide a breath sample. 1/10/12 RP 62-63; 1/24/12 (DeCuire) RP 18-19, 52; 3/20/12 RP 83-84.

2. PRETRIAL MOTIONS.

By amended information, Mortenson was charged in the King County Superior Court with Attempting to Elude a Pursuing Police Vehicle, Felony Driving Under the Influence (“DUI”), Driving While License Suspended in the Second Degree, and Tampering with a Witness. CP 11-13. The State alleged that during the commission of the eluding, Mortenson’s actions endangered the physical safety of a person other than himself or the pursuing law enforcement officer. CP 11.

During pretrial motions in front of the Honorable Judge Gain, the State moved to dismiss the witness tampering charge. 1/10/12 RP 21-22. Mortenson pled guilty to Driving While License Suspended in the Second Degree. CP 55-62; 1/11/12 RP 13-24.

Because the Felony DUI charge required proof that Mortenson had at least four prior convictions for qualifying offenses within ten years,² Mortenson moved *in limine* to bifurcate the trial, and prohibit the State

² See RCW 46.61.502(6)(a); RCW 46.61.5055(4)(a); RCW 46.61.5055(14)(a).

from producing evidence of his prior convictions until after the jury first determined that he had driven under the influence. CP 14-19; 1/10/12 RP 30-32, 112-14. Judge Gain denied Mortenson's motion to bifurcate the trial, but agreed to bifurcate the jury instructions. 1/10/12 RP 114-16. Mortenson then agreed to stipulate that he had four prior qualifying convictions within ten years. CP 75-77; 1/24/12 (Runnels) RP 8-9.

Mortenson moved *in limine* to prohibit the State from introducing evidence that he had refused to submit to a breath test. CP 28; 1/10/12 RP 106-07. Mortenson argued that the evidence was of minimal relevance, and that it was more prejudicial than probative. 1/10/12 RP 107. Judge Gain denied Mortenson's motion to exclude evidence of his refusal to submit to a breath test, but determined that he was entitled to elicit on cross-examination that he had spoken to an attorney, and had only declined the test after doing so. 1/10/12 RP 111-12. The court prohibited the State from eliciting testimony during direct examination that Mortenson had requested to speak with an attorney. 1/10/12 RP 111; 1/11/12 RP 25-27.

In his written trial brief, Mortenson moved to suppress any statements, made by him during the incident, that were considered profanity, were racial slurs, or were threats of violence. CP 29. During pretrial motions, the court mentioned this written motion, but it was not

discussed, argued, or ruled on. 1/10/12 RP 20-22. Later, after testimony pursuant to CrR 3.5, Mortenson unsuccessfully requested that the court exclude his use of the word “fuck” in his statement, “Fuck, let’s go. I haven’t been drinking.” 1/10/12 RP 106. However, Mortenson struck his written motion, stating, “I didn’t hear any testimony about profanity or racial slurs. *So I’ll strike that motion.*” 1/10/12 RP 118 (emphasis added). Prior to Deputy Petrenchak’s and Deputy Lee’s testimony in front of the jury, the prosecutor informed the court that he had:

instructed [the officers] on all the court’s prior rulings. There will be no testimony regarding the defecation in the pants by Mr. Mortenson, there will be no discussion on direct about conversations with attorneys or the fact that he changed his mind with respect to taking the breath test after speaking to an attorney. I understand that [sic] court’s ruling was that Mr. Heiman can open that door if he wishes to. And so the State will not be going there, either.

1/24/12 (Runnels) RP 12.

3. THE TRIAL IN FRONT OF JUDGE GAIN.

The case proceeded to trial in front of Judge Gain. Deputy Petrenchak testified that during the incident, Mortenson’s speech was difficult to understand because it was slurred and laced with profanity.

1/24/12 (Runnels) RP 56. Mortenson did not object.

Later, the State asked Deputy Petrenchak about providing Mortenson with the implied consent warnings:

- Q. And the second go round of the implied consent warnings, did he express any confusion about what he had just read or what he had previously been read to [sic] by you?
- A. Only that at one point he asked to speak to an attorney after he had – I don't remember the exact order. Yeah. I don't remember anything specific that I would consider confusion.

1/24/12 (DeCuire) RP 13. Mortenson did not object. The prosecutor immediately moved on to another topic. Id. Later, during cross-examination, Mortenson elicited from Petrenchak that he had indeed spoken with a lawyer, and only changed his mind regarding the breath test *after* his conversation with the lawyer. 1/24/12 (DeCuire) RP 52.

On redirect examination of Petrenchak, the State elicited that Mortenson had privately spoken with an attorney for 17 minutes, and that he refused to take the breath test afterward. 1/24/12 (DeCuire) RP 56, 83-84. Mortenson specifically stated that he had *no* objection to the State's inquiry. 1/24/12 (DeCuire) RP 84.

Later, during Deputy Lee's testimony, the State asked about Mortenson's behavior at the Auburn Jail. 1/24/12 (DeCuire) RP 76. Lee responded, "His speech was slurred as far as I remember, and he was very belligerent, making racial comments toward me." Id. Mortenson objected. 1/24/12 RP (DeCuire) 77. Judge Gain sustained the objection

and instructed the jury to disregard Lee's statement. Id. After the jury was excused, Mortenson stated:

Your Honor, the only thing that defense is disappointed about that there was testimony about the racial slur, and it obviously has potential impact on the case. I know that the State informed the officer not to or the Deputy, and it was not intentional at all. But I'm concerned – I'll talk to my client about it.

1/24/12 (DeCuire) RP 84. The court indicated they would discuss it further the next morning and recessed. Id.

The following day, Mortenson requested a mistrial on the basis that Deputy Lee testified that Mortenson made a "racial slur" toward him after his arrest. 1/25/12 RP 3. Judge Gain granted the request for a mistrial, noting that Petrenchak had mentioned on direct examination that Mortenson had requested to speak to an attorney, and that the "racial comments" had been "the subject of a pretrial ruling."³ CP 78-79; 1/25/12 RP 6.

4. THE TRIAL IN FRONT OF JUDGE SMITH.

Following the mistrial, the case was reassigned to the Honorable Judge Lori Smith. Mortenson moved again to bifurcate the trial. 3/14/12 RP 22, 30-32. Judge Smith adopted Judge Gain's ruling and refused to bifurcate the trial, but agreed to bifurcate the jury instructions. 3/14/12 RP

³ However, as noted above, Judge Gain never ruled on a motion to exclude mention of Mortenson making racial slurs, as Mortenson withdrew that motion.

29, 32, 38. Again, Mortenson stipulated that he had four prior predicate convictions within ten years. CP 109-11, 137; 3/15/12 RP 5.

Judge Smith also adopted Judge Gain's ruling that the State could elicit the fact that Mortenson refused to provide a breath sample, but reiterated that the State was not permitted to mention that Mortenson requested, or spoke to, a lawyer. 3/14/12 RP 61. The court agreed that Mortenson himself could choose to present evidence that he spoke with a lawyer, should he choose to do so. Id.

Later, at Mortenson's request, the court decided not to bifurcate the jury instructions as it had previously indicated it would. 3/22/12 RP 62-63. Also at Mortenson's request, the court provided a limiting instruction to the jury regarding its consideration of the parties' stipulation to Mortenson's four prior convictions. CP 120.

The jury found Mortenson guilty of Attempting to Elude and Felony DUI. CP 139-40; 3/23/12 RP 3. The jury answered "no" to the special verdict question of whether a third person had been threatened with physical injury or harm during the commission of the eluding. CP 138; 3/23/12 RP 4.

Mortenson was sentenced on April 13, 2012. CP 142-52; 4/13/12 RP. He received a 60-month sentence for the Felony DUI and a

concurrent 29-month sentence for the Attempting to Elude. CP 145;
4/13/12 RP 33. He filed this timely appeal. CP 377.

C. **ARGUMENT**

1. **THE TRIAL COURT EXERCISED SOUND
DISCRETION WHEN DENYING MORTENSON'S
MOTION TO DISMISS THE JURY VENIRE.**

Mortenson argues that the trial court erred when it denied his motion to dismiss the venire after the court read from the Amended Information at the outset of jury selection. He claims that he was denied a fair trial because the court read the statutory citations for the crime of Felony DUI at the same time that it read the elements of the crime, including the element that the defendant has “at least four prior offenses as defined under RCW 46.61.5055(14)(a).” He reasons that the trial court’s reading of the statutory citations for Felony DUI (46.61.502 and 46.61.5055) resulted in the jury deducing that his “prior convictions pursuant to RCW 46.61.5055(14)(a)” were also for DUI.

This argument should be rejected because the trial court properly exercised its discretion in ruling that it was not necessary to dismiss the entire venire to ensure that Mortenson received a fair trial. The irregularity, if any, was not serious, and the trial court specifically instructed the jury that it was not to speculate about the nature of

Mortenson's prior convictions, nor consider them for any purpose other than establishing the necessary predicate convictions. This Court should not conclude that the potential connection between statutory citations was so prejudicial that nothing short of reversal would ensure Mortenson's right to a fair trial.

a. Relevant Facts.

At the start of jury selection, the court read from the Amended Information when it introduced the case to the jury:

The second count, the State alleges the crime of felony DUI... committed as follows: "The defendant, Chris Robert Mortenson, in King County, Washington, on or about August 21, 2010, drove a vehicle within this State while under the influence or affected by intoxicating liquor or any drug while under the combined influence of or affected by intoxicating liquor and any drug, having at least four prior offenses as defined under RCW 46.61.5055(14)(a) within 10 years of the arrest for the current offense contrary to RCW 46.61.502 and 46.61.5055 and against the peace and dignity of the State of Washington."

3/15/12 RP 23-24. Mortenson did not immediately object, but he raised the issue after the jury had been excused from the courtroom. 3/15/12 RP 46-47. Mortenson complained that the court had read the statutory citation for Felony DUI to the jury. *Id.* He reasoned that because the statutory citation for Felony DUI "mirrored" the statutory citation for the prior offense element, "[T]he jury now knows . . . that my client had four prior

DUI's." 3/15/12 RP 46. Although he admitted that "it may not take a genius to figure out" that the stipulation itself may mean that he had four prior DUIs, Mortenson nonetheless asked for a new jury pool. 3/15/12 RP 46-47, 50. The court denied Mortenson's request. 3/15/12 RP 50-51.

b. The Court Did Not Abuse Its Discretion When Denying Mortenson's Motion For A New Venire.

A defendant has a constitutional right to be tried by an impartial jury. U.S. Const. amend. VI, Wash. Const. art. I, § 22. When an element of the charged offense is the fact of a prior conviction, such evidence may prejudice the jury and deprive a defendant of his right to a fair trial. Old Chief v. United States, 519 U.S. 172, 174, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); State v. Johnson, 90 Wn. App. 54, 63, 950 P.2d 981 (1998). Although the court must accept a defendant's stipulation to a prior conviction to prevent the jury from hearing its details, the court need not shield the jury from all reference to the prior offense. State v. Roswell, 165 Wn.2d 186, 195, 196 P.3d 705 (2008) (citing Old Chief, 519 U.S. at 191, n.10). Indeed, "It is well established that admission of prior convictions, while prejudicial, does not necessarily deprive a defendant of a fair trial." Roswell, 165 Wn.2d at 195.

Here, in order to convict Mortenson of Felony DUI, the State had to prove that he had been previously convicted of "four or more prior

offenses within ten years as defined in RCW 46.61.5055.” CP 132; RCW 46.61.502(6)(a). RCW 46.61.5055(14)(a) defines a “prior offense” to include a DUI conviction under the state statute or an equivalent local ordinance. RCW 46.61.5055(14)(a)(i).⁴

In contrast to a crime such as unlawful possession of a firearm, where the defendant can “sanitize” his prior offense by presenting its existence generally as a “felony” or a “serious felony,” here the Felony DUI charge required the State to present evidence of specific prior convictions for one of the offenses defined in RCW 46.61.5055(14)(a). CP 132. Indeed, Mortenson’s stipulation itself reflects an acknowledgement of such a requirement. See CP 137. While Mortenson was entitled to a stipulation as to the existence of his prior convictions, he was not entitled to strip the element from the jury’s consideration entirely. Because the elements of the crime (even elements relating to prior convictions) play a crucial role in the determination of guilt, a defendant cannot stipulate to the existence of an element, thus

⁴ Additionally, a “prior offense” in this context also includes a conviction for physical control of a vehicle while under the influence (RCW 46.61.5055(14)(a)(ii)), vehicular homicide or vehicular assault committed while under the influence, or committed in a reckless manner if originally filed as being committed while under the influence (RCW 46.61.5055(14)(a)(iii), (iv)), negligent driving in the first degree, reckless driving or reckless endangerment, if originally filed as DUI, physical control, vehicular homicide or vehicular assault (RCW 46.61.5055(14)(a)(v)), any out-of-state equivalent offense (RCW 46.61.5055(14)(a)(vi)), and deferred prosecutions arising from one of these charges (RCW 46.61.5055(14)(a)(vii), (viii), (ix)).

preventing the jury from hearing of it entirely. Roswell, 165 Wn.2d at 195 (citing State v. Gladden, 116 Wn. App. 561, 566, 66 P.3d 1095 (2003)).

Accordingly, there was no error when the trial court introduced the case and recited to the jury the fact that Felony DUI includes an element that the defendant has “at least four prior offenses as defined under RCW 46.61.5055(14)(a).” Indeed, Mortenson does not argue otherwise. Rather, Mortenson criticizes the court’s reading of the statutory citation for Felony DUI, arguing that because it was read in conjunction with the element regarding prior offenses, it “demolished” his efforts to sanitize his prior convictions through a stipulation. See Brf. of Appellant at 15. Mortenson is wrong.

Here, the relevant question is whether the entire venire was so prejudiced that Mortenson could not receive a fair trial. As such, the court’s denial of his motion to dismiss the venire is akin to the denial of motion for a mistrial. See State v. Young, 129 Wn. App. 468, 479, 119 P.3d 870 (2005) (mistrial should have been granted when there was a substantial likelihood that prejudice affected the jury verdict). Therefore, the legal standards governing a motion for a mistrial should govern in these circumstances.

A trial court’s decision to deny a motion for a mistrial is reviewed for manifest abuse of discretion. State v. Greiff, 141 Wn.2d 910, 921,

10 P.3d 390 (2000) (citing State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). An appellate court will find an abuse of discretion only if no reasonable judge would have decided that a mistrial was not necessary. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A mistrial should be granted “only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly.” State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The reviewing court must give deference to the trial court’s judgment, as the trial judge is clearly in the best position to gauge whether such irreparable prejudice has occurred. Lewis, 130 Wn.2d at 707. See also State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991) (The trial court is in the best position to determine whether a juror can be fair and impartial based on mannerisms, demeanor, and general behavior).

Each case must be decided on its own facts, considering three factors: 1) the seriousness of the irregularity; 2) whether the error involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard the remarks. Young, 129 Wn. App. at 473 (citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). Even a fairly serious irregularity does not warrant a mistrial if it is relatively insignificant in the context of the entire record. See Hopson, 113 Wn.2d at 284-86 (a witness’s remark that the victim met the

defendant before “he went to the penitentiary the last time” was not prejudicial in light of the whole record and substantial evidence of guilt). In any case, jurors are presumed to follow the trial court’s instructions to disregard inadmissible evidence. Johnson, 124 Wn.2d at 77. Moreover, the issue must always be examined “against the backdrop of all the evidence” and in light of the record as a whole. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

This Court’s decision in Young is instructive. Young was charged with first-degree aggravated murder, first-degree assault, and first-degree unlawful possession of a firearm. The parties stipulated that Young had a prior conviction for a “serious offense,” and agreed not to disclose to the jury its nature. Young, 129 Wn. App. at 472. However, when the court introduced the case to the jury venire, it read directly from the information, informing them that the defendant was alleged to have been previously convicted “of a serious offense . . . to wit: Second Degree Assault.” Id. at 471. The trial court denied Young’s motion for a mistrial, but this Court reversed, finding that the disclosure was a “serious irregularity,” and that because it was not cumulative of other evidence, because there was no curative or limiting instruction given, and because the evidence of guilt was not overwhelming, the prejudicial nature of the disclosure was not harmless. Id. at 479.

This case is readily distinguishable from Young. First, the irregularity was not serious. Mortenson overstates the court's reading of the information as having "revealed that his prior offenses were for the same offense as the instant charge." Brf. of Appellant at 17-18. He then utilizes this flawed premise to conclude that "the entire venire learned that [he] had been previously convicted of four or more DUI offenses." Id. To accept Mortenson's argument, this Court must surmise that when the trial court read the statutory citation found at the very end of the elements of Felony DUI: "contrary to RCW 46.61.502 and 46.61.5055 and against the peace and dignity of the State of Washington," the jury recognized this statutory citation was the "same" as the statutory citation previously referred to in the element for predicate convictions, and then deduced from there that Mortenson had at least four prior DUI convictions. However, it is unlikely that any of the jurors followed such a mental process, memorizing a statutory citation, recognizing it again later, and then drawing the conclusion Mortenson asks.

Mortenson's attempt to bolster this hypothesis with the comments of one juror is unpersuasive. He points out that during jury selection, juror 31 stated, "I think that if people have prior convictions that they should get a designated driver if they chose [sic] to drink," and later said, "I just heard prior that the defendant had four prior convictions or

something such as that that someone said. I believe the Judge stated that.”
3/15/12 RP 79-80. Juror 31 said that it would be hard for her to be fair
“with four prior convictions.” 3/15/12 RP 81. She was excused for cause.
Id.

However, juror 31’s conclusion that Mortenson may have “four
prior convictions or something such as that,” could easily have been drawn
from the simple fact that the elements of Felony DUI include an element
that a defendant has four or more prior convictions. Even if juror 31 (or
other jurors) concluded that the four prior convictions were for DUI
specifically,⁵ that is something that could be inferred simply from the
court reading the elements of the charge to the jury—not because the
jurors went through the unlikely intellectual task of following a link
between statutory citations.

Indeed, when the court read the charges, the jury heard that the
State alleged that Mortenson drove a vehicle in the State of Washington
while under the influence of or affected by alcohol, having at least four
prior offenses within 10 years of the arrest for the current offense. 3/15/12
RP 23-24. As Mortenson himself pointed out, “it may not take a genius to
figure out” that he had four prior DUI convictions. 3/15/12 RP 46-47, 49.

⁵ Although, as noted above, Mortenson’s prior convictions did not have to be for DUI,
as other related offenses qualify as predicate convictions under the statute.
RCW 46.61.5055(14)(a).

Additionally, Mortenson had a full opportunity to question individual jurors regarding their ability to be fair in light of the charges as read by the court. See 3/15/12 84-103, 123-46. The “irregularity” of reading the statutory citation for Felony DUI was not serious.

Moreover, the jury was specifically instructed that they were not to speculate on the nature of Mortenson’s prior convictions, that they were not to consider the evidence for any purpose other than whether the State had proved the element of Felony DUI regarding prior convictions, and, more specifically, that they were not to consider the evidence of his prior convictions when determining whether Mortenson drove under the influence in this instance. CP 120. A jury is presumed to follow the court’s instructions. State v. Yates, 161 Wn.2d 714, 763, 168 P.3d 359 (2007).

Finally, the evidence that Mortenson drove under the influence was overwhelming in this case. He was speeding, refused to stop for Deputy Petrenchak, drove erratically, crossing the center lanes and fog line several times, smelled strongly of alcohol, staggered and stumbled out of his car, refused to cooperate with Deputy Petrenchak’s commands, slurred his speech to the point that he was difficult to understand, and refused to take a breath test. Moreover, his passenger admitted that they had just spent

time at a bar prior to being stopped. 3/20/12 RP 40-47, 53-54, 59-63, 68, 83-87, 159; 3/21/12 RP 32-33.

Unlike Young, the irregularity here, if any, was slight, there was a proper limiting instruction given to the jury, and the evidence was so substantial that it is unlikely that unfair prejudice affected the jury's verdict. In sum, the record does not support Mortenson's claim that the entire venire was tainted to such a degree that a new venire was necessary to ensure a fair trial. Mortenson has not shown that the trial court abused its discretion, and this Court should affirm.

2. THE JURY INSTRUCTIONS PROPERLY INFORMED THE JURY THAT IT MUST BE UNANIMOUS TO REACH A VERDICT.

Mortenson next claims that because the language of the concluding jury instruction relating to the Felony DUI charge differs from the language relating to the Attempting to Elude/Failure to Obey charge, the instructions violated his right to a unanimous verdict.

His argument should be rejected. First, he agreed with the instruction below, and has thus waived his right to present this error for the first time on appeal. Additionally, the court instructed the jury based upon the Washington State Pattern instructions, and when considered as a

whole, it was manifestly apparent to the jury that unanimity was required to reach a verdict as to the Felony DUI charge.

a. Mortenson Is Precluded From Raising This Issue For The First Time On Appeal.

CrR 6.15(c) requires timely and well-stated objections by counsel to the instructions given. The purpose of the court rule is to provide the trial court with the opportunity to correct any errors before instructing the jury. State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492, 494 (1988). Similarly, RAP 2.5(a) requires a defendant to object in the trial court unless the instruction constitutes a “manifest error affecting a constitutional right.” To raise an issue not previously preserved, an appellant must show that (1) the error is manifest, and (2) the error is truly of constitutional dimensions. State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). This Court should not “sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” O’Hara, 167 Wn.2d at 98 (quoting Scott, 110 Wn.2d at 685).

Here, Mortenson agreed with the concluding instruction provided. 3/22/12 RP 61-62. Thus, in order for this Court to address his claim, Mortenson must first identify a constitutional error, and then he must show how the asserted error *actually affected* his rights at trial.

State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). “It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” Id. (citing State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1992)). In this context, “manifest” means “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Only after the court determines that the claim does in fact raise a manifest constitutional error does it move on to a harmless error analysis. McFarland, 127 Wn.2d at 333.

For all the reasons stated below, Mortenson cannot meet his burden to show that there was any instructional error, of constitutional magnitude or otherwise, or even if there was, that it actually affected his rights. Because he agreed to the instruction in the trial court, Mortenson did not properly preserve this claim.

- b. The Jury Instructions Properly Informed The Jury That A Unanimous Decision Was Required To Render A Verdict.

Jury instructions are reviewed de novo for errors of law, evaluating the allegedly deficient instruction in the context of the instructions as a whole. State v. Sublett, 176 Wn.2d 58, 78, 292 P.3d 715 (2012) (citations omitted). Jury instructions must make the relevant legal standard

“manifestly apparent to the average juror.” State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (citing State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)). Jury instructions are sufficient if they are “readily understood and are not misleading to the ordinary mind.” State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Moreover, so long as instructions, when read as a whole, properly inform the jury of the applicable law, the trial court has considerable discretion as to how to word individual instructions. State v. Aguirre, 168 Wn.2d 350, 363-64, 220 P.3d 669 (2010); State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992).

A criminal defendant has the right to a unanimous jury verdict. Wash. Const. art. I, § 21; State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). Washington Pattern Jury Instruction - Criminal (“WPIC”) 151.00 is the pattern concluding instruction for basic charges with no lesser offenses. It tells the jury:

You must fill in the blank provided in [*the*] [*each*] verdict form the words “not guilty” or the word “guilty”, according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision.

The pattern concluding instruction found in WPIC 155.00 is to be used for charges that include lesser offenses:

When completing the verdict forms, you will first consider the crime of _____ as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words “not guilty” or the word “guilty”, according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B [or C]. If you find the defendant not guilty of the crime of _____, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of _____. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words “not guilty” or the word “guilty”, according to the decision you reach. *[If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B].*

In Mortenson’s case, count one (Attempting to Elude) included a lesser offense (Failure to Obey). However, count two, Felony DUI, had no lesser offenses. As a result, the trial court’s concluding instruction was a hybrid of WPIC 151.00 and 155.00. The jury was instructed in relevant part:

When completing the verdict forms, you will first consider the crime of Attempting to Elude a Pursuing Police Vehicle as charged. If you unanimously agree on a verdict, you must fill in the blank provided in the verdict form A the words “not guilty or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of Attempting to Elude a Pursuing Police Vehicle, or if after full and careful consideration of the

evidence you cannot agree on that crime, you will consider the lesser crime of Failure to Obey Officer. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words “not guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

You must fill in the blank provided in the verdict form C with the words “not guilty” or the word “guilty”, according to the decision you reach.

...

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision.

CP 134-35 (Instruction 17).

Mortenson argues that Instruction 17 requires reversal because the language that informs the jury how to approach verdict form C did not include the words, “If you unanimously agree” and “[i]f you cannot agree on a verdict, do not fill in the blank.” He surmises that because this language *was* used with respect to verdict forms A and B, the jury could have been confused into thinking unanimity *was not* required as to verdict form C, and may have filled in the word “guilty” when in fact they were unable to agree. This argument is not persuasive.

As an initial matter, Mortenson neglects to cite to WPIC 151.00 or the fact that the trial court’s instruction “[Y]ou must fill in the blank provided in the verdict from C with the words ‘not guilty’ or the word

‘guilty’, according to the decision you reach” is taken word-for-word from this long-approved pattern instruction.⁶ Even so, Mortenson makes no argument that this language, by itself, is erroneous. Nor could he. Instead, he takes the unlikely position that the act of combining WPIC 151.00 and WPIC 155.00 resulted in confusion, because there was an *extra* reminder regarding unanimity when instructing the jury how to assess the charges relating to count one.

Even assuming such an ambiguity could possibly exist, it was clarified in the concluding paragraph of Instruction 17, which applies to all of the charges and verdict forms, and stated:

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

CP 135. This language, and its placement at the very end of the instruction, made it manifestly apparent to the jury that unanimity was required to reach a verdict as to any and all charges.

⁶ Mortenson argues, “The WPIC-proposed language was included in the concluding instruction with regard to verdict form A (attempting to elude) and verdict form B (the lesser-included failure to obey). But as to verdict form C, regarding the DUI charge, the court’s instruction simply stated, “You must fill in the blank provided in verdict form C with the words ‘not guilty’ or the word ‘guilty’, according to the decision you reach.” Brf. of Appellant at 24.

Moreover, the jury was specifically told that it “must consider the instructions as a whole.” CP 116 (Instruction 1). In Instruction 2, the court further clarified:

As jurors, you have a duty to discuss the case with one another and to deliberate ***in an effort to reach a unanimous verdict***. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors.

...

You should not however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

CP 117 (Instruction 2) (emphasis added). Finally, the “to-convict” instruction for Felony DUI told the jurors that if they had “a reasonable doubt as to any one of [the elements], then it will be your duty to return a verdict of not guilty as to count II.” CP 132 (Instruction 16).

Despite Mortenson’s claim, in light of the instructions as a whole, it was manifestly apparent to the jury that unanimity was required to reach a verdict on the Felony DUI charge. Mortenson’s argument should be rejected.

c. Any Error Was Harmless.

Even if an instruction is misleading, reversal is unwarranted unless the defendant shows prejudice. Aguirre, 168 Wn.2d at 364 (citing

Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)). The State must show that the failure to accurately instruct the jury as to unanimity is harmless beyond a reasonable doubt. State v. Williams, 136 Wn. App. 486, 496, 150 P.3d 111 (2007) (citing State v. Kitchen, 110 Wn.2d 403, 406, 756 P.2d 105 (1988)).

As noted, there was overwhelming, uncontested evidence that Mortenson drove under the influence and that he had four or more prior qualifying offenses. Mortenson was speeding, refused to stop for a pursuing police car with lights and siren activated, drove erratically, crossing the center lanes and fog line several times, smelled strongly of alcohol, staggered and stumbled out of his car, refused to cooperate with arresting officers, slurred his speech to the point that he was difficult to understand, had bloodshot, watery eyes, and refused to take a breath test. 3/20/12 RP 40-47, 53-54, 59-63, 68, 83-87, 159. Mortenson's passenger, Catherine Lowery, admitted that they had just spent time at a bar prior to being stopped. 3/21/12 RP 32-33. She told police officers that Mortenson's driving was "erratic," and that she was "uncomfortable" with it. 3/21/12 RP 36-37. Contrary to Mortenson's claims, Lowery's statement was not discredited or contradicted by her testimony at trial; she merely testified that she could no longer "recall" details of the evening. 3/21/12 RP 34-37.

In the unlikely event that this Court determines that the jury instructions violated Mortenson's right to a unanimous jury, any error was harmless beyond a reasonable doubt.

3. THE COURT PROPERLY ADMITTED EVIDENCE OF MORTENSON'S REFUSAL TO SUBMIT TO A BREATH TEST.

Mortenson argues that the court erred when it admitted evidence that he initially agreed to submit to the BAC test, but later changed his mind. Mortenson argues that this evidence should have been excluded as more prejudicial than probative, and that it interfered with his constitutional right to counsel. However, Mortenson did not object below to the admission of the evidence on the basis that it interfered with his right to counsel. Thus, he has not properly preserved that claim. Additionally, because the trial court properly exercised its discretion in admitting the evidence, Mortenson is not entitled to relief.

a. Mortenson Is Precluded From Arguing That His Right To Counsel Was Violated.

As outlined above, a defendant is generally precluded from raising an issue for the first time in the appellate courts. RAP 2.5(a). Additionally, "A party may only assign error in the appellate court on the *specific* ground of the evidentiary objection made at trial." State v. Elkins, 152

Wn. App. 871, 878, 220 P.3d 211 (2009) (quoting State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)) (emphasis added). See also ER 103(a)(1) (timely objection, stating the specific grounds, is required for claim of error). An exception to this general rule is made when the appellant demonstrates that the error complained of constitutes manifest constitutional error. RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 926-27.

At trial, Mortenson objected to the admission of his refusal to take the BAC test solely on the basis that it was more prejudicial than probative. CP 28; 1/10/12 RP 106-07; 3/14/12 RP 61, 63-64. He did not argue that it interfered with his right to counsel by violating the attorney-client privilege.⁷ Therefore, unless he demonstrates manifest constitutional error, he has not preserved this claim.

The right to counsel under article I, section 22 and the Sixth Amendment attach when formal judicial criminal proceedings have been initiated. State v. Templeton, 148 Wn.2d 193, 218-19, 59 P.3d 632 (2002) (citing Heinemann v. Whitman Cy., 105 Wn.2d 796, 800, 718 P.2d 789 (1986)); Kirby v. Illinois, 406 U.S. 682, 689-90, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). When Mortenson refused to provide a breath sample, he was under arrest, but he had not yet been formally charged or cited with a crime. As such, Mortenson had no right to counsel under the

⁷ Mortenson claims that he objected below on the ground that the evidence was a violation of the attorney-client privilege. See Brf. of Appellant at 28. The record simply does not support his assertion.

Sixth Amendment or art. I, sec. 22.⁸ Therefore, Mortenson's claim, that the court's ruling interfered with his right to counsel, is not a *constitutional* claim of error, and review is precluded under RAP 2.5(a).

b. Even If This Court Considers Mortenson's Claim, It Is Meritless.

Even if this Court considers this claim for the first time, it must be rejected. A defendant is entitled to attorney-client confidentiality. RCW 5.60.060(2)(a). The privilege applies to communication and advice between an attorney and client. State v. Perrow, 156 Wn. App. 322, 328, 231 P.3d 853 (2010). Mortenson confuses the privilege of confidential attorney-client communication with the non-communicative act of his refusal. See Seattle v. Stalsbroten, 138 Wn.2d 227, 233-38, 978 P.2d 1059 (1999) (refusal to submit to sobriety test is a non-testimonial act); State v. Athan, 160 Wn.2d 354, 368-69, 158 P.3d 27 (2007) (admission of defendant's saliva was not communication implicating attorney-client privilege).

The trial court made clear that there would be no inquiry into the substance of any communication between Mortenson and the lawyer.

⁸ Because he was under arrest, Mortenson had a rule-based right to counsel under CrR 3.1(b). Templeton, 148 Wn.2d at 211. See also City of Spokane v. Kruger, 116 Wn.2d 135, 139, 803 P.2d 305 (1991) (distinguishing rule-based right from constitutional right). However, Mortenson makes no argument that his rights under CrR 3.1(b) were violated; he claims that his *constitutional* right to counsel was interfered with.

3/14/12 RP 63-64. Mortenson was free to inquire as to the timing of the refusal (that it came *after* he spoke to a lawyer) and to argue that the refusal was the result of their conversation, not consciousness of guilt.

3/14/12 RP 63-64. Mortenson's decision to discuss (or not to discuss) this fact was voluntary and strategic.⁹ See 3/20/12 RP 120-22. He provides no persuasive authority to support his wholesale claim that a defendant can exclude evidence that he created, merely because he spoke to a lawyer.

Mortenson cites to State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2012) in support of his argument that his refusal to submit to a BAC was inadmissible. In that case, after consulting with a lawyer, the defendant refused to voluntarily provide a DNA sample for comparison purposes. 174 Wn. App. at 261. At trial, the State introduced his refusal as substantive evidence of his guilt. This Court determined that because Gauthier had a Fourth Amendment right to refuse a warrantless sampling of his DNA, the introduction of his lawful exercise of that right as substantive evidence against him was impermissible. 174 Wn. App. at 267.

⁹ The court ruled that if Mortenson questioned Deputy Petrenchak about his decision to speak to an attorney, the State could bring up evidence of Mortenson's general demeanor (belligerent, insulting and rude) during that time frame. 3/20/12 RP 110-22. While it is unclear why this evidence would not have been independently admissible, Mortenson's attorney made the tactical decision not to open this door.

Unlike Gauthier, Mortenson had no constitutionally protected right to refuse the BAC test. Washington drivers are presumed to have consented to a breath or blood test to determine alcohol concentration if arrested for DUI. RCW 46.20.308(1). Although they may choose to refuse the test, such choice “is not a constitutional right, but rather a matter of legislative grace.” State v. Bostrom, 127 Wn.2d 580, 590, 902 P.2d 157 (1995). Stated differently, evidence of Mortenson’s refusal is not improper evidence of his exercise of a constitutional right because no such right existed. See State v. Long, 113 Wn.2d 266, 271-72, 778 P.2d 1027 (1989) (holding there are no constitutional barriers prohibiting the admission into evidence of a suspect’s refusal to submit to a breath test after being given implied consent warnings (citing State v. Zwicker, 105 Wn.2d 228, 713 P.2d 1101 (1986))). Gauthier is inapposite.

Finally, in one sentence with no supporting authority, Mortenson claims that admission of his refusal violated his right “to remain silent.” Brf. of Appellant at 33. As noted above, Mortenson’s refusal to submit to a BAC test is not testimonial evidence, and thus there was no Fifth Amendment prohibition on its admission at his trial. Stalsbroten, 138 Wn.2d at 237-38. Mortenson’s constitutional challenges to the admission of the evidence fail.

c. The Court's Admission Of The Evidence Was A Proper Exercise Of Discretion.

Mortenson claims that the refusal evidence was more prejudicial than probative, and as such, should have been excluded under ER 403. Because the court properly exercised its discretion when it decided that the evidence was relevant and highly probative, this claim fails.

A decision to admit or exclude evidence is reviewed for abuse of discretion. State v. Griswold, 98 Wn. App. 817, 823, 991 P.2d 657 (2000). "A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds, or its discretion is exercised for untenable reasons." State v. Cohen, 125 Wn. App. 220, 223, 104 P.3d 70 (2005) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). A court acts unreasonably "if its decision is outside the range of acceptable choices given the facts and the legal standard." Id.

Washington drivers are deemed to have consented to a breath test to determine alcohol concentration when police have reasonable grounds to request the test pursuant to a DUI investigation. RCW 46.20.308(1), (2). A driver can choose to refuse a breath test, but penalties ensue, such as suspension of a driver's license. RCW 46.20.308(7). Moreover, RCW 46.61.517 provides that such a refusal is "admissible into evidence at a subsequent criminal trial." The relevance is obvious: because a BAC

test provides strong evidence of guilt or innocence, a “driver’s refusal to take the test is evidence of guilty knowledge.” Cohen, 125 Wn. App. at 222. Although relevant, evidence may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Such a balancing must be applied to the particular facts of each case. Cohen, 125 Wn. App. at 226. The trial court does not need to state its analysis on the record. Cohen, 125 Wn. App. at 225 (citing State v. Gould, 58 Wn. App. 175, 184, 791 P.2d 569 (1990)).

Evidence of Mortenson’s refusal to take the BAC test was highly probative of his knowledge that he was under the influence. That there may have been other explanations for his refusal (such as the advice of counsel) did not create unfair prejudice that substantially outweighed its probative value. Judge Gain correctly concluded that Mortenson could properly challenge the weight of the evidence by introducing the fact that he refused only after talking to an attorney; that fact alone did not defeat the admissibility of the evidence. 1/10/12 RP 111-12.

Judge Gain’s decision to admit evidence that Mortenson initially appeared to agree to the BAC and then later refused, was a proper exercise of discretion. Mortenson did not challenge Judge Smith’s later decision to adopt Judge Gain’s ruling. 3/14/12 RP 63-64. This Court cannot say that Judge Gain’s decision was “outside the range of acceptable choices,” or

that no reasonable judge would have concluded that the refusal was admissible.

Mortenson claims that “[t]he prosecution was well aware Mr. Mortenson changed his mind about submitting to a breath test *based upon* a telephone conversation with counsel.” Brf. of Appellant at 30 (emphasis added). He then goes on to argue that the State “capitalized” on the opportunity to argue Mortenson’s change of heart demonstrated his intoxication. Brf. of Appellant at 32. Mortenson assumes too much. The prosecutor did not know what the attorney advised Mortenson to do or not to do. See 1/10/12 RP (Deputy Petrenchak testified that after the attorney spoke to Mortenson, the attorney told Petrenchak that Mortenson was ready to be asked about the BAC, but “thought that he was probably going to refuse.”). The State knew only that Mortenson, after initially expressing some agreement (“Fuck, let’s go. I haven’t been drinking), later declined to take the test after being brought to the Auburn Jail, being advised of and signing his implied consent warnings in writing, and speaking to a lawyer. Mortenson’s refusal was highly probative of his intoxication, and because the trial court appropriately found that it was admissible, the State properly relied on it.

4. THE STATE PRESENTED SUFFICIENT EVIDENCE OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

Next, Mortenson argues that there was insufficient evidence to support his conviction for Attempting to Elude a Pursuing Police Vehicle. Specifically, he claims that no rational trier of fact could find from the evidence presented that he drove in a reckless manner. However, the State's evidence showed that during the time that he refused to stop his vehicle in response to Deputy Petrenchak's lights and sirens, Mortenson drove in a rash and heedless manner, indifferent to the consequences. Mortenson's claim should be rejected.

Evidence is sufficient if, taken 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. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Id. (citation omitted). In assessing the sufficiency of the evidence, circumstantial evidence is as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

An appellate court defers to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

A person is guilty of eluding if he willfully fails or refuses to immediately bring his vehicle to a stop, and drives in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to stop. RCW 46.61.024(1). Driving in a “reckless manner” means that a person drives in a rash or heedless manner, indifferent to the consequences. CP 124; State v. Roggenkamp, 153 Wn.2d 614, 622, 106 P.3d 196 (2005) (citing State v. Bowman, 57 Wn.2d 266, 270-71, 356 P.2d 999 (1960)). There is no requirement that there be a probability of harm. See State v. Whitcomb, 51 Wn. App. 322, 327, 753 P.2d 565 (1988) (even under the previous “willful and wanton” standard, State not required to prove that anyone was endangered by the defendant’s conduct or that a high probability of harm existed).

A rational fact-finder could easily conclude that Mortenson drove in a reckless manner. Just prior to Deputy Petrenchak signaling to him to stop, Mortenson had been driving 20 miles per hour over the speed limit on a two-lane road. 3/20/12 RP 39-41. After Petrenchak caught up to Mortenson, Mortenson continued to speed at approximately 60 miles per

hour (15 miles per hour over the speed limit) until Mortenson eventually slowed to make a turn. 3/20/12 RP 50. During the time that he refused to stop for Deputy Petrenchak, Mortenson crossed both the centerline and the fog line a number of times. 3/20/12 RP 46-47. Petrenchak characterized Mortenson's driving as "erratic." 3/20/12 RP 47. Mortenson made quick, multiple turns on narrow residential roads,¹⁰ failing to utilize his turn signal and driving down the middle of the streets, on which there were no lane dividers. 3/20/12 RP 54, 126-27. When he finally came to a stop, Mortenson pulled into the oncoming lane and stopped the vehicle at an angle, blocking the roadway. 3/20/12 RP 54-55. After Mortenson was arrested, his passenger told Deputy Lee that Mortenson's driving had been "erratic," that it had made her uncomfortable, and that she was "very scared and concerned." 3/21/12 RP 36-38.

Based on the evidence presented by the State, a rational juror could determine beyond a reasonable doubt that Mortenson drove in a rash and heedless manner, indifferent to the consequences. Mortenson's claim must be rejected.

¹⁰ "Redeposition" appears several times in the transcript. It is clear from the context that the speakers were saying "residential." See 3/20/12 RP 54, 125-26.

**5. MORTENSON DID NOT RECEIVE A
FUNDAMENTALLY UNFAIR TRIAL.**

Mortenson argues that the cumulative error doctrine warrants reversal. His claim must be rejected because he was not denied a fair trial.

The cumulative error doctrine applies where several trial errors occurred which, standing alone, may not be sufficient to justify reversal, but when combined, may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004) (citing Greiff, 141 Wn.2d at 929). To seek reversal pursuant to the “accumulated error” doctrine, the defendant must establish the presence of *multiple* trial errors, and show that accumulated prejudice affected the verdict. The doctrine does not apply to cases where the defendant has failed to establish multiple errors, or where the errors that have occurred have “had little or no effect on the outcome at trial.” Greiff, 141 Wn.2d at 929; see also State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (errors included discovery violations, three types of bad acts evidence being improperly admitted, the impermissible use of hypnotized witnesses, and improper cross examination of the defendant); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (errors included improper hearsay about the details of child sex abuse and the abuser’s identity, the court

challenging defense counsel's integrity in front of the jury, a counselor vouching for the victim's credibility, and prosecutorial misconduct).

Here, Mortenson has failed to establish any error. Thus, he cannot obtain reversal based on the cumulative error doctrine. Moreover, even if multiple errors occurred, Mortenson has failed to establish that such errors materially affected the outcome of the trial. His claim that cumulative error denied him a fair trial must be rejected.

6. MORTENSON'S OFFENDER SCORES FOR BOTH ATTEMPTING TO ELUDE AND FELONY DUI ARE PROPERLY CALCULATED AS "15."

Mortenson argues that his offender scores on both counts were improperly calculated. Specifically, Mortenson claims that: (1) the only prior convictions that can count toward his offender score for the Felony DUI are listed in RCW 9.94A.525(2)(e)(ii), and include only his serious traffic offenses occurring within ten years from his current arrest date, and (2) his offender score for both the Felony DUI and the Eluding charge erroneously included a point for his 2001 Negligent Driving conviction. The State concedes that the sentencing court erroneously included one point toward each of Mortenson's offender scores for his 2001 Negligent Driving conviction. However, Mortenson's remaining claims are

meritless. Mortenson's offender scores for both the Eluding and the Felony DUI are properly calculated at "15."

Mortenson further claims that the State failed to adequately prove the existence and comparability of his criminal history. He is wrong. The State produced sufficient documentation for the sentencing court to find by a preponderance of the evidence that the convictions existed and properly counted toward Mortenson's offender scores.

- a. The SRA Does Not Limit The Prior Convictions That Count Toward An Offender Score For Felony DUI Solely To Those Offenses Outlined in RCW 9.94A.525(2)(e).

Mortenson contends that the only convictions that can count toward his offender score for the Felony DUI charge are those outlined in RCW 9.94A.525(2)(e), and more specifically, subsection (ii) of that statute. Mortenson is wrong. RCW 9.94A.525(2)(e) merely speaks to when a defendant's prior convictions for Felony DUI/Felony Physical Control and serious traffic offenses "wash out" when scoring a present conviction for Felony DUI or Felony Physical Control.

A sentencing court's offender score calculation is reviewed de novo. State v. Wilson, 113 Wn. App. 122, 136, 52 P.3d 545 (2002), rev. denied, 149 Wn.2d 1006 (2003). Generally speaking, a criminal defendant does not waive a challenge to a miscalculation of an offender

score by failing to object in the sentencing court. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). This is because a sentence based on an improperly calculated score lacks statutory authority. Id.

The meaning of a statute is a question of law reviewed de novo. State v. Ammons, 136 Wn.2d 453, 456, 963 P.2d 812 (1998). The court's fundamental objective in reading a statute is to "discern and implement the intent of the legislature." Id. (quoting State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). If a statute's plain meaning is unambiguous, it is given that effect. Id. "Such meaning is derived from all that the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question." State v. Morales, 168 Wn. App. 489, 492, 278 P.3d 668 (2012) (citations omitted). Related provisions must be read together to achieve a harmonious result. State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (2000).

RCW 9.94A.525 governs offender score calculation. Both Attempting to Elude and Felony DUI are "felony traffic offenses." Former RCW 9.94A.030(24)(a) (2009). When the offense being scored is a "felony traffic offense":

count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; ***for each felony offense count one point for each adult and ½ point***

for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and ½ point for each juvenile prior conviction;
count one point for each adult and ½ point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

Former RCW 9.94A.525(11) (2008) (emphasis added). Thus, under the plain language of the RCW 9.94A.525, for both Mortenson's Eluding and his Felony DUI conviction, one point is added to his offender score for each of his adult felony convictions, and one point is added for each of his adult "serious traffic offenses."

Other sections of RCW 9.94A.525 govern when prior convictions "wash out," or *do not* count, toward the calculation of the offender score.

The pertinent portions of the statute are as follows:

(2)(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community

without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered “prior offenses within ten years” as defined in RCW 46.61.5055.

Former RCW 9.94A.525 (2008).

Because Mortenson has never been crime-free for a period of five years between March of 1998 and September 2005,¹¹ none of his five felony convictions wash out pursuant to RCW 9.94A.525(2)(c). Similarly, with respect to count one (the Eluding charge) none of Mortenson’s prior convictions for “serious traffic offenses” wash out under RCW 9.94A.525(2)(d). However, because count two is a Felony DUI, RCW 9.94A.525(2)(e), rather than RCW 9.94A.525(2)(d), dictates when Mortenson’s prior convictions for “serious traffic offenses” wash out with respect to that charge.

¹¹ CP 148, 156-376.

In Morales, supra, this Court discussed how to apply the wash out provisions of RCW 9.94A.525(2)(e). Morales was convicted of Felony DUI. 168 Wn. App. at 491. Morales had three prior “serious traffic offenses” within ten years of the date of his arrest for the current Felony DUI being scored. The parties agreed that, under subsection (ii), those offenses scored, i.e., they did not wash out. 168 Wn. App. at 494. However, Morales had four “serious traffic offenses” from the early 1990s, outside the ten-year window. With respect to those prior convictions, the parties disagreed on whether to score them.

The State argued that the convictions counted under RCW 9.94A.525(2)(e)(i), which provides that prior convictions for Felony DUI/Felony Physical Control/serious traffic offenses are included if “committed within five years since the last date of release from confinement ... or entry of judgment and sentence.” Though nine years had passed between Morales’s 1992 conviction for physical control of a motor vehicle and his next DUI conviction in 2001, the State argued that his 1996 misdemeanor assault conviction prevented the DUI offenses from the early 1990s from washing out. Id. at 496-97.

This Court disagreed, holding that “‘the prior convictions’ to which subsection (2)(e)(i) refers are the specific convictions outlined in the immediately preceding provision of the statute.” Id. at 497-98. In other

words, only convictions for “felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor, or any drug and serious traffic offenses,” operate to prevent wash out under subsection (i). Since Morales’s misdemeanor assault was not a conviction for one of those crimes, it did not prevent the earlier DUI convictions from washing out. Id.

In sum, RCW 9.94A.525(2)(e), and Morales, are properly read as follows: When scoring a present conviction for Felony DUI or Felony Physical Control, prior convictions for “serious traffic offenses” and Felony DUI/Felony Physical Control score if *either* of the following exist: (1) they are within ten years of the date of arrest for the current offense, *or* (2) no matter the date, the intervals between release from confinement or judgment and sentence on one serious traffic offense/Felony DUI/Felony Physical Control and the date of the next serious traffic offense/felony DUI/Felony Physical Control is five years or less. See Morales, 168 Wn. App. at 498 (“subsection (2)(e)(i) specifies that the qualifying priors for scoring purposes are those within five year intervals of “release from confinement (including full-time residential treatment) or entry of judgment and sentence.”) Stated differently, once a defendant has completed a five-year window with no convictions for serious traffic offenses or Felony

DUI/Felony Physical Control, all prior convictions for those offenses wash, unless they are within ten years of the date of the current arrest.

- i. Mortenson's offender score for Felony DUI properly includes five points for his five prior felony convictions.

As outlined above, Former RCW 9.94A.525(11) (2008) requires that when scoring Mortenson's Felony DUI charge, one point is added for each of his four prior felonies, and one point is added for his other current felony offense of Eluding.¹² Thus, the trial court properly included five points for Mortenson's felony convictions in his offender score for the Felony DUI charge.

Relying on Morales, Mortenson contends that this was error, claiming the only offenses that count when an offender is sentenced for felony DUI are those that are listed in RCW 9.94A.525(2)(e). As outlined above, Mortenson misinterprets Morales.

Morales does not support the assertion that the *only* prior convictions that count in calculating an offender score for one convicted of felony DUI are for those offenses listed in subsection (2)(e). Rather, Morales is properly understood as stating that the *only convictions that can prevent wash-out* of a defendant's prior convictions for Felony DUI/Felony

¹² RCW 9.94A.589(1)(a) dictates that other current offenses are considered "prior convictions" for scoring purposes.

Physical Control/serious traffic offenses *are other convictions* for Felony DUI/Felony Physical Control/serious traffic offenses within the statutory five-year interval. 168 Wn. App. at 497-98. Indeed, one need look no further than the facts of Morales itself to conclude that Mortenson is wrong.

In addition to the Felony DUI, Morales was simultaneously sentenced for the crime of Eluding—just like Mortenson. 168 Wn. App. at 491. The court stated that, “Subsection (2)(e)(ii) . . . requires that his three most recent prior [serious traffic] convictions be included in his offender score. His current conviction of the crime of attempting to elude is scored as 1. Therefore, his correct offender score is 4.” 168 Wn. App. at 500-01. Just like Morales, Mortenson’s felony convictions were properly counted in his offender score for the Felony DUI charge.

Mortenson’s claim that the legislature “was not concerned with unrelated class C felony offenses” is not supported by the authority he cites in support of it. Mortenson cites to the Bill Reports for H.B. 3317, 59th Leg., Reg. Sess. (Wash. 2006), in support of his argument that the legislature’s intent was not to include unrelated felonies in the offender score for DUI. However, the plain language of the Bill Reports themselves (copies of which are attached to this brief) do not support such a conclusion. Rather, the plain language of RCW 9.94A.525(2)(e), considered along with the related section

RCW 9.94A.525(11), makes clear that Mortenson's felony convictions were properly scored.

- ii. All of Mortenson's prior convictions for "serious traffic offenses" are properly included in his offender score for Felony DUI.

In contrast to the defendant in Morales, none of Mortenson's prior convictions for "serious traffic offenses" wash-out under RCW 9.94A.525(2)(e). Under subsection (ii), Mortenson's four prior convictions for serious traffic offenses occurring within the ten years prior to August 21, 2010 (the date of his current arrest), automatically count. Morales, 168 Wn. App. at 494-95. This includes Mortenson's 5/21/2001 DUI conviction from Federal Way, his 10/7/2002 DUI conviction from Fife, his 2/20/2005 DUI conviction from Federal Way, and his 9/4/2005 conviction from Federal Way.

Additionally, under subsection (2)(e)(i), Mortenson's six other prior convictions for serious traffic offenses also count, because they were all committed "within five years since the last date of release from confinement . . . or entry of judgment and sentence." This is due to the fact that Mortenson never completed a full five-year interval *between any of his ten qualifying offenses*:

Citation/Charge	Offense Date	Sentencing Date	Jurisdiction
874409173/DUI	11/8/1987	9/4/2003	Pierce Co.
5246721/DUI	3/28/1988	11/27/1991	Federal Way
72165/DUI	12/23/1991	1/27/1993	SeaTac
34213/DUI	7/5/1994	5/9/1997	KC Dist. Ct.
137343/DUI	4/9/1997	5/9/1997	Federal Way
8334/Reck. Driving	5/21/1998	5/14/2001	Federal Way
19372/DUI	5/12/2001	8/22/2001	Federal Way
16089/DUI	10/7/2002	1/13/2003	Fife
36452/DUI	2/20/2005	4/7/2006	Federal Way
38527/DUI	9/4/2005	3/28/2007	Federal Way

CP 148,¹³ 156-376.

In sum, under Former RCW 9.94A.525(2)(e) (2008), Mortenson’s ten prior convictions for “serious traffic offenses” count toward the calculation of his offender score for Felony DUI, because they either occurred within ten years of the date of his arrest for the current offense, or because they were all committed within five years since the date of release or entry of judgment.

Mortenson claims that based upon State v. Draxinger, 148 Wn. App. 533, 200 P.3d 251 (2008), the sentencing court could only include prior convictions that qualify under RCW 9.94A.525(2)(e)(ii)—serious traffic offenses that occurred within the past ten years. Brf. of Appellant

¹³ The Judgment and Sentence erroneously includes one of Mortenson’s prior DUI convictions twice (the 7/5/1997 DUI conviction from King County District Court/Aukeen Division), and erroneously left off another altogether (his 11/8/1997 DUI conviction from Pierce County District Court). CP 148. Also, as outlined below, the court erroneously included a Negligent Driving conviction (7/26/2001 from Sumner Municipal Court) in Mortenson’s offender score. CP 148. The remedy for the combined effect of these errors is to reduce Mortenson’s offender scores by “1.”

at 48-49. This claim should be rejected because Draxinger, a Division Two case, conflicts with this Court's interpretation of the statute in Morales, and is unpersuasive in its complete lack of analysis.

Draxinger concludes that subsection (ii) applies if the defendant has four or more prior convictions for serious traffic offenses, while subsection (i) applies when the defendant has fewer than four such convictions. 148 Wn. App. at 537. However, nothing in the plain language of the statute supports this conclusion, which the court appears to have reached with little to no analysis. This Court is under no obligation to apply Draxinger to Mortenson's case, and it should not, as it is inconsistent with this Court's reasoned analysis in Morales.

- b. Mortenson's Prior 2001 Conviction For Negligent Driving Is Not A "Serious Traffic Offense" And Should Not Have Been Included In His Offender Scores.

"Serious traffic offenses" are defined to include misdemeanor DUI (alcohol or drug), misdemeanor physical control (alcohol or drug), reckless driving, hit-and-run attended, or any out-of-state, county, or municipal conviction for an equivalent offense. Former RCW 9.94A.030(40) (2009). Negligent driving is not a "serious traffic offense," and as such, Mortenson's 2001 conviction for negligent driving from Sumner Municipal Court should not have been included in his offender

scores.¹⁴ This Court should remand to correct Mortenson's offender scores to "15." Because he has in excess of nine points, his standard ranges remain the same.

c. The State Presented Adequate Evidence Of Mortenson's Prior Convictions.

The State is required to establish a defendant's criminal history by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); see also State v. Hunley, 175 Wn.2d 901, 915, 287 P.3d 584 (2012) ("The burden to prove prior convictions at sentencing rests firmly with the State."). Due process requires that a defendant be sentenced on the basis of reliable information that is supported by the record. Ford, 137 Wn.2d at 481 (citations omitted).

The State may establish a defendant's prior convictions through certified copies of the judgment and sentence or "other comparable documents of record or transcripts of prior proceedings." Hunley, 175 Wn.2d at 910-11 (quoting In re Pers. Restraint of Adolph, 170 Wn.2d 556, 566, 570, 243 P.3d 540 (2010)). Indeed, sentencing courts are authorized to consider records from other judicial proceedings, including plea statements, judgment and sentences, transcripts and other court records. Ford, 137 Wn.2d at 480.

¹⁴ The Judgment and Sentence erroneously refers to this conviction as a DUI. CP 148. However, Mortenson was ultimately convicted of Negligent Driving. CP 285-88.

Additionally, the requirements of both the SRA and due process are satisfied when a sentencing court relies on the defendant's affirmative acknowledgement of the existence and comparability of his prior convictions when calculating his offender score. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). A defendant's mere failure to object to the State's understanding of his criminal history is insufficient to constitute an acknowledgment. State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009); Hunley, 175 Wn.2d at 915. However, a defendant's affirmative acknowledgement of the "*facts and information* introduced for the purposes of sentencing" suffices. Mendoza, 165 Wn.2d at 928 (emphasis in original).

Here, Mortenson was asked at sentencing whether he agreed with the State's calculation of his offender score. 4/13/12 RP 6. Mortenson initially refused to commit, stating that he would "defer to the court." 4/13/12 RP 6-8. Mortenson was asked specifically if he would like additional time to further review the State's paperwork; he declined. Id. The State produced over two hundred pages of documentation to support the court's finding of Mortenson's criminal history. CP 156-376. Ultimately, Mortenson affirmatively agreed that his offender score was at least a "9." 4/13/12 RP 8 ("[W]e will agree that he is at the maximum part of his sentence."). The court paused the proceedings, stating, "Okay, I'm

just going to take a look at these.” Id. The court then found Mortenson’s offender scores to be “16” for each count. CP 143.

In this appeal, Mortenson broadly asserts that the State “made no effort to parse out the qualifying factors or otherwise prove up each of the prior offenses.” Brf. of Appellant at 56. However, because Mortenson raised no specific challenge at sentencing, the State was not required to respond to any specific arguments. The State presented more than sufficient evidence for the court to find Mortenson’s criminal history by a preponderance of the evidence. CP 156-376.

Addressing Mortenson’s claims, they fail. Mortenson argues that a certified Judgment and Sentence was required for the sentencing court to find the existence of his prior conviction for Identity Theft from Pierce County. He cites to no authority for this proposition. The State produced a certified copy of the statement of defendant on plea of guilty, on which appears a Judge’s signature below the statement, “The defendant is guilty as charged.” CP 371. And although Mortenson also “doubts” whether certified court dockets are sufficient for the State to meet its burden of proof, he cites to no authority for that proposition either. Indeed the Washington Supreme Court has specifically approved of the documents utilized by the State in Mortenson’s case. See e.g., Adolph, 170 Wn.2d at 566 (approving review of a defendant’s District and Municipal Court

Information Case Summary (“DISCIS”)); State v. Vickers, 148 Wn.2d 91, 120-21, 59 P.3d 58 (2002) (certified copy of docket sheet sufficient).

With respect to all of Mortenson’s misdemeanor serious traffic offenses, he claims the State failed to prove his “release from confinement” date. However, as outlined above, that information is relevant only to a finding that the offenses were “committed within five years since the last date of release from confinement ... *or* entry of judgment and sentence.” Former RCW 9.94A.525(2)(e)(i) (2008) (emphasis added). It is apparent from the State’s documentation that there was *never* a five-year period between the entry of judgment and sentence on any of Mortenson’s prior serious traffic convictions. Therefore, no finding regarding release date was required.

Mortenson also argues, with respect to his prior serious traffic convictions from municipal courts, that the court should have made a specific finding regarding the equivalence of the municipal ordinance he was found guilty of violating. However, Mortenson advances no specific argument that any of his DUI convictions from Federal Way, Fife and SeaTac are *not* equivalent to the State DUI statute, RCW 46.61.502. This Court is under no obligation to consider claims for which insufficient argument has been made. State v. Elliot, 114 Wn.2d 6, 15, 785 P.2d 440 (1990). See also Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d

801, 809, 828 P.2d 549 (1992) (appellate court need not consider claims of error not supported by argument or authority).

Moreover, it is clear from the record that the court did not err when including Mortenson's DUI convictions from the municipal courts. All three jurisdictions have long adopted by reference RCW 46.61.502, the State statute for DUI. See FWRC 6.15.010 (Federal Way); STMC 9.05.010 (SeaTac adopted the State's Model Traffic Ordinance, including State DUI laws, in 1990); FMC 10.04.040 (Fife adopted the State's Model Traffic Ordinance, including State DUI laws, in 1980).

The State presented sufficient evidence for the court to find by a preponderance that Mortenson's offender score for each of his crimes was "15." Should this Court determine otherwise, Mortenson's claim that the State would be unable to provide additional support for his criminal history at a resentencing is erroneous. RCW 9.94A.530(2),¹⁵ which allows consideration of criminal history not previously presented, became effective June 12, 2008. Laws of 2008, ch. 231 § 4, 5. By its plain language, the "triggering event" for its application is a sentencing or

¹⁵ The portion of this statute which makes the defendant's failure to object to a criminal history summary an acknowledgment of that history was recently held to be unconstitutional on its face. Hunley, 175 Wn.2d at 917. Hunley does not appear to affect that portion of the statute referred to herein, regarding what evidence the State can produce at a resentencing hearing. In fact, the remedy in Hunley was to remand for the State to prove the defendant's criminal history if not affirmatively acknowledged. Id. at 592.

resentencing hearing. Were Mortenson to be resentenced, the triggering event for RCW 9.94A.530's application (a resentencing) would occur after the statute's effective date (June 12, 2008), and thus its application to Mortenson's case would be proper.

7. THE STATE AGREES THAT THE COMBINED TERM OF INCARCERATION AND COMMUNITY CUSTODY EXCEEDS THE STATUTORY MAXIMUM.

Mortenson contends that the trial court erred by sentencing him, on the Felony DUI charge, to a combined term of incarceration and community custody that exceeds the statutory maximum. The State agrees. The trial court should strike the term of community custody.

Based on an offender score of 16, the trial court sentenced Mortenson to 60 months of confinement and 12 months of community custody. CP 145-46. These terms together exceeded the 60-month statutory maximum for the offense. RCW 9A.20.020(10(c)); RCW 46.61.502(6). Although the court included a notation on the judgment and sentence stating that the total term of confinement and community custody could not exceed the statutory maximum, this so-called "Brooks notation"¹⁶ no longer complies with statutory requirements in light of RCW 9.94A.701(9). State v. Boyd, 174 Wn.2d 470, 471, 275 P.3d 321 (2012).

¹⁶ In re Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009).

Under RCW 9.94A.701(9), the term of community custody “shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime.” The statute took effect July 26, 2009. Laws of 2009, ch. 375, § 5. Since Mortenson was sentenced on April 13, 2012, after the effective date of the statute, the trial court erred by imposing a total term of confinement and community custody in excess of the statutory maximum, notwithstanding the Brooks notation. Boyd, 174 Wn.2d at 473.

As noted above, the sentencing court also erred when it included a point in Mortenson’s offender scores for his 2001 Negligent Driving conviction. However, Mortenson’s properly-calculated offender score of “15” also results in a standard range of 60 months. Thus, the community custody term will still need to be stricken. This Court should remand with instructions to impose a community custody term consistent with RCW 9.94A.701(9). Boyd, 174 Wn.2d at 473.

D. CONCLUSION

For all of the above stated reasons, the State respectfully requests that this Court affirm Mortenson's convictions, and remand to correct his offender scores to "15," and to strike the community custody term for the Felony DUI charge.

DATED this 21st day of August, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

AMY MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

HOUSE BILL REPORT

HB 3317

As Passed Legislature

Title: Revises provisions relating to driving under the influence of intoxicating liquor or any drug.

Brief Description: Changing provisions relating to driving under the influence of intoxicating liquor or any drug.

Sponsors: By Representatives Ahern, Lantz, Lovick, Darneille, Chase, Williams, Hunter, Clibborn, Kilmer, Hudgins, Ericks, Simpson, Conway, Takko and Morrell.

Brief History:

Floor Activity:

Passed House: 2/28/06, 97-0.

Senate Amended.

Passed Senate: 3/7/06, 45-0.

House Concurred.

Passed House: 3/8/06, 98-0.

Passed Legislature.

Brief Summary of Bill

- Makes drunk driving a felony, ranked as a seriousness level V under the Sentencing Reform Act, if the offender: (a) has four or more prior offenses within 10 years; or (b) has ever been convicted of vehicular assault while under the influence or vehicular homicide while under the influence.

HOUSE COMMITTEE ON

Majority/Minority Report: None.

Staff: Trudes Tango (786-7384).

Background:

DUI LAW

Drunk driving (DUI) is a gross misdemeanor. The maximum confinement sentence for a gross misdemeanor is one year in jail. The DUI law contains a complex system of mandatory minimum penalties that escalate based on the number of prior offenses and the concentration of alcohol (BAC) in the offender's blood or breath. The minimum penalties are as follows:

First offense:

- *BAC under 0.15 or no BAC for reasons other than refusal*- one day in jail or 15 days of electronic monitoring; \$350 fine; 90 days license loss.
- *BAC of 0.15 or higher or person refused BAC* - two days in jail or 30 days of electronic monitoring; \$500 fine; one year license loss or two years if refused BAC.

One prior offense within seven years:

- *BAC under 0.15 or no BAC for reasons other than refusal* - 30 days in jail and 60 days of electronic monitoring; \$500 fine; two years license loss.
- *BAC of 0.15 or more or person refused BAC*- 45 days in jail and 90 days of electronic monitoring; \$750 fine; 900 days license loss or three years if refused BAC.

Two or more prior offenses within seven years:

- *BAC under 0.15 or no BAC for reasons other than refusal* - 90 days in jail and 120 days of electronic monitoring; \$1,000 fine; three years license loss.
- *BAC of 0.15 or more or person refused BAC* - 120 days in jail and 150 days of electronic monitoring; \$1,500 fine; four years license loss.

A "prior offense" counts to increase an offender's sentence under the DUI laws if the arrest for that offense occurred within seven years of the arrest for the current offense. "Prior offenses" include convictions for: (a) DUI; (b) vehicular homicide and vehicular assault if either was committed while under the influence; (c) negligent driving after having consumed alcohol ("wet neg"), reckless driving, and reckless endangerment if the original charge was DUI; and (d) any equivalent local DUI ordinance or out-of-state law. In addition, a deferred prosecution for DUI or "wet neg" counts as a prior offense even if the charges are dropped after successful completion of the deferred prosecution treatment program.

In addition to serving mandatory jail time, a DUI offender is subject to other sanctions that include alcohol assessment, the mandatory use of an ignition interlock system on any vehicle the offender drives, and probation.

FELONY SENTENCING UNDER THE SENTENCING REFORM ACT

An adult who is convicted of a felony is sentenced under the provisions of the Sentencing Reform Act (SRA). The SRA has a sentencing grid in statute that provides a standard sentence range based on the seriousness level of the current offense and the offender's prior criminal history score. Unless the sentencing judge imposes an exceptional sentence upward or downward, the sentencing judge will sentence the offender to a period of confinement within that standard range. However, in no case may a sentence be longer than the maximum allowed by statute for a particular class of felony. For class C felonies, this maximum is five years in prison.

Felonies are "ranked" in the SRA from Level I (low) to Level XVI (high). An offender's criminal history score ranges from 0 to 9+ and is calculated based on numerous factors, including the number of prior felony convictions and the relationship between those prior convictions and the current offense. A few prior non-felony crimes can count toward an offender's score in sentencing for a current felony. "Serious traffic" offenses, which include DUI, are non-felony crimes that count when the current offense is a felony traffic offense.

Prior felony traffic offenses, which include vehicular assault and vehicular homicide, count double when the current offense is also a felony traffic offense.

The SRA has "washout" periods that determine how long a prior conviction continues to count toward an offender's score. Class C felonies and serious traffic offenses wash out if the offender has spent five years without committing an offense since the date of his or her release from confinement.

At the time of sentencing, the court also imposes a term of community custody for offenders who have been convicted of an offense categorized as a "Crime Against Persons." Conditions of community custody and levels of supervision are based on risk. The court has discretion when setting the range of community custody, but generally, the range for a person convicted of a "Crime Against Persons" will be between nine to 18 months.

Under the SRA, less serious offenders may receive up to 50 percent off their sentence as earned early release. For offenses categorized as "Crimes Against Persons," an offender is eligible for up to one-third off as earned early release.

JUVENILE ADJUDICATIONS

The Juvenile Justice Act (Act) governs the disposition (or sentencing) of juvenile offenders. The Act contains a disposition grid with presumptive sanctions based on the seriousness of the offense and prior criminal history. Offenses are "categorized" (very much like ranking in the SRA) between Category E (least serious) through Category A+ (most serious). A DUI is categorized as a D offense. A juvenile adjudicated of DUI who has no prior criminal history will typically receive local sanctions. More serious offenders are subject to confinement in the state juvenile facility.

Summary of Bill:

A DUI conviction is a class C felony if the offender: (a) has four or more prior offenses within 10 years; or (b) has ever been convicted of vehicular homicide while under the influence of alcohol or drugs or vehicular assault while under the influence of alcohol or drugs.

Felony DUI is a Level V offense. This means a DUI offender with four prior misdemeanor DUIs will receive a presumptive sentence range of 22 - 29 months.

Felony DUI is categorized as a "Crime Against Persons." This means the offender is eligible for earned early release not to exceed one-third of his or her sentence, and the community custody provisions apply.

An offender is not eligible for the first time offender waiver program, DOSA, or work ethic camp. The court must order the offender to undergo treatment during incarceration. The offender shall be liable for the costs of treatment unless the court finds the offender indigent and no third-party insurance is available. The license suspension and ignition interlock provisions under the misdemeanor DUI laws apply.

Under the Juvenile Justice Act, felony DUI is made a Category B+ offense. This means a juvenile with zero or one prior adjudication will receive a presumptive disposition range of 15 - 36 weeks in a state juvenile facility.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect July 1, 2007.

Testimony For: None.

Testimony Against: None.

Persons Testifying: None.

Persons Signed In To Testify But Not Testifying: None.

SENATE BILL REPORT

HB 3317

As Reported By Senate Committee On:
Judiciary, March 6, 2006

Title: An act relating to making it a felony to drive or be in physical control of a vehicle while under the influence of intoxicating liquor or any drug.

Brief Description: Changing provisions relating to driving under the influence of intoxicating liquor or any drug.

Sponsors: Representatives Ahern, Lantz, Lovick, Darneille, Chase, Williams, Hunter, Clibborn, Kilmer, Hudgins, Ericks, Simpson, Conway, Takko and Morrell.

Brief History: Passed House: 2/28/06, 97-0.

Committee Activity: Judiciary: 3/6/06 [DPA-WM]

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended and be referred to Committee on Ways & Means.

Signed by Senators Kline, Chair; Weinstein, Vice Chair; Johnson, Ranking Minority Member; Carrell, Esser, Hargrove, McCaslin and Rasmussen.

Staff: Lidia Mori (786-7755)

Background: Drunk driving (DUI) is a gross misdemeanor. The maximum term of confinement for a gross misdemeanor is one year in jail. The DUI law contains a complex system of mandatory minimum penalties that escalate based on the number of prior offenses and the concentration of alcohol (BAC) in the offender's blood or breath. A "prior offense" counts to increase an offender's sentence under the DUI laws if the arrest for that offense occurred within seven years of the arrest for the current offense. "Prior offenses" include convictions for: (a) DUI; (b) vehicular homicide and vehicular assault if either was committed while under the influence; (c) negligent driving after having consumed alcohol ("wet neg"), reckless driving, and reckless endangerment if the original charge was DUI; and (d) any equivalent local DUI ordinance or out-of-state law. In addition, a deferred prosecution for DUI or "wet neg" counts as a prior offense even if the charges are dropped after successful completion of the deferred prosecution treatment program.

In addition to serving mandatory jail time, a DUI offender is subject to other sanctions that include alcohol assessment, the mandatory use of an ignition interlock system on any vehicle the offender drives, and probation. An adult who is convicted of a felony is sentenced under the provisions of the Sentencing Reform Act (SRA). The SRA has a sentencing grid in statute that provides a standard sentence range based on the seriousness level of the current offense and the offender's prior criminal history score. Unless the sentencing judge imposes an exceptional sentence upward or downward, the sentencing judge will sentence the offender to a period of confinement within that standard range. However, in no case may a sentence be

longer than the maximum allowed by statute for a particular class of felony. For class C felonies, this maximum is five years in prison.

Felonies are "ranked" in the SRA from Level I (low) to Level XVI (high). An offender's criminal history score ranges from 0 to 9+ and is calculated based on numerous factors, including the number of prior felony convictions and the relationship between those prior convictions and the current offense. A few prior non-felony crimes can count toward an offender's score in sentencing for a current felony. "Serious traffic" offenses, which include DUI, are non-felony crimes that count when the current offense is a felony traffic offense. Prior felony traffic offenses, which include vehicular assault and vehicular homicide, count double when the current offense is also a felony traffic offense.

The SRA has "wash out" periods that determine how long a prior conviction continues to count toward an offender's score. Class C felonies and serious traffic offenses wash out if the offender has spent five years without committing an offense since the date of his or her release from confinement. The SRA also has sentencing alternatives for some types of offenders, such as the first-time offender waiver program, drug offender sentencing alternative (DOSAs), and work ethic camp. At the time of sentencing, the court also imposes a term of community custody for certain offenders, including those offenders who have been convicted of an offense categorized as a "Crime Against Persons." Conditions of community custody and levels of supervision are based on risk. The court has discretion when setting the range of community custody, but generally, the range for a person convicted of a "Crime Against Persons" will be between nine to 18 months. Under the SRA, an offender may earn an early release of up to 50 percent off a sentence for less serious offenses. For offenses categorized as "Crimes Against Persons" and other serious offenses, an offender may receive earned early release time up to one-third off.

The Juvenile Justice Act (Act) governs the disposition (or sentencing) of juvenile offenders. The Act contains a disposition grid with presumptive sanctions based on the seriousness of the offense and prior criminal history. Offenses are "categorized" between Category E (least serious) through Category A+ (most serious). A DUI is categorized as a D offense. A juvenile adjudicated of DUI who has no prior criminal history will typically receive local sanctions, meaning the court may impose one or all of the following: 0-30 days in confinement in a local juvenile detention facility; 0-12 months of community supervision; 0-150 hours of community restitution; and/or \$0-\$500 fine. More serious offenders are subject to confinement in the state juvenile facility. The Juvenile Justice Act provides disposition alternatives that give courts discretion to suspend the juvenile's disposition and impose conditions. Some of those alternatives include the suspended disposition alternative, the chemical dependency disposition alternative, and the mental health disposition alternative.

Summary of Amended Bill: A DUI conviction is a class C felony if the offender: (a) has four or more prior offenses within seven years; or (b) has ever been convicted of vehicular homicide while under the influence of alcohol or drugs or vehicular assault while under the influence of alcohol or drugs. Felony DUI is a Level V offense. This means a DUI offender with four prior DUIs will receive a presumptive sentence range of 22 - 29 months. Felony DUI is categorized as a "Crime Against Persons." A felony DUI offender is eligible for earned early release not to exceed one-third of his or her sentence and community custody provisions apply. An offender is not eligible for the first time offender waiver program, DOSAs, or work

ethic camp. The court must order the offender to undergo treatment during incarceration. The offender shall be liable for the costs of treatment unless the court finds the offender indigent and no third-party insurance is available. The license suspension and ignition interlock provisions under the misdemeanor DUI laws apply.

The provisions under the SRA related to "wash out" periods and vacation of records are amended to include the seven year period in which "prior offenses" under the DUI laws are counted.

Under the Juvenile Justice Act, felony DUI is made a Category B+ offense. This means a juvenile with four prior DUI adjudications who is adjudicated of another DUI will receive a presumptive disposition range of 15 - 36 weeks in a state juvenile facility.

Amended Bill Compared to Original Bill: Language in the bill is corrected to reflect that if the offender is a juvenile, he or she will be punished according to RCW 13.40. The "wash out" periods under the sentencing reform act and the current DUI laws are clarified as they apply to felony DUI convictions.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: Washington is only one of three states that does not have a felony DUI law. There were 222 deaths from people driving under the influence of alcohol in 2004. The purpose of government is protection of its citizens and with this bill, we are protecting citizens against drunk driving. This legislation is directed at the chronic drunk driver. We will not need to build a new prison but we do need to build capacity. While these offenders are in prison and in our control, we need to provide treatment. Experts estimate that they need 11 to 12 months of treatment. The only way to deter a habitual drunk driver is to take him or her off the road and provide treatment. Word will get around to the DUI offenders in bars and other drinking establishments that they are looking at a longer incarceration time if they drink and drive. This is a huge issue to county sheriffs. These offenders are a low risk when sober and they won't require a maximum security prison. Drunk drivers are a threat to police officers on the road as well as to the general public. For a juvenile to get a DUI felony, he or she still has to have had four prior DUI adjudications.

Testimony Against: None.

Who Testified: PRO: Representative Ahern, prime sponsor; Representative Lantz; Senator Brandland; Jim Reiersen, Deputy Prosecutor; Karen Minahan, Mothers Against Drunk Drivers; Don Pierce, Washington Association of Sheriffs and Police Chiefs; Tom McBride, Washington Association of Prosecuting Attorneys; Anita Kronuall, citizen.

FINAL BILL REPORT

HB 3317

C 73 L 06

Synopsis as Enacted

Brief Description: Changing provisions relating to driving under the influence of intoxicating liquor or any drug.

Sponsors: By Representatives Ahern, Lantz, Lovick, Darneille, Chase, Williams, Hunter, Clibborn, Kilmer, Hudgins, Ericks, Simpson, Conway, Takko and Morrell.

Senate Committee on Judiciary

Background:

DUI Law

Drunk driving (DUI) is a gross misdemeanor. The maximum confinement sentence for a gross misdemeanor is one year in jail. The DUI law contains a complex system of mandatory minimum penalties that escalate based on the number of prior offenses and the concentration of alcohol in the offender's blood or breath (BAC).

The penalties range from one day in jail for a first time offender with a BAC under 0.15, to 120 days in jail and 150 days of electronic home monitoring for an offender who has a BAC over 0.15 and has two or more prior offenses within seven years. In addition to mandatory jail time, the court must impose minimum fines ranging from \$350 to \$1,500 and license suspension ranging from 90 days (for a first time offender with a low BAC) to four years (for a multiple offender with a high BAC). A DUI offender is also subject to alcohol assessment, mandatory use of ignition interlocks, and probation.

A "prior offense" counts to increase an offender's sentence under the DUI laws if the arrest for that offense occurred within seven years of the arrest for the current offense. "Prior offenses" include convictions for: (1) DUI; (2) vehicular homicide and vehicular assault if committed while under the influence; (3) negligent driving after having consumed alcohol ("wet neg"), reckless driving, and reckless endangerment if the original charge for any of those offenses was DUI; and (4) any equivalent local DUI ordinance or out-of-state law. In addition, a deferred prosecution for DUI or "wet neg" counts as a prior offense even if the charges are dropped after successful completion of the deferred prosecution treatment program.

Felony Sentencing Under the Sentencing Reform Act

An adult who is convicted of a felony is sentenced under the provisions of the Sentencing Reform Act (SRA). The SRA has a sentencing grid in statute that provides a standard sentence range based on the seriousness level of the current offense and the offender's prior criminal history score. Unless the sentencing judge imposes an exceptional sentence upward or downward, the sentencing judge will sentence the offender to a period of confinement within that standard range. However, in no case may a sentence be longer than the maximum

allowed by statute for a particular class of felony. For class C felonies, this maximum is five years in prison.

Felonies are "ranked" in the SRA from Level I (low) to Level XVI (high). An offender's criminal history score ranges from 0 to 9+ and is calculated based on numerous factors, including the number of prior felony convictions and the relationship between those prior convictions and the current offense. Some prior non-felony crimes can count toward an offender's score in sentencing for a current felony. "Serious traffic" offenses, which include DUI, are non-felony crimes that count when the current offense is a felony traffic offense. Prior felony traffic offenses, which include vehicular assault and vehicular homicide, count double when the current offense is also a felony traffic offense.

The SRA has "washout" periods that determine how long a prior conviction continues to count toward an offender's score. Class C felonies and serious traffic offenses wash out if the offender has spent five years without committing an offense since the date of his or her release from confinement.

At the time of sentencing, the court also imposes a term of community custody for offenders who have been convicted of an offense categorized as a "Crime Against Persons." Conditions of community custody and levels of supervision are based on risk. The court has discretion when setting the range of community custody, but generally, the range for a person convicted of a "Crime Against Persons" will be between nine to 18 months.

In addition, for offenses categorized as "Crimes Against Persons," an offender is eligible for up to one-third off as earned early release.

Juvenile Adjudications

The Juvenile Justice Act (Act) governs the disposition (or sentencing) of juvenile offenders. The Act contains a disposition grid with presumptive sanctions based on the seriousness of the offense and prior criminal history. Offenses are "categorized" (very much like ranking in the SRA) between Category E (least serious) through Category A+ (most serious). A DUI is categorized as a D offense. A juvenile adjudicated of DUI who has no prior criminal history will typically receive local sanctions. More serious offenders are subject to confinement in a state juvenile facility.

Summary:

A DUI conviction is a class C felony if the offender: (1) has four or more prior offenses within 10 years; or (2) has ever been convicted of vehicular homicide while under the influence of alcohol or drugs or vehicular assault while under the influence of alcohol or drugs.

Felony DUI is a Level V offense. This means a DUI offender with four prior misdemeanor DUIs will receive a presumptive sentence range of 22 - 29 months.

Felony DUI is categorized as a "Crime Against Persons." This means the offender is eligible for earned early release not to exceed one-third of his or her sentence, and the community custody provisions apply.

An offender is not eligible for the first time offender waiver program, DOSA, or work ethic camp. The court must order the offender to undergo treatment during incarceration. The offender is liable for the costs of treatment unless the court finds the offender indigent and no third-party insurance is available. The license suspension and ignition interlock provisions under the misdemeanor DUI laws apply.

Under the Juvenile Justice Act, felony DUI is made a Category B+ offense. This means a juvenile adjudicated of felony DUI will receive a presumptive disposition range of 15 - 36 weeks in a state juvenile facility.

Votes on Final Passage:

House	97	0	
Senate	45	0	(Senate amended)
House	98	0	(House concurred)

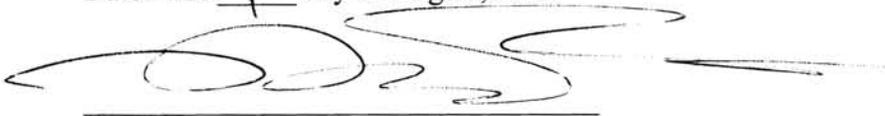
Effective: July 1, 2007

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. CHRIS MORTENSON, Cause No. 68812-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 9 day of August, 2013



Name
Done in Seattle, Washington

STATE OF WASHINGTON
COURT OF APPEALS DIVISION I
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