

No. 73311-7-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

STEVEN R. HOUSER, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court erred in not granting defense motion to preclude mention of defendant's prior DUI convictions in opening statement where the fact that the defendant had four prior DUI convictions was an element of the offense, and where defense and the state had not agreed on language for the stipulation that was sufficient to meet the element before opening and defendant was reluctant to enter into a stipulation if it didn't sanitize the priors.
2. Whether the defendant failed to preserve his contention that the jury instruction language that the jury did not need to be unanimous as to which alternative means had been proven was erroneous where he failed to except to the language below and failed to address how the alleged error was a manifest error of constitutional magnitude in this case and where the law regarding jury unanimity in alternative means cases is well settled.
3. Whether the trial court erred in giving a missing witness instruction where there was more than one "missing witness" and the defendant's alleged driver was not available to the State and defendant had not even attempted to find the driver, where the permissive instruction did not shift the burden to defendant and where closing argument focused on the lack of corroboration to support defendant's exculpatory theory of the case.
4. Whether the trial court erred in including defendant's prior felony escape conviction in his offender score for felony driving while under the influence of intoxicants where the Supreme Court has since held that prior felony convictions should be included in the offender score in accord with the other provisions of RCW 9.94A.525(2).

C. FACTS

1. Procedural facts

Appellant Steven Houser was charged with Felony Driving while Under the Influence, in violation of RCW 46.61.502, under Whatcom County Superior Court No. 14-1-01484-1 after his conviction was reversed due to an insufficient information. Court of Appeals No. 70913-5-I; CP 4-5; RP 4-5. Houser was tried by a jury who found him guilty. RP 52. The court imposed a standard range sentence. CP 81.

2. Substantive Facts

On the evening of May 19, 2013 Sherry Hathway answered a knock on the door at her residence in Deming around 9 p.m. RP 125-26. The person, Houser, appeared a little disabled to her and he had a bloody nose and swollen lip. RP 127-27, 144. She called 911 while her husband, Frank, went outside with Houser. RP 129, 138-40. Frank, who had been employed with the fire department for over 25 years, said Houser told him that Houser he had had an accident and had put his car in a ditch about a mile or so up the road. RP 139-41, 143-44. Houser appeared excited and somewhat disoriented, and Frank thought that he was under the influence of something because Houser wasn't answering his questions normally and had slowed down responses. RP 141-43, 151.

Sherry came back out with a washcloth for Houser's face, a blanket and some water, but Houser didn't touch the water or have anything else to eat or drink while he was at the Hathaway residence. RP 129-30, 143, 146, 225. Houser didn't give Frank very much information on the accident so he had someone from the fire department go check on the vehicle. RP 143. The EMTs arrived and attended to Houser, though Houser didn't complain of any injuries aside from his facial ones, and State Patrol troopers arrived about 20-30 minutes later. RP 132, 143, 145, 150, 152-53. A lady by the name of Jill arrived later, but no other male was seen at the residence or in the area. RP 131-32, 145, 355. Houser didn't say that there was anyone else with him. RP 146.

State Patrol Troopers Magnussen and Lipton contacted Houser at the Hathaway residence. They didn't see anyone on the road on their way to the residence. RP 154, 156-58, 179. When Trooper Magnussen contacted Houser, Houser had a swollen lip, bloodshot watery eyes, and other signs of being under the influence. RP 159, 349-51. When asked, Houser told the trooper that he had driven off the road and hit a pole and then walked to the Hathaway residence to use their phone. RP 172, 349. He said he'd had three to four beers that night, and that he'd been drinking all the way from a friend's house, where he'd been working on an engine, to the scene of the accident. RP 172. After confirming with the EMTs that

Houser was okay, the trooper asked Houser if he was willing to submit to field sobriety tests (FSTs). RP 173-74. After Houser agreed and after the horizontal gaze nystagmus (HGN) test was performed, which indicated impairment, Houser decided not to perform any other FSTs. RP 174, 352. After giving Houser a voluntary PBT test, the trooper arrested Houser and advised him of his rights. RP 175-76, 353. Houser then became agitated and hostile, yelling at the troopers, "You guys are such fucking assholes. I wasn't even driving. My buddy was driving," and told them they couldn't prove he was the driver. RP 176-77, 354. Houser did not tell the troopers the name of his buddy that night and hadn't up to the start of trial. RP 177-78, 358-59, 438. No one had contacted the troopers to tell them they had been driving that night. RP 178.

After they left the residence, the troopers drove to the collision site. They didn't see anyone on the road at that time. RP 179. Houser's truck had gone straight off the road instead of negotiating the almost 90 degree left hand turn in the road, and had gone through a fence and into a large pole. RP 180-81, 356-57. There was damage to the right side of the truck, the left front quarter panel and bumper. RP 181. Nothing blocked the driver's side door, but a large fence post was wedged up against the passenger side door, which would have made it difficult to open. RP 229. There was glass inside the truck that appeared to have come from the

busted driver's side window. RP 181-82, 198, 228, 357. The passenger side window was broken as well. RP 227. There was fresh blood on the steering wheel, which appeared to be consistent with Houser's facial injury. RP 182-83, 357. There was a beer can inside and a piece of mail with Houser's name on it. RP 182-83.

After impounding the truck, the troopers took Houser to the hospital because Houser wanted to be checked out by a doctor and the troopers had applied for a blood draw. RP 208-09. During the DUI interview process, Houser said he had had alcohol within the last 24 hours, but that he didn't have any drugs, including marijuana. RP 213-13. He also said he had had a beer and a couple shots of whiskey after the collision while walking on the way to Jill's house, but the troopers didn't find any litter along the roadway near the collision. RP 215-16, 348. He said the collision happened at 8 p.m. while traveling along highway 9. RP 216-17. He admitted drinking, but denied driving. RP 219. When he removed his shoes, a fair bit of glass, consistent with the glass found on the driver's side floorboard of the truck, was found in the shoes. RP 220. The troopers didn't find any other passenger. RP 223.

The result of the blood draw test was .19, and extrapolating back two hours from the blood draw at 12:34 a.m. would have made the results .21 to .23, assuming no intervening consumption of alcohol. RP 273-76,

290, 335-37. The results would have been even higher if there had been a longer period of time without any intervening drinking. RP 337. Both troopers concluded that Houser was obviously impaired that night. RP 222, 362.

Houser was the only one who testified for the defense. He stated that he had been working on a friend's truck that morning and after that he got some beer at a gas station and drove to his friends Randy and Julie's house, but they weren't home so he waited there in his truck for them. RP 371-72. While he was waiting, he saw a friend of his, Gary, walking down the street. RP 373. Gary had lived next door to him when he was 19. RP 373. They talked some and then decided to go get some marijuana for Gary¹, but that person wasn't there, so they went to Maple Falls where Gary got some. RP 374-75. Houser testified Gary drove Houser's truck because Houser had been drinking beer back at Randy and Julie's house. RP 375. After getting the marijuana, they went back to a grocery store in Maple Falls and Houser continued to drink beer. RP 376. After that they drove towards Jill's house, but didn't make it because they got in the accident. Houser testified Gary was driving and Houser was in the passenger seat. RP 376-77. Houser remembered going off the road, but

¹ Houser didn't use marijuana because he was allergic to it. RP 376.

didn't remember getting out of the truck. RP 377. He remembered going in and out, but also remembered being at the Hathaway residence and walking along the road thinking he would go to Jill's house, but then realizing it was too far. RP 377-78. He didn't know how his lip got injured, but remembered spitting blood along the way. RP 378.

Houser testified that he tried to communicate with Frank and the officers but that he wasn't able to due to the fact that he'd been drinking, Black Velvet and 211. RP 379. He didn't understand why the troopers were at the Hathaway residence and didn't understand why he was doing FSTs. RP 378, 380.

On direct, he testified that he hadn't had contact with Gary since that night, that he didn't know how to contact him and that he hadn't tried to contact him. RP 380. On cross-examination, he testified that he had known Gary for a year, year and a half, but that he didn't know Gary's last name, though Gary's wife's name was Debbie. He said he once knew Gary's last name, but he hadn't seen Gary for 15 years before that day. RP 396. He hadn't made any attempt to find Gary or Debbie. RP 394. He testified Gary and he had a friend in common, Nate, but that he didn't know Nate's last name either and he hadn't seen Nate in a long time. RP 397. He testified he didn't know what happened to Gary after the collision, that Gary didn't stay in the truck, that he didn't know if Gary

had been injured or if Gary had walked off, or how Gary had gotten out of the truck. RP 414.

On cross-examination, Houser also testified the house that he was at initially was Rick Reed's house and gave a partial address for it. RP 383-84. He testified as to how he knew Rick and that the last time he had seen Rick was that day. RP 388-89. He said he had tried to call Rick. RP 395. No one had given the troopers Rick Reed's name or information. RP 435.

Houser testified that Randy and Julie's last name was Budd and that they had been neighbors of his when he lived on Irving Street. RP 390. He said that he hadn't had contact with them since that day either, and that he'd had two more beers while he had waited for them. RP 391-92.

He testified that Jill's last name was Haner, that she lived in Acme on Galbraith Road though he didn't know the address. He said he had dated her at the beginning of 2013, but that he hadn't kept in contact with her and hadn't contacted her about this incident even though he was aware that she showed up at the Hathaway residence that night. RP 406, 412-13.

Houser testified that he thought it was around 2:30-3:30 p.m. when they were in Maple Falls attempting to get the marijuana. RP 402-404. He testified it took them 20 minutes to an hour to get the marijuana and then

they drove towards Jill's house. RP 407-08. Houser wasn't sure how long it took to go from the place in Maple Falls to the collision site, but that he thought it was about an hour to an hour and a half². RP 408. He drank the last two beers on the way and they got the whiskey along the way. RP 409, 424. He testified he wasn't driving because he was drinking, as well as the fact that his license had been suspended. RP 415, 422. He wasn't sure how he had gotten out of the truck. RP 414.

In the middle of the State's case, an exhibit was entered which was a stipulation by Houser that he had previously been convicted of four qualifying offenses under RCW 46.61.5055 within a 10 year period. RP 244; CP 100-01(Ex. 25). Houser testified on cross he had signed the stipulation and agreed with it. RP 381-82.

D. ARGUMENT

- 1. The trial court did not err in not precluding the State from mentioning the prior DUI convictions in opening because the parties had not agreed on language for the stipulation that was sufficient to meet the element of the charged offense.**

Houser asserts that the trial court erred in not granting defense request that his four prior convictions for Driving Under the Influence ("DUI") not be mentioned in opening statement despite the fact that they

² Trooper Lipton testified on rebuttal that driving from Maple Falls to the Hathway residence takes about 20 minutes. RP 435.

were an element of the offense the State had to prove at trial. However, at the time the issue arose *before* opening, Houser in fact had not signed any stipulation and the parties had not agreed on the language that would be sufficient to prove the element. As there was no sufficient stipulation that Houser had in fact agreed to at the time of opening statement and the four prior DUI convictions was an element of the offense, the court did not err in not granting defense's request. Moreover, the initial language that the defense proposed included the phrase "DUI, so if that was the stipulation the trial erred in not permitting, any error was harmless.

If a defendant is charged with a crime that has a prior conviction as an element of the offense, the defendant may stipulate to the facts of that element in order to prevent the State from introducing into evidence details regarding the prior conviction. State v. Roswell, 165 Wn.2d 186, 195, 196 P.3d 705 (2008), citing Old Chief v. U.S., 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). The jury, however, is not shielded from all evidence regarding the conviction upon an adequate stipulation, only from evidence that led to the former conviction. *Id.* A defendant cannot stipulate to the existence of the prior conviction element of an offense in order to remove it from the jury's consideration regarding the charge. *Id.* It is not error for a court to reject a proposed stipulation that is insufficient to meet the statutory element of the offense. State v. Ortega,

134 Wn. App. 617, 624-25, 142 P.3d 175 (2006), *rev. den.*, 160 Wn.2d 1016 (2007).

Furthermore, an *Old Chief* stipulation may not be entered into over the objection of a defendant. State v. Humphries, 181 Wn.2d 708, 336 P.3d 1121 (2014). Although a colloquy with the defendant is not necessary for entry of such a stipulation, if the parties or court is aware that the defendant is not in favor of the stipulation, it may not be accepted by the court. *Id.* at 714-16. A trial court's decision to deny a stipulation is reviewed for manifest abuse of discretion. State v. Gladden, 116 Wn. App. 561, 564-65, 66 P.3d 1095 (2003); *accord*, State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

Here, during motions in limine, defense counsel requested the State be precluded from all mention of driving offenses except the four prior DUI convictions and any mention of DUIs if the court granted its motion to bifurcate the trial, though he acknowledged the four prior DUIs were an element of the offense. RP 64-65. During the discussion of Houser's motion to bifurcate, the purpose of which was to preclude the jury from hearing any testimony regarding the prior convictions until after it determined whether or not Houser was guilty of driving while under the influence, the parties agreed that Old Chief was distinguishable because the stipulation in that case sanitized what the prior conviction was,

whereas here the fact that the prior convictions were for DUIs was an element of the offense. RP 84-88; CP 9-17. When the judge inquired about whether Houser could stipulate to the existence of the priors, the prosecutor informed the court that while he had stipulated in the prior trial, it was her understanding that he was not willing to do so now. RP 89-90. Defense counsel informed the judge that Houser had stipulated in the prior trial but that the stipulation had still included language the priors were DUIs and the judgments still had been introduced which, although redacted, still mentioned the offenses were DUIs.³ He suggested the judge might come up with some language to sanitize the convictions, but preferred bifurcation. RP 92-94. When the judge inquired whether the state would still seek to admit the judgments if the stipulation were sufficient to meet the element, defense inquired whether such a stipulation would sanitize out the mention of DUIs. RP 95-98. Acknowledging the issue, the judge ultimately denied the motion to bifurcate because the four prior DUIs were an element of the offense, but left open the possibility of a stipulation if the parties could agree on the language. RP 97-99. The judge, however, wanted to make sure that Houser knew that he wasn't trying to induce Houser to enter into the stipulation. RP 99.

³ The prosecutor responded that her recollection was that the prior stipulation wasn't sufficient to prove the element and that the stipulation occurred mid-trial. RP 95.

The next day, after jury selection, defense counsel had proposed a stipulation that had been discussed with the prosecutor which would read:

That on May 19, 2013 the defendant Steven Houser had previously been convicted of four prior *DUIs* that qualify as prior offenses within a ten year period within the incident date of this case, May 19, 2013.

RP 105 (emphasis added). He then requested that the *DUIs* not be mentioned in opening statement “until we – not an issue.” RP 106. The prosecutor responded she didn’t agree with that because the charge was felony *DUI* and she needed to prove the priors. RP 106. The judge informed the parties that he had considered the issue and hadn’t come up with any way to avoid informing the jury of the stipulation and the nature of the stipulation. RP 107-08. The prosecutor then indicated she didn’t feel comfortable referring to a stipulation when the defendant hadn’t signed one and it hadn’t been entered. RP 109. There was further discussion regarding the stipulation amongst the judge and parties without agreement as to the specific language, with defense counsel emphasizing he wanted it to sanitize the convictions, i.e., not mention that they were for *DUIs*. RP 110-15. Defense counsel indicated that he *thought* there would be a stipulation, but requested that there not be any mention of it “until [he] guess[ed] an opportunity present[ed] itself to make a much more final decision on that.” RP 116-17. The prosecutor didn’t agree and indicated

that if there wasn't going to be a stipulation, she would need to call an additional witness. RP 117.

The court proceeded to opening statements without making any specific ruling on the mention of the DUIs during opening. The prosecutor stated the State, in addition to showing that Houser had been driving under the influence, needed to show that "there were four prior DUI offenses within ten years" of the date of the incident. RP 118-19. She also stated that the State would present witnesses to show the "defendant had four prior DUI offenses within ten years." RP 122. Defense counsel did not object to these statements. RP 119-122.

During a recess, in the middle of the third witness's testimony, the prosecutor informed the court she thought they had an agreed stipulation, which Houser had signed: "The defendant Steven Houser has previously been convicted of four prior qualifying offenses as defined by RCW 46.61.505(5) (sic) within a ten year period of the incident date of this case, May 19, 2013." RP 188. After discussing how the stipulation would be presented to the jury, Houser confirmed he had discussed the stipulation with his attorney. RP 188-92. The court accepted the stipulation and it was later admitted as part of State's case. RP 192, 244; CP __.

On cross-examination Houser admitted he had signed the stipulation and that he agreed with it. During closing, the prosecutor read

the stipulation to the jury, explained that because of the stipulation certain witnesses weren't called, and that Houser had admitted that he was stipulating to the third element and therefore the third element had been met beyond a reasonable doubt. RP 501-02. There was no mention that the priors were for DUIs, but, in accord with the stipulation, that they were for violations of the statute, RCW 46.61.5055.

Houser relies upon Old Chief, 519 U.S. 172 and State v. Young, 129 Wn. App. 468, 119 P.3d 870 (2005), in asserting the trial court had to accept his proffered stipulation, and asserts the proffered stipulation was to the language that was ultimately set forth in Ex. 25. The defendant in Old Chief was charged with offenses that did not involve a specific prior offense conviction, only that the defendant had previously been convicted of a felony. Old Chief, 519 U.S. at 174-75. The crime Houser was charged with required proof of 4 prior convictions for DUI within a 10 year period of the date of the charged offense. Therefore, the name or nature of the conviction was relevant in Houser's case whereas it wasn't in Old Chief. Moreover, the stipulation in Old Chief when offered or made was sufficient to prove the required element⁴. *Id.* at 176-77, 186. Here, when Houser made the request that nothing be said in opening about the

⁴ There were some other issues regarding the language of the stipulation which was presented in a jury instruction. Old Chief, 519 U.S. at 176 n.2.

prior DUI convictions, defense and the state had not agreed upon language sufficient to prove the element beyond a reasonable doubt, and it wasn't certain that Houser would even agree to a stipulation.

Young is similarly distinguishable because the parties and judge had all agreed the nature of the defendant's prior conviction, second degree assault, would not be revealed to the jury before the judge mistakenly referenced that information when it read the charge to the jury. Young, 129 Wn. App. at 470-71. Here, Houser originally wasn't willing to stipulate and at the time of opening the parties had not agreed on language that would meet the requirements of the State regarding that statutory element and the requirements of the defense to sanitize the conviction. Moreover, in Young no curative instruction was given the jury, but here the jury was instructed they could only consider the evidence regarding the prior offenses for purposes of the third element and not for any other purpose. *Id.* at 477; CP 45 (No. 12).

This case is more similar to State v. Garcia, 177 Wn. App. 769, 313 P.3d 422 (2013), than Young. In Garcia, the defendant, charged with first degree unlawful possession of a firearm, stipulated that he had previously been convicted of a "serious offense." Garcia, 177 Wn. App. at 771, 773. Unfortunately, the jury instructions had not been modified to reflect the stipulation and still referenced that an element of the offense

was that the defendant had previously been convicted of first degree robbery. Id. at 771, 773. Apparently neither party, nor the judge, caught this when the instructions were read to the jury. The prosecutor caught the error during closing when the to-convict instruction was displayed for the jury. The prosecutor removed the instruction from the jury's view as soon as possible, and made no mention of the nature of the prior offense. Id. at 774. After closings, the parties discussed the error, and the judge replaced that instruction with a corrected one, and informed the jury that the former instruction was erroneous. Id. at 775. Defense moved for a mistrial, which was denied.

On appeal, the court concluded that the jury's temporary exposure to an instruction was not such a serious irregularity that it could not have been cured with a limiting instruction. Id. at 776. It found the irregularity less serious than that in Young because there was no direct evidence connecting the defendant to first degree robbery, and the jury had not been informed the defendant had been convicted of the crime, but only that the jury had to find he had previously been convicted of that offense. Id. at 780. In finding the curative instruction given to the jury a significant factual distinction from the Young case, the court noted that specifically mentioning the prior offense in a curative instruction would re-emphasize the irregularity, thereby causing potentially more prejudice to the

defendant. Id. at 783. The court ultimately held that “exposing the jury to the incorrect instruction was not so serious that the trial court’s instruction could not cure any potential prejudice, and that the trial court’s instruction to disregard the incorrect instruction was effective in limiting any prejudice...” Id. at 785.

As in Garcia, all the jury was told by the prosecutor in opening was that they would have to *find* that Houser had previously been convicted of four prior DUIs. No evidence was presented that connected Houser to any specific reference to “DUIs.” The jury was further told it could not consider the stipulation for any purpose other than proof of the third statutory element. Defense counsel presumably did not object to the mention during opening because he didn’t want to draw attention to that information and knew that it was an element of the offense and no agreement had been reached as to any stipulation.

Houser’s statement that he offered to stipulate to the complete language of the element is misleading. He had not agreed to that language until *after* opening statement and well into the testimony. Once the parties reached an agreement as to sufficient language to prove the element beyond a reasonable doubt, there was no further mention of the DUIs. The only mention of the prior DUIs was in opening statement. The prosecutor did get Houser to commit on cross-examination that he was

agreeing to the stipulation in an abundance of caution, but there was no reference to DUIs⁵. RP 381-82.

The prosecutor was right to be concerned about whether the jury would accept the stipulation as sufficient evidence to meet the third element of the offense.⁶ As noted by the court in Old Chief, juries may have expectations as to what type of proof is necessary to meet an element and may feel that an admission or stipulation, while in fact legally sufficient, isn't sufficient to meet their expectations and may penalize the prosecution for not fully proving the element to them. Old Chief, 519 U.S. at 188-89. Here, the jury did in fact desire more information than the stipulation in determining whether the prosecution had met its burden of proof as to the third element, despite the fact that the stipulation mirrored the statutory language. The jury sent out a question that stated: "May we see RCW 46.61.5055 and an explanation/definition of qualifying

⁵ Upon objection from defense when she asked Houser to read the verbiage of the stipulation, the prosecutor explained her inquiries regarding the stipulation: "I want to be sure with his signature that that is what he is stipulating to given the State's obligations and what elements need to be proven." RP 382

⁶ Although Houser does not make a claim of prosecutorial misconduct, he speculates that the prosecutor purposefully drew attention to the stipulation, in her cross examination and closing argument, in order to convict Houser "under a propensity theory" because she was "infuriated by the defendant's denials of guilt." There is nothing in the record to support these accusations. The prosecutor explained that she was concerned about meeting her burden to prove all elements of the crime, and was emphasizing *not* that Houser had previously been convicted of four DUIs (because the prosecutor did not, and the stipulation did not, mention the DUIs), but rather that he was admitting the third element of the crime and therefore that element had been proved beyond a reasonable doubt.

events/offenses? We are looking for a range of offenses.”⁷ Supp CP ___, Sub Nom. 35. And in the recent case of State v. Case, 169 Wn. App. 422, 358 P.3d 432 (2015)⁸, Division II held that while a generic stipulation regarding two prior convictions for violations of no contact orders was sufficient evidence for the jury’s consideration, it was not sufficient to meet the legal requirements of the trial court’s gatekeeping function for determining the validity of the orders.

The trial court did not err in not granting defense counsel’s request that no mention of the prior DUIs be made in opening. While defense counsel had indicated Houser might be willing to enter into a stipulation, he had not in fact agreed to do so with language that met both parties’ requirements, and the judge was aware that Houser was unwilling or reluctant to enter into a stipulation prior to opening. The lack of an agreed stipulation that was sufficient to meet the statutory element meant the State still had to prove that element, and the court did not err in not precluding the prosecutor from referencing it in opening. *See, City of Puyallup v. Spenser*, __ P.3d ___, 2016 WL 265106 (2016) (a party may refer in opening statement to admissible evidence that it has a good faith belief will be presented at trial).

⁷ The court denied the jury’s request and directed them to the instructions. RP 554.

⁸ The Washington Supreme Court has accepted review in this case. Sup. Ct. No. 92293-4.

Moreover, the only stipulation meeting the statutory element that defense referenced before opening was one that specifically referenced the priors as being DUIs. If that was the stipulation the court should have accepted, then certainly any reference to the prior DUIs in opening was harmless. *See, State v. Rivera*, 95 Wn. App. 132, 139, 974 P.2d 882 (1999), *superseded by* 992 P.2d 1033 (2000) (an error in admitting evidence of the nature and/or name of a defendant's prior convictions when the defendant offers to stipulate to the conviction status element of the offense, and where the stipulation is sufficient to prove the element, is harmless if it is more probable than not that the error did not materially affect the outcome of the trial).

2. **Houser may not assert that the jury instruction language regarding unanimity, and argument based on the instruction, was erroneous where he did not except to that language and has failed to demonstrate this alleged error is a manifest error of constitutional magnitude.**

Despite not having excepted to the instruction below, Houser asserts on appeal that Instruction No. 13, the to-convict instruction, was erroneous because he was entitled to juror unanimity on the means in this case. He also asserts the prosecutor's argument, referring to the language in that instruction that while the jury needed to be unanimous as to guilt on the charge, they did not need to be unanimous as to the alternative means

of committing the charge, exacerbated the error. Houser has failed to demonstrate on appeal how this is a *manifest* error issue of constitutional magnitude in this case. This Court should decline to address this issue because he failed to preserve it below and has failed to demonstrate that it is a manifest error of constitutional magnitude. Moreover, the law regarding unanimity and alternative means is well-settled and this Court recently rejected the crux of Houser's argument in State v. Lizzaraga, 191 Wn. App. 530, 364 P.3d 810 (2015).

a. *RAP 2.5(a)*

RAP 2.5(a) permits the Court to consider an issue raised for the first time on appeal only when it involves a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). “ ‘Manifest’ under RAP 2.5(a) requires a showing of actual prejudice.” State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). In order to show actual prejudice, an appellant must demonstrate that the asserted error had practical and identifiable consequences in the trial of the case. *Id.* An alleged unpreserved instructional error must be analyzed on a case by case

basis to determine whether it was a manifest error affecting a constitutional right. *See, O'Hara*, 167 Wn.2d at 100.

“It is well-settled law that *before error can be claimed on the basis of a jury instruction given by the trial court, an appellant must first show that an exception was taken to that instruction in the trial court.*” *State v. Salas*, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995) (quoting *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990)) (emphasis in original). Courts may refuse to review alleged instructional errors if no meaningful exception was made below. *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988).

Here, instead of submitting an argument demonstrating how this alleged jury instructional error constitutes a manifest error in this particular case, Houser simply drops a footnote asserting that all alleged unanimity errors are manifest errors of constitutional magnitude. While juror unanimity certainly implicates constitutional aspects⁹, Houser still has to demonstrate that the particular alleged error was manifest in this case. *See, State v. Lazcano*, 188 Wn. App. 233, 360, 354 P.3d 233 (2015), *rev. den.* ___ P.3d ___ (Mar 2, 2016) (appellant still needed to demonstrate manifest error of constitutional magnitude even though double jeopardy

⁹ As noted in *State v. Wright*, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009), the federal constitution does not require unanimity as to alternative means as long as there is sufficient evidence on *any* alternatives.

implicates constitutional issues). He has not, and because he failed to except to this language in the instruction below¹⁰, the Court should decline to review this issue.

b. *the unanimity language in Inst. No. 13 is a correct statement of the law*

While it is well settled that a defendant has a right to juror unanimity, it is also well settled that the right to juror unanimity is as to guilt for the charged *crime*. See, State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988), *modified on other grounds by In re St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992); State v. Ramos, 163 Wn.2d 654, 660, 184 P.3d 1256 (2008). Alternative means crimes set forth different means of committing the *same crime*. Lizzaraga, 191 Wn. App. at 564¹¹ (emphasis added). “[I]t is well-established that unanimity is not required where sufficient evidence supports each of the alternative means of committing the crime.” Id.; *accord*, State v. Wright, 165 Wn.2d 783, 802, 203 P.3d 1027 (2009). Relying upon State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994), also cited by Houser, the court explained that if there is sufficient evidence to support each of the alternative means submitted to the jury, the jury need not be unanimous as to the means

¹⁰ Defense did not object or except to the language in the State’s to-convict instruction regarding unanimity, but did propose an alternative instruction that eliminated the BAC alternative means. RP 448-51, 461.

¹¹ A petition for review in Lizzaraga was filed on Dec. 21, 2015.

because the court infers that the jury rested its decision on a unanimous finding as to means. Lizzaraga, 191 Wn. App. at 564 n.16 (quoting Ortega-Martinez, 124 Wn.2d at 707-08). The court in Lizzaraga also noted that the Washington Supreme Court had recently reaffirmed the premise that a jury need not be unanimous as to the alternative means if sufficient evidence exists as to each means. Id. at 565, citing State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

Houser does not address the Lizzaraga opinion in his brief, but it appears it may have been issued the same day he filed his brief. Lizzaraga, a Division I opinion, is binding precedent on this Court. As in Lizzaraga, Houser does not contend that there isn't sufficient evidence to support the alternative means of felony DUI charged. Instruction No. 13 was based on comparable language in WPIC 4.23. Therefore, the jury instruction and the prosecutor's argument informing the jury that they did not need to be unanimous as to the means as long as they unanimously agreed that Houser had committed the crime were not erroneous.

3. **The trial court did not err in giving a missing witness instruction as there was more than one witness that it applied to and it did apply to "Gary" because he was not available to the State and Houser had not attempted to find him.**

Houser asserts that the trial court erred in giving a missing witness instruction and such error was not harmless. Specifically he asserts that

“Gary,” the driver according to Houser’s testimony, was not available to him and because the instruction improperly shifted the burden of proof to him as to who was driving. The jury instruction was not limited to “Gary.” There were other witnesses, Rick and Jill, who could have corroborated Houser’s testimony, but that defense did not call. Gary was not a witness that was available at all to the State. No information regarding Gary had been provided to the State before trial. While Houser claimed he wouldn’t have been able to find Gary, he admitted he had made no attempts to find him. The instruction did not improperly shift the burden to Houser to prove he was not the driver because other instructions and closing argument made it clear that Houser bore no burden and the argument properly focused on attacking the credibility of Houser’s testimony.

Trial courts have considerable discretion in wording jury instructions. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 140 L.Ed.2d 322, 118 S.Ct. 1192 (1998). A party is not entitled to an instruction that is not a correct statement of the law or for which there is insufficient evidentiary support. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). “[W]hether legal error in jury instructions could have misled the jury is a question of law, which we

review de novo.” State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008).

Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence, but “if the defendant testifies about an exculpatory theory or defense that could have been corroborated by an available witness, then, in limited circumstances, the State may call attention to the defendant’s failure to offer corroborating evidence.” State v. Sundberg, __ P.3d __, 2016 WL 825378 (2016) ¶15. The missing witness doctrine can be applied to both the defendant’s theory of the case as well as the State’s. Montgomery, 163 Wn.2d at 598. The missing witness doctrine may be invoked, and a missing witness instruction given, when: (1) the missing witness is “peculiarly available” to the defendant; (2) the potential testimony is material; (3) the witness’s absence is not sufficiently explained; and (4) invocation of the doctrine would not implicate the defendant’s right to remain silent or shift the burden of proof. *Id.* at 598-99. A missing witness instruction permits the jury to infer, and the State to argue, that the missing witness’s testimony would have been unfavorable to the defendant. Sundberg, at ¶17. There are no concerns regarding the Fifth Amendment if the defendant testifies. Sundberg, at ¶16. Even if the facts and circumstances do not support a missing witness instruction, the State

can still properly challenge the defense's exculpatory theory of the case. See, Sundberg ¶20 (even though a missing witness instruction had not been given, prosecutor was still "permitted to comment on the defendant's failure to produce corroborative evidence to support" the defendant's testimony, without shifting the burden of proof).

a. availability

Houser asserts that the trial court erred in permitting the instruction because the witness was not available to him. A witness is "peculiarly available" to the defense if there is "such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging." State v. Cheatam, 150 Wn.2d 626, 6523, 81 P.3d 830 (2003). The availability of a witness is determined based on upon the witness's relationship to the parties, not just mere physical presence or accessibility. *Id.*

Here, Houser claimed on direct that a friend of his named "Gary" was driving when Houser's truck went off the road. Houser just happened to see Gary, a former friend and neighbor of his from when he was 19, earlier that day walking along the road while he was waiting outside

another friend's house in his truck. RP 373-77. He also testified that he didn't know Gary's last name, that he did know his wife's name was Debbie but didn't know her last name, that he had a friend in common with Gary but didn't know his last name either and hadn't seen him in a long time. RP 393-98. He admitted he had made no attempts to find Gary or Debbie, though defense counsel argued during the discussion of instructions that Houser couldn't have procured Gary's attendance because he had been incarcerated since the day of the incident. RP 394, 463.

Houser also testified that he had been working on his truck earlier that day at his friend Rick Reed's house, he testified on cross how he knew Rick, why he left Rick's and that he had not seen Rick since the day he worked on his truck. RP 383-89. He also testified that the female who showed up at the Hathway house that night was a former girlfriend of his, Jill Haner, that she lived in Acme on Galbraith Road, although he didn't know the exact address, that he didn't keep in touch with Jill and that he hadn't contacted her about the incident and that she wasn't going to be called to testify on his behalf. RP 406, 412-13.

None of this information had been provided to the State before Houser testified, and Gary, Rick and Jill did not testify for Houser. RP 435, 438, 440-42. While Houser did tell the troopers that he wasn't driving that night, that a buddy of his was, Houser had not told them the

buddy's name. RP 177-78, 438. This also was after he had just told them *he* had driven off the road and hit a pole. Houser is the only one who had information that could lead to finding his buddy Gary. He made no attempt to find him in almost two years since the date of the incident. He would have had access to a phone while incarcerated and he certainly had access to an investigator through counsel. Gary was peculiarly available to defense, and certainly was not available to the State. Gary is the only who could corroborate that Houser was not driving that night when the truck went off the road, so his testimony would have been material and not cumulative.

Although Houser knew where both Rick and Jill lived, as he had been to both their houses before, he did not attempt to contact them or call them as witnesses at trial. They were the only ones who could corroborate Houser's testimony about what he had been doing earlier that day and could have corroborated some of his testimony about the circumstances at the Hathaway residence. While their testimony was not as material as Gary's would have been, it was not cumulative and it was relevant to corroborate Houser's version of events. The trial court did not err in permitting the missing witness instruction where the evidence was sufficient to support the instruction as to Gary, Rick and Jill. The instruction did not apply to just Gary, but to any missing witness. CP 48.

While the prosecutor referenced the instruction with respect to Gary, her argument focused on Jill as someone who could have come in to testify. RP 546.

b. shifting of burden of proof

Houser also asserts that the trial court erred in permitting the missing witness instruction because the instruction shifted the burden of proof regarding an element of the offense. Houser argues that the giving of the instruction ipso facto shifted the burden of proof to him regarding the element of whether he was the driver of the truck. It did not. The instruction isn't mandatory, but permissive. It permits a jury to infer that the testimony of the missing witnesses would not have been favorable to a defendant, not that it has to, and does not direct or that the State no longer bears the burden of proof on an element of the offense. The other jury instructions informed the jury that the State bore the burden of proof as to all elements of the crime. CP 36 (Inst. 3).

Moreover, the prosecutor did not argue that the burden shifted, but instead reiterated that she bore the burden of proof and that the defendant bore no burden. RP 500, 504, 539. In arguing that the State had met the element of being under the influence, the prosecutor mentioned in closing that Houser had said that Gary was the driver and then described Houser's testimony about how much he had had to drink that day and when. RP

519-20. It was in fact *defense* that drew attention to the missing witness instruction, Inst. No. 15, in closing, and to questions jurors might have about why Gary didn't testify, explaining that he didn't testify because Houser didn't have any way to track Gary down. RP 533; CP 48. In rebuttal, in addressing Houser's statement to the troopers that night that he wasn't the driver, that his buddy was, the prosecutor responded that Houser didn't give the troopers the name of his buddy that night. RP 540. In addressing Houser's credibility, the prosecutor argued that if Houser weren't the driver, wouldn't he have tried to find witnesses to support his story. RP 540-41. In questioning the credibility of Houser's testimony, the prosecutor's argument always related back to the specific testimony of Houser, and inquired whether that testimony was reasonable to believe. 543-45, 548-50. The prosecutor summed up:

You get to consider everything; the testimony, the manner in which they testified, the reasonableness of their story, the inconsistencies in their stories, how it may or may not add up, *why you did or did not see particular witnesses to tell you what happened that night*, why this is the first time ever in almost two years we have ever heard about Gary, why no one has contacted law enforcement to admit, hey, I am a witness; hey, I was the driver. No one has come forward. If they had, they normally would have followed up on that investigation. There is no evidence that there is nobody (sic) else there. When I asked him, well, what happened to Gary after the collision? He goes I don't know. How did he get out? I don't know. Mr. Hathaway was concerned there was somebody else possibly injured, if there was somebody else in the car. But there wasn't.

He never told Mr. Hathaway there was anybody else driving or anybody else injured because he told him he was the driver. He told him he caused the collision. That's why he is the driver.

RP 551-52. The prosecutor never told the jury or intimated that Houser bore the burden of proving that he was not the driver. The prosecutor never argued the jury should consider that the testimony of "Gary" and "Jill" would have been unfavorable. Questioning the lack of corroboration for Houser's exculpatory theory of the case, and indicating that the jury consider who testified and who did not in assessing the credibility of the defense theory, did not impermissibly shift the burden of proof to Houser. *See, Sundberg*, __ P.3d __ at ¶ 20-23 (where defendant testified that he did not know the drugs were in the overalls he was wearing when arrested and that he had occasionally lent the overalls to a person he had hired as a laborer for a week, prosecutor's argument questioning why the laborer didn't testify, that the defendant had failed to call the witness to testify did not improperly shift the burden of proof to defendant); *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (not all comments on a defendant's failure to call witnesses impermissibly shifts the burden of proof and state's argument that defendant could have produced the persons whose names were on defendant's "crib sheets" was not impermissible).

c. *harmless error*

Even if it was error to instruct the jury on the missing witness doctrine, any error was harmless in this case.

An improper jury instruction may be harmless error so long as the jury is properly instructed on the State's burden. ... 'An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' Whether a flawed jury instruction is harmless error depends on the facts of a particular case."

Montgomery, 163 Wn.2d at 600 (internal citations omitted).

First, the instruction only permits the jury to draw a *permissible* inference that the missing witness's testimony would have been unfavorable *if* the jury itself finds that the witness was peculiarly available to the party who didn't call them, the issue the witness would have testified about was of fundamental importance, it appeared naturally within the party's interest to call them, there was no satisfactory explanation as to why the person wasn't called, and the inference is reasonable in light of all the circumstances. Inst. No. 15, CP 48. The instruction identified both the State and Houser as the parties to which the instruction could apply, and there was more than one witness to which the jury could have applied the instruction.

Second, the prosecutor emphasized that the defendant bore no burden twice in her argument, and that the State bore the burden. She

referred to the missing witnesses, in rebuttal after defense drew attention to the instruction, primarily in the context of assessing Houser's credibility and the credibility of his exculpatory theory of the case. RP 546-47, 551. She tied her arguments back to Houser's testimony on direct and on cross examination. She permissibly attacked Houser's theory of the case by commenting on his failure to produce corroborative evidence that supported his testimony. All of that argument was permissible with or without a missing witness instruction. *See, State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *rev. den.* 115 Wn.2d 1014 (1990) ("When the defendant attempts to establish his theory of the case by alleging the corroborating testimony of an uncalled witness, the prosecutor is entitled to attack the adequacy of the proof, pointing out weaknesses and inconsistencies, including the lack of testimony which would be integral to the defendant's theory.") The impact of the instruction in the context of the legitimate arguments of the prosecutor and the less than credible testimony of the defendant, given his admissions right after the collision that he had been driving, was minimal, and therefore harmless.

4. The trial court did not err in including Houser's felony escape conviction in the offender score for the felony DUI pursuant to State v. Sandholm.

Houser next asserts that the trial court erred in including his prior felony escape conviction in his offender score because former RCW

9.94A.525(2)(e) was a specific sentencing provision that applied to felony DUI offenses, to the exclusion of the other provisions of RCW 9.94A.525(2). In doing so, he relies upon caselaw that has been overruled by State v. Sandholm, 184 Wn.2d 726, 364 P.3d 87 (2015). Sandholm specifically holds that under former RCW 9.94A.525 prior felony offenses should be included in the offender score for felony DUIs, in accord with the other provisions of RCW 9.94A.525(2).

In asserting that former RCW 9.94A.525(2)(e)¹² is the only subsection of RCW 9.94A.525 that should be considered in determining the offender score for felony DUIs, Houser cites to State v. Morales, 168 Wn. App. 489, 278 P.3d 668 (2012) and State v Jacob, 176 Wn. App. 351, 308 P.3d 800 (2013). Both those cases were expressly overruled by Sandholm, a case which issued a few days before Houser filed his brief. Sandholm, 184 Wn.2d at 738. Instead, Sandholm held:

... that former subsection (2)(e) sets out certain *additional* provisions for calculating an offender score when the present conviction is for felony DUI. This subsection expresses the legislature's intent that repeat DUI offenders not benefit from the washout provisions contained in the previous subsections of the SRA for prior traffic and driving offenses. Former subsection (2)(e) adds to the list of offenses that shall be included in an offender score; it does not narrow it.

¹² The legislature amended RCW 9.94A.525(2)(e) in 2013 to express that other prior convictions should be scored as set forth in the other provisions of RCW 9.94A.525(2), effective September 2013. Laws of 2013, Second Spec. Sess., ch. 35 § 8.

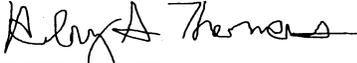
Id. at 739. The Sandholm court concluded that the defendant's prior drug convictions should therefore be included in the offender score on the defendant's felony DUI offense. Id.

The judge here agreed with the State that Houser's prior felony escape conviction should be included in Houser's offender score, and imposed a standard range sentence based on an offender score of five. RP 603-05; CP 80-81. The trial court did not err.

E. CONCLUSION

The State respectfully requests that this Court deny Appellant's appeal and affirm his conviction and sentence for Felony DUI.

Respectfully submitted this 25th day of March, 2016.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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