

COA No. 68558-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RICH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SKAGIT COUNTY

The Honorable Susan K. Cook

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to find a knowing, voluntary and intelligent waiver prior to granting Mr. Rich's motion to represent himself.

2. The trial court erred in entering the unnumbered finding of fact in the written form "Waiver of Right to Counsel," finding that Mr. Rich knowingly and voluntarily waived his right to counsel. CP 246.

3. The defendant's conviction for Felony DUI must be reversed where there was not substantial evidence of both statutory alternatives.

4. The State failed to establish "prior offenses" as a threshold matter to the court, or prove to the jury that Mr. Michael Rich had four "prior offenses" as required for Felony DUI.

5. Mr. Rich's right to jury unanimity under Petrich was violated.

6. The trial court's instruction telling the jury it need not be unanimous as to which alternative of DUI was proved was manifest constitutional error under RAP 2.5(a)(3).

7. The prosecutor committed misconduct in closing argument.

8. The defendant's offender score was miscalculated.

9. The defendant's combined sentence of incarceration and community custody exceeds the statutory maximum.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court fail to find a knowing, voluntary and intelligent waiver prior to granting Mr. Rich's motion to proceed pro se, where the court's written order (completed by defense counsel) indicates that Mr. Rich was affirmatively misadvised as to the charges and the penalty faced?

2. Must the defendant's conviction for Felony DUI be reversed where there was not substantial evidence of both statutory alternatives – driving while influenced by alcohol or drugs, and driving while influenced by alcohol and drugs – that were set forth in the "to-convict" instruction?

3. Did the State fail to establish "prior offenses" per RCW 46.61.5055(14) as a threshold matter to the court, where the court did not have before it proof of four convictions satisfying the statutory definition, absent evidence of an equivalent local ordinance?

4. Did the State assume the burden of proving applicable "prior offenses" to the jury?

5. Did the State fail to prove to the jury beyond a reasonable doubt that Mr. Rich had four convictions meeting the definition of "prior offenses," absent evidence of an equivalent local ordinance?

6. Did the State fail to prove that there were four prior crimes belonging to the defendant Michael Rich, as shown by independent evidence, under the beyond a reasonable doubt standard?

7. Was Mr. Rich's right to jury unanimity under Petrich violated where the State offered multiple acts (five prior convictions) to prove the element of four prior DUI or Reckless Driving offenses, where there was no unanimity instruction, the prosecutor did not elect which four convictions the jury should base its verdict on, and the evidence as to one or more of the prior offenses was controverted?

8. Did the prosecutor commit misconduct in closing argument by arguing facts not in evidence and using the defendant's prior DUI offenses as proof of propensity?

9. Was the defendant's offender score miscalculated when the sentencing court counted full points for Mr. Rich's juvenile offenses, and when it failed to follow the statutory requirement to assess prior convictions (served concurrently) under the same criminal conduct analysis?

10. Was the defendant's combined sentence of incarceration and community custody in excess of the statutory maximum?

C. STATEMENT OF THE CASE

1. Procedural history. The Skagit County prosecutor charged Michael Rich with count 1: Felony Driving Under the Influence ("Felony DUI") per RCW 46.61.502(1)(a) (based on four prior DUI offenses), and count 2: the gross misdemeanor of Driving While License Suspended per RCW 46.20.342(1)(a). CP 1-2.

Mr. Rich was allowed to proceed pro se by order entered August 24, 2011. 8/24/11RP at 3-15; CP 246-248 (Appendix A). The written form his lawyer completed for him, entitled "Waiver of Right to Counsel," did not state the crimes with which he had been charged, and simply listed "5 years" as the maximum penalty. CP 246 (Appendix A). The trial court did not orally find that Mr. Rich had validly waived his right to counsel, but instead signed the written form. CP 246-248.

Following trial on the charge of Felony DUI, the jury found Mr. Rich guilty and he was sentenced to 60 months incarceration, and 12 months of community custody. CP 119, 141-52.¹

He appeals. CP 205-06.

¹ The charge of DWLS was dismissed on the defendant's motion by trial court order of October 6, 2011. CP 255; 10/6/11RP at 27-30.

2. Facts. Wendy Pullen was exiting her driveway onto Goldie Road at 9:30 at night in November, and as she started driving, she passed Tammy Anderson's white vehicle idling near the entrance to the driveways of several homes, including the LaCounts, her uncle and aunt. 2/28/12RP at 29-30, 88. The vehicle began turning in, but missed the LaCounts' driveway and instead went down a slight embankment into a ditch. 2/28/12RP at 30, 38-39. Ms. Pullen was in a hurry to get to work, but before driving away, she used her cell phone to call the LaCounts and tell them what she had seen. 2/28/12RP at 33-34.

Mr. LaCount was aroused from bed by his niece's phone call. 2/28/12RP at 55. He got out of bed, got dressed and put on a jacket and shoes, and then went outside and walked over to the driveway ditch area, to see what was going on. 2/28/12RP at 55-57. There was no damage to the vehicle. 2/28/12RP at 62. Photographs of the small, drainage-size ditch near the driveway were admitted. Supp. CP ____, Sub # 188 (Exhibit List, Exhibits 2-5).

Mr. LaCount approached the passenger side of the vehicle. 2/28/12RP at 57. Mr. LaCount saw Mr. Rich's wife Tammy, the owner of the vehicle, in the front passenger seat, with a beer can

between her legs. When Tammy saw Mr. LaCount looking in her direction, she tried to hide the can from view by moving it closer to the vehicle door. 2/28/12RP at 57-58.

Mr. LaCount stated that a male, identified by him as Mr. Rich and a friend of the family, was sitting in the driver's seat. 2/28/12RP at 57. He was trying to accelerate and decelerate in order to rock out of the ditch and onto the road surface. 2/28/12RP at 57, 60, 64. Mr. Rich exited the vehicle and indicated that he had telephoned Richard Rich to come and tow the car out of the ditch, with his van and tow cable. 2/28/12RP at 58. From where Mr. LaCount was standing several feet from the other side of the vehicle, he stated he smelled alcohol coming from Mr. Rich when Mr. Rich opened the driver's side door. 2/28/12RP at 58-59. When Mr. LaCount asked Mr. Rich if he was "drunk," Mr. Rich pointed to Tammy and said that she was his designated driver. 2/28/12RP at 59, 62.

Richard Rich, the defendant's relative, stated that he drove his van equipped with a tow cable to the LaCounts' property because he "received a phone call from Michael Rich stating that he had drove his car or his girlfriend's car in a ditch, asked if I could come and help him out." 2/29/12RP at 6. When Deputy Bearden

of DUI." 2/28/12RP at 92-93. Following Miranda and the Deputy's reading of an implied consent form, Mr. Rich later refused to undergo BAC breath testing for alcohol. 2/28/12RP at 97-99.

At trial, Mr. Rich testified that he was not driving the car, and stated that Mr. LaCount must have mistaken Tammy for him since they both have long hair and glasses. 2/28/12RP at 172-73. Mr. Rich told the Deputy that he was driving in order to protect Tammy. 2/28/12RP at 173.

D. ARGUMENT

1. MR. RICH DID NOT VALIDLY WAIVE HIS RIGHT TO COUNSEL.

a. The trial court must find that the defendant's constitutional right to counsel was knowingly, intelligently and voluntarily waived. The Sixth and Fourteenth Amendments to the United States Constitution, as well as art. I, § 22 of the Washington Constitution, allow criminal defendants to waive their constitutional right to the assistance of counsel. Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Joyner, 69 Wn. App. 356, 362, 848 P.2d 769 (1993).

A defendant thus may engage in self-representation, but a valid waiver of the constitutional right to counsel must be found by the trial court. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct.

1019, 82 L.Ed. 1461 (1938). A valid waiver must be knowing, intelligent and voluntary. Joyner, 69 Wn. App. at 362, 848 P.2d 769 (citing Smith, 50 Wn. App. at 528). A colloquy on the record establishes a knowing and intelligent waiver if it demonstrates that the defendant made the decision to represent himself with knowledge of the following, “at a minimum” (1) the nature and classification of the charges, (2) the maximum penalty upon conviction, and (3) the existence of the technical rules. City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

A judge presented with a request for self-representation must investigate by colloquy as long and as thoroughly as the circumstances of the case before him demand, in order to determine if the waiver is knowing, voluntary and intelligent. City of Bellevue v. Acrey, 103 Wn.2d at 210 (citing Von Moltke v. Gillies, 332 U.S. 708, 723–24, 68 S.Ct. 316, 92 L.Ed. 309 (1948)). On appeal, the State bears the burden of proving that a defendant’s waiver of any constitutional right was knowing and voluntary. See, e.g., State v. Stegall, 124 Wn.2d 719, 730, 881 P.2d 979 (1994); United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir.1994). The reviewing court evaluates the question of waiver of the right to a lawyer with great care, indulging “every reasonable presumption

against waiver.” Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

There was no valid waiver in this case, where the trial court employed an abbreviated colloquy and granted the pro se request by use of an incorrect written pro se waiver form at the prosecutor’s request, which affirmatively misadvised Mr. Rich of the charges he faced and the maximum penalty. CP 246 (Appendix A).

b. Pro se waiver -- written form. During the hearing on Mr. Rich’s request to proceed pro se, the prosecutor told the court and the defendant that Mr. Rich had been charged with “felony DUI involving a license suspended,” but neither the prosecutor nor the court orally stated the penalty involved for either of what were in fact two counts – Felony DUI, and DWLS -- with which Mr. Rich was charged. 8/24/11RP at 3, 4-15. Mr. Rich was not orally advised regarding the maximum penalties he faced on either of the respective counts. 8/24/11RP at 3, 4-15.

Instead, the prosecutor proffered a written form entitled “Waiver of Right to Counsel,” as the appropriate means of waiver, and the trial court employed it at the State’s behest, as Mr. Rich’s then-attorney filled in the blanks on the form because Mr. Rich was handcuffed (Mr. Rich later signed the document). 8/24/11RP at 3.

The waiver form stated that the maximum penalty of incarceration that Mr. Rich was facing was "5 years," but did not state the charges he was facing. CP 246 (Appendix A). The form also did not state the maximum penalty or any penalty for any particular, or for any other charge or count (no particular crime(s) charged was specified at all). CP 246 (Appendix A).

In addition, although the written form stated that the sentences for "more than one crime" could be required to be served consecutively, the form did not list any particular charge or charge(s), and did not state that multiple counts had been charged. CP 246 (Appendix A). As completed by handwritten entries and signed by the trial court, the printed form read in relevant part:

An accused has a constitutional right to represent himself or herself if he or she chooses to do so, but there are potential dangers and disadvantages of representing yourself. The following questions must be filled in so that the Court can determine that your decision to represent yourself is knowingly made.

* * *

4. Do you realize that you are currently charged with Yes?

5. Do you realize that the maximum penalty for Yes: 5 years is confinement in a state correctional institution for a term of 5 years years, or by a fine in an amount fixed by the court of \$10,000, or by both such fine and confinement? Yes.

* * *

8. Do you realize that if you are found guilty of more than one crime, this court can order that the sentences be served consecutively, that is one after another? Yes.

* * *

I find that the defendant has knowingly and voluntarily waived his or her right to counsel. I will therefore approve the defendant's election to represent himself.

CP 246 (Appendix A). The prosecutor represented to the court that Mr. Rich, based on this written form he had filled out with help of counsel, "appears to understand the nature of the charges he is facing[.]" 8/24/11RP at 6. The trial court did not orally state that it was granting Mr. Rich's motion to proceed as his own counsel (discussions moved on to the topic of pro se resources), but the court signed the order containing the above language. 8/24/11RP at 1-15; CP 246.

c. The waiver of counsel is invalid because it affirmatively misadvises Mr. Rich of the charges and the maximum penalty, and thus fails to demonstrate a knowing, voluntary or intelligent waiver of the right to a lawyer. At the time of the pro se waiver, Mr. Rich was charged with Felony DUI, with a maximum term of 60 months, see RCW 46.61.502(6), RCW 9A.20.021(1)(c), and Driving While License Suspended in the First Degree, a gross misdemeanor, see RCW 46.20.342, RCW

9A.20.021(2). The trial court, at sentencing on the two convictions, would have had discretion to impose the misdemeanor sentence consecutive to the sentence imposed for the felony conviction, including under RCW 9.92.080(2) and (3).²

More so than failing to correctly advise Mr. Rich of the maximum possible penalty, the trial court allowed self-representation based on a form which affirmatively misadvised Mr. Rich. Without this critical information being provided correctly, a defendant's waiver of his important right to be represented by an attorney is not knowingly waived. State v. Silva, 108 Wn. App. 536, 542-42, 31 P.3d 729 (2001) (valid waiver required advisement of maximum sentence trial court could impose at sentencing).

² RCW 9.92.080 reads in pertinent part:

(2) Whenever a person is convicted of two or more offenses which arise from a single act or omission, the sentences imposed therefor shall run concurrently, unless the court, in pronouncing sentence, expressly orders the service of said sentences to be consecutive.

(3) In all other cases, whenever a person is convicted of two or more offenses arising from separate and distinct acts or omissions, and not otherwise governed by the provisions of subsections (1) and (2) of this section, the sentences imposed therefor shall run consecutively, unless the court, in pronouncing the second or other subsequent sentences, expressly orders concurrent service thereof.

The trial court and the prosecutor relied on the written pro se waiver form as advisement of Mr. Rich for purposes of his request to represent himself, as did Mr. Rich, who, after being misinformed, answered the following additional question (question 20):

20. Now, in light of the penalty that you might suffer if you are representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer? Yes.

CP 246 (Appendix A).

This is inadequate. The defendant must understand the risks associated with self-representation so that it can be shown with constitutional certainty that he has made his decision knowingly. Acrey, 103 Wn.2d at 211; Faretta, 422 U.S. at 835. In this case, the trial court's written order granting pro se status affirmatively misadvised Mr. Rich of the maximum penalty, and affirmatively indicates that he waived his right to a lawyer in reliance on that erroneous information. CP 246. Because the relevant inquiry is always the defendant's knowledge at the time he waived his right to counsel, United States v. Erskine, 355 F.3d 1161, 1169-70 (9th Cir.2004), Mr. Rich's waiver of counsel was unknowing, unintelligent, and involuntary, since he was affirmatively misinformed of the penalty he faced, and he waived counsel in light

of that misinformation. CP 246; U.S. Const. amend. 6; U.S. Const. amend. 14.

Notably, the Acrey Supreme Court, in imposing the requirement that the trial court conduct a thorough, searching colloquy with the defendant to determine if he understands the risk he faces at trial, strongly disapproved of the use of written forms that purport to substitute for the required searching inquiry. In Bellevue v. Acrey, the defendants signed a document entitled “Statement of Rights of Accused Persons,” which included advisement of the right to a lawyer. Bellevue v. Acrey, 103 Wn.2d at 205. The Supreme Court ruled that the defendants did not knowingly waive their right to counsel by signing this form, where among other factors, they were not informed of the maximum penalty upon conviction. Bellevue v. Acrey, 103 Wn.2d at 211.

The Acrey Court made clear that the trial court, by colloquy with the accused, should “assume responsibility” for ensuring that the defendant’s waiver of counsel in a criminal case is knowing and voluntary. Bellevue v. Acrey, 103 Wn.2d at 210. The Court relied with approval on the Court of Appeals decision in State v. Chavis, 31 Wn. App. 784, 644 P.2d 1202 (1982), which rejected as inadequate the written waiver undertaken by the defendant, stating:

“[A] mere routine inquiry —the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver. . .

Bellevue v. Acrey, 103 Wn.2d at 210 (quoting State v. Chavis, at 789–90).

The present case is an example of just the sort of danger, and constitutional error, that is likely to result where a searching colloquy is dispensed with in favor of a boilerplate written form – which in this case was itself affirmatively wrong. The trial court’s finding of a knowing waiver below was erroneous in the face of the affirmative misadvisement, and Mr. Rich did not validly waive his right to counsel. Bellevue v. Acrey, 103 Wn.2d at 212.

d. Reversal is required. A criminal defendant “[can] not make a knowledgeable waiver of his constitutional right to counsel” where he “was never advised of the maximum possible penalties for the crimes with which he was charged.” State v. Silva, 108 Wn. App. at 541. Where a waiver is invalid, no “harmless error” analysis applies. Silva, 108 Wn. App. at 542 (rejecting State’s contention that invalid Faretta waiver which failed to warn that sentences could be ordered to be served consecutively was not error because trial court did not order consecutive sentences at sentencing).

Reversal is therefore required. United States v. Arit, 41 F.3d 516, 521 (9th Cir. 1994); Silva, at 542.

2. MR. RICH'S RIGHT TO JURY UNANIMITY WAS VIOLATED WHERE THERE WAS NOT SUBSTANTIAL EVIDENCE ON EACH OF THE ALTERNATIVE MEANS OF FELONY DUI.

a. Alternative means charged, and argued. In the jury instructions, the State included two different statutory alternatives for the charged crime of driving under the influence under RCW 46.61.502(1):

- (a) driving while under the influence of or affected by "intoxicating liquor or a drug," or
- (b) driving while under the "combined influence of or affected by intoxicating liquor and a drug"

CP 96-118 (Jury instructions, Instr. no. 10 ("to-convict" instruction); see RCW 46.61.502(1). Driving while under the influence is an "alternative means" crime. State v. Martin, 69 Wn. App. 686, 688-89, 849 P.2d 1289 (1993).

However, at trial, Deputy Bearden testified solely that Mr. Rich exhibited signs of alcohol intoxication. This led to his arrest; after arrest, a marijuana pipe was found on Mr. Rich, but was not tested. Deputy Bearden stated that he was a DUI investigator, trained in DUI detection, 2/28/12RP at 82, but he was neither proffered as, or established to be a DRE (Drug Recognition Expert).

In any event, the Deputy did not testify that Mr. Rich showed signs of marijuana intoxication, nor did he connect the indicators that he used to determine alcohol intoxication as being somehow also indicative of marijuana intoxication – a matter, unlike the signs of alcohol intoxication, which is not a matter of a lay jury’s common experience. See State v. Baity, 140 Wn.2d 1, 18, 991 P.2d 1151 (2000) (Drug Recognition Expert (“DRE”) testimony may be admissible under ER 702 where it is scientific or specialized opinion that may be helpful to the jury).

The court’s jury instruction no. 10 specifically told the jury it need not be unanimous as to the alternative means.³ CP 96-118 (Jury instructions, Instr. no. 10). And in closing argument, the deputy prosecutor did not attempt to make clear to the jury that it should rely only on the .502(1)(a) (alcohol or drug only) means. Indeed, quite the opposite – the prosecutor recited both alternative means (including combination alcohol/drug), then expressly told the

³ The trial court’s instruction no. 10, telling the jury it need not be unanimous as to which alternative of DUI was proved, was manifest constitutional error under RAP 2.5(a)(3). CP 96-118 (Instr. no. 10); State v. Martin, 69 Wn. App. at 686-89 (error in DUI “to-convict” instruction in telling jury it need not be unanimous as to which alternative “mode of commission” of DUI was committed implicated Due Process and the right to proof of the crime charged and required reversal where substantial evidence must support both alternative means charged).

jury it could use the untested marijuana pipe as evidence of guilt on the charge:

We don't know much about drugs. All we know is that a marijuana pipe with burnt residue was found on Mr. Rich's person when he was arrested. We don't know if that was a factor in this, but it's evidence you can consider. We don't know. Well, why don't we know exactly? Well, we don't have any tests that show us either way. Why don't we have any tests? We didn't take a test.

2/29/12RP at 52. The prosecutor then continued on to describe the witness observations of Mr. Rich that showed he was intoxicated by alcohol. 2/29/12RP at 52, 53-54 (breath "wreaked [sic]of beer" to civilian witness LaCount), 55-55 (Deputy Bearden noted "strong odor of alcohol on Mr. Rich's breath and person" and "slurred speech, bloodshot, and watery eyes").⁴

The initial error of instructing upon two alternative means in the jury instructions where only one is supported by evidence can be neutralized for appeal by the prosecutor in closing argument if he or she makes clear the State is pursuing guilt only on one particular alternative, a requirement that is strictly applied. State v. Witherspoon, ___ Wn. App. ___, 286 P.3d 996, 1003 (October 16, 2012) (failure to make clear in closing that a certain means was the

⁴ At trial during the State's questioning of Mr. Rich, he stated that he had consumed one 22-ounce Ice House beer that night, which he had shared with his girlfriend Tammy. 2/28/12RP at 179-80.

prosecution theory confused jury and required reversal under alternative means doctrine). Here, the prosecutor did the opposite and instead argued that the jury had evidence, and could convict Mr. Rich, on both alternatives. The “substantial evidence” test applies.

b. There was not substantial evidence of both alternative means charged. In Washington, criminal defendants have a constitutional right to a unanimous jury verdict. Wash. Const. art. I, section 21. A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). Further, due process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14.

“Alternative means” statutes identify a single crime and provide more than one means of committing that crime. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). The

requirements of unanimity and proof beyond a reasonable doubt are safeguarded, in an alternative means case, by substantial evidence review. The appellate court must be able to conclude that the evidence at trial was sufficient to prove each of the alternative means presented to the jury, because absent a unanimity instruction or a special verdict, the reviewing court cannot know which means the jurors relied upon, thus there must be substantial evidence on both to affirm. Kitchen, 110 Wn.2d at 410; State v. Arndt, 87 Wn.2d 374, 376, 553 P.2d 1328 (1976).

Here, Mr. Rich's conviction must be reversed because there was not substantial evidence on the alternative means of .502(1)(b). Mr. LaCount made clear that what he smelled when Mr. Rich opened the car door was the smell of beer. 28/12RP at 74, He was never asked about, much less did he volunteer any testimony regarding marijuana smell, or any signs of marijuana use, usage or intoxication. The Deputy testified that he believed Mr. Rich (and Tammy) had been "drinking." 2/28/12RP at 82, 84, 92, 95. Dispatch had reported that the reporting party said her husband (Mr. LaCount) had seen an open container of alcohol in the car, and Mr. Rich stumbled when the Deputy called him out from under the vehicle in the ditch to come and talk to him.

Additionally, when Mr. Rich pulled his driver's license out of his wallet sleeve and gave it to the Deputy as requested, there was a casino card with the license card. 2/28/12RP at 88-89, 120.

Mr. Rich appeared to have been drinking because the Deputy "could smell the odor of the consumption of alcohol coming from his breath and person," and "when he spoke he had slurred speech, bloodshot watery eyes." 2/28/12RP at 89.

Deputy Bearden "placed [Mr. Rich] under arrest for suspicion of DUI." 2/28/12RP at 92-93, 95-96. After arrest, Deputy Bearden located a marijuana-style pipe on Mr. Rich's person, which had residue in it, and smelled like burnt marijuana. 2/28/12RP at 92. Deputy Bearden stated that pipe was never tested. 2/28/12RP at 111.

Later, the implied consent warnings, which were read to Mr. Rich before Deputy Bearden proposed to give him a BAC breath test (and Mr. Rich refused), indicated the test would be "to determine alcohol concentration." 2/28/12RP at 98-99.

All of this is inadequate to support the second alternative means charged in the jury instructions, requiring proof that Mr. Rich was driving under the influence of a drug. The "substantial evidence" that is required on each alternative means, in order to

affirm a general verdict, is evidence which is adequate to convince the appellate court that a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. State v. Kitchen, 110 Wn.2d at 410-11. This standard is equated to that required to affirm on a sufficiency challenge. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994).

Here, Deputy Bearden described the reasons he believed Mr. Rich had been drinking alcohol, and was affected by it. He never stated that Mr. Rich appeared to be under the influence, affected, or impaired, by marijuana. Further, he had not, in the first place, described any training he had received particular to detecting marijuana usage, impairment, intoxication, or to detecting whether a person was under the influence of marijuana. The evidence was legally insufficient. See Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); U.S. Const. amend. 14. Reversal is required under the alternative means doctrine.

3. THE STATE FAILED TO PROVE THE ELEMENT OF FOUR PRIOR OFFENSES OF THE DEFENDANT.

a. The State must prove four or more “prior offenses” of the defendant as an element of Felony DUI. Due process requires the State to prove each essential element of the crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. I, Section 22; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In order to convict a defendant for Felony DUI as charged under RCW 46.61.502(6), the State was required to prove that Mr. Rich had four or more prior convictions for DUI under RCW 46.61.502 or an “equivalent local ordinance,” or for certain offenses, including Reckless Driving, where the offense was originally charged as DUI under RCW 46.61.502 or an equivalent local ordinance. RCW 46.61.502(6); RCW 46.61.5055(14).

In State v. Chambers, 157 Wn. App. 465, 237 P.3d 352 (2010), the Court of Appeals stated that the issue of whether a prior offense meets the definition set forth in RCW 46.61.5055 so as to qualify as a predicate for the elevating element is a threshold question of applicability, and that only judgments showing prior offenses that meet this definition may be admitted. Chambers, 157 Wn. App. at 479.

The next question of the existence of four prior offenses for purposes of the element of Felony DUI must be proved to the jury beyond a reasonable doubt. Chambers, 157 Wn. App. at 474, 476. The State must establish by evidence independent of the record, such as booking photographs or fingerprints, or distinctive personal information that the person named in the document of a prior conviction is the defendant in the present action. State v. Santos, 163 Wn. App. 780, 784, 260 P.3d 982 (2011) (citing State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005)).

b. Objections and motion for directed verdict. Mr. Rich objected to the admission of the five judgments offered by the State to prove that Mr. Rich had four or more prior offenses for DUI or applicable offenses. 2/28/12RP at 79-81; Supp. CP ____, Sub # 188 (Exhibit list, exhibits 7-10⁵). Mr. Rich moved for a directed verdict following the State's case, on ground that the State had not proved four prior offenses belonging to the defendant. 2/28/12RP at 161. Subsequently, during the defense case, in cross-examination by the prosecutor, Mr. Rich conceded that he had previously been convicted of a DUI offense, but denied that he had five convictions. 2/28/12RP at 185.

⁵ Exhibit 9 contains documents pertaining to two convictions.

c. Jury instructions. The State, beyond seeking evidentiary admission under Chambers of prior judgments meeting the applicability definition of RCW 46.61.5055(14), additionally took on the burden of proving to the jury beyond a reasonable doubt that that Mr. Rich had four prior convictions for DUI under RCW 46.61.502 or an “equivalent local ordinance,” or for Reckless Driving, where the offense was originally charged as DUI under RCW 46.61.502 or an equivalent local ordinance.

The jury instructions required proof of four or more prior offenses. CP 96-118 (Jury instruction 10). The instructions, rather than leaving the jury solely with the question of the existence of prior offenses as the defendant’s, expressly defined “prior offense” as requiring proof of, *inter alia*:

1) A conviction for a violation of RCW 46.61.502, Driving Under the Influence, or an equivalent local ordinance; [or]

* * *

5) A conviction for a violation of . . . RCW 46.61.500, Reckless Driving . . . or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502, Driving Under the Influence[.]

CP 96-118 (Jury instruction no. 13); see RCW 46.61.5055(14).

Jury instructions to which there is no objection become the law of the case. State v. Hickman, 135 Wn.2d at 103-04; State v. Salas,

127 Wn.2d 173, 182, 897 P.2d 1246 (1995) (if “no exception is taken to jury instructions, those instructions become the law of the case”). The State assumes the burden of proving the offense as stated without objection in the jury instructions. State v. Hickman, 135 Wn.2d 97, 104, 954 P.2d 900 (1998); State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995). This includes definitions in the jury instructions, which apply as therein stated. Scoccolo Constr., Inc. v. City of Renton, 158 Wn.2d 506, 522–23, 145 P.3d 371 (2006) (Madsen, J., concurring) (narrow and debatable definition of “acting for” accepted in instructions was law of the case); Englehart v. Gen. Elec. Co., 11 Wn. App. 922, 923, 527 P.2d 685 (1974) (definition of accidental death was law of the case, no error having been assigned); CP 96-118 (Jury instructions nos. 10, 13); RCW 46.61.5055(14).

d. The documents proffered by the State did not establish and were not admissible as proof of four applicable prior offenses as defined by RCW 46.61.5055(14). The State offered, and the court admitted into evidence, judgments from five convictions. Exhibits 7-10. First, however, while Exhibit 7 includes a citation for Driving Under the Influence in Stanwood under Washington state law RCW 46.61.502, the judgment of guilty from

the Skagit County District and Municipal Court indicates the offense adjudicated is termed “DWI,” indicated by a checking of the box next to that pre-printed term. Exhibit 7 (documents from C49522). Importantly, the State did not proffer to the court the elements of any local ordinance and made no showing that “DWI” is a local ordinance equivalent to RCW 46.61.502, which is DUI. “DWI” appears to refer to an offense entitled “Driving While Intoxicated,” but the Stanwood Municipal Code contains no such or similar offense and does not include RCW 46.61.502 in its provision adopting state laws. Stanwood Municipal Code 10.08.010 (“Statutes designated”).⁶

Michael Rich also contends that Exhibit 8, documents from a judgment for Reckless Driving, based on a citation for violation of RCW 46.61.502 in No. C0583323 from the Skagit County District and Municipal Court, includes the same reference to “DWI.” Exhibit 8.

⁶ The Stanwood Municipal Code does not adopt the Washington Model Traffic Ordinance, WAC 308-330, which adopts the State DUI law. See WAC 308-330-425; compare Mount Vernon Municipal Code 10.04.010, adopting WAC 308-330; see *State v. Fladebo*, 53 Wn. App. 116, 117, 765 P.2d 1310 (1988) (“Fladebo was charged in the Mount Vernon Municipal Court with driving while intoxicated, in violation of Mount Vernon Municipal Code 10.04”). The Skagit County Code contains no provision regarding Driving While Intoxicated, including in Title 10 “Vehicles and Traffic.” Skagit County Code 10.04 to 10.28.

Reversal is required because the State failed to adequately establish the threshold question of applicability as to a necessary four prior offenses under RCW 46.61.5055(14). Chambers, 157 Wn. App. at 479. The trial court had before it no showing by the State of an “equivalent local ordinance” which would establish that the “DWI” judgments satisfied RCW 46.61.5055(14).

e. The documents proffered by the State did not prove to the jury beyond a reasonable doubt four prior offenses belonging to the defendant. The State must prove beyond a reasonable doubt the existence of four or more prior offenses of the defendant. Chambers, 157 Wn. App. at 474, 476. Here, the State introduced a copy of Mr. Rich’s Washington State identification card and asked Deputy Bearden to compare the information on the card with the identifying information in the five judgments. 2/28/12RP at 88, 100-03. Supp. CP ____, Sub # 188 (Exhibit list, Exhibit 11).

When criminal liability depends on the accused's being the person to whom a document pertains, the State must do more than introduce the record of the prior offense and show that the defendant has the same name as the name entered in the judgments. State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005); State v. Harkness, 1 Wn.2d 530, 543, 96 P.2d 460 (1939).

Rather, the State must establish by evidence independent of the record, such as booking photographs or fingerprints, eyewitness identification, or distinctive personal information that the person named in the document is the defendant in the present action. State v. Santos, 163 Wn. App. 780, 784. Mr. Rich argues that the State's evidence at trial was inadequate proof of identity and there was insufficient proof for the jury to find beyond a reasonable doubt that any of the five convictions were his. State v. Santos, 163 Wn. App. at 784; Huber, 129 Wn. App. at 502–03.

f. The documents proffered by the State did not prove to the jury beyond a reasonable doubt four prior offenses as defined by RCW 46.61.5055(14). In the jury instructions, the State, under the law of the case doctrine, assumed the burden of proving to the jury beyond a reasonable doubt, not just the existence thereof, but proving four or more convictions meeting the definition of “prior offense” set forth in the instructions pursuant to RCW 46.61.5055(14). CP 96-118 (Jury instructions nos. 10, 13).

Based on Mr. Rich's arguments supra regarding the prior judgments in Exhibits 7 and 8, the State did not prove four or more such convictions, in the absence of evidence submitted to the jury that those convictions were pursuant to an “equivalent local

ordinance.” No local ordinances were submitted to the jury. Because this is a question of proof to a jury beyond a reasonable doubt, cases regarding the issue whether “DUI” in a charging document adequately provides notice of the crime charged are not pertinent. See, e.g., State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989); State v. Grant, 104 Wn. App. 715, 719-21, 17 P.3d 674 (2001). The evidence was insufficient for the jury to convict for Felony DUI. U.S. Const. amend. 14; Wash. Const. art. I, Section 22; In re Winship, 397 U.S. at 364.

4. EVEN IF THE JURY PROOF OF PRIOR OFFENSES WAS SUFFICIENT, MR. RICH CONTROVERTED THE STATE’S EVIDENCE THAT HE HAD ANY MORE THAN ONE PRIOR OFFENSE, AND REVERSAL IS THEREFORE REQUIRED UNDER STATE V. PETRICH.

a. State v. Petrich applies in this case where multiple DUI or Reckless Driving judgments were proffered by the State in support of the element of the crime requiring four prior offenses. Criminal defendants have a right to an expressly unanimous jury verdict. Wash. Const. art. 1, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); U.S. Const., Amend. 6; United States v. Payseno, 782 F.2d 832, 836 (9th Cir.1986). In a case where the State presents evidence of multiple acts but fails to elect which incident or incidents should be relied on

by the jury to find guilt, and no unanimity instruction is given, the right to jury unanimity is violated. State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984).⁷

No unanimity instruction was given in this case. CP 96-118 (Jury instructions). The prosecutor proffered all five of the convictions as proof of the statutory element requiring four prior offenses to convict. Exhibits 7-10; 2/28/12RP at 79-81 (evidence phase); 2/29/12RP at 59-63 (closing argument). However, the prosecutor did not elect in closing argument which four, from among the five proffered convictions, should be relied on by the jury to find the “prior offenses” element of Felony DUI proved. State v. Heaven, 127 Wn. App. 156, 160-61, 110 P.3d 835 (2005) (State’s non-limited discussion in closing argument of certain acts as supporting certain charged counts was not an election such as to render unanimity instruction unnecessary). Petrich applies to the present case.

b. The error was not harmless where Mr. Rich, under oath, controverted the State’s claim that he had anything more than one prior DUI/Reckless Driving offense. A Petrich error is

⁷ The unanimity issue in multiple acts cases is one of constitutional magnitude that Mr. Rich may raise for the first time on appeal, as manifest constitutional error. RAP 2.5(a)(3); State v. Love, 80 Wn. App. 357, 360 and n. 2, 908 P.2d 395 (1996) (multiple acts case).

constitutional, and is presumed to be prejudicial. In Petrich cases, neither sufficiency of the evidence, nor the existence of overwhelming evidence, suffices to render the error constitutionally harmless. Rather, the presumption of reversible prejudice can be overcome only

if no rational juror could have a reasonable doubt as to any one of the incidents alleged.

(Emphasis added.) Kitchen, 110 Wn.2d at 411 (clarifying Petrich) (citing State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn.2d 1011 (1986)).

Thus affirmance in the face of a Petrich error requires the Court of Appeals to be able to conclude that a reasonable juror could come to only one conclusion: here, that every single one of the five judgments introduced by the State was proved beyond a reasonable doubt. Only in such instance would the Petrich error be harmless. For example, in Kitchen, the Court found the Petrich error could not be affirmed on grounds of harmlessness because the testimonial evidence regarding one or more of the acts offered to support guilt was conflicting:

In both Mr. Coburn's and Mr. Kitchen's trials the prosecution placed testimony and circumstantial proof of multiple acts in evidence. There was

conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred.

Kitchen, at 412. Because the trial evidence conflicted as to whether some of the acts occurred, the Kitchen Court reversed.

For further example, in State v. Brooks, 77 Wn. App. 516, 892 P.2d 1099 (1995), the State never elected which of two alleged acts it was relying on to convict Brooks for burglary -- the allegation that Brooks entered a storage shed, or the allegation that he entered the property's pump house. State v. Brooks, 77 Wn. App. at 520. Reversal was required under the Kitchen standard because the trial evidence as to one of the multiple acts was conflicting -- the defendant testified that a person named Dave was responsible for burglarizing the storage shed. State v. Brooks, 77 Wn. App. at 521. Because there was conflicting evidence as to that act from both sides of the criminal case, a rational juror (who is entitled to believe either party) could have had a reasonable doubt as to whether one of the incidents was proved against Brooks beyond a reasonable doubt. State v. Brooks, 77 Wn. App. at 521 ("Based upon this testimony, it is possible a rational juror could have had a reasonable doubt as to whether Mr. Brooks burglarized the storage

shed"). In such circumstances of controversion of the evidence, reversal is categorically required.

Here, a rational juror could have entertained doubt as to whether one, or more, of the five judgments proffered by the State was a conviction belonging to Mr. Rich, thus the Petrich error requires reversal. In this case, Mr. Rich controverted the State's evidence by his testimony under oath:

Q: You've been convicted five times previously of DUI or DUI amended to Reckless Driving; is that correct?

A: No, I don't believe so.

Q: So Exhibits 7 through 10.

A: I don't believe it's been five times or anything, but one exhibit.

Q: Have you ever been convicted of DUI?

A: Yes, I have.

Q: How many times?

A: I have no idea. It's not – I'm not sure.

Q: Could it be five?

A: No, I don't think so.

2/28/12RP at 185. The Petrich error requires reversal regardless of whether the evidence that the five judgments of conviction belonged to Mr. Rich was sufficient, or even overwhelming. Given that the evidence was controverted by the parties, reversal is required under the constitutional standard applicable to unanimity error. State v. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 570.

c. The error also requires reversal on the independent ground that the evidence was conflicting regarding whether one or more of the five judgments satisfied the “DUI or equivalent local ordinance” standard set forth in the jury instructions. As noted supra, the State assumed the burden of proving to the jury beyond a reasonable doubt that that Mr. Rich had four prior convictions for DUI under RCW 46.61.502 or an “equivalent local ordinance,” or for Reckless Driving, where the offense was originally charged as DUI under RCW 46.61.502 or an equivalent local ordinance. This definition of “prior offense” in the jury instruction was the law of the case. State v. Hickman, 135 Wn.2d at 103-04; State v. Salas, 127 Wn.2d at 182.

However, the evidence as to at least one of the convictions was conflicting, at a minimum. For example, Exhibit 7 demonstrated a prior offense entitled “DWI,” and there was no proof, or there was at least conflicting evidence, as to whether “DWI” was a local ordinance that is equivalent to RCW 46.61.502. A Petrich error is harmless only where the evidence as to all of the multiple acts proffered in support of the element was uncontroverted. Where the evidence below as to one or more from

among the five convictions was conflicting, as it was here, that requirement for harmlessness is not met.

Reversal of Mr. Rich's conviction for Felony DUI is required.

5. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY STATING FACTS NOT IN EVIDENCE AND ARGUING THE DEFENDANT'S PRIOR DUI CONVICTIONS SHOWED A PROPENSITY TO DRIVE UNDER THE INFLUENCE.

a. Mr. Rich's motions *in limine*. Prior to trial, Mr. Rich moved in limine to preclude the prosecutor from making "any references to any prior DUI alleged to have been committed by the defendant," on ground that this would be highly prejudicial. Supp. CP 74-93 (Defendant's Motions In Limine and Order, at p. 6); 2/27/12RP at 24. The prosecutor responded that prior DUI convictions were "an element of the crime," and the court denied the motion, ruling:

Motion denied. Those are admissible because they are necessary elements of the crime of felony DUI.

2/27/12RP at 24. Mr. Rich also moved unsuccessfully to bifurcate the underlying driving allegation with the issue of four prior offenses. CP 74-93 (Defendant's Motions In Limine and Order, at p. 19); 2/27/12RP at 30; see State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008); Spencer v. Texas, 385 U.S. 554, 561, 87 S.Ct.

648 17 L.Ed.2d 606 (1967) (both stating that prejudice created by evidence of prior conviction introduced to prove element may be countered with limiting instruction from the trial court). However, the trial court granted Mr. Rich's motion in limine to exclude all use of prior convictions that were not relevant or were inadmissible under ER 403, and where the State had provided no notice of intent to introduce any prior conduct under ER 404(b) (prohibition on propensity evidence). CP 74-93 (Defendant's Motions In Limine and Order, at pp. 4-5).

b. Prosecutor's closing argument. In closing argument, the prosecutor noted that Mr. Rich had waived his Miranda rights and then refused to take the BAC breath test for alcohol presented by Deputy Bearden in the testing room. 2/29/12RP at 56-57.⁸

Then, critiquing Mr. Rich's trial testimony that he refused to take the BAC test because they were not scientific, the prosecutor argued to the jury that Mr. Rich testified in that way because submitting to breath tests in the past had not helped him avoid his five prior DUI convictions:

⁸ In defense testimony, Mr. Rich testified that he refused to take the BAC breath test offered by Deputy Bearden in the BAC room because he did not trust such tests, because they are not scientific and can get a person in trouble when they have not done anything wrong. 2/29/12RP at 32.

There's consciousness of guilt there. Mr. Rich, when asked to explain why, he said: I don't trust tests they are not scientific. Well, perhaps he made that argument because the previous five times hasn't helped him out much.

(Emphasis added.) 2/29/12RP at 57. Mr. Rich did not object.

c. The prosecutor committed flagrant, incurable misconduct by arguing that the prior DUI convictions and BAC numbers showed Mr. Rich had a propensity to drive drunk.

The prior offense documents showed that Mr. Rich had taken BAC tests in connection with several, but not all, of the prior convictions, and the documents listed the BAC numbers generated. Supp. CP ____, Sub # 188 (Exhibit list, Exhibits 7, 8, 9, 10).

However, the prosecutor, in violation of the orders in limine, employed the prior offense documents to argue to the jury, not just that he had four applicable prior DUI offenses, but that Mr. Rich had a *propensity* to drive drunk. In addition, the prosecutor also argued facts not in evidence, representing that Mr. Rich had five times produced BAC results showing alcohol intoxication.

The right to a fair trial is secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v.

Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999); U.S. Const. amends 6, 14; Wash. Const. art. 1, sec 22. But prosecutorial misconduct may deprive a defendant of this right to a fair trial. State v. Glassman, ___ Wn.2d ___, 286 P.3d 673, 677 (Oct. 18, 2012) (citing State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)). "A ' [f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.' " State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011). Thus, for example, it is error to argue evidence to the jury that has not been admitted at trial. State v. Pete, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004); see also State v. Glassman, 286 P.3d at 677-78.

Here, the trial prosecutor expressly argued that Mr. Rich refused to take the BAC breath test presented by Deputy Bearden because BAC breath tests in his five prior DUI cases had shown he was drunk. 2/29/12RP at 57. State v. Clafin, 38 Wn. App. 847, 849–50, 690 P.2d 1186 (1984) ("a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record").

Notably, the prosecutor had promised to remove any prejudicial information from Exhibits 7 to 10, the documents proffered to show Mr. Rich's prior qualifying convictions, and the court elicited from the prosecutor that he had indeed taken out "anything that might be extraneous information or prejudicial above and beyond prior convictions." 2/28/12RP at 78, 80. All of this indicated the prosecutor's knowledge of the proper basis for admitting the documents, and the fact that the prior convictions had not been admitted for, and should not be used for an improper, propensity purpose.

This prosecutorial misconduct was flagrant and ill-intentioned and may be appealed, and, considering the limited nature of the evidence of alcohol intoxication in the present incident, requires reversal of Mr. Rich's conviction, despite his failure to object below. State v. Glassman, 286 P.3d at 678. The prosecutor understood that the defendant's prior DUI convictions were admissible solely to prove the prior offenses *element* of Felony DUI. 2/27/12RP at 24. But the prosecutor's argument to the jury directly implied that he had been able to discover special facts (not presented to the jury) that showed Mr. Rich was truly guilty, and further, the prosecutor argued that Mr. Rich was guilty

because his prior convictions and BAC numbers showed he had the bad character of a repeat drunk driver. This Court should reverse his conviction based on prosecutorial misconduct.

6. MR. RICH'S OFFENDER SCORE WAS INCORRECTLY CALCULATED.

Mr. Rich's offender score was miscalculated by including full points for his juvenile offenses, and further, where the trial court failed to score his prior adult convictions for robbery and assault as the same criminal conduct. 3/22/12RP at 89, 94-97; CP 14-52 (Judgment and sentence); CP 153-204, 207-245.

First, Mr. Rich's juvenile convictions were improperly scored as counting for one full point each. CP 15. The appellate court reviews a trial court's sentencing calculation *de novo*. State v. Cross, 156 Wn. App. 568, 587, 234 P.3d 288 (2010).

Pursuant to RCW 9.94A.525(7) and (11), these convictions for crimes that were not subject to increased scoring applicable to current convictions for a violent offense or prior convictions for designated crimes, count as ½ point each. Reversal is required for resentencing.

Second, RCW 9.94A.525(5)(a)(i) states in pertinent part that the current sentencing court "shall determine" with respect to other prior adult offenses for which sentences were served concurrently,

whether those offenses are the “same criminal conduct” under the analysis found in RCW 9.94A.589(1)(a). RCW 9.94A.525(5)(a)(i).

Mr. Rich did not agree to the existence of any of his convictions for sentencing, 3/22/12RP at 87, and raised the concern at sentencing that his prior offenses were the same offense. 3/22/12RP at 86-87, 90; CP 235 (2/24/05 judgment), requiring the State to prove the offender score for those convictions.

7. THE SENTENCE IMPOSED BY THE TRIAL COURT FOR FELONY DUI EXCEEDS THE STATUTORY MAXIMUM.

a. The sentence imposed for Felony DUI exceeds the statutory maximum. The statutory maximum sentence for a criminal offense sets the ceiling of punishment that may be imposed. In re Personal Restraint of Brooks, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009); RCW 9A.20.021. A term of community custody must be authorized by the Legislature. Id. The controlling statute instructs the trial court that a term of community custody may not exceed the statutory maximum when combined with the prison term imposed. Id.; RCW 9.94A.701(9). Mr. Rich was convicted of Felony DUI, which is a Class C Felony with a

maximum penalty of 60 months. RCW 46.61.502(6); RCW 9A.20.021(c); CP 141.

At the sentencing hearing, Mr. Rich addressed the court and stated, *inter alia*, that imposing incarceration of 60 months, followed by community custody, would “go beyond the statutory maximum.” 3/22/12RP at 94.

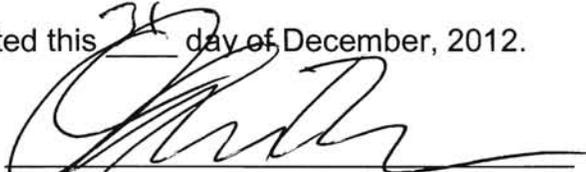
The trial court imposed 60 months incarceration and 12 months community custody, exceeding the maximum penalty. CP 144 (Judgment and sentence, at p. 4, ¶¶ 4.1, 4.2). The notation in paragraph 4.2 either indicates that 12 months community custody is imposed, or that community custody is imposed for the period of earned early release, in either event violating .701(9), which became effective in its original incarnation as subsection (8) on July 26, 2009. CP 144; State v. Boyd, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

b. Resentencing is required. To remedy the error, the trial court must amend the judgment to reduce the term of community custody, so that Mr. Rich's sentence remains within the statutory maximum. RCW 9.94A.701(9); State v. Boyd, 174 Wn.2d at 473.

F. CONCLUSION

Based on the foregoing, Mr. Michael Rich respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this ²⁶ day of December, 2012.



Oliver R. Davis WSBA 24560
Washington Appellate Project - 9105
Attorneys for Appellant

Appendix A

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5
6 SUPERIOR COURT OF WASHINGTON
7 COUNTY OF SKAGIT

8 STATE OF WASHINGTON,
9 Plaintiff,
10 v.
11 MICHAEL C. RICH, JR.
12 Defendant.

NO. 10-1-945-0
WAIVER OF RIGHT TO COUNSEL

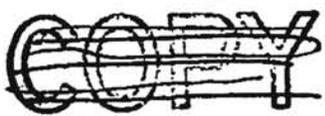
13 An accused has a constitutional right to represent himself or herself if he or she chooses to
14 do so, but there are potential dangers and disadvantages of representing yourself. The following
15 questions must be filled in so that the Court can determine that your decision to represent yourself
16 is knowingly made.

- 17 1. What was the last grade of school you completed? 10th + GED
18 2. Have you ever studied law? No
19 3. Have you ever represented yourself or any other defendant in a criminal action?
No

20 If yes, please indicate what the charges were and whether the matter proceeded to trial
21 and/or appeal. N/A

- 22 4. Do you realize that you are currently charged with Yes?
23 5. Do you realize that the maximum penalty for Yes: 5 years

24 is confinement in a state correctional institution for a term of 5 years
25 years, or by a fine in an amount fixed by the court of \$10,000
26 or by both such fine and confinement? Yes



1 6. Do you realize that if you are convicted of any crime, the court, in addition to imposing jail
2 time and a fine, could also require you to pay restitution to your victim, to pay court costs, and to
3 obey certain post-release restrictions on your conduct? Yes?

4 7. Do you realize that the standard sentence range for the felony counts will be based on the
5 crime charged and your criminal history? Criminal history includes prior convictions and juvenile
6 adjudications, whether in this state, in federal court, or elsewhere. Yes.

7 8. Do you realize that if you are found guilty of more than one crime, this court can order that
8 the sentences be served consecutively, that is one after another? Yes.

9 9. Do you realize that the State may be able to charge you with additional or other crimes
10 which may carry greater or increased penalties as this case progresses? Yes.

11 10. Do you realize that if you represent yourself, you are on your own? Yes *man.*
12 The Court cannot tell you how you should present your case, write your memorandums, or obtain
13 the presence of witnesses.

14 11. Are you familiar with the Rules of Evidence (ER) and the Superior Court Criminal Rules
15 (CrR)? Vaguely. These rules govern the way in which a criminal matter is presented in
16 the superior court. These rules will apply to you the same as they apply to an attorney. State v.
17 Smith, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985).

18 12. Do you realize that if you decide to take the witness stand, you must present your
19 testimony by asking questions of yourself? Yes. You cannot just
20 take the stand and tell your story. You must proceed question by question through your testimony.

21 13. Do you realize that a lawyer would be familiar with the Rules of Evidence, skilled in
22 following the Rules of Criminal Procedures, and could advise you of possible defenses to the
23 pending charges? Yes.

24 14. Do you realize that if you proceed pro se that if you do not properly present a defense,
25 subpoena witnesses, or otherwise represent yourself in a competent manner that you will not be
26 able to obtain a reversal of a conviction on the grounds that you received inept representation?
27 Yes.

28 15. Why do you not want an attorney? I can do a better job than an atty.
If it is because you do not believe that you can afford an attorney, do you realize that an attorney
can be appointed at public expense if you are indigent, or if you are partially able to contribute to

1 the cost of counsel. Your eligibility for court appointed counsel is determined by a review of your
2 financial resources. Do you wish to be screened for court appointed counsel? No

3 16. Do you realize that once you waive your right to counsel that it is discretionary with the
4 court whether you may withdraw the waiver? Yes

5 17. Do you realize that if you waive the right to counsel, that the court is not required to delay
6 the currently set trial date? Yes

7 18. Do you realize that while the court may provide you with an attorney as a legal advisor or
8 standby counsel, that you do not have an absolute right to receive this assistance and that you, and
9 not standby counsel must prepare for trial? Yes

10 19. Have any threats or promises been made to induce you to waive your right to counsel?
No

11 20. Now, in light of the penalty that you might suffer if you are representing yourself, is it still
12 your desire to represent yourself and to give up your right to be represented by a lawyer?
13 Yes

14 21. Is your decision entirely voluntary on your part? Yes

15 I have read and completed this form. I have no questions for the court about the risks of
16 proceeding pro se or about my right to have counsel appointed to assist me. I request that the court
17 allow me to represent myself.

18
19 DATED 9-29-11

Michael P Rich
DEFENDANT

22 I find that the defendant has knowingly and voluntarily waived his or her right to counsel.
23 I will therefore approve the defendant's election to represent himself.

24
25 DATED 8/24/11

J. M. Meyer
JUDGE

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68558-9-I
v.)	
)	
MICHAEL RICH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|---|----------------------------|--|
| <p>[X] ERIK PEDERSEN, DPA
SKAGIT COUNTY PROSECUTOR'S OFFICE
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MOUNT VERNON, WA 98273</p> | <p>(X)
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| <p>[X] MICHAEL RICH
881050
WASHINGTON STATE PENITENTIARY
1313 N 13TH AVE
WALLA WALLA, WA 99362</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF DECEMBER, 2012.

X _____ 

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