

NO. 68812-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRIS MORTENSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE
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A. ARGUMENT IN REPLY

- 1. The State’s arguments fail to show Mr. Mortenson received a fair trial by an impartial jury when, after he went to great efforts to shield the jury from the taint of his prior offenses, the venire received prejudicial information about prior DUI offenses that was then repeated and the trial court failed to grant his request for a new panel.**

“[I]t is just as essential that one accused of crime shall have a fair trial as it is that he be tried at all.” *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). To sanitize the effect of four or more prior DUI offenses—the same crime instantly alleged—Mr. Mortenson (a) bifurcated the jury instructions, after his request for a bifurcated trial was denied, so that the jury would not consider his prior offenses until after it had determined the State’s proof on the other elements and charged offenses, (b) excluded mention of prior offenses and multiple DUIs from voir dire, (c) stipulated to the prior offenses to prevent the State from putting extensive evidence of prior DUI convictions before the jury at trial, and (d) indicated in the stipulation and jury instruction only that he had four prior offenses that satisfied the statutory criteria of the instant charge. Despite these efforts, the court read the charges to the venire directly from the amended information, without forewarning, which included that the prior offenses were under RCW 46.61.5055, the DUI statute with which he was currently charged, a fact also presented to the venire at the outset.

Therefore, instead of simply learning that Mr. Mortenson had committed prior offenses of an unspecified type that satisfied the statute, the jury learned that Mr. Mortenson had committed DUIs on four or more occasions. At least one panel member made this connection. 3/15/12 RP 80-81, 148. That panel member shared her understanding with the entire venire—that Mr. Mortenson had four or more prior DUIs. 3/15/12 RP 79-80. Even more prejudicially, she further broadcast that the prior record meant Mr. Mortenson was guilty of the current charge by way of propensity. 3/15/12 RP 80-81.

Following this prospective juror's comments in front of the venire, Mr. Mortenson moved for a new panel, which the trial court denied. 3/15/12 RP 50-51, 148. The trial court's failure to strike the jury panel violated his constitutional rights to a fair trial, an impartial jury and the presumption of innocence, as well as Evidence Rule 404(b). Const. art. I, § 22; U.S. Const. amends. VI, XIV; *State v. Roberts*, 142 Wn.2d 471, 517, 14 P.3d 713 (2000); *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999); ER 404(b).

In contending the "irregularity" was "not serious," the State makes several oversights. First, our Supreme Court recognizes "how highly prejudicial such evidence [that an element of the crime is a prior conviction of the very same type of crime] may be." *State v. Roswell*, 165

Wn.2d 186, 198, 196 P.3d 705 (2008). The Court finds it “important” to the accused to constrain the effect upon the jury of prior convictions. *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002). However, here the very “particular danger that a jury may believe that the defendant has some propensity to commit that type of crime” was broadcast to the venire. *Roswell*, 165 Wn.2d at 198. Indeed, in *Young*, this Court called the broadcasting of a prior offense that was different than the instant charge a “serious irregularity.” 129 Wn. App. 468, 476, 119 P.3d 870 (2005). It is illogical to deem the situation at bar, where the venire was informed of prior offenses of the same type as the instant charge, “not serious.” Resp. Br. at 15.

Second, the situation at bar does not involve merely a “potential connection” that the prior offenses were for the same offense on which the jury was to determine guilt—DUI. Resp. Br. at 16. Juror No. 31 actually made the connection. She shared the connection with the venire, so everyone on Mr. Mortenson’s jury was aware of his repeat-DUI status. Then she told the rest of the venire that knowledge of the prior DUI offenses was sufficient for her to believe Mr. Mortenson was guilty of the instant DUI charge. Put otherwise, the connection was actually made and actually broadcast in Mr. Mortenson’s case.

Likewise, this connection can fairly be attributed to the prejudicial recitation of the amended information read to the venire. *See* Resp. Br. at 22-24 (arguing to the contrary). This venire was the third jury panel called to consider the instant charges. The first two venires were not read the statutory citation governing the prior and instant offenses. 3/15/12 RP 46-47, 49, 51. And no prior venire member commented on Mr. Mortenson's prior offenses or their propensity effect. 3/15/12 RP 148; *see* 1/12/12 RP 4-12; 1/25/12 RP 3-7; CP 78.

Further, the limiting instruction could not have cured the taint because it did not prevent the jury from making the connection made and published by Juror No. 31. *See* Resp. Br. at 24 (arguing limiting instruction cured any error). The court's limiting instruction provided that the jury "is not to speculate as to the nature of the prior convictions." CP 120. The jurors did not need to speculate as to the nature of the prior convictions. The court essentially told the jury the priors were DUI offenses and Juror No. 31 confirmed that understanding. Accordingly, no speculation was required. Moreover,

While it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.

Miles, 73 Wn.2d at 71. The limiting instruction was merely included in the court’s instructions to the jury at the conclusion of the case. CP 120. The venire received the prejudicial information at the outset. 3/15/12 RP 24. The “instruction fails to adequately address the problem of the prejudicial impact of the inherently prejudicial disclosure.” *Young*, 129 Wn. App. at 477. The instruction had minimal, if any, effect.¹

The State’s argument that Mr. Mortenson had ample opportunity to examine the panel on the effect of the disclosure is also specious. Resp. Br. at 24 (citing to voir dire generally). The court had ruled on the parties’ agreement that prior DUI offenses would not be discussed during voir dire. 1/10/12 RP 121; 3/14/12 RP 29. And even absent that ruling, defense counsel would only have increased the prejudice had he further examined on the issue.

Finally, the State argues this issue should be reviewed under an abuse of discretion standard. The trial court’s discretion could not override Mr. Mortenson’s constitutional right to a fair trial. *Cf. State v. Davis*, 141 Wn.2d 798, 826, 10 P.3d 977 (2000) (trial court’s discretion to

¹ Thus even under the *Young* standard advanced by the State, reversal is required. Like in *Young*, informing the venire that the prior offenses are the same as the charged offense is a “serious irregularity.” 129 Wn. App. at 475-76. Further, the inadvertent disclosure at the outset of jury selection was not cumulative of any information the venire had received at the time or during the course of the trial—because of all the steps Mr. Mortenson had taken to sanitize the effect of prior offenses of the same type. *Id.* at 476. Thus, like in *Young*, this Court should reverse and remand for a new, fair trial. *Id.* at 479.

control voir dire is limited by defendant's right to a fair trial). A fair trial could not be had, and in this case was not had, by a jury that learned Mr. Mortenson had prior convictions of the same type for which he was presently charged. Justice obtained by unfair means is no justice at all "and [is] dangerous to the whole community." *Miles*, 73 Wn.2d at 71 (quoting *Hurd v. Michigan*, 25 Mich. 405 (1872)). Mr. Mortenson did not request a mistrial, he requested a new panel in a timely fashion at the outset of voir dire. Because the court denied that timely and reasonable request, the convictions should be reversed and remanded for a new trial.

2. Alternatively, the DUI conviction should be reversed because a confusing and faulty instruction lowered the State's burden, diluted the presumption of innocence and interfered with the constitutional right to a unanimous jury.

As explained in Mr. Mortenson's opening brief, the jury was explicitly instructed that it must be unanimous to reach a verdict on verdict form A, attempting to elude. CP 134; Op. Br. at 21-27. Likewise, the jury was explicitly instructed that it must be unanimous to reach a verdict on verdict form B, the lesser included offense of failure to obey. CP 134. The jury was also explicitly instructed that it must be unanimous to answer the special verdict form affirmatively. CP 135. The instructions for each of these forms—A, B and the special verdict—also instructed the jury what to do in the event of a deadlock. CP 134-35. But with regard to the

DUI count, verdict form C, the jury was not instructed that it had to be unanimous and it was not instructed on how to respond if the jury is deadlocked. CP 135.

The distinct impression left with the average juror is that unanimity is required to verdict forms A, B and the special verdict. A hung jury is acceptable on verdict forms A, B and the special verdict. But as to the DUI count, the jury “must [simply] fill in the blank provided in verdict form C with the words ‘not guilty’ or the word ‘guilty.’” CP 135; *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996) (jury instructions require manifest clarity).²

A criminal defendant has the due process right to instructions that clearly and accurately charge the jury regarding the law to be applied in a given case. U.S. Const. amends. V, XIV; Const. art. I, § 3; *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977). The standard for clarity in jury instructions is higher than for statutes, because while a court can resolve an ambiguously-worded statute through interpretive tools and an

² Interestingly, in its response to this argument, the State advances the position that the average juror is well-versed enough in the law to understand it had to be unanimous on the DUI count and how to proceed if the jury deadlocked on that count, despite any such instruction from the court (and where such an instruction was provided on other charges). Yet, in response to Mr. Mortenson’s argument that a new venire should have been called, the State argues the panel members would not have recognized the same statutory citations as referring to the same charges. Resp. Br. at 22. As Mr. Mortenson explains, *infra*, any juror that did not reach that conclusion him or herself, was made patently aware of it when Juror No. 31 shared it with the venire.

understanding of the law, “a jury lacks such interpretive tools and thus requires a manifestly clear instruction.” *LeFaber*, 128 Wn.2d at 902. Instructions which relieve the State of its burden or fail to correctly inform the jury of an essential ingredient of the crime prejudicially deny a defendant due process of law. *Id.* at 903.

In *LeFaber*, the trial court issued an instruction on self-defense that permitted two interpretations, one which was accurate and one which was erroneous. In holding the instruction denied the defendant due process of law, the Supreme Court remarked, “the offending sentence lacks any grammatical signal compelling [the correct] interpretation over the alternative, conflicting, and erroneous reading.” *LeFaber*, 128 Wn.2d at 902-03. The risk that the jury chose the legally incorrect path among two possible interpretations of the instruction required reversal. *Id.*; accord *State v. Cowen*, 87 Wn. App. 45, 49, 939 P.2d 1249 (1997) (reversing because grammatical reading of instruction could have left jury with incorrect impression of law).

A criminal defendant is also entitled to jury unanimity. Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amends. VI, XIV;

Const. art. I, §§ 3, 21, 22. The instructions here were ambiguous, at best, on whether unanimity was required to reach a verdict on the DUI charge and whether a hung jury could result on that charge.

The State relies on the WPICs to argue that the instruction here was proper. Resp. Br. at 28-29. First, the fact that particular language has been adopted as a pattern instruction does not render it accurate as a matter of law. *State v. Bennett*, 161 Wn.2d 303, 307-08, 165 P.3d 1241 (2007); *State v. Hayward*, 152 Wn. App. 632, 645-46, 217 P.3d 354 (2009) (“WPICs are not the law”). More significantly, however, the State does not rely on a single WPIC. Instead, the State argues that Instruction 17 was a combination of two WPICs. That may well be, but the argument fails to take into account that the combination of the two WPICs created the error because it used conflicting language to instruct the jury on how to reach a verdict, and deadlock, on each count. By combining the pattern instructions, Instruction 17 also deviates from WPIC 151.00, the pattern “basic concluding instruction” for a single count. WPIC 151.00 tells the jury straightforwardly that it must enter the words guilty or not guilty and it must be unanimous in that decision, the only verdict at issue in a single-count case. WPIC 151.00. In the case at bar, the language used to instruct the jury in filling out the form with the words guilty or not guilty for the DUI verdict was distinct from the other offenses and the special verdict.

Also, on the DUI count there was no instruction as to failure to agree. Further, the concluding unanimity statement was separated from the DUI verdict language by instructions on the special verdict, which also included unanimity language. Instruction 17 strayed too far from the form and too far from the lack of ambiguity of WPIC 151.000 to find that pattern instruction persuasive here. Reliance on the WPICs does not save the error.

The State's reliance on other instructions to save the ambiguity here is no more persuasive. Resp. Br. at 32. As the State points out, the opening instruction told the jury to consider the instructions as a whole. CP 116; Resp. Br. at 32 (citing Instruction # 1). But this instruction supports Mr. Mortenson's argument. Requiring the jury to look at the instructions together indicates that the jury should consider the fact that different information was provided for reaching a verdict on the DUI charge than the other offenses and special verdict. It encouraged comparing the counts. Further, while the to-convict instruction on the DUI count accurately informed the jury it must find the elements beyond a reasonable doubt, it contained no information regarding unanimity or failure to agree. CP 132; Resp. Br. at 32 (citing Instruction # 16). Accordingly, these instructions likewise could not save the error in Instruction 17.

Contrary to the State's assertion, the error was not harmless. The State purports to understand that it bears the burden of proving the error was harmless beyond a reasonable doubt. Resp. Br. at 33 (citing *State v. Williams*, 136 Wn. App. 486, 496, 150 P.3d 111 (2007)). However in arguing the error was harmless beyond a reasonable doubt, the State's brief reviews the evidence in the light most favorable to the State. Resp. Br. at 33-34. In doing so, the State incorrectly ignores conflicting evidence that was likely to produce reasonable doubt. For example, the evidence of Mr. Mortenson's driving did not show impairment—he drove over the speed limit on a straight road and then slowed to make six or seven turns without incident—and the State did not introduce any roadside, breathalyzer or blood tests. *E.g.*, 3/20/12 RP 37-41, 50-56, 94-101-04, 122-25, 137-38. The jury returned a special verdict form finding Mr. Mortenson's driving did not endanger anyone. CP 138; *accord* 3/20/12 RP 53, 137-38 (no moving vehicles or pedestrian in sight). The evidence also discredited the out-of-court statements of the passenger, who was severely intoxicated and on medication at the time she made the statements. *E.g.*, 3/20/12 RP 45; 3/21/12 RP 34-40, 42-43, 53-55. The State cannot show that the confusing language in Instruction 17 was harmless beyond a reasonable doubt. The presumption of prejudice cannot be overcome. *See State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d

548 (1977) (erroneous instruction given on behalf of the party in whose favor the verdict was entered is presumed prejudicial unless it is affirmatively shown to be harmless; instructional error is harmless only if it is “trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case”).

Finally, the State’s argument that Mr. Mortenson forfeited review of this issue is incorrect. First, Mr. Mortenson did not propose the erroneous instruction. He did not invite the error. Second, Mr. Mortenson did not “agree[] with the concluding instruction provided[,]” as the State now argues. Resp. Br. at 26. The portion of the transcript to which the State cites pertains to a discussion of an entirely distinct portion of Instruction 17. 3/22/12 RP 61-62. Mr. Mortenson does not claim error with that section on appeal. Thus, Mr. Mortenson did not invite the error or otherwise forfeit review. Moreover, the claim that the instruction violated Mr. Mortenson’s constitutional due process rights by diminishing the presumption of innocence and his right to jury unanimity are manifest constitutional errors that can be raised for the first time on appeal. *E.g.*, *State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996); *Bennett*, 161 Wn.2d at 315-16; *see Op. Br.* at 23-24.

In sum, where jury instructions may be read to permit an erroneous interpretation of the law, they are fatally flawed. *LeFaber*, 128 Wn.2d at 902. Because the jury could have read Instruction 17 to permit a nonunanimous verdict and to prohibit a hung jury on the DUI charge, that conviction should be reversed.

3. The trial court violated Mr. Mortenson's Fifth Amendment right to counsel and abused its discretion by admitting evidence that he changed his mind about submitting to a breath test after consulting with counsel.

The trial court committed further error by finding admissible Mr. Mortenson's initial acquiescence to a breath test and his change of heart following consultation with an attorney. The admission of the evidence violated Mr. Mortenson's constitutional right to counsel and was substantially more prejudicial than probative.

The State claims that Mr. Mortenson had only a rule-based right to counsel, and thus any challenge to that right is not a constitutional error subject to review under RAP 2.5(a)(3). Resp. Br. at 35-36. That argument is flawed because Mr. Mortenson was under arrest and entitled to counsel because he was subject to custodial interrogation. 1/10/12 RP 55-62, 81-83 (Pentrenchak read *Miranda* warnings to Mortenson after he was seated in patrol car at scene of arrest); *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). When Mr. Mortenson spoke with

counsel, his attorney told the police not to ask Mr. Mortenson any further questions. 1/10/12 RP 62-63. Mr. Mortenson's Fifth Amendment right to counsel had attached. U.S. Const. amends. V, VI; *Miranda*, 384 U.S. 436.

Moreover, contrary to the State's contention, trial counsel preserved the objection below. *Compare* 1/10/12 RP 106 (arguing for suppression based on intervening conversation with attorney) *with* Resp. Br. at 34-35. In fact, the trial court explicitly ruled on this basis. 1/10/12 RP 111. The court ruled,

With regard to the refusal, I'm satisfied that the state of the law, and I welcome any case authority otherwise, is that the refusal is admissible. However, let me make it clear, that the fact that the refusal came after the exercise of a constitutional right to talk to an attorney is not admissible. That's a comment on the exercise of a constitutional right.

Id. The court continued by explaining that Mr. Mortenson could open the door, thus putting himself in "the Hopson's choice of leaving the refusal as a refusal or bringing out a reason that may negate a refusal, but that does in fact indicate that he consulted with a lawyer." *Id.*

The court's ruling not only violated Mr. Mortenson's constitutional right to counsel, but was also an abuse of discretion under ER 403. *See State v. Cohen*, 125 Wn. App. 220, 225, 104 P.3d 70 (2005). The evidence of Mr. Mortenson's refusal to submit to a breath test had little probative value. *State v. Burke*, 163 Wn.2d 204, 218-19, 181 P.3d 1

(2008) (silence “is ambiguous because an innocent person may have many reasons for not speaking”); *Doyle v. Ohio*, 426 U.S. 610, 617 n.8, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (silence may have several explanations consistent with innocence and is of dubious probative value); *United States v. Foutz*, 540 F.2d 733, 739-40 (4th Cir. 1976) (“The inference that one who flees from the law is motivated by consciousness of guilt is weak at best.”). “[D]espite its lack of probative value” evidence regarding Mr. Mortenson’s refusal and change of mind “undoubtedly” was considered by the jury. *People v. DeGeorge*, 541 N.E.2d 11, 13 (N.Y. 1989). In fact, the State seized upon the court’s erroneous ruling and put the evidence at the center of its case. 3/20/12 RP 24, 29 (opening statement), 3/22/12 RP 86, 102-03 (closing argument); Exhibit 9 at slides 16-18.

The trial court improperly overrode Mr. Mortenson’s constitutional right to counsel and the statutory and constitutional rights to privacy that attach. Further, the court abused its discretion in finding the probative value outweighed the substantial prejudice.

4. The State failed to prove Mr. Mortenson drove recklessly, requiring reversal of the attempting to elude conviction and dismissal of the charge.

The State’s response fails to rectify its lack of sufficient proof on an element of the attempting to elude a pursuing police vehicle—that Mr. Mortenson was driving in a rash or heedless manner, indifferent to the

consequences. *Compare* Op. Br. at 34-37 with Resp. Br. at 42-44. To prove Mr. Mortenson was driving “in a reckless manner” the State must have shown beyond a reasonable doubt that he was “driving in a rash or heedless manner, indifferent to the consequences.” *State v. Bowman*, 57 Wn.2d 266, 270-71, 356 P.2d 999 (1960). No reasonable juror could have found Mr. Mortenson indifferent to the consequences where he slowed to take turns, which were executed without raising concern, and did not threaten any person with physical injury or harm. CP 138 (special verdict form); 3/20/12 RP 46-47, 53, 103-04, 122-23, 124-26.

“Heedless” means a lack of attention or mindlessness. *Webster’s Third New Int’l Dictionary* at 1049 (3d ed. 1996) (defining “heedless” and “heed”). Similarly, “rash” is commonly defined as “imprudently involving or incurring risk.” *Id.* at 1883 (defining “rash”). Moreover, the statute requires such driving be done with indifference to the consequences. *E.g.*, CP 124 (instruction 9). The State’s evidence failed to approach this level of recklessness. In fact, Mr. Mortenson’s vehicle did not so much as approach the curb, approach park vehicles, or encroach on any other obstacle. 3/20/12 RP 127.

To be clear, mere negligence or carelessness is insufficient to constitute driving in a reckless manner. *Bowman*, 57 Wn.2d at 270-71. At most, here, the State proved that Mr. Mortenson could have been more

careful in his driving, by using turn signals while he executed turns at the appropriate speed. But the State did not show beyond a reasonable doubt that Mr. Mortenson was “driving in a rash or heedless manner, indifferent to the consequences.”

The State puts much weight on Deputy Petrenchak’s description of the driving as “erratic.” Resp. Br. at 44. That description alone is insufficient to prove driving in a reckless manner beyond a reasonable doubt. *See, e.g., State v. Montgomery*, 163 Wn.2d 577, 594-95, 183 P.3d 267 (2008) (police officer’s opinion on guilt carries low probative value); *Webster’s* at 772 (defining “erratic” as wandering and deviating from the usual course). Furthermore, it is belied by the evidence. The evidence showed that at first, Mr. Mortenson drove over the speed limit on a straight road; Deputy Petrenchak was unconcerned about Mr. Mortenson’s driving other than the speed at which he was moving. 3/20/12 RP 40-44, 50, 6-98, 100-03, 100-01. He then slowed his vehicle to within the legal limit and executed turns on deserted roads without issue. 3/20/12 RP 46-47, 53, 103-04, 122-23, 124-26; *see* Resp. Br. at 6 (recognizing same). Deputy Petrenchak had no difficulty following the vehicle, which did not endanger people or property in the vicinity. 3/20/12 RP 127, 130-31. The jury agreed that no persons were endangered by Mr. Mortenson’s driving. CP 138 (special verdict form).

Mr. Mortenson's driving was neither "erratic" nor "in a reckless manner." The conviction should be reversed and the charge dismissed. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

5. Even if not independently, the errors denied Mr. Mortenson his constitutional right to a fair trial in the cumulative.

As set forth in the opening brief, even if the above trial errors do not independently require reversal, the Court should hold that the aggregate effect of these trial court errors denied Mr. Mortenson a fundamentally fair trial. *See* Op. Br. at 37-39.

6. The State concedes that the sentence should be remanded because the combined term of incarceration and community custody exceeds the statutory maximum.

The State agrees that the combined term of incarceration and community custody exceeds the statutory maximum, requiring remand of the sentence. RCW 9A.20.021; RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012); Op. Br. at 39-42; Resp. Br. at 63-64. For the reasons set forth in the parties' briefing, this Court should accept the State's concession. Consistent with *Boyd*, the appropriate remedy is to remand the sentence to the trial court to strike the term of

community custody or resentence Mr. Mortenson in compliance with RCW 9.94A.701(9). *See Boyd*, 174 Wn.2d at 473.

7. Mr. Mortenson's sentence should be remanded also because the trial court miscalculated the offender score and the State failed to present sufficient evidence to support the proposed criminal history.

- a. The State fails to overcome Mr. Mortenson's argument that the DUI offender score was miscalculated.

In his opening brief, Mr. Mortenson set forth extensive support for his contention that the offender scores were improperly calculated. Op. Br. at 42-50. The State concedes the trial court erred by including one point for a 2001 negligent driving conviction because that offense is not a serious traffic offense. Resp. Br. at 46-47 This Court should accept the State's concession. The State unpersuasively disagrees with Mr. Mortenson's remaining arguments.

First, the State argues that any prior conviction should count in Mr. Mortenson's offender score. In other words, the State contends that the subsections of RCW 9.94A.525(2) should be read in the conjunctive. Resp. Br. at 47-50, 53-54. The State's argument requires this Court to read out the statutory language. While arguing that statutory provisions must be read harmoniously, the State regards RCW 9.94A.525(11) in isolation. Resp. Br. at 48-49. But the calculation of an offender score in subsection (11) must be read together with the washout provisions of

subsection (2)(e), just as the washout provisions applicable to other offenses under subsection (2) inform the calculations under subsections (6) through (21). *See State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). Under the State's reading, the washout provisions of subsection (2) would have no effect on most offender scores because every felony offense would be included under the calculation provisions.

Moreover, the State's reading is not supported by any courts that have reviewed the issue. As discussed in Mr. Mortenson's opening brief, this Court held in *Morales* that a plain reading of the statute indicates that only prior DUI convictions, serious traffic offenses and a few other offenses not relevant here can be included in the offender score for a felony DUI offense. Op. Br. at 42-49 (discussing *State v. Morales*, 168 Wn. App. 489, 278 P.3d 668 (2012)). The State's argument that *Morales* held otherwise based on the inclusion of an attempting to elude offense is mistaken. Resp. Br. at 54. In *Morales*, the parties had agreed the eluding charge counted as an "other current offense." *Morales*, 168 Wn. App. at 492.. Thus, because it was not challenged the Court did not have occasion to consider whether the offense was properly included. *Id.* In fact, Division Two recently affirmed Mr. Mortenson's reading of the statute as including only those offenses enumerated in RCW 9.94A.525(2)(e) in an offender score for a current DUI offense. *State v. Jacob*, ___ Wn. App. ___,

308 P.3d 800, 805 (2013) (adopting the *Morales* holding “that under subsection (i) only RCW 9.94A.525–specified prior convictions count as offender score points for purposes of sentencing a defendant convicted of [a] felony DUI”).

The State’s reading not only conflicts with *Morales* and *Jacob*, but the State further asks this Court to disregard *State v. Draxinger*, 148 Wn. App. 533, 537, 200 P.3d 251 (2008). Resp. Br. at 56-57. Tellingly, however, the State provides no rationale to support its reading that no prior offenses washout unless they survive both subsections (2)(e)(i) and (2)(e)(ii). As set forth in Mr. Mortenson’s opening brief, the offender score for the DUI count was miscalculated: the proper offender score for this count is no more than a four.

b. The State failed to produce adequate evidence of the qualifying factors for each alleged prior offense.

Mr. Mortenson relies primarily on his opening brief with regard to the State’s deficiencies in proving the qualifying facts for each prior offense alleged. It is unclear from the State’s brief whether it contends Mr. Mortenson affirmatively acknowledged the existence and comparability of the prior offenses alleged by the State. *See* Resp. Br. at 50-60 (arguing case law but demonstrating no affirmative acknowledgment that the State proved the existence of the required

qualifying factors). To the extent the State's brief can be read to argue Mr. Mortenson affirmatively assented to the State's satisfaction of its burden, the record does not support the State's contention. 4/13/12 RP 6-8. Trial counsel stated it would "defer to the Court" on the adequacy of the State's proof. 4/13/12 RP 6-7. Trial counsel did not affirmatively assent that the State satisfied its burden.

B. CONCLUSION

As set forth herein and in Mr. Mortenson's opening brief, his conviction for driving under the influence should be reversed for several independent reasons. First, the trial court should have dismissed the venire when the court revealed prejudicial information related to prior offenses of the same type. Second; the concluding jury instruction was ambiguous, causing juror confusion and diminishing the State's burden. Moreover, evidence regarding Mr. Mortenson's contact with an attorney was erroneously admitted. Finally, the cumulative effect of these trial errors denied Mr. Mortenson a fair trial.

Additionally, the Court should reverse the attempting to elude conviction because the evidence was insufficient to demonstrate driving in a reckless manner beyond a reasonable doubt. The aforementioned trial errors coupled with the deficiency in the evidence produced cumulative trial error on this count as well.

If the Court nonetheless affirms the convictions, the sentence should be reversed and remanded to correct the offender score and strike the term of community custody.

DATED this 23rd day of October, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MZ', is written over a horizontal line.

Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68812-0-I
v.)	
)	
CHRIS MORTENSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **REPLY 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:

[X] AMY MECKLING, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF OCTOBER, 2013.

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