IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTINE ELKINS, a/k/a CHRISTINE MOSES, Appellant.	))))))))))	NO. 61839-3-I DIVISION ONE ORDER GRANTING MOTION TO PUBLISH OPINION IN PART AND AMENDING OPINION

The respondent, State of Washington, has moved to publish the opinion filed August 24, 2009. Appellant Christine Elkins objects to publication, but the panel has determined that partial publication should be granted and the opinion amended. Now, therefore

ORDERED that the "Implied Consent Warnings" section, beginning on page 13 and ending on page 16 immediately before the "Sentencing" section, be moved to page 4 immediately after the "ANALYSIS" title, and the footnotes shall be renumbered accordingly; and it is further

ORDERED that two paragraphs be added at the end of the "Implied Consent Warnings" section to read,

We affirm the convictions but remand to correct an error in the misdemeanor

judgment and sentence.

The remainder of this opinion has no precedential value and will be filed for public record in accordance with RCW 2.06.040.

and it is further

ORDERED that the opinion be published in part consistent with the opinion.

DATED this ____ day of _____ 2009.

_____

_____ _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 61839-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
CHRISTINE ELKINS, a/k/a CHRISTINE MOSES,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: August 24, 2009
	)	

Lau, J. — The jury convicted Christine Elkins of attempting to elude a pursuing police vehicle, driving under the influence (DUI), second degree assault, felony hit and run, and bail jumping. Elkins argues that the trial court erred by (1) admitting her custodial statements without Miranda[1] warnings, (2) failing to exclude the video and sound recording in violation of Washington's privacy act, (3) admitting her refusal to submit to a breath test despite misleading implied consent warnings, and (4) refusing to exercise its discretion to impose a mitigated sentence for the hit and run conviction. We conclude Elkins waived her Miranda violation challenge below, any privacy act violation is harmless, the implied consent warnings were not misleading, the sentencing court properly exercised its discretion, and her statement of additional grounds lacks merit. Accordingly, we affirm the convictions but remand to correct an error in the misdemeanor judgment and sentence.

FACTS

On December 28, 2006, a traffic altercation occurred between Christine Elkins and Donald Hill. When Elkins rolled down her window and shouted expletives at Hill, he called her a "beaner" and told her to go back to her own country. The heated exchange continued when Hill and Elkins pulled into a grocery store parking lot and got out of their cars. Hill said that Elkins struck him with a Crown Royal bottle as he tried to get back into his car. Elkins' son Thaddious got out of Elkins' car and also started hitting Hill. Elkins hit Hill again. Then Thaddious grabbed the bottle and smashed it

[1] Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

over Hill's head. As Hill fell to the ground, Elkins and her son drove away.

Police officers soon spotted Elkins' car and signaled her to pull over. But Elkins drove off and led police on a high speed chase through Auburn. She clipped the front bumper of one police car and continued on, with the officers still in pursuit. Another patrol car hit Elkins' car in a parking lot, but she kept driving. The chase finally ended when Elkins lost control of her car and crashed. When Auburn Police Officers Todd Byers and Joseph Vojir arrested Elkins, they smelled a strong odor of intoxicants on her breath and noted her speech was slurred.

On the way to the jail, Officer Vojir turned on the patrol car's dashboard video and sound recorder and pointed it at Elkins. Elkins immediately began talking. When she said, "I'm a Native American and I'm honest," Officer Vojir responded, "[T]hat's why you are assaulting somebody and ran from the police."[2] 1 Report of Proceedings (RP) (Mar. 18, 2008) at 21. Elkins replied,

> Well, he shouldn't have told me to go back to my own country; I'm in my own country. Why don't you guys go back to where the Mayflower came from. This is Native American land, not Pilgrim land. Pilgrims come from the fucking Mayflower, across the way. Don't hate because I fucking peeled out on you guys. Fucking haters. Lucky I was fucking buzzed or I'd have got away. Damn it. Did they fuck up their car by hitting me? They did, didn't they? Shouldn't have tried to hit me.

Pretrial Ex. 1. At that point, Officer Vojir advised Elkins that she was being recorded and that anything she said could be used against her in a trial. But Elkins continued

[2] The transcription of the videotape reflects that Officer Vojir said, "Yeah, that's why you stole from somebody and ran from the cops?" Pretrial Ex. 1. Officer Vojir testified that this was a transcription error.

talking. When they arrived at the jail, Officer Vojir read Elkins the standard Washington State Patrol DUI implied consent warnings. She refused to take a breath test.

The State charged Elkins with attempting to elude a pursuing police vehicle, DUI, second degree assault with a special deadly weapon allegation, third degree assault, felony hit and run, and bail jumping. At the pretrial CrR 3.5 hearing to determine whether Elkins' statements made in the patrol car were spontaneous and voluntary, Officer Vojir testified that he heard another officer read Elkins her Miranda rights at the time of arrest.[3] Following the CrR 3.5 hearing, the court concluded that Elkins' statements were admissible. In addition, the court admitted the Elkins video and sound recording from the point after Officer Vojir notified her that she was being recorded and also allowed him to testify about what Elkins said prior to the notice.

At trial, Elkins claimed self-defense to the assault charge based on posttraumatic stress syndrome and battered women's syndrome. A jury convicted Elkins as charged, but did not find she used a deadly weapon during the second degree assault.[4] At sentencing, defense counsel argued for an exceptional mitigated sentence of 30 months on the hit and run conviction, which carried the longest sentence. After concluding no legal basis existed to grant an exceptional sentence, the trial court imposed a standard range sentence. Elkins appealed.

ANALYSIS

Miranda Warnings[5]

[3] At the CrR 3.5 hearing, the State called only one witness. Elkins did not testify.

[4] The jury therefore did not deliberate on the alternative third degree assault charge.

Elkins argues that there is no competent evidence that she received Miranda warnings when she was arrested. She acknowledges that the CrR 3.5 record supports the trial court's finding that she received Miranda warnings at the time of arrest because Officer Vojir testified at the CrR 3.5 hearing that another officer read her Miranda rights. Nevertheless, she argues that the entire record does not support such a finding because at trial, Officers Vojir and Byers each testified that the other read Elkins her rights.

"[T]he Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination requires that custodial interrogation be preceded by advice to the accused that he has the right to remain silent and the right to the presence of an attorney." State v. Earls, 116 Wn.2d 364, 378, 805 P.2d 211 (1991). "Miranda warnings were designed to protect a defendant's right not to make incriminating statements while in police custody." State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). "Without Miranda warnings, a suspect's statements during custodial interrogation are presumed involuntary." State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004).

But Elkins did not raise this issue below. Therefore, she cannot raise it for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). "The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual

[5] We note that the precise nature of Elkins' contentions is unclear.

prejudice that makes the error 'manifest,' allowing appellate review." State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007).

The State correctly asserts that Elkins waived appellate review of the issue by (1) failing to assign error to the trial court's relevant factual findings and (2) expressly waiving the issue in the trial court. We agree. Under RAP 10.3(g), "[t]he appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." Elkins did not assign error to finding of fact 2.

> Officer Bear read the Defendant her Miranda Warnings, per his department issued Miranda Rights Card. Officer Vojir was present during the reading of these rights. The defendant acknowledged that she understood her rights.

"[F]indings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged." State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). The trial court's unchallenged finding establishes that Officer Bear read Elkins her Miranda rights.

Moreover, the record shows that at the CrR 3.5 hearing, defense counsel waived the claimed error by informing the trial court that no factual dispute existed over whether Elkins had received Miranda warnings. He said the only issue was whether Elkins' statements made in the back of Officer Vojir's patrol car were spontaneous and voluntary, thereby constituting a valid waiver of her Miranda rights. Defense counsel specifically stated, "It's not a factual motion." 1 RP (Mar. 18, 2008) at 14. He also agreed with the summary of facts in the State's trial memorandum, "which I believe captures the legal issue on what we'll be litigating with regard to statements that Ms. Elkins made on that video." 1 RP (Mar.

18, 2008) at 14. The State's trial memorandum twice asserted that Officer Bear read Elkins her Miranda rights and argued that Elkins knowingly, intelligently, and voluntarily waived her rights by spontaneously talking to Officer Vojir.

Later, during argument over the admissibility of Elkins' statements, the trial court asked defense counsel whether he was arguing that "although the Miranda warnings were read, [Elkins] was not in a position to exercise them?" RP March 18, 2008 at 33-34. Defense counsel responded, "Correct." The trial court then stated,

> It appears, then, that there is very little dispute over the formal 3.5 hearing. The officer did, according to the testimony, advise her of her warning or was present when another officer advised her of her rights under the Miranda case. . . .
>
> . . . .
>
> Considering the testimony that I have heard, therefore, it appears that any statements made were volunteered after the receipt of Miranda warnings which are not in contest and her statements will be admissible . . . .

1 RP (Mar. 18, 2008) at 35–36. Defense counsel did not ask the trial court to supplement its oral findings and did not object to the trial court's written findings. Accordingly, even assuming that Elkins raised an issue of constitutional magnitude, we decline to consider it. State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983) (appellate review precluded where defendant waived or abandoned constitutional rights by affirmatively withdrawing pretrial motion to suppress evidence).

Furthermore, the record does not support Elkins' contention that the inconsistency between the trial testimony of Officer Vojir and Officer Byers requires reversal. In State v. Sadler, 147 Wn. App. 97, 130, 193 P.3d 1108 (2008), the defendant argued that the record did not support the trial court's conclusion that his Miranda rights were read, because one officer testified that he advised defendant of his rights and another officer testified that he

did not hear that officer read defendant his rights. The court held that the officers' testimonies were not necessarily inconsistent because it is conceivable that the officer did not hear defendant's rights being read because he was performing other duties at that time. Sadler at 130. Similarly, the trial testimony of Officers Byers and Vojir is inconsistent only with respect to which officer read her rights—not whether her rights were read.

Elkins also argues that her statements to Officer Vojir were inadmissible because when she said, "I'm a Native American and I'm honest," he knowingly elicited an incriminating response by saying, "Yes, that's why you are assaulting somebody and ran from the police." The State responds that the trial court properly found that Elkins' statements were the product of a valid waiver of her Miranda rights. Challenged findings of fact are reviewed for substantial evidence, which is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). This court reviews a trial court's conclusions of law at a suppression hearing de novo. State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

A suspect who has been advised of her Miranda rights may either invoke or waive them. State v. Warness, 77 Wn. App. 636, 639, 893 P.2d 665 (1995). The trial court's unchallenged finding that the police officer advised Elkins of her Miranda rights is a verity on appeal. Therefore, the issue is whether substantial evidence supports the trial court's finding that Elkins' statements in Officer Vojir's patrol car were "spontaneous and voluntary," and whether that finding supports the court's conclusion that Elkins validly waived her Miranda

rights.

"[A] confession is voluntary, and therefore admissible, if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily, and intelligently waives those rights." State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). "The test for waiver is a 'totality of the circumstances' test." State v. Massey, 60 Wn. App. 131, 141, 803 P.2d 340 (1990). Whether a waiver is valid "'"depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."'" Earls, 116 Wn.2d at 379 (quoting Edwards v. Arizona, 451 U.S. 477, 482, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981)). The State bears the burden to prove, by a preponderance of the evidence, that the defendant validly waived her constitutional Miranda rights. Earls, 116 Wn.2d at 379.

Here, the trial court found,

> While being transported, after a full waiver of her rights, she began to speak with Officer Vojir about the assault and eluding with police. The full statement made by the defendant is consistent with the audio transcription in the State's Trial Brief. She concluded her statement at the end of the transport. These statements made by the defendant were spontaneous and voluntary. There was no improper conduct by police or use of psychological pressure by police to obtain these statements. Additionally, no threats or promises were made to obtain these statements.

Finding of fact 3. The trial court then concluded,

> The defendant's statements made at the time of arrest and made to Officer Vojir during the transport of the defendant and at the precinct were made after she was properly advised of her constitutional rights, and acknowledged that she understood and waived those rights. Thus, these statements were knowingly, intelligently, and voluntarily made and are admissible at trial.

Conclusion of law 2.[6]

We conclude that the trial court properly found that Elkins validly waived her rights. Waiver may be either express or implied. State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986).

> Implied waiver has been found where the record reveals that a defendant understood his rights and volunteered information after reaching such understanding. Waiver has also been inferred where the record shows that a defendant's answers were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights.

Terrovona, 105 Wn.2d at 646 (footnote omitted).

Elkins does not assert and the record does not show that she invoked her right to remain silent or her right to counsel while in Officer Vojir's patrol car. Here, the video and sound recording amply show that Elkins demonstrated a willingness to talk to Officer Vojir. After an officer advised Elkins of her Miranda rights, she began spontaneously talking and continued talking as Officer Vojir drove her to the police station.

> Elkins: You might find something. For real.
> (Radio chatter)
> Elkins: I love you. You guys want a crackhead? Think you dig more? I'm artist native. Did you find some? Are you on a crack case so you can find it? He wants a crack head. You didn't look in the fucking Vette, that's where it is, in the Vette. Have a crack head in the Vette. That's where it is. Damn it. Have to scoop it up when I get out. I'm a Native American and I'm honest.
> Officer Vojir: Yeah, that's why you [are assaulting] somebody and ran from the cops?
> Elkins: Well, he shouldn't have told me to go back to my own country; I'm in my own country. Why don't you guys go back to where the Mayflower

[6] Elkins did not assign error to this conclusion of law.

> came from. This is Native American land, not Pilgrim land. Pilgrims come from the fucking Mayflower, across the way. Don't hate because I fucking peeled out on you guys. Fucking haters. Lucky I was fucking buzzed or I'd have got away. Damn it. Did they fuck up their car by hitting me? They did, didn't they? Shouldn't have tried to hit me.
>
> Officer Vojir: Actually, now, you are being recorded, so everything you say could be used against you in trial.
>
> Elkins: That's all right, they shouldn't have hit me. White people need to go back where the Mayflower came from. This is Native American land. That white man had no right telling me to go back to my country, calling me a Mexican, because I'm not Mexican, I'm Native American. And I own Muckleshoot. Native American Muckleshoot. Damn straight. White people don't—need to go back to where the Mayflower brought them from. White man had no right telling me to go back to my country. I am in my country. This is Native American land. You know why. You know, the United States, in the Bible, because the United States was discovered after death, A.D. of Christ. This is going to be Native land again one day, live off the land and appreciate it, give back to Mother Earth, the way it should be. Fuck all this corruption the white man brought to our people. Corruption. All corruption. White man brought diseases from humping sheep.

Officer Vojir responded only after Elkins voluntarily began speaking. The record shows and the trial court found no evidence officers exerted psychological pressure or coercion to obtain Elkins' statements. Officer Vojir testified that neither he nor any other officers made any threats or promises to Elkins. Therefore, even if we assume that Officer Vojir's remark was a question or its functional equivalent, Elkins impliedly waived her Miranda rights. Thus, the trial court properly admitted her statements at trial.

The State further contends that even if Elkins did not receive Miranda warnings, her statements to Officer Vojir were admissible because they were not the product of custodial interrogation. "The Miranda protection is premised on custodial interrogation. . . . A suspect who is in custody but not being interrogated does not have Miranda

rights." Warness, 77 Wn. App. at 639–40. Because we conclude that the trial court's finding that the police officer advised Elkins of her Miranda rights is a verity on appeal, we do not address the question of whether Officer Vojir's statement amounted to custodial interrogation.[7]

Privacy Act

Elkins next asserts that the video and sound recording taken while seated in the back of Officer Vojir's patrol car should have been suppressed because police officers violated Washington's privacy act. "This case involves interpretation of the privacy act. Interpretation of a statute is a question of law that this court reviews de novo." State v. Courtney, 137 Wn. App. 376, 382, 153 P.3d 238 (2007), review denied, 163 Wn.2d 1010 (2008).

Washington's privacy act prohibits the recording of private conversations without the consent of all parties. RCW 9.73.030. An exception is carved out for emergency response personnel, including police, under certain circumstances. RCW 9.73.090(1). Under RCW 9.73.090(1)(b), "[v]ideo and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court." Subsection (1)(b) requires that an arrested person be informed that the recording is being made and be fully informed of his or her constitutional rights at the beginning of the recording. RCW 9.73.090(1)(c) is entitled

[7] The report of proceedings from the CrR 3.5 hearing indicates that the court did not expressly rule on the issue of whether Officer Vojir's statement amounted to interrogation because Elkins agreed that there was no issue of fact about whether she received Miranda warnings.

"Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles." It provides in part, "A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording." Subsection (1)(c), unlike subsection (1)(b), does not expressly require the officer to read Miranda warnings on the recording.

Before transporting Elkins to jail, Officer Vojir activated the dashboard videocamera and recorder. He did not immediately tell Elkins she was being recorded. After she made several incriminating statements, Officer Vojir told her that she was being recorded and that anything she said could be used against her in court. But he did not record a statement of Miranda rights on the tape. The trial court concluded that subsection (1)(c) applied and that Officer Vojir was therefore not required to read Elkins her Miranda rights on the tape. The court admitted the video and voice recording from the point Officer Vojir gave notice and allowed him to testify based on his independent recollection of Elkins' statements during the entire recording.

Elkins argues that subsection (1)(b) controls, because it plainly applies to recordings made of "arrested persons. . . in custody," irrespective of location or whether a formal interrogation is taking place. She contends that Officer Vojir violated subsection (1)(b) by failing to read her Miranda rights on the video and sound recording taken in the back of his police car and asserts that her statements are inadmissible.

But we need not reach this issue because, even assuming that the trial court erred in admitting the recording, the error was harmless. "Admission of evidence in violation of the privacy act is a statutory,

and not a constitutional, violation." Courtney, 137 Wn. App. at 383. The error is not prejudicial unless the erroneously admitted evidence materially affected the outcome of the trial. Courtney, 137 Wn. App. at 383. Here, the jury saw a video recording of Elkins' attempt to elude police, including her collision with a patrol car. The jury also heard Elkins' phone call to "Gerri," which occurred after her Miranda rights were read to her at the jail. There, Elkins admitted, "Fuckin I ran into fuckin police," "Fuck man we fuckin outran the motherfuckers all the way from Auburn," "I seen 'em coming man. I said fuck there they are. Fuckin floorin' it so I was flyin' like fuckin 100 mph down fuckin M Street," "I was eluding all the way from Auburn," "Fuck man I fuckin lost it around the corner and then boom hit right in that driveway," and "I wouldn't even take a breathalyzer. . . . I say fuck 'em. They ain't gonna fuckin find out how much alcohol, how much, how much Crown I had in me." There is no reasonable probability that the trial's outcome would have been different had the trial court excluded Elkins' video and voice recording.

Implied Consent Warnings

Elkins argues that the trial court erred by admitting her refusal to take a breath test because the implied consent warnings did not fully inform her of the consequences of refusing the test. The sufficiency of implied consent warnings is an issue of law reviewed de novo. Jury v. Dep't of Licensing, 114 Wn. App. 726, 731, 60 P.3d 615 (2002).

Drivers in Washington are presumed to have consented to a breath or blood test to determine alcohol concentration if arrested for DUI, but drivers may refuse the test. RCW 46.20.308(1). "The choice to

submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace." State v. Bostrom, 127 Wn.2d 580, 590, 902 P.2d 157 (1995). "A driver must be afforded an opportunity to make a knowing and intelligent decision whether to take the Breathalyzer test." Gonzales v. Dep't of Licensing, 112 Wn.2d 890, 894, 774 P.2d 1187 (1989). Thus, the implied consent statute requires the arresting officer to inform the driver in substantially the following language:

> (a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and
> (b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and
> (c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504; and
> (d) If the driver's license, permit, or privilege to drive is suspended, revoked, or denied the driver may be eligible to immediately apply for an ignition interlock driver's license.

RCW 46.20.308(2). "Failure to give a proper implied consent warning will result in suppression of the results of the [B]reathalyzer test." State v. Trevino, 127 Wn.2d 735, 747, 903 P.2d 447 (1995).

It is uncontested that Officer Vojir read Elkins the standard Washington State Patrol (WSP) implied consent warnings. And the parties agree that the WSP warning language is essentially identical to the language required by the implied consent statute. But Elkins contends that the implied consent statute and the WSP warnings are incomplete and misleading because the driver is not told that under RCW 46.61.506(1), the privilege to drive could

be suspended, revoked, or denied if a test shows the driver had an alcohol concentration less than 0.08 but the driver is nevertheless convicted of being under the influence.[8]

We disagree. The implied consent statute does not require this additional warning. "The officer may not add warnings that are not contained in the plain language of the implied consent statute." State v. Koch, 126 Wn. App. 589, 594, 103 P.3d 1280 (2005). Moreover, the consequence imposed by RCW 46.61.506(1) plainly applies only to the class of drivers who take a breath test, not those who refuse. See State v. Bartels, 112 Wn.2d 882, 890, 774 P.2d 1183 (1989) (suppression of test results required only for defendants who were part of group misled by erroneous warnings). Because Elkins refused the test, she cannot establish prejudice.

Elkins further argues that the statute and the WSP implied consent warnings are insufficient because the driver is not told that a mandatory jail term flowed from a conviction after refusing the test.[9] Again, we disagree. Elkins did not challenge the admissibility of her refusal to take the breath test on this ground below. "A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

---

[8] RCW 46.61.506(1) provides, "Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug, if the person's alcohol concentration is less than 0.08, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug."

[9] RCW 46.61.5055(1)(b)(i) imposes a mandatory prison sentence of two days to one year on convicted drivers who refuse an alcohol concentration test.

Moreover, "[t]here is no requirement that each and every specific consequence of refusal be enunciated." State v. Bostrom, 127 Wn.2d 580, 586, 902 P.2d 157 (1995). The language in the implied consent warnings informing drivers that refusal to take the test may be used in a criminal trial is sufficient to alert them that the evidence could be used during sentencing. Bostrom, 127 Wn.2d at 586.

Elkins relies on Cooper v. Dep't of Licensing, 61 Wn. App. 525, 810 P.2d 1385 (1991) to argue that an implied consent warning that does not accurately convey the law is not adequate merely because it mirrors the statutory warning language. Her reliance is misplaced. In Cooper, the warnings given were complete because they did not omit any language from the implied consent statute. But the police added warning language that was not entirely accurate. Cooper, 61 Wn. App. at 527. The court held that the warning was misleading and prevented the defendant from making a knowing and intelligent decision about whether to take the breathalyzer test. Cooper, 61 Wn. App. at 528. Here, in contrast, the warnings were complete and the officer did not add any language. The trial court properly admitted evidence of Elkins' refusal to take the test.

Sentencing

Elkins finally argues that the trial court erred in concluding that it lacked discretion to impose a mitigated exceptional sentence for her hit and run conviction, which carried a standard range sentence of 53 to 60 months. "The court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

"[T]he sentencing court has the discretion to determine whether the circumstances warrant an exceptional sentence downward." State v. Korum, 157 Wn.2d 614, 637, 141 P.3d 13 (2006). A defendant may not appeal a standard range sentence unless the sentencing court "has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Elkins contends that the trial court found sufficient mitigating factors to reduce her sentence but erroneously concluded that it lacked discretion to find that the mitigating factors justified reducing the longest sentence from 60 months to 30 months.[10] But Elkins misconstrues the trial court's ruling. The record shows that the trial court considered Elkins' posttraumatic stress disorder and her inability to conform her conduct to the requirements of the law. The court then stated,

> Again, I listened to the evidence in this case with a sense of profound sadness over various things that have happened to you in your life. From a legal standpoint, with the focus on punishment, and looking at your criminal history and the facts of some of your criminal history, I also have to be concerned with protection of the public. And one of the last concerns under the statute is rehabilitation of the defendant. My assessment of the legal standard is that even if I would like to reduce your sentence, and I would, I don't believe there is a proper legal basis for me to do so, Ms. Elkins.

RP (May 30, 2008) at 27–28.

[10] In particular, she contends that there are at least two applicable statutory mitigating factors—"The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct," RCW 9.94A.535(1)(c), and "The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded." RCW 9.94A.535(1)(e).

A trial court that has considered the facts and concluded that no basis exists to impose a sentence outside the standard range has exercised its discretion. Garcia-Martinez, 88 Wn. App. at 330. Here, the record shows that the trial court considered the evidence in support of an exceptional mitigated sentence in light of the purposes of the Sentencing Reform Act (SRA). But it concluded that no basis existed for an exceptional minimum sentence. Two of the stated purposes of the SRA are protection of the public and ensuring proportionality between an offender's sentence and his or her criminal history. RCW 9.94A.010(1), (4). Elkins' criminal history included two prior convictions for DUI and approximately 28 other driving offenses. The court properly exercised its discretion in refusing to impose an exceptional minimum sentence.

Relying on State v. In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 330–31, 166 P.3d 677 (2007), Elkins argues that the court's decision to mitigate supersedes restrictive SRA provisions. Her reliance is misplaced. In Mulholland, the court held that RCW 9.94A.535, which provides, "A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence," gave the trial court discretion to impose an exceptional sentence under either subsection of RCW 9.94A.589(1). Here, in contrast, there is no express statutory provision overriding RCW 9.94A.535's requirement that the court consider the purposes of the SRA in deciding whether to impose an exceptional sentence.

The State properly concedes, however, a minor error in the misdemeanor judgment and sentence. The trial court unambiguously ordered concurrent sentences on all counts including the DUI

misdemeanor count. But the court did not mark the appropriate box on the misdemeanor judgment and sentence form to indicate a concurrent sentence. We therefore remand to correct the misdemeanor judgment and sentence.

Statement of Additional Grounds

Elkins raises two additional issues in her statement of additional grounds for review. First, she argues that she received ineffective assistance of counsel because her counsel failed to produce evidence showing what really happened during the police chase and failed to sufficiently develop her posttraumatic stress disorder and battered women's syndrome defenses. Second, she contends that she was denied a fair trial because the State knowingly relied on false and misleading evidence of what happened during the chase to obtain a conviction. These arguments lack merit.

In sum, the trial court did not err in admitting (1) Elkins' statements made in the back of Officer Vojir's patrol car, (2) the video and sound recording, and (3) her refusal to submit to a breath test. And the court properly exercised its sentencing discretion. We affirm Elkins' convictions and remand to correct the misdemeanor judgment and sentence.

WE CONCUR: