

FILED
July 29, 2015
Court of Appeals
Division I
State of Washington

No 92015-0
Court of Appeals No. 71937-8-I



THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MUSTAF AHMED,

Petitioner.

Received
Washington State Supreme Court

AUG - 4 2015
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Ronald R. Carpenter
Clerk

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

A.	IDENTITY OF PETITIONER.....	1
B.	OPINION BELOW.....	1
C.	ISSUE PRESENTED.....	1
D.	STATEMENT OF THE CASE.....	1
E.	ARGUMENT.....	2
	Because there was insufficient evidence of one of the alternatives means, Mr. Ahmed’s conviction must be reversed	2
F.	CONCLUSION.....	7

TABLE OF AUTHORITIES

Washington Constitution

Const. Art. I, § 21 1, 2

Washington Supreme Court

State v. Kintz, 169 Wn.2d 537, 238 P.3d 470 (2010) 3

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994) 2, 5,
7

State v. Owens, 180 Wn.2d 90, 323 P.2d 1030 (2014)..... 2, 5, 7

State v. Roggenkamp, 153 Wn. 2d 614, 106 P.3d 196 (2005)..... 4

State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987) 5

Vita Food Products, Inc. v. State, 91 Wn.2d 132, 587 P.2d 535 (1978) 3

Washington Court of Appeals

State v. Wilhelm, 78 Wn. App. 188, 896 P.2d 105 (1995) 4

Statutes

RCW 46.61.502 3, 4

A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4 Mustaf Ahmed asks this Court to accept review of the opinion in *State v. Ahmed*, 71937-8-I (June 29, 2015).

B. OPINION BELOW

The Court of Appeals affirmed Mr. Ahmed's conviction of driving under the influence.

C. ISSUE PRESENTED

The right to a unanimous jury guaranteed by Article I, section 21 is violated where the jury is instructed on alternative means but does not provide a particularized expression of unanimity as to which alternative(s) its verdict rests upon. In such cases the conviction must be reversed unless there is sufficient evidence to support each alternative. The Court of Appeals concluded that for the offense of driving under the influence the statutory provision providing a person commits the offense if they drive under the influence of alcohol *or* drugs defines a single alternative.

D. STATEMENT OF THE CASE

State Patrol Trooper Adam Gruener saw Mr. Ahmed driving 80 mph in a 60 mph zone while crossing the fogline on one occasion by a single tire-width. 4/3/14 RP 33. The trooper stopped Mr. Ahmed. *Id.* at

34-36. Upon approaching the car, the trooper noted Mr. Ahmed's eyes were bloodshot, he was sweating, and there was an odor of alcohol.

4/3/14 RP 39. A blood sample taken from Mr. Ahmed following his arrest revealed a blood-alcohol level of .073 and a THC level of 3.4. *Id.* at 70-71.

The State charged Mr. Ahmed with one count of driving under the influence and one count of driving with a suspended license. CP.

A jury convicted Mr. Ahmed as charged. CP 109-10.

E. ARGUMENT

Because there was insufficient evidence of one of the alternatives means, Mr. Ahmed's conviction must be reversed.

Article I, section 21 requires a unanimous jury verdict in criminal matters. When the State alleges a defendant has committed a crime by alternative means, and the jury is instructed on multiple means, the right to a unanimous jury requires the jury unanimously agree on the means by which it finds the defendant has committed the offense. *State v. Owens*, 180 Wn.2d 90, 323 P.2d 1030 (2014). If the jury returns "a particularized expression" as to the means relied upon for the conviction, the unanimity requirement is met. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). However,

“[a] general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means.” *State v. Kintz*, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (citing *Ortega-Martinez*, 124 Wn.2d at 707-08); *Owens*, 180 Wn.2d at 99.

This case presents a significant question of the application of these provisions to the offense of driving under the influence. For the reasons below this court should accept review under RAP 13.4.

RCW 46.61.502(1) provides a person is guilty of driving under the influence where they drive while: (1) having an alcohol concentration of 0.08 or higher within two hours after driving, (2) having a THC concentration of 5.00 or higher within two hours after driving; (3) being under the influence of any intoxicating liquor or drug, or (4) being under the influence of a combination of intoxicating liquor or any drug. Properly understood, RCW 46.61.502’s third alternative requires the State prove either the person was under the influence of intoxicants or the person was under the influence of drugs.

Each statutory provision is intended to “effect some material purpose.” *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). “The drafters of legislation . . . are presumed to have

used no superfluous words and [courts] must accord meaning, if possible, to every word in a statute.” *State v. Roggenkamp*, 153 Wn. 2d 614, 624, 106 P.3d 196 (2005) (Internal citations and brackets omitted.) The fourth statutory alternative addresses the combined effects of drugs and alcohol. RCW 46.61.502(1)(d). Thus, to give it independent meaning, the third alternative must mean something else.

To establish a person is under the influence, the State must prove the “ability to handle an automobile was lessened in an appreciable degree by the consumption of intoxicants or drugs.” *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995). To give independent meaning to the third alternative it must require the State prove a person was under the influence of intoxicants but not drugs, or that he was under the influence of drugs but not intoxicants. And they must establish one, but not the other, affected the person’s driving to an appreciable degree. Or, arguably, the State could prove that each independently affected the person’s ability to drive to an appreciable degree. But what the State cannot do is present evidence of the presence of both drugs and alcohol and simply that the person’s driving was affected to an appreciable degree without establishing which caused that because that is what is meant by the “combined effects.”

This, however, is the reading the Court of Appeals applies, concluding the subsections reach the same rather than different conduct. Opinion at 5.

The State charged and the jury was instructed on both the under the influence of intoxicants or drugs alternative as well as the combined-influence alternative. CP 1, 123. The jury returned a general verdict, one without “a particularized expression of unanimity” as to either alternative. The jury was not instructed that it must unanimously agree as to the alternative means. Indeed, the trial court affirmatively instructed the jury they need not unanimously agree. CP 123. That instruction is directly contrary to the Court’s repeated urging that trial courts should instruct on the requirement of unanimity for alternative means crimes. *Ortega-Martinez*, 124 Wn.2d at 717, n.2 (citing *State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987)). In the absence of a particularized finding of unanimity as to the means, Mr. Ahmed’s conviction must be reversed unless each alternative is supported by sufficient evidence. *Owens*, 180 Wn.2d at 99. They are not.

Assuming for purposes of argument that the State proved Mr. Ahmed was under the combined effects of drugs and alcohol, it did not prove drugs independent of alcohol affected his driving, or that drugs

independent of alcohol did so. The State presented evidence of both drugs and intoxicants in Mr. Ahmed's blood but did not offer any evidence that one but not the other affected his driving to an appreciable degree.

The State offered the trooper's observations of Mr. Ahmed's driving 80 mph in a 60 mph zone, crossing the fogline on one occasion by a single tire-width. 4/3/14 RP 33. The trooper testified that while other cars moved to the roadside in response to his emergency lights, Mr. Ahmed exited the freeway and continued through two intersections before stopping in a parking lot. *Id.* at 34-36. The trooper estimated the total time between his activations of his lights and Mr. Ahmed stopping to be 35-45 seconds. *Id.* at 36.

Upon approaching the car, the trooper noted Mr. Ahmed's eyes were bloodshot, he was sweating, and there was an odor of alcohol. 4/13/14 RP 39. Regarding the trooper's observations, toxicologist Sarah Swenson testified "I think that they could be consistent with someone who is under the influence of alcohol and/or drugs." *Id.* at 73. However she allowed there are far fewer studies of the effects of marijuana on driving than on the effects of alcohol, and could not cite any studies concerning the combined effects. *Id.* at 77. Further, Ms.

Swenson acknowledged that one would need to look at a number of different things to know if they were impaired at any given level of THC concentration. 4/13/14 RP 78.

Because the State did not offer sufficient evidence to support the alcohol or drugs alternative, that alternative means must be dismissed and the case remanded for a new trial. *Owens*, 180 Wn.2d at 95; *Ortega-Martinez*, 124 Wn.2d at 707-08.

F. CONCLUSION

As set forth above, this Court accept review under RAP 13.4 and reverse Mr. Ahmed's conviction

Respectfully submitted this 29th day of July, 2015.

s/ Gregory C. Link
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 71937-8-1
v.)	
)	UNPUBLISHED OPINION
MUSTAF MOHAMED AHMED,)	
)	FILED: June 29, 2015
Appellant.)	

2015 JUN 29 AM 10:00
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

DWYER, J. — Mustaf Ahmed appeals from the judgment entered on a jury’s verdict finding him guilty of felony driving under the influence.¹ Ahmed contends that insufficient evidence was adduced at trial as to each of the charged alternative means of committing the crime, as was necessary to ensure jury unanimity in the absence of a particularized expression of unanimity from the jury.² Ahmed’s contention is based on the premise that one of the means charged—driving while “under the influence of or affected by intoxicating liquor or a drug”—represents, in actuality, two alternative means. We reject Ahmed’s assertion and conclude that sufficient evidence was adduced at trial to support each alternative means charged. Consequently, we affirm.

¹ Ahmed was also charged with, and convicted of, driving while license suspended/revoked in the first degree. He does not appeal from that conviction.

² Such a particularized expression of unanimity is guaranteed when the jury is instructed that it must be unanimous as to which means it finds proved. No such instruction was given to Ahmed’s jury.

Washington State Patrol Trooper Adam Gruener observed Ahmed driving a motor vehicle at a rate of 80 miles per hour in a 60 miles per hour zone. Ahmed's vehicle drifted over the fog line of the shoulder by approximately one tire's width before coming back into the lane of travel, at which point Gruener, who was following Ahmed's vehicle, activated his patrol car's emergency lights. Ahmed, however, did not slow down, did not brake, and did not respond at all; rather, he continued driving on the freeway at 80 miles per hour for 15 seconds. Eventually, Ahmed's vehicle exited the freeway and, despite other vehicles pulling over in recognition of Gruener's presence, continued along surface streets for 20 to 30 seconds before Ahmed finally stopped his vehicle approximately one-half mile from the freeway. Upon approaching Ahmed's vehicle, Gruener observed that Ahmed's eyes were bloodshot and watery, that he was sweating profusely, and that his speech was slurred. Gruener further noticed both a strong odor of alcohol emanating from Ahmed's vehicle and an open can of beer behind the passenger's seat. Ahmed was then arrested.

When Gruener took Ahmed to the hospital to have his blood drawn Ahmed admitted to drinking, telling Gruener, "I know I fucked up, I shouldn't have been driving." An analysis of Ahmed's blood revealed an ethanol level of 0.073 and a THC level of 3.4 nanograms per milliliter. Later, at trial, forensic toxicologist Sarah Swenson testified that, in her opinion, based on the other evidence presented, Ahmed's behavior was "consistent with someone who is under the influence of alcohol and/or drugs."

Ahmed was charged by information with one count of felony driving under the influence pursuant to subsections (c) and (d) of RCW 46.61.502(1). These provisions are as follows:

(1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

(c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or

(d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

The jury returned a guilty verdict.³ Ahmed was sentenced to 15 months of incarceration, 12 months of community custody, and ordered to pay various amounts of fines and assessments.

II

Ahmed contends that his right to a unanimous jury verdict was violated. This is so, he asserts, because the jury did not specify which of the charged means supported its verdict, and the State failed to adduce sufficient evidence as to one of the means. We disagree.

In Washington, a criminal defendant is entitled to a unanimous jury verdict. WASH. CONST. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980) (citing State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963)).

This right may also include the right to a unanimous jury determination as to the *means* by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime. In reviewing this type of challenge, courts apply the rule that when there is sufficient evidence to support each of the alternative means of committing

³ The jury also found that Ahmed had the requisite predicate criminal history necessary to elevate the DUI from a gross misdemeanor to a felony. This aspect of the case is not at issue on appeal.

the crime, express jury unanimity as to which means is not required. If, however, there is insufficient evidence to support any means, a particularized expression of jury unanimity is required.

State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014);⁴ accord State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994); In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 339-40, 752 P.2d 1338 (1988); State v. Whitney, 108 Wn.2d 506, 507, 739 P.2d 1150 (1987); State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976).

The alternative means of committing the offense of driving under the influence are set forth by the subsections of RCW 46.61.502(1). State v. Franco, 96 Wn.2d 816, 829, 639 P.2d 1320 (1982); State v. Shabel, 95 Wn. App. 469, 473, 976 P.2d 153 (1999).

(1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or

(c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or

(d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

RCW 46.61.502.

⁴ Washington law differs from federal law in this regard. In federal prosecutions, "jury unanimity is not required as to the means by which a defendant commits a crime, regardless of whether there is sufficient evidence to support each of the alternative means." Owens, 180 Wn.2d at 95 n.2.

Ahmed was charged pursuant to RCW 46.61.502(1)(c) and (d).⁵ The to-convict instruction given to the jury, provided, in pertinent part:

- (2) That the defendant at the time of driving a motor vehicle
 - (a) was under the influence of or affected by intoxicating liquor or a drug; or
 - (b) was under the combined influence of or affected by intoxicating liquor and a drug.

Jury Instruction 9.

Ahmed contends that the phrase, "was under the influence of or affected by intoxicating liquor or a drug," sets forth two alternative means of violating the statute and, consequently, the State must submit sufficient evidence of each in order to authorize the jury's verdict. We disagree. Previously, faced with the same argument, we stated, "[t]he Washington Supreme Court has rejected the application of this doctrine [requiring sufficient evidence on each alternative means] to 'means within means.'" State v. Al-Hamdani, 109 Wn. App. 599, 604, 36 P.3d 1103 (2001) (citing Jeffries, 110 Wn.2d at 339). Thus, while there may be alternative means of committing an offense, there is no such thing as "means within means." Accordingly, the phrase, "was under the influence of or affected by intoxicating liquor or a drug," sets forth a single alternative means of

⁵ Prior to December 6, 2012, RCW 46.61.502(1)(b) and (c) read "[w]hile the person is under the influence of or affected by intoxicating liquor or any drug," and "[w]hile the person is under the combined influence of or affected by intoxicating liquor and any drug." The legislature amended the statute on November 6, 2012 and added the "per se" legal limit for THC in recodified subsection (1)(b), and added the specific references to marijuana in recodified subsections (1)(c) and (1)(d). LAWS OF 2013, Ch.3, § 33. Although Ahmed's offense occurred in 2013, the information and jury instructions did not specifically reference "marijuana." This had no practical effect on Ahmed's prosecution because marijuana is a "drug" as that term is defined in RCW 46.61.540.

committing the offense for which sufficient evidence must be adduced to authorize the jury's verdict.⁶

III

The due process clauses of the federal and state constitutions, U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3, require that the State prove each element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319.

A claim of evidentiary insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence can be equally reliable.

⁶ Thus, pursuant to subsection (c), the State may secure a conviction by proving that the defendant drove a vehicle while under the influence of intoxicating liquor or while under the influence of marijuana or while under the influence of any drug. The statute uses the word "or" in its inclusive disjunctive sense, see Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010); E. Allan Farnsworth, "Dmeaning" in the Law of Contracts, 76 Yale L.J. 939, 955 (1967), not in its exclusive disjunctive sense, as urged by Ahmed. Thus, the prosecution may prove one option without the necessity of disproving all other options.

State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the jury on questions of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012).

When viewed in the light most favorable to the State, sufficient evidence was adduced to support a jury finding that Ahmed drove while “under the influence of or affected by intoxicating liquor” as set forth in Jury Instruction 9, element (2)(a). Trooper Gruener observed Ahmed driving faster than the speed limit and drifting out of the lane of travel. When Gruener pulled Ahmed over, he noted that Ahmed had watery, bloodshot eyes, and slurred his speech. Additionally, Gruener smelled an odor of alcohol emanating from both the vehicle and Ahmed himself, and there was an open container of alcohol in Ahmed’s vehicle. Ahmed admitted to Gruener that he had been drinking, and that he had “fucked up” and “shouldn’t have been driving.” His blood contained ethanol at a level of 0.073. Further, the forensic toxicologist testified that, in her opinion, Ahmed’s behavior was “consistent with someone who is under the influence of *alcohol and/or drugs*.” (Emphasis added.) Viewing the evidence and all inferences therefrom in the light most favorable to the State, a rational trier of fact could have found that Ahmed “was under the influence of or affected by intoxicating liquor.” Accordingly, sufficient evidence was adduced at Ahmed’s trial to support the alternative means of driving while “under the influence of or

affected by intoxicating liquor or a drug," as set forth in Jury Instruction 9, element 2(a).⁷

Sufficient evidence was also adduced to support a jury finding that Ahmed drove while "under the combined influence of or affected by intoxicating liquor and a drug," as set forth in Jury Instruction 9, element (2)(b). The evidence presented to the jury, as explicated above, is sufficient to support a finding that intoxicating liquor contributed to Ahmed being "under the combined influence of or affected by intoxicating liquor and a drug." As to the effect of a drug, evidence was presented that Ahmed was "under the influence of or affected by" marijuana, which is a drug. Ahmed took 35 to 45 seconds to stop his vehicle after Gruener activated his emergency lights, thus exhibiting time and space distortion, which forensic toxicologist Swenson testified is an effect of "marijuana . . . [and] not something you would normally see with ethanol." Further, a test of Ahmed's blood revealed that it contained substantial amounts of THC, and the forensic toxicologist testified that, in her opinion, the indicators of impairment displayed by Ahmed were "consistent with someone who is under the influence of alcohol *and/or* drugs." (Emphasis added.) Accordingly, sufficient evidence was adduced at trial to support the alternative means of driving while "under the combined influence of intoxicating liquor and a drug."

⁷ Although not necessary for an affirmance, a rational juror could also have concluded that Ahmed drove while under the influence of a drug. Ahmed drove poorly, as described above. He took 35 to 45 seconds to stop his vehicle after Gruener activated his emergency lights, thus exhibiting time and space distortion, which forensic toxicologist Swenson testified is an effect of "marijuana . . . [and] not something you would normally see with ethanol." Additionally, Ahmed's blood contained 3.4 nanograms of THC per milliliter, which is near the legal limit, and expert testimony established that an individual can be impaired below the legal limit. That same forensic toxicologist testified that, in her opinion, the indicators of impairment displayed by Ahmed were "consistent with someone who is under the influence of alcohol *and/or* drugs." (Emphasis added.)

No. 71937-8-1/9

Affirmed.

Drye, J.

We concur:

Trickey, J.

Reach, J.

.. . .

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71937-8-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: July 29, 2015