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Supreme Court No. 96612-5
(COA No. 76657-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC LAMAR JACKSON,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Eric Lamar Jackson petitions this Court for review of the Court of Appeals opinion in *State v. Jackson*, No. 76657-1-I (filed October 8, 2018). RAP 13.1(a), 13.3(a)(1), (b), 13.4(b). A copy of the opinion and the order denying Mr. Jackson's motion for reconsideration are attached in the Appendix.

B. COURT OF APPEALS DECISION

A jury convicted Mr. Jackson of physical control of a vehicle while under the influence despite proof by a preponderance of evidence that he had moved the vehicle safely off the roadway before the police responded. The Court of Appeals acknowledged Mr. Jackson moved the vehicle entirely off the public roadway and entirely onto the driveway of a private parking lot and recognized the vehicle only partially obstructed the driveway. However, it rejected the affirmative defense because the vehicle was not parked in compliance with parking conventions and because no law enforcement officer affirmatively testified to the absence of danger. In so holding, the Court of Appeals expanded the requirements

for the statutory affirmative defense of safely off the roadway and affirmed Mr. Jackson conviction despite insufficient evidence.[1]

C. ISSUES PRESENTED FOR REVIEW

1. RCW 46.61.504(2) provides, "No person may be convicted under this section and it is an affirmative defense . . . if . . . the person has moved the vehicle safely off the roadway." The undisputed evidence established Mr. Jackson moved the vehicle entirely off the public roadway, entirely onto the driveway of a private parking lot, and another car was able to and did access the driveway. Should this Court grant review and find no rational juror could have failed to find Mr. Jackson established by a preponderance of the evidence the affirmative defense of safely off the roadway and that the Court of Appeals denied Mr. Jackson due process when it affirmed a conviction based on insufficient evidence?

2. The affirmative defense of safely off the roadway is codified by statute and interpreted in case law. The Court of Appeals opinion expands the elements of the affirmative defense beyond the statute and conflicts with case law by imposing the additional elements that a defendant must establish the vehicle was parked in compliance with

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[1] Mr. Jackson also appealed his conviction and sentence for possession of a controlled substance pursuant to RCW 69.50.4013. The Court of Appeals affirmed the conviction but reversed the sentence and remanded for resentencing as a misdemeanor. Slip Op. at 12-13. Mr. Jackson does not petition this Court for review of that portion of the opinion.

parking conventions and must introduce an affirmative statement from law enforcement conceding the vehicle presented no danger. Should this Court grant review and hold the affirmative defense of safely off the roadway imposes no additional requirements?

3. In *State v. Votava*[2] and *State v. Day*[3], this Court held the legislative intent of protecting public safety should serve as the guiding principle in interpreting the physical control and other driving statutes. Here, the Court of Appeals declined to apply that principle when it interpreted the statute to require the additional elements that in order to be safely off the roadway, the defendant must also park the vehicle in accordance with expected parking conventions in a manner causing no inconvenience to others and must also present an affirmative acknowledgment from law enforcement that the parked car presented no danger. In imposing additional requirements not contained in the statute or suggested by this Court's precedent, did the Court of Appeals act contrary to the substantial public interest of promoting public safety, and does the Court of Appeals opinion conflict with this Court's opinions of *Votava* and *Day*?

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[2] 149 Wn.2d 178, 66 P.3d 1050 (2003).
[3] 96 Wn.2d 646, 638 P.2d 546 (1981).

D. STATEMENT OF THE CASE

Sometime around 1:00 am, Deputies Lopez, Johnson, and, later, Kelly, responded to a call at the Crowne Plaza Hotel in SeaTac. RP 585-86, 626, 671, 800, 904. In the hotel's northern parking lot -- an area Deputy Johnson knew as one where tired motorists often pulled over at night -- deputies discovered Mr. Jackson asleep in the driver's seat of a vehicle parked in the driveway of the private parking lot. RP 589, 802, 824, 875, 890-91. The vehicle was entirely off the adjacent public roadway, International Boulevard, also known as Pacific Highway. RP 627-28, 663-64, 723-24, 803-04, 877. The vehicle was entirely on the private parking lot driveway and was parked facing west towards the driveway entrance. RP 627-28, 663-64, 723-24, 803-04, 877. The vehicle was parked in front of the two arm gates that separate the driveway from the main parking lot area. RP 588, 661-62, 877; Ex. 10. The driveway itself is two lanes wide with three parking spots immediately adjacent on the north side of the driveway. RP 803-04; Ex. 10. All three driveway parking spots were open and unoccupied when the deputies arrived. RP 804, 824-25.

Deputy Lopez, the main responding officer, was able to access the driveway and parked his car facing the vehicle in which Mr. Jackson was sitting. RP 589, 614, 627-28, 663-64. Sufficient room existed for Deputy

Lopez also to park his vehicle entirely in the driveway of the private parking lot, not on the public highway. RP 614, 627-28, 663-64. Deputy Lopez testified Mr. Jackson's parked car was blocking the inbound traffic lane of the driveway but that he "could have pulled around" the parked car. RP 589.

Mr. Jackson awoke in response to the police approach and Deputy Lopez knocking on the window. RP 589, 626, 877-78, 891. The vehicle's engine was off and the car was not in drive. RP 638-39, 896-97. Deputy Lopez believed Mr. Jackson was impaired and arrested him following a search.[4] RP 597, 641-43, 806. A jury convicted him of physical control of a vehicle while under the influence despite Mr. Jackson's presentation of the affirmative defense of safely off the roadway. CP 66.

E. ARGUMENT

RCW 46.61.504(2) provides, "No person may be convicted under this section and it is an affirmative defense . . . if . . . the person has moved the vehicle safely off the roadway." The opinion of the Court of Appeals narrows this affirmative defense by imposing additional

[4] Deputies found diazepam, a gun, and a bag of cocaine. The State moved to dismiss the charge related to the diazepam following the court's order of suppression. RP 320-21. Mr. Jackson testified deputies recovered the gun from the trunk of the car and that neither the car nor the gun found in the trunk were his. RP 889-90, 884-85. The jury acquitted Mr. Jackson of possession of a firearm. CP 64. Mr. Jackson does not seek review of the conviction related to the cocaine.

requirements not contained in the statute or case law. In addition, the Court of Appeals departs from this Court's precedent by failing to interpret the affirmative defense through the lens of promoting public safety. In doing so, the opinion of the Court of Appeals affirmed the conviction despite sufficient evidence establishing the affirmative defense by a preponderance of the evidence, is contrary to opinions of this Court and the Court of Appeals, and presents an issue of substantial public interest. For these reasons, this Court should accept review under RAP 13.4.

1. **Insufficient evidence supports Mr. Jackson's conviction for physical control of a vehicle while impaired because he established the affirmative defense of safely off the roadway by a preponderance of the evidence.**

   a. *A defendant may not be convicted of physical control of a vehicle if he moved the vehicle safely off the roadway.*

The State must prove beyond a reasonable doubt each and every essential element of the charged crime. U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 3, 21, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The defendant has the burden of proving an affirmative defense by a preponderance of the evidence. *State v. Lively*, 130 Wn.2d 1, 13, 921 P.2d 1035 (1996). A reviewing court must reverse a conviction where no rational trier of fact could have found

the defendant failed to prove the affirmative defense by the greater weight of the evidence. *Id.* at 17; *City of Spokane v. Beck*, 130 Wn. App. 481, 483, 486, 123 P.3d 854 (2005).

b. Mr. Jackson established by a preponderance of the evidence that he moved the vehicle safely off the roadway.

RCW 46.61.504(2) does not further define "safely off the roadway." Case law establishes a vehicle is safely off the roadway if the driver no longer poses a threat to the public. *Votava*, 149 Wn.2d at 185-86; *Day*, 96 Wn.2d at 649-50; *Beck*, 130 Wn. App. at 488; *City of Edmonds v. Ostby*, 48 Wn. App. 867, 870-71, 740 P.2d 916 (1987).

The car in which Mr. Jackson was sitting posed no threat to the public. The car was entirely off the public roadway. RP 627-28, 663-64, 723-24, 803-04, 877; Slip Op. at 2, 6. The car was entirely on the driveway of a private parking lot. RP 627-28, 663-64, 723-24, 803-04, 877; Slip Op. at 2, 6. One lane of the driveway remained unobstructed. RP 589; Slip Op. at 6-7. Sufficient room existed for another car – Deputy Lopez's car – to access the same driveway and even to park in the driveway facing Mr. Jackson.[5] RP 589, 614, 627-28, 663-64; Slip Op. at

[5] Indeed, sufficient room may have existed for a third car to access the driveway. Testimony conflicted as to whether Deputy Kelly also parked his car on the driveway next to Deputy Lopez or parked on the roadway. *See* RP 816, 823 (Deputy Johnson testifying Deputy Kelly parked next to Deputy Lopez in the driveway), 681 (Deputy Kelly testifying he parked on International Boulevard).

6. Finally, the car engine was not on, nor was the car in gear. RP 638-39, 896-97; Slip Op. at 6-7. No danger existed that the car could have moved while Mr. Jackson was asleep or otherwise not attending to the car. *Cf. Ostby*, 48 Wn. App. at 870-71 (rejecting affirmative defense where car "motor was running and the transmission was in drive" because such situation "posed a danger to the public").

Viewing the evidence in the light most favorable to the State, Mr. Jackson established by a preponderance of the evidence that he moved the vehicle safely off the roadway, and no rational juror could have found otherwise. However, the Court of Appeals required more. The Court of Appeals opinion rejected the affirmative defense because Mr. Jackson parked the vehicle in the driveway of the parking lot, not in a designated parking space, and he failed to introduce an affirmative statement from law enforcement that the vehicle posed no threat. However, neither the statute nor case law impose these additional elements, and the Court of Appeals impermissibly narrowed the affirmative defense by mandating these additional requirements.

c. The Court of Appeals opinion misinterprets the statute and conflicts with other Court of Appeals opinions by imposing additional requirements to establish the affirmative defense.

In *City of Spokane v. Beck*, police found the defendant, who was asleep and intoxicated, behind the wheel of her vehicle with the engine running. 130 Wn. App. at 484. Her car was parked over two marked parking spots in a convenience store parking lot. *Id.* The arresting officer testified the car presented no danger. *Id.* The Court of Appeals held no rational juror could have found the defendant failed to establish the defendant was safely off the roadway and upheld the lower court's dismissal for insufficient evidence. *Id.* at 488.

By contrast, in *City of Edmunds v. Ostby*, the Court of Appeals rejected the affirmative defense. 48 Wn. App. 867. In *Ostby*, the defendant was also parked in a private parking lot not within a marked parking spot. *Id.* at 868. The defendant was also passed out behind the wheel of the car, but the car lights were on, the engine was on, and the car was in gear. *Id.* The Court of Appeals rejected the affirmative defense and reinstated the conviction because under those specific facts the "situation posed a danger to the public." *Id.* at 871.

Here, the Court of Appeals recognized the vehicle was entirely off the public roadway and entirely on a private driveway. Slip Op. at 2, 6. It

also acknowledged the vehicle was only blocking part but not all of the driveway and it did not obstruct all access. Slip Op. at 6-7. However, the Court of Appeals declined to reverse because Mr. Jackson failed to present a concession from the deputies that the manner in which the car was parked presented no danger, as the arresting officer in *Beck* conceded. Slip Op. at 7 ("While in *Beck* the officer testified that the defendant's car was 'off the roadway and there was no danger,' here no deputy made a concession of that nature." (quoting *Beck*, 130 Wn. App. at 484)).

In addition, the Court of Appeals noted, "Jackson's testimony did not contradict the State's evidence that the car was parked in the driveway for incoming and outgoing traffic to the hotel parking lot." Slip Op. at 7. But Jackson need not contradict that evidence to establish successfully the affirmative defense. Parking in marked parking spots in a manner most convenient to others is not mandated.

Neither RCW 46.61.504(2) nor case law impose these additional requirements on defendants. Even if a defendant parks a car off the public roadway in an inconvenient manner, contrary to the indicated wishes of the private landowner, and not in accordance with marked parking spots, the defendant may still be safely off the roadway. Nothing in the statute or case law requires a defendant establish "safely" by a particular kind of evidence from a particular witness – law enforcement. The Court of

Appeals opinion creates additional requirements that law enforcement must affirmatively acknowledge the absence of danger and that cars must be parked in compliance with parking conventions. Slip Op. at 6-7. In doing so, the Court of Appeals opinion misinterprets the statute and conflicts with *Beck* and *Ostby*.

Mr. Jackson presented sufficient evidence to establish the affirmative defense of safely off the roadway. Neither the statute nor case law mandate the additional requirements imposed by the Court of Appeals opinion. This Court should accept review pursuant to RAP 13.4(b).

2. The Court of Appeals opinion conflicts with this Court's opinions holding the legislative purpose of promoting public safety guides the application of the statute and implicates a substantial public interest by declining to interpret the statute in a way to promote public safety.

Our legislature established a driver who is impaired or intoxicated is not guilty of the offense of physical control of a vehicle if he moves the vehicle safely off the roadway. The goal of this affirmative defense is to protect and promote public safety by encouraging impaired and intoxicated drivers to remove their vehicles from the roadways in a safe manner. *Votava*, 149 Wn.2d at 184-85; *Day*, 96 Wn.2d at 649. To encourage compliance with this goal, this Court has held the legislative intent of promoting public safety guides a court's interpretation of the statute and affirmative defense. *Votava*, 149 Wn.2d at 185; *Day,* 96

Wn.2d at 648-50. Further, courts should interpret the statute to exempt conduct where a defendant is no longer posing a threat to public safety. *Votava*, 149 Wn.2d at 187-88; *Day*, 96 Wn.2d at 649-50. To encourage drivers to act safely, the statute prohibits conviction of physical control of a vehicle of one whose conduct fails to establish a threat to public safety.

In *Votava*, this Court applied that guiding principle to construe the meaning of "has moved" to include situations where the defendant caused the vehicle to be moved, as opposed to moved the vehicle himself. 149 Wn.2d at 188. Similarly, in *Day*, this Court applied the statutory purpose of protecting the public to interpret the driving while intoxicated statute as not encompassing conduct where the actor "is no longer posing a threat to the public." 96 Wn.2d at 649 n.4, 648-50 (declining to apply driving while intoxicated statute to offense committed on private property where such application would be unreasonable in light of legislative purpose of statute).

Here, the Court of Appeals did not apply the statute with that legislative purpose in mind. Mr. Jackson established, as did the State's own evidence, the vehicle was off the public roadway and on the driveway of a private parking lot. The car only partially blocked access to the driveway, as another driver (Deputy Lopez) did, in fact, park in the driveway and testified he could have driven around the car in which

Jackson sat. Despite this, the Court of Appeals held he failed to prove the vehicle was safely off the roadway.

If courts interpret the affirmative defense to encompass conduct even where the individual acts to promote public safety, individuals will be less encouraged to act in accordance with public safety. *See, e.g., Votava*, 149 Wn.2d at 187 (explicitly rejecting State's strict interpretation of statute to require defendant personally move vehicle because such interpretation "creates an incentive for intoxicated persons to drive."). We as a society are not protected by encouraging impaired or intoxicated motorists to believe it is only worthwhile to get off the roadway if they can completely comply with all parking markings and can park in a manner preferable to all others and posing no inconvenience. Imposing more onerous parking obligations encourages impaired motorists to drive all the way to their intended destination even if they are under the influence. This is not what the statute requires, it is not what the legislature intended, and it is not what we as a society want. It benefits the public to encourage impaired motorists to get off the roadway immediately, if they can do so safely.

When a car is off the roadway, it is safely off the roadway. Interpreting the affirmative defense to require additional elements is contrary to the legislative purpose of promoting public safety by

encouraging drivers to remove themselves from the public roadway by immunizing them from criminal liability. The Court of Appeals opinion conflicts with this Court's interpretation of that legislative purpose as applied to the affirmative defense. This Court should accept review pursuant to RAP 13.4(b) to address this misinterpretation which is contrary to a substantial public interest and to reaffirm this Court's precedent in *Votava* and *Day*.

F. CONCLUSION

Mr. Jackson respectfully requests this Court grant review pursuant to RAP 13.4(b).

DATED this 30th day of November 2018.

Respectfully submitted,

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APPENDIX 1

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. ERIC LAMAR JACKSON, Appellant.	No. 76657-1-I DIVISION ONE UNPUBLISHED OPINION FILED: October 8, 2018

APPELWICK, C.J. — Jackson was convicted of physical control of a vehicle while under the influence and possession of a controlled substance. He argues that the evidence was insufficient to convict him of physical control of a vehicle while under the influence, because no rational jury could have found that he failed to prove the affirmative defense—that he was safely off the roadway. And, he argues that the "to convict" instruction for the charge of unlawful possession of a controlled substance omitted an essential element, because it failed to identify the controlled substance he possessed. He asserts that this error was not harmless as to the conviction or sentence. We affirm the convictions, but remand for resentencing on the unlawful possession of a controlled substance conviction.

FACTS

On February 29, 2016, King County Sherriff deputies were dispatched to the Crowne Plaza Hotel on International Boulevard in SeaTac. When they arrived,

they saw a silver car blocking a driveway. A man, later identified as Eric Jackson, was in the driver's seat.

The area where the deputies located the vehicle is not a public roadway, but a driveway to the hotel. The driveway, which runs east to west (perpendicular to the public roadway, that runs north to south), is a two lane driveway, one lane for ingress and one lane for egress. Gate arms restrict ingress and egress to the parking area. A few marked parking spaces are located on the north side of the driveway, between the parking lot gate and the street. On the south side of the driveway is a curb and a fence. Jackson's vehicle was facing toward the public roadway (on the south side, blocking incoming traffic). There was at least a car length between the street and his vehicle.

Deputy Anthony Lopez noticed that Jackson appeared to be asleep and knocked on the window to get his attention. Deputy Lopez asked Jackson to step out of the car because he suspected that Jackson was intoxicated, and his car was blocking the driveway. Lopez asked Jackson to perform field sobriety tests. Jackson was not able to complete the horizontal gaze nystagmus (HGN) test. Lopez testified that during the test Jackson "kept moving his head, kept dropping his head, [and] was swaying." Lopez also noticed that Jackson's eyes were "extremely watery."

The deputies arrested Jackson. Deputy Lopez testified that, during the search incident to Jackson's arrest, he found a pistol and a bag of crack cocaine. Lopez did not remember where he found the bag of suspected cocaine. Lopez also testified that during his initial frisk of Jackson he mistook Jackson's gun for a

cellphone. The deputies also found a "bubble packet" of medication, later identified as diazepam, in Jackson's car.[1] The deputies got a warrant to draw blood from Jackson. Deputy Lopez took Jackson to Harborview Medical Center, where a nurse administered the blood draw. A blood test showed that Jackson had cocaine and diazepam in his system.

The State charged Jackson with unlawful possession of a firearm, two counts of possession of a controlled substance—one count for possession of cocaine and one count for possession of diazepam—and physical control of a vehicle while under the influence. After the court granted the motion to suppress the diazepam evidence, the State asked the court to dismiss the charge of possession of diazepam. The charge was dismissed. The jury found Jackson not guilty of unlawful possession of a firearm, but guilty of possession of a controlled substance, cocaine and of physical control of a vehicle while under the influence. Jackson appeals.

DISCUSSION

Jackson makes three arguments. First, he argues that the evidence was insufficient to convict him of physical control of a vehicle while under the influence. Second, he argues that the to convict instruction for possession of a controlled substance unconstitutionally relieved the State of its burden of proof, because it did not specify cocaine as the controlled substance. Third, he argues that, even if his conviction of possession of a controlled substance is affirmed, this court should

[1] At trial, the court granted Jackson's motion to suppress evidence of the diazepam.

reverse his sentence because the sentence does not comport with the jury's verdict.

I. Sufficiency of Evidence

Jackson contends that the evidence was insufficient to prove actual physical control while under the influence because he proved the affirmative defense—that he was parked safely off the roadway in a private driveway. The sufficiency of the evidence is a question of constitutional law that the appellate court reviews de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

In order to be found guilty, the State had to prove that Jackson had actual physical control of the vehicle while he was under the influence of or affected by alcohol or any drug. RCW 46.61.504(1)(c). It is an affirmative defense to a charge of physical control that "prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway." RCW 46.61.504(2). The inquiry for this court is whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the accused failed to prove the affirmative defense by a preponderance of the evidence. City of Spokane v. Beck, 130 Wn. App. 481, 486, 123 P.2d 854 (2005).

In Beck, the defendant's car was running and parked, taking up two spaces in a parking lot, 20 to 30 yards from the roadway. Id. at 484. The defendant called for a ride before she fell asleep in the driver's seat. Id. at 488. An officer arrested the defendant for physical control of a vehicle while under the influence. Id. at 484, 486. The arresting officer acknowledged at trial that the defendant's car was "off the roadway and there was no danger." Id. at 484. This court held that the

evidence was insufficient for a jury to conclude that Beck did not prove the defense, that she was safely off the roadway, by a preponderance of the evidence. Id. at 483, 488.

The court in Beck distinguished the facts of that case from those in City of Edmonds v. Ostby, 48 Wn. App. 867, 740 P.2d 916 (1987). Beck, 130 Wn. App. at 488. In Ostby, an officer found the defendant passed out behind the wheel of a car in an apartment complex's parking lot. 48 Wn. App. at 868. The car was running, its lights were on, and it was still in gear. Id. "The vehicle was not in a parking stall, but was situated in the middle of the roadway, blocking access to adjoining parking areas and buildings." Id. This court stated, "[T]he physical control statute can apply to an intoxicated driver apprehended on private property." Id. at 870. Then, it held that "[w]hether the vehicle was 'safely off the roadway' is a factual issue to be decided by the trier of fact." Id. (quoting RCW 46.61.504). And, it found that substantial evidence[2] supported the district's court's conclusion—that Ostby was not safely off the roadway. Id. at 870-71.

The issue here is whether Jackson failed to prove that it was more likely than not that his vehicle was safely off the roadway. Jackson argues that the facts differ from those in Ostby, because his "vehicle was not blocking access, he was at least a car length removed from the public Pacific Highway, the engine had not been running for an hour, and his lights were not on."

[2] Ostby was decided before our Supreme Court decided the standard of review for challenges to the sufficiency of the evidence to support a conviction based on an affirmative defense in State v. Lively, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996).

Deputy Lopez testified that Jackson's car was "blocking the driveway" and, more specifically, that it was "right in front of the gate area." Lopez also clarified, "I could have pulled around it. I think it was mostly blocking incoming traffic." And later, Lopez explained that Jackson's car was "off the main road and off the sidewalk" on the access way to the hotel entryway, with the front of the car facing International Boulevard. Jackson's car was far enough into the driveway that Lopez pulled his car into the driveway and parked in front of Jackson's, enabling Lopez's car to be completely off of International Boulevard. Deputy Patrick Kelly, who arrived on the scene after Deputy Lopez, testified that Jackson's car was parked blocking a driveway of the hotel, in such a way that it was "preventing vehicles from entering or leaving that area." Deputy Steven Johnson, who arrived with Lopez, testified that Jackson's car was "roughly in the middle" of the driveway. Johnson also described the hotel parking as where he "often at night will see people, motorists, who are tired pull over there."

In describing the location of the car, Jackson testified,

> Okay. And the hotel would be back here. There's a gate here for entry. . . . And then there's a fence going down this side. And this is Pacific Highway. So I would have been probably like right here towards the curb and the fence.

The record is unclear as to whether the car was running when Deputy Lopez asked Jackson to step out of it. Lopez testified that he did not remember hearing the car running, nor did he remember seeing the keys. This case is distinguishable from Ostby on that fact, because there the record was clear that the defendant was passed out behind the wheel with the motor running and the transmission in drive.

But, Jackson's testimony did not contradict the State's evidence that the car was parked in the driveway for incoming and outgoing traffic to the hotel parking lot. While in Beck the officer testified that the defendant's car was "off the roadway and there was no danger," here no deputy made a concession of that nature. 130 Wn. App. at 484. In fact, Jackson was parked in one of the two lanes of the driveway, or according to one of the deputies, in the middle of the lanes, meaning vehicles exiting the roadway to get to the parking entry gate would have to make their way around him by entering the exit lane. And, Jackson testified that he was on the south side of the driveway, toward the curb and the fence. Because his car was facing toward the highway, we can infer from the record that he was facing the wrong way in what would have been the ingress lane to the parking lot. Viewed in the light most favorable to the State, the evidence was sufficient for a jury to conclude that Jackson failed to prove that he was, more probably that not, safely off the roadway.

The evidence was sufficient for a jury to find that Jackson was in actual physical control of a vehicle while under the influence.

II. To Convict Instruction

Jackson argues next that the to convict instruction for possession of a controlled substance relieved the State of its burden of proof, because it did not specify cocaine as the controlled substance.

A. Essential Element

The State bears the burden of proving every element of the crime charged beyond a reasonable doubt. State v. Fisher, 165 Wn.2d 727, 753, 202 P.3d 937

(2009). It follows that the to convict instruction must contain every element of the crime charged. Id. Failure to include every element of the crime charged amounts to constitutional error that may be raised for the first time on appeal. Id. at 753-54. We review to convict instructions de novo. Id. at 754.

When a defendant is charged with possession of a controlled substance, the identity of the substance is an essential element that must be stated in the to convict instruction if it increases the maximum sentence. See State v. Gonzalez, 2 Wn. App. 2d 96, 106, 408 P.3d 743, review denied, 190 W.2d 1021, 418 P.3d 790 (2018). Because the various provisions of RCW 69.50.4013 "have the effect of imposing different maximum sentences based on the type and amount of the controlled substance possessed," the identity of the controlled substance is an essential element. Id. at 110.

Here, the identity of the substance that the State alleged Jackson possessed, cocaine, was an essential element because it exposed him to greater punishment. Possession of cocaine is a class C felony, while possession of forty grams or less of marijuana is only a misdemeanor. RCW 69.50.4013(1), (2); RCW 69.50.4014. The instruction provided,

> To convict the defendant of the crime of Possession of a Controlled Substance, as charged in count [two], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the [sic] February 29, 2016, the defendant possessed a controlled substance; and
>
> (2) That the acts occurred in the State of Washington.

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count [two].
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count [two].

The State asserts that there was no error because the to convict instruction's use of "as charged" incorporated the information, which specified cocaine as the controlled substance. To support its assertion, the State cites State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010).

In Sibert, a plurality of our State Supreme Court affirmed a controlled substances delivery conviction despite the fact that the to convict instruction omitted reference to the specific substance. 168 Wn.2d at 312-13. The plurality held that the failure to specify methamphetamine in the to convict instruction was not error when (1) the to convict instruction incorporated the drug identity by reference to the charging document, which specified methamphetamine, and (2) that drug and only that drug was proved at trial. Id. at 309-10, 317. But, only four justices agreed to this part of the lead opinion, and the four dissenting justices agreed that the omission was error. Id. at 317 (lead opinion), 325-26 (Alexander, J., dissenting), 334 (Sanders, J., dissenting). The ninth justice concurred in the lead opinion's result only. Id. at 317. Because there is no majority opinion adopting any analysis on this issue, Sibert does not control whether the omission of the essential element of the identity of the controlled substance is error. See State v. Johnson, 173 Wn.2d 895, 904, 270 P.3d 591 (2012) ("A plurality has little precedential value and is not binding.").

In recent similar cases, this court has held that omitting the essential element of the identity of the controlled substance in the to convict instruction is error. Gonzalez, 2 Wn. App. 2d at 111; State v. Clark-El, 196 Wn. App. 614, 619-20, 384 P.3d 627 (2016) (recognizing that Sibert did not result in binding law on this issue and that omitting the identity of the controlled substance in the to convict instruction is error, especially where the to convict instruction did not include "as charged" language).

Under existing case law, omitting the essential element of the identity of the controlled substance from the to convict instruction is error.

B. Harmless Error Analysis

The State argues that, even if it was erroneous to omit a reference to cocaine in the to convict instruction, the error was harmless as to Jackson's conviction.

Under the federal constitution, an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 4, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002) (following Neder). A jury instruction that omits an essential element is harmless if it appears beyond a reasonable doubt the error did not contribute to the verdict. Brown, 147 Wn.2d at 341. The omitted element must be supported by "uncontroverted evidence," and the reviewing court must be able to "'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" Id. (quoting Neder, 527 U.S. at 19).

Jackson argues that, under article I, sections 21 and 22 of the Washington Constitution, omitting an essential element from the to convict instruction requires automatic reversal. And, he further argues that this court should follow the lead of the New Hampshire and Mississippi courts and hold that harmless error does not apply in this context. Jackson's arguments are the same as those presented in Gonzalez and Clark-El. Gonzalez, 2 Wn. App. 2d at 112; Clark-El, 196 Wn. App. at 620-24. Jackson does not attempt to show why the analysis in either of those cases is incorrect. Consistent with the analyses in Gonzalez and Clark-El, we hold that the error in omitting the essential element of the identity of the controlled substance is subject to harmless error analysis as to the conviction.

Alternatively, Jackson asserts that the failure to require proof of the charged controlled substance was not harmless beyond a reasonable doubt. He argues that the State presented evidence of various substances at trial, and the jury "might have entertained a reasonable doubt as to the validity of the testing" of the substance found on Jackson or in his blood.

Although the record includes evidence that Jackson had both cocaine and diazepam in his blood, the fact that Jackson was in possession of cocaine was uncontroverted. At trial, the State presented the cocaine found on Jackson. Moreover, Jackson testified, "[T]here was cocaine in the car and the cocaine was in a baseball hat inside of the passenger side of the car." And, later Jackson testified, "I knew I had cocaine, yes, ma'am." In jury instruction 15, the trial court told the jury, in part, "Possession in Count 2 means having a substance in one's

custody or control." The to convict instruction also referred the jury to count two of the information, which clearly specified possession of cocaine.

Given these facts, the error in the to convict instruction was harmless beyond a reasonable doubt because the omitted element is supported by uncontroverted evidence, and this court is able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Accordingly, we affirm the unlawful possession of a controlled substance conviction.

III. Sentencing

Jackson argues third that even if this court affirms the conviction, this case must be remanded for resentencing. He contends that the jury's verdict, that he possessed an unidentified controlled substance, authorized the sentencing court to impose only the "lower possible sentence" for possession of controlled substance, which is a misdemeanor.

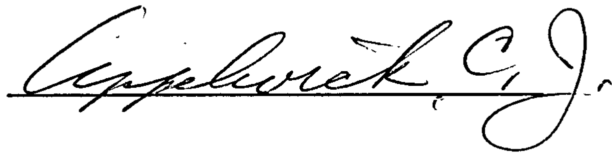
"'The constitutional right to jury trial requires that a sentence must be authorized by a jury's verdict.'" Clark-El, 196 Wn. App. at 624 (quoting State v. Morales, 196 Wn.2d 106, 109, 383 P.3d 539 (2016)). If a court imposes a sentence that is not authorized by the jury's verdict, harmless error analysis does not apply. Id.

The jury's finding that Jackson possessed an unidentified controlled substance authorized the sentencing court to impose only the lowest possible sentence for possession of a controlled substance. Gonzalez, 2 Wn. App. 2d at 114 (Holding that without a finding regarding the nature of the controlled

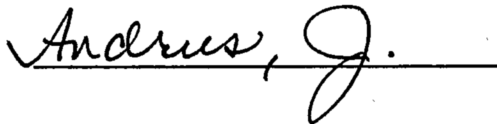
substance, the jury's verdict authorized the court to impose only the lowest possible sentence for unlawful possession of a controlled substance.). The trial court nevertheless imposed a felony sentence in this case.

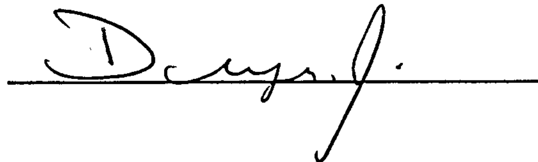
The State concedes that resentencing is required.[3]

We affirm Jackson's convictions, but remand for resentencing on the conviction for unlawful possession of a controlled substance in order for the court to impose a misdemeanor sentence.



WE CONCUR:





[3] At oral argument, the State asked this court to distinguish sentencing in this case from Clark-El because here, Jackson admitted to possession of cocaine while testifying. But, Jackson never stipulated to cocaine possession nor entered a plea agreement acknowledging his cocaine possession. As in Clark-El and Gonzalez, the jury's verdict that Jackson possessed an unidentified controlled substance did not provide a basis upon which the trial court could impose a sentence based on possession of cocaine.

APPENDIX 2

FILED
11/6/2018
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent, v. ERIC LAMAR JACKSON, Appellant.	No. 76657-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Eric Jackson, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Judge

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. 76657-1-I**, 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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Washington Appellate Project

Date: November 30, 2018

WASHINGTON APPELLATE PROJECT

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