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Court of Appeals  
Division III  
State of Washington  
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NO. 35520-9-III

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

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STATE OF WASHINGTON,

Respondent,

v.

CHAD ENGLEHARDT,  
Appellant.

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

Spokane County Cause No. 16-1-01590-6

The Honorable James Triplet, Judge

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BRIEF OF APPELLANT

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Skylar T. Brett  
Attorney for Appellant

LAW OFFICES OF LISE ELLNER  
SKYLAR T. BRETT  
P.O. Box 2711  
Vashon, WA 98070  
(206) 494-0098  
skylarbrettlawoffice@gmail.com

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The state presented insufficient evidence to convict Mr. Englehardt of driving under the influence.
2. No rational jury could have found beyond a reasonable doubt that Mr. Englehardt drove the car.

**ISSUE 1:** A conviction must be reversed for insufficient evidence when no rational jury could find all the elements proved, even when taking the evidence in the light most favorable to the state. Did the state present insufficient evidence to convict Mr. Englehardt of driving under the influence when no witness claimed to have seen him drive or to have seen the car move at all?

3. Mr. Englehardt's case must be remanded for a new trial on the lesser charge of "actual physical control" of a vehicle while under the influence.

**ISSUE 2:** Upon reversal of a conviction for a greater charge for insufficient evidence, an appellate court may only remand a case for entry of a conviction on a lesser charge if the jury necessarily disposed of each of the elements of that charge pursuant to a separate jury instruction. Is this court prohibited from remanding Mr. Englehardt's case for entry of a conviction for "actual physical control" of a motor vehicle when the jury did not necessarily dispose of that charge before conviction?

4. The trial court violated Mr. Englehardt's Wash. Const. art. I, § 21 right to a unanimous verdict.
5. The trial court erred by failing to instruct the jury that it had to unanimously agree whether the state had proved that Mr. Englehardt committed the offense of driving under the influence or of being in "actual physical control" of a vehicle while under the influence.
6. The failure to give a unanimity instruction violated Mr. Englehardt's constitutional rights because the state did present substantial evidence that he had committed the offense of driving under the influence.

**ISSUE 3:** The constitutional right to a unanimous verdict requires a jury to be instructed that they must unanimously

agree what offense has been proved. Did the court violate Mr. Englehardt's right to a unanimous jury by instructing the jury in a manner permitting conviction regardless of whether the jury was unanimous regarding whether he had committed the offense of driving under the influence or of being in "actual physical control" of a vehicle?

7. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

**ISSUE 4:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Englehardt is indigent?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Late at night, someone called 911 to report a car that was almost in the Spokane River. Verbatim Transcript of Exhibit P-2, pp. 7-9. When the police arrived, they found Chad Englehardt inside the car, with the driver's door open. RP 273, 368. The car was off the road, on an embankment of the river. RP 269-70. The car was being held up by a tree, without which it would have fallen into the water. RP 271.

Mr. Englehardt told the police that he had been walking home when he found the car on the embankment. RP 372. He said that he got into the car to see if he could move it out of danger. RP 372, 398.

Mr. Englehardt admitted that he had been drinking. RP 399. A subsequent blood draw showed his blood-alcohol level to be above the legal limit for driving. RP 537. The state charged Mr. Englehardt with felony driving under the influence (DUI), based on the allegation that he had at least four prior DUI convictions. CP 3.

No witness at trial claimed to have seen Mr. Englehardt drive the car. *See RP generally.* Indeed, no one saw the car moving at any point. *See RP generally.* No one testified who had witnessed the accident that resulted in the car landing on the embankment. *See RP generally.*

The police did not find the car's keys in Mr. Englehardt's possession, in the car, or anywhere else. RP 295, 298. The car was not registered to Mr. Englehardt. RP 296.

One officer claimed that the car was running when he arrived, but he did not write in his report that the car had been running. RP 283, 288.

The court's to-convict instruction conflated DUI and the lesser offense of "actual physical control." It listed the elements of the two offenses as though they were a single offense, as follows:

- (1) That on or about April 22, 2016, the defendant drove or had actual physical control of a motor vehicle in the State of Washington;
  - (2) That the defendant at the time of driving a motor vehicle or being in actual physical control
    - (a) was under the influence of or affected by intoxicating liquor or
    - (b) had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after driving or being in physical control as shown by an accurate and reliable test of the defendant's blood;
  - (3) That the defendant has four or more prior offenses within ten years.
- CP 86.

The court did not instruct the jury that it had to unanimously agree whether Mr. Englehardt had driven or merely been in "actual physical control" of the car. CP 75-94.

The court provided the jury with a single verdict form, which read as follows:

We, the jury, find the defendant.... [blank for not guilty or guilty] of the crime FELONY DRIVING UNDER THE INFLUENCE or BEING IN ACTUAL PHYSICAL CONTROL WHILE UNDER THE INFLUENCE as charged. CP 94.

During closing argument, the prosecutor relied heavily on the contention that the jury should convict Mr. Englehardt based on his physical control of the car, even if they did not believe that he had been driving. RP 630.

The jury found Mr. Englehardt guilty of the offense described in the verdict form. CP 94. The trial court entered a conviction for felony driving under the influence on Mr. Englehardt's Judgment and Sentence. CP 154.

This timely appeal follows. CP 180.

### **ARGUMENT**

**I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. ENGLEHARDT OF DRIVING UNDER THE INFLUENCE; HIS CASE MUST BE REMANDED FOR A NEW TRIAL TO DETERMINE WHETHER THE STATE CAN PROVE THAT HE HAD ACTUAL PHYSICAL CONTROL OF THE VEHICLE.**

Being in "actual physical control" of a motor vehicle while under the influence of alcohol and driving while under the influence (DUI) are two distinct offenses, criminalized in separate statutes. RCW 46.61.502 (criminalized driving under the influence); RCW 46.61.504 (criminalizing

“physical control of vehicle while under influence); *State v. Smelter*, 36 Wn. App. 439, 441, 674 P.2d 690 (1984); *See also State v. Beck*, 42 Wn. App. 12, 15, 707 P.2d 1380 (1985) (describing the “material differences” between DUI and actual physical control).

“Actual physical control” is a lesser-included offense DUI. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008). Accordingly, the state may elect to present the offense of “actual physical control” to the jury even when an accused person has only been formally charged with DUI. *Id.*

Here, Mr. Englehardt was charged with DUI, but the prosecutor presented jury instructions and extensive argument regarding “actual physical control” to the jury at trial. CP 3; RP 630. In fact, the state and the court conflated the two charges in both the to-convict instruction and the verdict form. CP 86, 94.

Even though the instructions and verdict form made it impossible to determine which charge the jury had found proved beyond a reasonable doubt, the court entered a conviction for DUI (the greater charge) in Mr. Englehardt’s case. CP 154.

But no rational jury could have found Mr. Englehardt guilty of *driving* under the influence when no witness claimed to have seen him drive (or even to have seen the car move at all). Because the state

presented insufficient evidence to convict Mr. Englehardt of DUI, his conviction must be reversed. *See State v. Larson*, 184 Wn.2d 843, 855, 365 P.3d 740 (2015).

Additionally, because the court's instructions and verdict form make it impossible to determine whether the jury unanimously found Mr. Englehardt guilty of the lesser offense of actual physical control, this error does not permit remand for entry of a conviction for that charge. *In re Heidari*, 174 Wn.2d 288, 292, 274 P.3d 366 (2012). Rather, this Court must remand this case for a new trial to determine whether the state can prove beyond a reasonable doubt that Mr. Englehardt was in actual physical control of the vehicle. *Id.*

A. No rational jury could have found beyond a reasonable doubt that Mr. Englehardt drove the vehicle; his DUI conviction must be reversed.

Evidence is insufficient to support a conviction if, taking the evidence in the light most favorable to the state, no rational jury could have found each element of an offense proved beyond a reasonable doubt. *Larson*, 184 Wn.2d at 855.<sup>1</sup>

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<sup>1</sup> The Court of Appeals reviews the evidence *de novo*. *Larson*, 184 Wn.2d at 855.

In order to convict for DUI, the state must prove beyond a reasonable doubt that the accused “had the vehicle in motion at the time in question.” *Beck*, 42 Wn. App. at 15.

Here, the state did not present any evidence at trial that Mr. Englehardt drove the car. No witness claimed to have seen him drive it. Indeed, no witness even claimed to have seen the car being driven by anyone. *See RP generally*. Rather, everyone who testified at trial came across the car only after it had been stopped in the embankment. No witness appeared to know how long it had been there before Mr. Englehardt sat down inside. *See RP generally*.

The keys to the car were not in Mr. Englehardt’s possession, in the car, or anywhere else nearby. RP 295, 298.

No rational jury could have found beyond a reasonable doubt that Mr. Englehardt “had the vehicle in motion,” as required to find him guilty of DUI. *Beck*, 42 Wn. App. at 15; *Larson*, 184 Wn.2d at 855. Mr. Englehardt’s DUI conviction must be reversed. *Id.*

- B. Because the jury instructions and verdict form do not permit the conclusion that the jury unanimously found all of the elements of “actual physical control” beyond a reasonable doubt, this case must be remanded for a new trial on that charge alone.

The jury instructions and verdict form in Mr. Englehardt’s case permitted the jury to find guilt if the jurors found that he had *either* driven

the car *or* been in actual physical control of it. CP 86, 94. The instruction did not require the jury to unanimously agree as to which offense had been proved. CP 75-94.

When an appellate court reverses a conviction for a greater offense based on insufficient evidence, remand for entry of a conviction for a lesser offense is not permissible unless “the record discloses that the trier of fact expressly found each of the elements of the lesser offense,” based on having received a separate instruction for that offense. *Heidari*, 174 Wn.2d at 292 (*quoting State v. Green*, 94 Wn.2d 216, 234-35, 616 P.2d 628 (1980)).

At Mr. Englehardt’s trial, the jury was not given a separate instruction recounting the elements of “actual physical control.” CP 75-94. Accordingly, the jury did not necessarily “dispose” of those elements in order to reach a verdict on the greater DUI charge. *Id.* (*quoting Green*, 94 Wn.2d at 234).

Similarly, remand for entry of a conviction for a lesser offense is not permissible where the verdict forms do not permit the conclusion that the jury unanimously agreed that a lesser offense has been proved beyond a reasonable doubt. *See Green*, 94 Wn.2d at 235.

The jury in Mr. Englehardt’s case was provided with only one verdict form, which asked them whether they had found him guilty of

“FELONY DRIVING UNDER THE INFLUENCE or BEING IN ACTUAL PHYSICAL CONTROL WHILE UNDER THE INFLUENCE...” CP 94. As a result, it is impossible to determine whether the jury unanimously agreed that he had committed the lesser offense of actual physical control. *Id.*

Because the jury did not expressly find that Mr. Englehardt had committed the offense of “actual physical control” by “disposing” of the elements as provided a separate jury instruction on that offense, his case may not be remanded for entry of a conviction for the lesser offense. *Heidari*, 174 Wn.2d at 292; *Green*, 94 Wn.2d at 235. Mr. Englehardt’s case must be remanded for a new trial to determine whether the state can prove beyond a reasonable doubt that he had “actual physical control” of the vehicle. *Id.*

**II. THE TRIAL COURT’S INSTRUCTIONS AND VERDICT FORM VIOLATED MR. ENGLEHARDT’S CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.**

An accused person has a state constitutional right to a unanimous jury verdict.<sup>2</sup> Art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123

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<sup>2</sup> The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

(Continued)

P.3d 72 (2005)<sup>3</sup>. This right also includes the right to jury unanimity on the *means* by which the defendant is found to have committed a crime. *State v. Lobe*, 140 Wn. App. 897, 903-905, 167 P.3d 627 (2007). A particularized expression of unanimity (in the form of a special verdict) is required unless there is sufficient evidence to support each alternative means submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994).

Accordingly, when the court instructs the jury regarding alternative means of committing an offense and does not require an expression of unanimity, reversal is required if the state failed to produce substantial evidence in support of each of the alternative means. *State v. Hayes*, 164 Wn. App. 459, 473, 262 P.3d 538 (2011) (*abrogation on other grounds recognized by State v. Tyler*, 195 Wn. App. 385, 382 P.3d 699 (2016)).

Though no published caselaw addresses a trial court's failure to make explicit that the jury must unanimously agree which offense (rather than which means of committing a single offense) has been proved, the logic applies with equal force to the situation of Mr. Englehardt's case.

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<sup>3</sup> Constitutional issues are reviewed *de novo*. *Dellen Wood Products v. Washington State Dept. of Labor and Industries*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014). A trial court's failure to provide a unanimity instruction is a manifest error affecting the constitutional right to a unanimous verdict. *State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3). Such errors can be raised for the first time on appeal. *Moultrie*, 143 Wn. App. at 392; *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997).

Absent a unanimity instruction (or absent the typical system of separate verdict forms for greater and lesser offenses, *see* WPIC 180.01, 180.05, 180.06), the court’s instructions permitted the jury to convict even if some jurors believed that he had committed DUI while others believed that he had committed “actual physical control.” *Id.*; CP 86, 94.<sup>4</sup>

Mr. Englehardt’s conviction violates his right to a unanimous jury because there was not substantial evidence to prove that he had driven the vehicle, as required to support the DUI charge. *Id.* At most, the prosecution presented evidence that Mr. Englehardt may have had control of the car. Because the state did not present substantial evidence to support each of the offenses submitted to the jury, the lack of an unanimity instruction violated Mr. Englehardt’s constitutional rights. *Id.*

The court violated Mr. Englehardt’s right to a unanimous verdict by instructing the jury regarding alternative offenses that were not supported by substantial evidence and not requiring the jury to be unanimous as to which offense had actually been proved. *Hayes*, 164 Wn. App. at 481. Mr. Englehardt’s conviction must be reversed. *Id.*

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<sup>4</sup> Defense counsel proposed a to-convict instruction and verdict form identical to those given by the court. CP 66, 74. But counsel did not invite this error because the instruction and verdict form, themselves, are not erroneous. Rather, the error stems from the court’s failure to additionally inform the jury that they had to unanimously agree which offense had been proved beyond a reasonable doubt.

**III. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THE COURT SHOULD DECLINE ANY REQUEST TO IMPOSE APPELLATE COSTS ON MR. ENGLEHARDT BECAUSE HE IS INDIGENT.**

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).<sup>5</sup>

Appellate costs are “indisputably” discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Englehardt indigent at the end of the proceedings in superior court. CP 182-83. That status is unlikely to change, especially with the imposition of a lengthy prison term. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

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<sup>5</sup> Division II’s commissioner has indicated that Division II will follow *Sinclair*.

Additionally, the newly amended RAP 14.2 specifies that the trial court's finding of indigency stands unless the state presents evidence that the accused's financial circumstances have changed:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2 (*as amended by 2017 WASHINGTON COURT ORDER 0001*).

The state is unable to provide any evidence that Mr. Englehardt's financial situation has improved since he was found indigent by the trial court.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

### **CONCLUSION**

No rational jury could have found Mr. Englehardt guilty of DUI beyond a reasonable doubt. The trial court violated his right to a unanimous verdict by failing to instruct the jury that they had to unanimously agree whether he had committed DUI or "actual physical control." Mr. Englehardt's case must be remanded for a new trial.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Englehardt who is indigent.

Respectfully submitted on April 17, 2018.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Chad Englehardt/DOC#969158  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Spokane County Prosecuting Attorney  
SCPAappeals@spokanecounty.org

Lise Ellner  
liseellnerlaw@comcast.net

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on April 17, 2018.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

# LAW OFFICE OF SKYLAR BRETT

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