

FILED
Court of Appeals
Division III
State of Washington
9/13/2018 9:42 AM
35520-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHAD R. ENGLEHART, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Attorneys for Respondent/Appellant

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. ISSUES PRESENTED 1

II. STATEMENT OF THE CASE 1

 Substantive facts. 1

 Procedural facts..... 4

III. ARGUMENT 6

 A. THERE WAS MORE THAN SUFFICIENT EVIDENCE
 PRESENTED FOR THE JURY TO FIND THAT THE
 DEFENDANT DROVE THE MOTOR VEHICLE. 6

 Standard of review. 6

 Application of standard of review..... 8

 B. THE CLAIMED ERRORS REGARDING THE JURY
 INSTRUCTIONS IN THIS CASE ARE
 ATTRIBUTABLE TO THE DEFENDANT AS THESE
 WERE THE VERY INSTRUCTIONS REQUESTED BY
 THE DEFENDANT. THEREFORE, ANY ERROR IN
 THIS REGARD IS INVITED. 9

 C. BECAUSE THE JURY WAS INSTRUCTED ON AND
 NECESSARILY FOUND THE ELEMENTS OF A
 VIOLATION THE LESSER INCLUDED OFFENSE OF
 FELONY “ACTUAL PHYSICAL CONTROL” OF A
 MOTOR VEHICLE, VACATION OF THE GREATER
 FELONY DRIVING WHILE UNDER THE
 INFLUENCE CONVICTION AND IMPOSITION OF
 THE LESSER INCLUDED OFFENSE FELONY
 PHYSICAL CONTROL OF A MOTOR VEHICLE IS
 THE APPROPRIATE REMEDY..... 13

IV. CONCLUSION..... 16

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>In re Dependency of K.R.</i> , 128 Wn.2d 129, 904 P.2d 1132 (1995).....	11
<i>In re Pers. Restraint of Heidari</i> , 174 Wn.2d 288, 274 P.3d 366 (2012).....	14
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997)	14
<i>State v. Davis</i> , 182 Wn.2d 222, 340 P.3d 820 (2014).....	7
<i>State v. Gonzales</i> , 46 Wn. App. 388, 731 P.2d 1101(1986)	9
<i>State v. Guzman Nuñez</i> , 160 Wn. App. 150, 248 P.3d 103 (2011), <i>aff'd</i> , 174 Wn.2d 707, 285 P.3d 21 (2012).....	10
<i>State v. Huyen Bich Nguyen</i> , 165 Wn.2d 428, 197 P.3d 673 (2008).....	14
<i>State v. Mace</i> , 97 Wn.2d 840, 650 P.2d 217 (1982)	9
<i>State v. Ortega-Martinez</i> , 124 Wn.2d 702, 881 P.2d 231 (1994).....	15
<i>State v. Owens</i> , 180 Wn.2d 90, 323 P.3d 1030 (2014)	15
<i>State v. Portee</i> , 25 Wn.2d 246, 170 P.2d 326 (1946)	9
<i>State v. Q.D.</i> , 102 Wn.2d 19, 685 P.2d 557 (1984)	9
<i>State v. Recuenco</i> , 154 Wn.2d 156, 110 P.3d 188 (2005).....	12
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	6, 7
<i>State v. Schaler</i> , 169 Wn.2d 274, 236 P.3d 858 (2010).....	10
<i>State v. Smith</i> , 174 Wn. App. 359, 298 P.3d 785 (2013)	10
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	10

<i>State v. Summers</i> , 107 Wn. App. 373, 28 P.3d 780 (2001), review granted, cause remanded on other grounds, 145 Wn.2d 1015, 37 P.3d 289 (2002), and opinion modified on reconsideration, 43 P.3d 526 (2002)	12
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	7
<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992).....	7
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981).....	7
<i>State v. Woodlyn</i> , 188 Wn.2d 157, 392 P.3d 1062 (2017).....	15

RULES

CrR 6.15.....	10
RAP 2.5.....	10

OTHER

WPIC 92.11.....	14
WPIC 92.26.....	13

I. ISSUES PRESENTED

1. Was there sufficient evidence to support a finding that the defendant was driving the motor vehicle?
2. Is any claim of instructional error barred by the invited error doctrine, because the defendant proposed the very instructions he now claims were erroneous?
3. Is vacation of the greater felony driving while under the influence conviction and imposition of the lesser included offense of felony actual physical control of a motor vehicle the appropriate remedy?

II. STATEMENT OF THE CASE

Substantive facts.

On April 22, 2017, at 10:43 p.m., a call was received by the 911 operator reporting an accident that had just occurred close to the intersection of Mission and South Riverton in Spokane. RP¹ 257-58. The reporting party² informed the operator that he was walking his dog and observed a vehicle had driven off of the road and nearly ended up in the river; it was currently being held up by a couple of trees. RP 251; Ex. P-2 (CD of 911

¹ Reference to the four consecutively numbered volumes of transcripts filed by Court Reporter Allison Stovall will be referenced simply as “RP.” The transcript of Exhibit P-2 filed by Court Reporter Kenneth Beck is referred to as “RP (Beck).” No other transcripts are referred to in this brief.

² The citizen who telephoned 911 gave the operator his phone number.

call admitted at RP 257). The caller stated there was a lone male in the car, “actually trying to start it.” (RP Beck) 8.

Officer Todd Belitz was on patrol in the immediate area and responded to the call. He arrived at the South Riverton location within two or three minutes of the 911 call. RP 269. As he arrived, he observed a Ford Explorer SUV, with its engine running, precariously perched at a 35- to 45-degree angle on the river’s edge.³ It appeared that a riverbank tree had prevented the vehicle from going into the river. RP 420-21.

Officer Belitz observed that the dome light was on in the vehicle, and the defendant, Mr. Englehardt, was seated in the driver’s seat. RP 283, 313. The engine was running and the vehicle was in gear. 273-74. Officer Belitz directed the defendant to put the vehicle in park, set the emergency brake, and turn the vehicle off. RP 273-74, 288, 313-14. As the defendant exited the vehicle and began climbing up the river embankment, Officer Belitz had to assist him as he was unstable on his feet. RP 274. The defendant was intoxicated.⁴ Officer Belitz located an empty bottle of

³ The vehicle was at a 35- to 45-degree angle to the flat ground. RP 420-21. The vehicle was a Ford Explorer. RP 508.

⁴ The defendant does not contest this fact on appeal, and it is well supported by the record. A blood draw established his blood alcohol concentration at 0.21 grams of ethanol per 100 milliliters of blood, a “.21,” well over the legal limit of “.08.” RP 537.

Fireball whiskey on the driver side floor board and some beer cans inside the vehicle. RP 276-77. The defendant's cell phone was also found in the vehicle, and it was retrieved and placed with his other belongings. RP 418.

Officer Brandon Rankin arrived on the scene and took over the investigation, as it was no longer an emergency. RP 369. The defendant proffered that he was walking in the vicinity of the collision, having walked from the "Special K Tavern" and was on his way home to his residence at 627 East Nora. RP 372, 376-79.⁵ He stated that he came across the vehicle on his walk home and that he entered the vehicle and attempted to move it away from the tree. RP 379.

The defendant stated that he learned from the insurance card that the vehicle belonged to a Frank Mott, a person he did not know. RP 508. A registration check of the vehicle revealed that the vehicle actually belonged to a Kenneth Mott. RP 296. Serendipitously, Officer Rankin discovered that the vehicle was registered to the same address as the defendant's stated residence – 627 East Nora. RP 512.⁶

⁵ The State established that the easiest and shorter walking route from the "Special K Tavern" to the defendant's home would not require the defendant to cross the Spokane River at all, while the route the defendant was suggesting he walked required him to cross the river twice. RP 377-78.

⁶ Prosecutor: Officer [Rankin], were you able to determine the registered owner's address?

A: I was.

Procedural facts.

The trial court's instruction no 8, CP 85, is *identical to defendant's proffered and requested instruction D-8, CP 65*. Both contain language setting forth the method by which a person commits the crime of driving while under the influence, as well as the lesser included offense of actual physical control. Compare CP 85 with CP 65; both provide:

A person commits the crime of *felony driving or being in actual physical control while under the influence* when he or she *drives or has actual physical control* of a motor vehicle while he or she is under the influence of or affected by intoxicating or while he or she has sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher *within two hours after driving or being in actual physical control* as shown by an accurate and reliable test of the person's blood and the person has four or more prior offenses within ten years.

(Emphasis added.)

The trial court specifically adopted the above defendant's instruction over the instruction offered by the State. RP 517.

The *defendant's* proposed "elements" instruction no. 9 contains all of the elements (three) for *both physical control and driving while under*

Q: And what was his address?

A: 627 East Nora, the same address that Mr. Englehardt gave me in the BAC room of the Public Safety Building.

RP 512.

the influence and does so in the same manner as adopted by the by the trial court in its instruction no. 9:

(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 or being in actual physical control* of a motor vehicle;

(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 actual physical control* as shown by an accurate and reliable test of the defendant's blood; and

(3) That the defendant has four or more prior offenses within ten years.

(Emphasis added.) (Compare defendant's instruction no. 9, CP 66, with court's instruction no. 9, CP 86.)

Finally, the verdict form provided by the defendant, CP 74, also includes the lesser included offense of "actual physical control" and is identical to the one given by the trial court:

We, the jury, find the defendant CHAD R. ENGLEHARDT

(write in "not guilty" or "guilty")

of the crime of FELONY DRIVING OR BEING IN ACTUAL PHYSICAL CONTROL VEHICLE WHILE UNDER THE INFLUENCE as charged.

Each of these instructions proffered by the defendant sets forth the lesser included offense that the defendant “drove *or had actual physical control* of a motor vehicle” and thereby, the defendant included the lesser included offense of physical control into the instructions and into the case.

III. ARGUMENT

A. THERE WAS MORE THAN SUFFICIENT EVIDENCE PRESENTED FOR THE JURY TO FIND THAT THE DEFENDANT DROVE THE MOTOR VEHICLE.

The defendant first contests the sufficiency of the evidence regarding the “driving” element of driving while under the influence. His second claim is that the instructions failed to establish jury unanimity as to whether he was convicted for “driving” or for “physical control,” which is premised in part on his first argument that there was insufficient evidence to support a jury determination that the defendant “drove” the vehicle. Therefore, by establishing that the major or first premise is incorrect, the second argument will be unsound.

Standard of review.

There was more than sufficient evidence present to establish the defendant drove; the well-settled test “for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068

(1992). When the sufficiency of the evidence is challenged in a criminal case, *all* reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.* A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *Id.* As our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992) (the court defers to the jury's determination

regarding conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence).

Application of standard of review.

On appeal, regarding his sufficiency of evidence argument, the defendant only challenges the issue of whether sufficient evidence exists to find that he drove the motor vehicle. Br. of Appellant, at 7-8.⁷ There was sufficient evidence that the defendant drove the motor vehicle.

The defendant was found in the driver's seat inside a running motor vehicle that was in gear, a vehicle that had recently left the roadway and had continued down a short embankment stopping just short of the river, providentially prevented from a watery demise by a tree or trees growing along the river's edge. The defendant was undeniably intoxicated and there was an empty "Fireball" whiskey bottle on the driver's floorboard. While the defendant denied knowing the registered owner of the Ford Explorer, remarkably, the vehicle was registered to the *same* residential address where the defendant resided. The defendant's tale of how he was just walking home the long route from a tavern when he coincidentally happened upon

⁷ He does not dispute the .21 blood alcohol reading, the existence of the necessary predicate offenses to elevate the ordinary "DUI" crime to a felony, or evidence that he was "under the influence of or affected by intoxicating liquor," nor does he contest that there was abundant evidence supporting a determination that he was in "actual physical control" of the vehicle.

this vehicle, and improvidently decided to undertake the chore of backing the tree-lodged Ford Explorer up the embankment, was, at best, unconvincing. In fact, his prevarication is one circumstance that corroborates the logical determination that the defendant was simply attempting to cover up his recent drunk driving accident. *Compare State v. Gonzales*, 46 Wn. App. 388, 402-03, 731 P.2d 1101(1986) (in burglary case, evidence becomes more legally sufficient where it is supported by “corroborative evidence of guilt such as false or improbable explanations of possession, flight, or physical evidence of the defendant’s presence at the scene of the [crime]”).⁸ Therefore, there was more than sufficient evidence to support a juror’s finding that the defendant was driving the motor vehicle.

B. THE CLAIMED ERRORS REGARDING THE JURY INSTRUCTIONS IN THIS CASE ARE ATTRIBUTABLE TO THE DEFENDANT AS THESE WERE THE VERY INSTRUCTIONS REQUESTED BY THE DEFENDANT. THEREFORE, ANY ERROR IN THIS REGARD IS INVITED.

Before addressing the merits of defendant’s claims that the absence of a special verdict form prevented a verdict that was unanimous, the State

⁸ *See also State v. Q.D.*, 102 Wn.2d 19, 28, 685 P.2d 557 (1984) (“Other evidence of guilt may include a false or improbable explanation of possession, flight, use of a fictitious name, or the presence of the accused near the scene of the crime”); *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1982); and *State v. Portee*, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946), as supporting the use of false or improbable explanations to corroborate the sufficiency of the evidence.

would note that he is precluded from challenging these instructions under both RAP 2.5(a) and by the invited error doctrine.

Generally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal. RAP 2.5(a);⁹ *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010); *State v. Smith*, 174 Wn. App. 359, 364, 298 P.3d 785 (2013). As this Court observed in *State v. Guzman Nuñez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012): “[T]he general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c),¹⁰ requiring that timely and well stated objections be made to instructions given or refused ‘in order that the trial court may have the opportunity to correct any error.’” *Accord, State v. Sublett*,

⁹ RAP 2.5(a) states an appellate court may refuse to review any claim of error which was not raised in the trial court.

¹⁰ CrR 6.15(c) states:

Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

176 Wn.2d 58, 75-76, 292 P.3d 715 (2012) (any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review).

Moreover, because any error was invited, it is not reviewable. Under the doctrine of invited error, counsel cannot set up an error at trial and then complain of it on appeal. Appellate courts may deem an error waived if, as here, the party asserting such error materially contributed to the error. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (citing *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds in State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995)). Here, *the defendant provided* the trial court with the “a person commits the crime of felony driving *or being in actual physical control*” instruction,¹¹ as well as the “to convict instruction”¹² and the verdict form¹³ that was used in his case.

The invited error doctrine prevents parties from benefiting from any error they caused at trial regardless of whether it was done intentionally or

¹¹ Compare court’s instruction no. 8, CP 85, with defendant’s proposed instruction no. 8, CP 65.

¹² Compare court’s instruction no. 9, CP 86, with defendant’s proposed instruction no. 9, CP 66.

¹³ Compare court’s jury verdict form, CP 94, with defendant’s proposed jury verdict form, CP 74.

unintentionally. The doctrine has been applied to errors of constitutional magnitude, including where an offense element was omitted from the to-convict instruction. *See State v. Recuenco*, 154 Wn.2d 156, 163, 110 P.3d 188 (2005) (citing *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002)), *rev'd on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)). The invited error doctrine is a “‘strict rule’ to be applied in every situation where the defendant’s actions at least in part cause[d] the error.” *State v. Summers*, 107 Wn. App. 373, 381-82, 28 P.3d 780 (2001), *review granted, cause remanded on other grounds*, 145 Wn.2d 1015, 37 P.3d 289 (2002), *and opinion modified on reconsideration*, 43 P.3d 526 (2002) (quoting *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)).¹⁴

Here, the defendant contributed to any instructional error by proposing the very instructions that now form the basis of his complaint. Any review of this alleged error is waived and forfeited.

¹⁴ Defendant has not raised any claim of ineffective assistance of counsel.

C. BECAUSE THE JURY WAS INSTRUCTED ON AND NECESSARILY FOUND THE ELEMENTS OF A VIOLATION THE LESSER INCLUDED OFFENSE OF FELONY “ACTUAL PHYSICAL CONTROL” OF A MOTOR VEHICLE, VACATION OF THE GREATER FELONY DRIVING WHILE UNDER THE INFLUENCE CONVICTION AND IMPOSITION OF THE LESSER INCLUDED OFFENSE FELONY PHYSICAL CONTROL OF A MOTOR VEHICLE IS THE APPROPRIATE REMEDY.

The defendant claims that the jury was not fully instructed on the elements of “actual physical control.” Br. of Appellant at 9. The jury was fully instructed on the elements of felony driving while under the influence as well as felony actual physical control of a motor vehicle.¹⁵ Indeed, the court’s instruction no. 9 is patterned after WPIC 92.26.

Instruction no. 9, (CP 86), sets forth in element no. 1, the elements that the defendant “drove” or had “actual physical control” of a motor vehicle.¹⁶ Defendant apparently complains that “actual physical control” was not given a separate instruction.¹⁷ However, neither term, “drove,” or “actual physical control” requires a further definitional instruction, they are both terms commonly understood. Trial courts need not define words and expressions that are of ordinary understanding or self-explanatory.

¹⁵ See court’s instruction no. 9. CP 86.

¹⁶ This is the only element contested as not being instructed upon. The other elements including the existence of predicate offenses remain unchallenged.

¹⁷ Br. of Appellant at 9.

State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). Indeed, the comment to the instruction regarding “actual physical control” warns *against* giving a specific instruction on that element that could constitute a comment on the evidence. *See* Comment to WPIC 92.11. Therefore, the jury was fully instructed on the elements of physical control.

The defendant’s overarching concern is that the jury found the defendant guilty of felony “driving” *or* felony “actual physical control” while under the influence, because both crimes are included in the single verdict form, yet both are separate criminal offenses under separate criminal statutes. However, in Washington, “physical control while under the influence is an included offense of DUI.” *State v. Huyen Bich Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008). Here, any juror who found the defendant guilty of felony driving while under the influence of alcohol necessarily found that the defendant was guilty of felony “actual physical control.” If a person is driving, that person is in “actual physical control.” Given that the jury was instructed on, and necessarily found the elements of a violation of the lesser included offense of felony physical control of a motor vehicle, vacation of the greater felony driving while under the influence conviction and imposition of the lesser included offense felony actual physical control of a motor vehicle is the appropriate remedy. *In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 292, 274 P.3d 366 (2012)

(remand for imposition of judgment on lesser offense is appropriate where jury was instructed on and found the elements of the lesser offense).

The above logic equally applies to the defendant's analysis under his claim discussing juror unanimity and alternative means of committing offenses.¹⁸ To ensure the state constitutional right to a jury trial under article I, section 21 is satisfied, Washington requires that a jury verdict in a criminal case be unanimous. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). That right extends to unanimity of means if the charge includes alternative means of committing the offense. *Id.* An alternative means offense is one "by which the criminal conduct may be proved in a variety of ways." *Id.* at 96. That right to unanimity is satisfied if there is sufficient evidence to support each means of the offense or if there is an express verdict on a specific means. *Id.* at 95. If the evidence is insufficient on one of the means of committing the offense, a general verdict must be reversed and the case remanded for a new trial. *State v. Woodlyn*, 188 Wn.2d 157, 165, 392 P.3d 1062 (2017); *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994). Here, there was sufficient

¹⁸ The defendant states that "[t]hough 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." Br. of Appellant at 11.

evidence to support both methods, “driving” and “actual physical control,” as contained in the jury instructions. Again, all jurors had to necessarily find that the defendant committed felony actual physical control of the motor vehicle, because those jurors that found he was driving necessarily found actual physical control, and as explained above, there was more than sufficient evidence to make that finding. Any error is harmless in this regard and remand for imposition of judgment on lesser offense of felony actual physical control is appropriate.

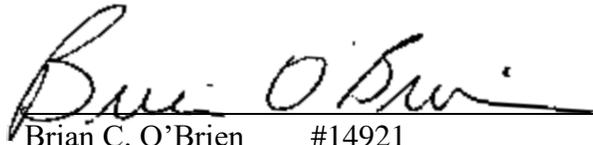
IV. CONCLUSION

There was more than sufficient evidence to support a finding that the defendant was driving the motor vehicle. Any claimed instructional error is barred by the invited error doctrine because the defendant proposed the very instructions he claims were erroneous; this doctrine prevents parties from benefiting from any error they caused at trial regardless of whether it was done intentionally or unintentionally. Given that the jury was instructed on, and necessarily found the elements of a violation of the lesser included offense of felony “actual physical control” of a motor vehicle, vacation of the greater felony driving while under the influence conviction

and imposition of the lesser included offense felony physical control of a motor vehicle is the appropriate remedy.

Dated this 13 day of September, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

CHAD ENGLEHARDT,

Appellant.

NO. 35520-9-III

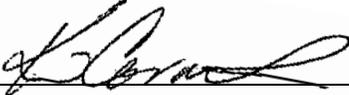
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on September 13, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Skylar Brett
skylarbrett@gmail.com

9/13/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

September 13, 2018 - 9:42 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35520-9
Appellate Court Case Title: State of Washington v. Chad Richard Englehart
Superior Court Case Number: 16-1-01590-6

The following documents have been uploaded:

- 355209_Briefs_20180913094137D3183962_0453.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Englehardt Chad - 355209 - resp br - BCO.pdf

A copy of the uploaded files will be sent to:

- skylarbrettlawoffice@gmail.com
- valerie.skylarbrett@gmail.com

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Brian Clayton O'Brien - Email: bobrien@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20180913094137D3183962