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No. 90246-1

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THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

KENNETH SANDHOLM,

Respondent.

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

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SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. INTRODUCTION

This Court has long held that the right to a unanimous jury guaranteed by Article I, section 21 and Article I, §section 22 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, this Court's precedent requires the conviction be reversed unless there is sufficient evidence to support each alternative.

Here, the State concedes and the Court of Appeals agreed that one of two charged alternatives was not supported by sufficient evidence. Moreover, the jury was not required to provide a particularized expression of unanimity as to either means. Thus, Mr. Sandholm's conviction must be reversed. On remand, the trial court cannot include two prior offenses in its calculation of Mr. Sandholm's offender score.

B. STATEMENT OF THE CASE

On October 29, 2009, a State Patrol trooper stopped Mr. Sandholm. 1/31/12 RP 125-26. The trooper had observed Mr. Sandholm commit three minor lane infractions over a span of about two

miles. *Id.* at 102-10, 123. When he spoke with Mr. Sandholm, the officer noticed an odor of alcohol. *Id.* at 124-26.

Following his arrest, Mr. Sandholm agreed to provide breath samples. The two samples provided results of .079 and .08. 2/7/13 RP 31-33. The margin of error for these results yields a range with a lower value as low as .072. *Id.*

Nevertheless, the State charged Mr. Sandholm with Driving Under the Influence (DUI). CP 329-30. The State alleged Mr. Sandholm committed the offense under two alternatives: driving (1) while under the influence of or while affected by intoxicating liquor, or (2) while under the combined influence of or while affected by intoxicating liquor and any drug. CP 329.

The trial court instructed the jury on both alternatives. CP 1431-32. Mr. Sandholm objected to that instruction, arguing the State had not presented any evidence that he was under the influence of drugs. 2/9/12 RP 100.

The jury was not instructed that it must unanimously agree as to the alternative means. Indeed the court affirmatively instructed the jury they need not unanimously agree. CP 1431-32.

The jury convicted Mr. Sandholm without a particularized expression of unanimity as to either alternative. CP 1440-41.

The trial court determined Mr. Sandholm's offender score to be 8. CP 1661. To arrive at that number the court included eight prior offenses, including two felony drug offenses.

C. ARGUMENT

**1. Because there was insufficient evidence of one of the alternatives means, Mr. Sandholm'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, 95, 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, 477-78 (2010) (citing *Ortega-Martinez*, 124 Wn.2d at 707-08); *Owens*, 180 Wn.2d at 99.

RCW 46.61.502(1) sets forth three alternative means of committing driving under the influence: driving while: (1) having an alcohol concentration of 0.08 or higher within two hours after driving, (2) being under the influence of any intoxicating liquor or drug, or (3) being under the influence of a combination of intoxicating liquor or any drug. *State v. Shabel*, 95 Wn. App. 469, 474, 976 P.2d 153 (1999); *see also, State v. Rivera-Santos*, 166 Wn.2d 722, 728, 214 P.3d 130, 132 (2009). The State charged and the jury was instructed on both the under the influence of intoxicants alternative as well as the combined-influence alternative. CP 329; 1431-32. Again, arguing the State had not presented any evidence that he was under the influence of drugs, Mr. Sandholm objected to submitting the second alternative to the jury. 2/9/12 RP 100.

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 1431-32. That instruction is

directly contrary to this Court's repeated urging that trial courts should instruct on the requirement of unanimity for alternative means crimes. *Ortega-Martinez*, 124 Wn.2d 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. Sandholm's conviction must be reversed unless each alternative is supported by sufficient evidence. *Owens*, 180 Wn.2d at 99. They are not.

It is undisputed the State did not prove Mr. Sandholm was under the combined influence of drugs and alcohol. The State conceded as much in the Court of Appeals. The State acknowledged "[Mr.] Sandholm correctly observes that the State failed to prove he was impaired by the combined influence of drugs and alcohol." Brief of Respondent at 9. The Court of Appeals too recognized the State had not presented any evidence that Mr. Sandholm was under the combined effects of drugs and alcohol. Opinion at 12-13. The absence of sufficient evidence of both alternatives requires reversal of the conviction. *Owens*, 180 Wn.2d at 95; *Ortega-Martinez*, 124 Wn.2d at 707-08. Moreover, because the combined-influence alternative is unsupported by sufficient evidence, that State cannot retry Mr. Sandholm on that alternative. *State v. Green*, 94 Wn.2d 216, 233, 616

P.2d 628 (1980); *State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997)

The opinion of the Court of Appeals properly recognizes the jury instructions affirmatively misstate the law with respect to unanimity. Opinion at 13. But rather than apply this Court's analysis from *Ortega-Martinez* to determine whether reversal is required, i.e., determine whether sufficient evidence supports each alternative, the court instead engaged in a uniquely contrived harmless-error analysis. From that analysis, the court concluded that because there is insufficient evidence of one alternative the error is harmless. Opinion at 13-14. But as this Court has made clear, it is precisely the absence of sufficient evidence which establishes the error. It would be a curious rule if insufficient evidence of the alternative both gives rise to the error and renders it harmless.

Moreover, the impropriety of the instruction provided to the jury here is not at issue. Mr. Sandholm has not challenged that instruction on appeal. Mr. Sandholm points to the improper instruction to demonstrate that not only was the jury not instructed that it need be unanimous, but instead was told unanimity was unnecessary. He has argued that in the absence of sufficient proof to support one of the

alternatives and without an expression of unanimity, such as a special verdict form, the lack of sufficient evidence requires reversal.

Under this Court's clearly established precedent, because the State did not offer sufficient evidence to support the combined-influence 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; *Green*, 94 Wn.2d at 233.

**2. The opinion of the Court of Appeals properly concludes the trial court miscalculated Mr. Sandholm's offender score.**

The calculation of a criminal defendant's standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which starts with a list of his prior convictions. *See* RCW 9.94A.030(11); RCW 9.94A.525; *State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). The determination of which prior offenses may be included in the offender score for a DUI related felony is controlled by RCW 9.94A.525(2)(e). *State v. Morales*, 168 Wn. App. 489, 500, 278 P.3d 668 (2012).

The trial court included eight prior convictions in its calculation of determined Mr. Sandholm's offender score. CP 1661. The court's finding of Mr. Sandholm's criminal history provides:

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
CONT SUBST VIOL- SECTION(D)	12/27/2000	ADULT	001011719	PIERCE CO
CONT SUBST VIO A; MFG/DELVR/P	3/27/1998	ADULT	971086325	KING CO
DRIVING/INTOX/UNDER INFLUENCE DRUG	12/27/2000	Adult Misd.	001011719	PIERCE CO
DUI- GROSS MISDEAMEANOR	5/28/2008	Adult Misd.	081016341	PIERCE CO
	<b>Disposition Date</b>			
DUI	4/12/2007	Adult Misd.	B00221259	TACOMA
DUI	2/5/2005	Adult Misd.	5yc000526	PIERCE CO
DUI	6/23/1999	Adult Misd.	99c001724	PIERCE CO
DUI	6/12/1998	Adult Misd.	980253974	BELLEVUE

CP 1666.

Consistent with its decisions in *Morales* and *State v. Jacob*, 176 Wn. App. 351, 308 P.3d 800 (2013), the Court of Appeals properly concluded the trial court erred by including Mr. Sandholm's prior drug offenses in his offender score.

*a. The plain language of former RCW 9.94A.525(2) limits the prior felony convictions which can be included in Mr. Sandholm's offender score.*

As it existed at the time of Mr. Sandholm's offense, RCW 9.94A.525(2) provided in relevant part:

....  
(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent

five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered “prior offenses within ten years” as defined in RCW 46.61.5055.

If the language of a statute is unambiguous, it alone controls.

*State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005);

*Tommy P. v. Board of County Commissioners*, 97 Wn.2d 385, 391, 645

P.2d 697 (1982). On several occasions, including in Mr. Sandholm’s case, the Court of Appeals has interpreted these provisions as limiting the prior offenses which may be included in the offender score calculation for driving under the influence. *Morales*, 168 Wn. App. at

498; *Jacob*, 176 Wn. App. at 358-59. Specifically, former subsection (e) limits the prior felonies which can be included in the offender score to two specified felonies: prior felony convictions of driving under the influence or physical control. *Morales*, 168 Wn. App. at 498; *Jacob*, 176 Wn. App. at 360.

The State, however, contends that subsection (c) and (d) apply in addition to former subsection (e). Petition for Review at 5-6. But if the State is correct and subsection (c) applies in addition to former subsection (e) then the fact that the latter lists two specific Class C felonies, felony DUI and physical control, would be entirely superfluous to (c). Because by the State's theory all Class C felonies are already included in the offender score under subsection (c) it was entirely unnecessary to specify in former subsection (e) how two particular Class C felonies were to be included. "Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other." *In re the Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). By listing two felonies to be included in the offender score for driving under the influence it must be presumed the Legislature did not intend inclusion of any others.

Additionally, the language “except as provided in (e) of this subsection” that appears in subsections (c) and (d) means those two subsections do not apply where the current conviction is for a felony conviction of driving under the influence. The meaning of a word or phrase “may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (Internal quotations omitted.) An examination of other provisions of the SRA which employ the term “[e]xcept as provided in” again leads to the conclusion that by using that term the Legislature did not intend subsection (c) to apply in circumstances in which former subsection (e) applied. Specifically that the term “except as provided in (e) of this subsection” means “subsection (c) only applies if (e) does not.”

Similar language is used in RCW 9.94A.589 regarding concurrent and consecutive sentences. RCW 9.94A.589(1)(a) provides in part:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score . . . .

RCW 9.94A.589(1)(b) and (c) then provide exceptions to the general rule requiring consecutive sentences where the current offenses are either serious violent offenses which arose from separate and distinct conduct or specific firearm offenses in which case they must be served consecutively. This Court has interpreted this language to mean that subsection (1)(a) only applies in circumstances in which (1)(b) or (1)(c) do not. *See In re the Personal Restraint of Charles*, 135 Wn.2d 239, 246, 955 P.2d 798 (1998).<sup>1</sup> Thus, the term “[e]xcept as provided in” in former RCW 9.94A.525(e) means the Legislature did not intend subsection (c) to apply in circumstances in which former subsection (e) applied.

Former RCW 9.94A.525(2)(e) limited the prior felonies which could be included in the offender score calculation for a current felony conviction of driving under the influence. Because Mr. Sandholm’s prior drug offenses are not among the felonies specified by former

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<sup>1</sup> *Charles* concluded the general rule of concurrent as opposed to consecutive sentences required firearm enhancements be served concurrently. In response the Legislature amended the statute governing such enhancements to require consecutive sentences. Laws of 1998, ch. 235, sec. 1.

RCW 9.94A.525(2)(e), the Court of Appeals properly concluded they could not be included in his offender score.

*b. The Legislature's 2013 amendment of RCW 9.94A.525(2)(e) to permit inclusion of "[a]ll other convictions" means that the prior statute did not permit that.*

To the extent there was any doubt what the prior statute permitted, and what it did not, the Legislature amended the statute in 2013. That amendment provides:

~~(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055 all predicate crimes for the offense as defined by RCW 46.61.5055(14) shall be included in the offender score, and prior convictions for felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)) shall always be included in the offender score. All other convictions of the defendant shall be scored according to this section.~~

Laws 2013, ch. 35, § 8 (Former text lined out, new text underlined).

By amending RCW 9.94A.525(2)(e) to require “[a]ll other convictions of the defendant shall be scored according to this section” the Legislature has made clear the prior statute did not permit inclusion or scoring of “all other convictions.” *See e.g., State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792, 795 (2003). In *Delgado* this Court concluded that the Legislature’s amendment of the “two strike” statute to include a clause pertaining to the comparability of other offense necessarily meant the prior statute did not permit inclusion of comparable offenses. *Id.*

“[E]very amendment is made to effect some material purpose.” *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). If the former statute already permitted inclusion of all Class C felonies or permitted the use of the wash-out rules in other portions of the statute, as the State argues, the amendment served no material purpose. Thus, the new amendment demonstrates the former statute did not permit this. *Vita Food*, 91 Wn.2d at 134.

That presumption may be rebutted only by clear evidence that the legislature intended the amendment to merely clarify existing law. *Roe v. TeleTech Customer Care Management (Colorado) LLC*, 171

Wn.2d 736, 751, 257 P.3d 586 (2011); *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). This is only the case where the legislation clarifies or technically corrects a statute “without changing prior case law constructions of the statute.” *Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 537, 39 P.3d 984, 989 (2002). Once a statute has been subject to judicial construction, subsequent “clarifying” legislation cannot apply retrospectively, otherwise the Legislature would be given “license to overrule [the judiciary], raising separation of powers issues.” *Johnson v. Morris*, 87 Wn.2d 922, 925-26, 557 P.2d 1299 (1976); *see also*, *Dunaway*, 109 Wn.2d at 216 n.6.

There is no clear evidence of a legislative intent to merely clarify the provisions of former RCW 9.94A.525(2)(e) and thus the amendment cannot be deemed a clarification. *Roe*, 171 Wn.2d at 751. Even if there were such evidence, because former RCW 9.94A.525(2)(e) has been judicially construed to mean something else, the amendment could not apply retroactively. *Johnson*, 87 Wn.2d at 925-26. Prior to the 2013 amendment, both Divisions One and Two of the Court of Appeals interpreted former RCW 9.94A.525(2)(e) as limiting the prior offenses which may be included in the offender score. Specifically, both courts determined the statute only permitted

inclusion of those Class C felonies and serious traffic offenses specified in former subsection(e). *Morales*, 168 Wn. App. at 498; *Jacob*, 176 Wn. App. at 358-59. Following the 2013 amendment, the statute now specifies “[a]ll other convictions of the defendant shall be scored according to this section.” In enacting this change, the Legislature has made clear that the former version at issue in Mr. Sandholm’s case did not permit inclusion of all other convictions. *Vita Food*, 91 Wn.2d at 134.

Even if the 2013 amendment were intended to be a clarification of legislative intent, it cannot contravene the prior judicial interpretation. *Johnson*, 87 Wn.2d at 925-26. Thus, the Court of Appeals in *Morales*, *Jacob*, and this case, properly concluded prior Class C felonies could not be included in the offender score calculation for driving under the influence in 2009

D. CONCLUSION

As set forth above, this Court should reverse Mr. Sandholm's conviction. Further, the Court should affirm the conclusion that Mr. Sandholm's two prior drug offenses cannot be included in his offender score.

Respectfully submitted this 26<sup>th</sup> day of September, 2014.

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**Supplemental Brief of Respondent**

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