68413-2

68413-2

No. 68413-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KENNETH SANDHOLM,

Appellant.

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

REPLY BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Constitution

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Statutes

Other Authorities

A. ARGUMENT

1. Mr. Sandholm was denied his right to a unanimous jury.

The Washington Constitution requires a unanimous jury verdict in criminal matters. Const. Art. I, § 21. When the State alleges a defendant has committed a crime by alternative means, the right to a unanimous jury is offended unless the State elects the means upon which it is relying or the jury is instructed that it must unanimously agree on a single means. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). Where neither of these options is met, reversal is required unless the evidence supporting each alternative is sufficient to the support the conviction. *State v. Ortega–Martinez*, 124 Wn.2d 702, 707–08, 881 P.2d 231 (1994).

RCW 46.61.502(1) estblsihes three alternatives 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 alleged, and the court instructed the jury on, two of the alternatives: (1) being under the influence of alcohol; and (2) being under the combined effect of drugs and alcohol. CP 329; CP 1431-32. Mr. Sandholm objected to the instruction, arguing the State had not presented any evidence that he was under the influence of drugs. 2/9/12 RP 100.

As set forth in Mr. Sandholm's initial brief, the State did not offer any proof of the second alternative. Thus, the Court must reverse his conviction. *Ortega–Martinez*, 124 Wn.2d at 707–08,

The State offers an argument in response that contradicts itself and simply ignores the law. First, the State contends it offered substantial evidence of both alternatives. Brief of Respondent at 6. As such the State contends it was not error for the court to instruct the jury that they need not be unanimous. Brief of Respondent at 8. Then, the State pivots and concedes it did not offer any evidence that Mr. Sandholm was under the influence of any drugs: "[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. Under *Ortega–Martinez* that should end the argument as the Court made clear that in the absence of sufficient evidence of each charged alternative this Court must reverse. 124 Wn.2d at 707–08. Next, and again despite its own acknowledgment of controlling and long-settled case law, the State maintains that the failure to prove one alternative does not require dismissal. Brief of Respondent at 9-10. Finally, and not allowing its prior concession nor settled legal principles to stand in its way, the State quickly pivots again to contend that its proof of the intoxication prong necessarily proved the combined-affects prong. Brief of Respondent 10-11. Each of the State's contentions is incorrect.

a. The trial court erred in instructing the jury that it need not be unanimous.

The trial court instructed the jury that it need not be unanimous as to the means by which Mr. Sandholm committed the offense. CP 1431-32. That instruction misstates the law.

The Supreme Court has said:

> If the evidence is *sufficient* to support each alternative means submitted to the jury a particularized expression of unanimity as to the means by which the defendant

> committed the crime is unnecessary to affirm the conviction because we infer that the jury rested its decision on a unanimous finding as to the means. On the other hand, if the evidence is *insufficient* to present a jury question as to the whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.

Ortega–Martinez, 124 Wn.2d at 707-08 (Emphasis in original, internal citations omitted). Nothing in that holding suggests that unanimity is not required. To the contrary, the Court added "We strongly urge counsel and trial courts to heed our notice that an instruction regarding jury unanimity on the alternative method is preferable." *Id. at* 717, n.2 (citing *State v. Whitney,* 108 Wn.2d 506, 511, 739 P.2d 1150 (1987)). Further, the comments to the pattern jury instruction specifically caution against its use in cases like this.

> **Use of caution.** Judges should use care when instructing jurors about alternative means. . . . judges must make sure that the instruction lists only those alternative elements that are supported by sufficient evidence—it is easy to mistakenly use a pattern instruction that covers more situations than those involved in the particular case.

11 Wash. Prac., *Pattern Jury Instr. Crim.* 4.23 (3d Ed). Thus, affirmatively instructing the jury that it need not be unanimous was error.

b. The State failure to prove one alternative requires reversal of Mr. Sandholm's conviction.

Next, the State contends that even though there was no evidence to support the combined-influence alternative this court can nonetheless affirm the conviction. Brief of Respondent at 10. That contention is contrary to controlling law set forth by the Supreme Court, which is ironically set forth at the outset of the State argument and then quickly ignored. *See, e.g.*, Brief of Respondent at 7 (citing *Ortega-Martinez*).

"A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means." *State v. Kintz*, 169 Wn. 2d 537, 552, 238 P.3d 470 (2010) (citing *Ortega–Martinez,* 124 Wn.2d at 708); *see also*, *State v. Fortune*, 128 Wn.2d 464, 467-68, 909 P.2d 930 (1996); *Whitney,* 108 Wn.2d at 511; *State v. Franco,* 96 Wn.2d 816, 823, 639 P.2d 1320 (1982); *State v. Arndt,* 87 Wn.2d 374, 377, 553 P.2d 1328 (1976). Because the State concedes there is insufficient evidence of one of the charged alternatives, and in the absence of jury unanimity, this Court must reverse Mr. Sandholm's conviction and dismissal of the unsupported alternative – the combined-affect alternative. *State v. Green*, 94 Wn.2d 216, 233, 616 P.2d 628 (1980).

In its final pivot, the State contends that although it offered no evidence that Mr. Sandholm was under the influence of any drug, it nonetheless proved he was under the combined influence of drugs and alcohol. The State reasons that proof that a person is under the influence of intoxicants is necessarily sufficient proof that they are under the combined effect of intoxicants and drugs even where there is no proof of drug use. This argument is both illogical and contrary to rules of statutory construction.

Essentially the state maintains that because 2+0=2 "0" contributed to the sum. This ignores the mathematical truth that "zero" is "the absence of a measurable sum." http://www.merriam-webster.com/dictionary/zero. Thus, the only reason 2+0=2 is because 2=2, and not because of the combination of "2" and "0." Thu,s where drug use is nonexistent there is no "combined affect; of drugs and alcohol there is only the effect of alcohol.

By the state's reasoning, the combined influence alternative is entirely superfluous as it would necessarily be proven if the State proved either of the other two alternatives. It is a basic rule of statutory interpretation that every statutory term is intended to have some material effect. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). Since the

Legislature has established separate statutory alternatives, each must be interpreted to address differ factual circumstance. The combined-influence alternative cannot simply be subsumed within the other two alternatives.

The State did not prove Mr. Sandholm was under the combined effects of drugs and alcohol. *Green*, 94 Wn.2d at 233.

2. The trial court deprived Mr. Sandholm of a fair trial by admitting evidence of his prior crimes.

> The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense.

Alleyne v. United States, _ U.S. _, 133 S. Ct. 2151, 2158 (2013) (internal citations omitted). Put another way, if a fact need not be submitted to the jury, it is not an element.

Both the Washington Supreme Court and United States Supreme Court have repeatedly stated that prior convictions are not elements of a crime even where those facts increase the defendant's punishment. *Almendarez-Torres v. United States*, 523 U.S. 224, 241, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *State v. Wheeler*, 145 Wn.2d 116, 120, 34 P.3d 799 (2001). Both courts have reasoned that prior offenses are a traditional, if not the most traditional, sentencing factor on which judges have relied. Further, the penalty classification of the offense is not an element of the offense. *State v. Williams,* 162 Wn.2d 177, 187-88, 170

P.3d 30 (2007). This is so even if the penalty classification is contained in the same statute setting forth the elements of the offense. *Id.* Therefore Mr. Sandholm's four prior convictions are not elements of the offense of driving under the influence.

In response, the State does not address this controlling precedent. Instead, the State cites to a number of Court of Appeals decisions which simply assumed, without any analysis, that a prior conviction was an element, as well as to the anomalous case of *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).

In *Roswell*, the Court concluded a prior offense was an element of communicating with a minor for an immoral purpose. The court reasoned that the prior offense did not merely elevate the punishment but "alters the crime that may be charged." 165 Wn.2d at 192. In fact, the only effect of the prior offense is to increase the available punishment, in all other respects the elements of the crime remain the same. *See* RCW 9A.68.090.

Prior offenses do not alter the present crime in any way, they merely aggravate the punishment that may be imposed; the elements of driving under the influence remain the same. In this regard the prior offenses are indistinguishable from the prior offenses at issue in

Wheeler, or the offense of confinement in *Williams.* Because it stands in sharp conflict with the Court's decisions that both predate and post-date it, *Roswell* is at best an anomaly confined to the crime at issue there, communication with a minor for immoral purposes. Indeed, since deciding *Roswell* the Court has reaffirmed its long-settled rule that prior convictions are not elements which need be submitted to a jury. *State v. McKague*, 172 Wn.2d 802, 803, n.1, 262 P.3d 1225 (2011).

None of the cases cited by the State offer any analysis of how prior convictions become elements of the offense. Instead, each case simply starts with the assumption that the recidivist fact is an element. That assumption is contrary to well established case law which has specifically analyzed the issue and reached the contrary result, that prior convictions are not elements even when they lead to a substantial increase in punishment.

In theory, the Legislature may define a fact as an element even where it is not constitutionally required to do so. The question becomes, how does the Legislature communicate that intent? The State does not even acknowledge that question much less answer it. It is clear the mere fact that a prior offense elevates the punishment does not communicate the legislative intent to treat the prior offense as an

element. If it were, the fact that a prior offense elevates a person's offender score would mean the prior offense is an element. But it is not. *Almendarez-Torres*, 523 U.S. at 243; *Wheeler*, 145 Wn.2d at 120. It is equally clear that simply including a fact, recidivism or other, in the substantive criminal statute is not constitutionally relevant to whether that fact is or is not an element. *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (aggravating factors are elements even when contained in separate chapter from substantive offense); *Williams*. 162 Wn.2d at 187-88 (nature of prior conviction is not element even when contained in same statute of as substantive elements of offense).

The Legislature has not expressed an intent to make recidivism an element of driving under the influence, and in light of the prejudicial nature of such evidence, that intent should not be presumed. *Almendarez-Torres*, 523 U.S. at 235. There is no basis to conclude that the prior offenses are elements of driving under the influence. Instead, they are merely sentencing factors.

Within constitutional limits, the Legislature is free to define the elements of a crime. The Legislature has defined the elements of DUI

in RCW 46.61.502(1). Those elements do not include proof of prior convictions.

As discussed in Mr. Sandholm's brief it is clear the admission of evidence of Mr. Sandholm's prior offenses materially affected the outcome of the case, and this Court should reverse Mr. Sandholm's conviction.

3. The trial court miscalculated Mr. Sandholm's offender score.

The determination of which prior offense 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).

As to Mr. Sandholm's six prior offenses for DUI, the State properly concedes that only four offenses may be included in Mr. Sandholm's offender score. Brief of Respondent at 18. *State v. Draxinger*, 148 Wn. App. 533, 537, 200 P.3d 251 (2008); *Morales*, 168 Wn.2d at 499-500.

With respect to the two prior drug offenses included in his offender score, as argued in Mr. Sandholm's initial brief, RCW 9.94A.525(2)(e) limits those offenses which may be included in the offender score for DUI-related felonies to those prior offenses

specifically listed in subsection (e). *Morales*, 168 Wn. App. at 498. Specifically *Morales* said:

> subsection (2)(e)(i) states "***the*** prior convictions [,]" indicating that only the specific classes of prior offenses stated immediately before this provision shall be counted in an offender's score for a DUI-related felony conviction.

Id.

Despite this unambiguous holding, the State argues that Mr. Sandholm has misinterpreted *Morales*. Brief of Respondent at 19. Instead, the State offers that "properly understood" *Morales* merely held "for purposes of subsection 2(e)(i)" only those offenses listed in RCW 9.94A.525(2)(e) shall be counted. Brief of Respondent at 19. But that is not what this Court's opinion actually provides. Rather, the opinion dicatates that Mr. Sandholm's prior drug offenses cannot be included in his offender score. *Morales,* 168 Wn. App. at 498.

The Legislature has recently amended the provisions of RCW 9.94A.525(2)(e). Engrossed Second Substitute Senate Bill 5912, § 8. Among the amendments' provisions is new language providing "All other convictions of the defendant shall be scored according to this section." That language seems intended to overrule the portion of *Morales* which precluded the use of prior felony offenses, meaning that

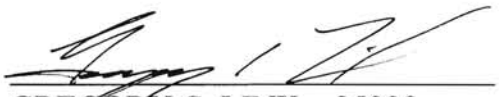
for crimes committed after the effective date of the legislation those offenses will be included in the offender score calculation. RCW 9.94A.345 ("Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed"). More importantly, this amendment illustrates that prior to its enactment the statute did not permit inclusion of prior nondriving offenses in the offender score. "The presumption is that every amendment is made to effect some material purpose." *Vita Food Prods., Inc. v. State,* 91 Wn.2d 132, 134, 587 P.2d 535 (1978). If the statute already permitted inclusion of prior non-driving offenses, the present amendment would serve no material purpose

Pursuant to RCW 9.94A.525(2)(e)(ii), the only relevant criminal history for purposes of Mr. Sandholm's offender score are the four prior driving under the influence convictions committed within ten years of the current offense. *Morales*, 168 Wn. App. at 498. RCW 9.94A.525(11) instructs those each count as a single point, yielding a score of 4. The trial court's calculation of Mr. Sandholm's offender score as 8 is plainly incorrect.

E. CONCLUSION

This Court must reverse Mr. Sandholm's conviction and sentence.

Respectfully submitted this 19th day of July, 2013.



GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68413-2-I
v.	)	
	)	
KENNETH SANDHOLM,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JENNIFER JOSEPH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] KENNETH SANDHOLM 776887 AIRWAY HEIGHTS CC PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF JULY, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710