71937-8

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No. 71937-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MUSTAF AHMED,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ASSIGNMENT OF ERROR

The trial court violated Mustaf Ahmed's right to a unanimous verdict.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The right to a unanimous jury guaranteed by Article I, section 21 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 the conviction must be reversed unless there is sufficient evidence to support each alternative. Where the State offered insufficient evidence of one of two charged alternatives means of driving under the influence, must this Court reverse his conviction?

C. STATEMENT OF THE CASE

State Patrol Trooper Adam Gruener saw Mr. Ahmed driving 80 mph in a 60 mph zone while crossing the fogline on one occasion by a single tire-width. 4/3/14 RP 33. The trooper stopped Mr. Ahmed. *Id.* at 34-36. Upon approaching the car, the trooper noted Mr. Ahmed's eyes were bloodshot, he was sweating, and there was an odor of alcohol. 4/3/14 RP 39. A blood sample taken from Mr. Ahmed following his

arrest revealed a blood-alcohol level of .073 and a THC level of 3.4. *Id.* at 70-71.

The State charged Mr. Ahmed with one count of driving under the influence and one count of driving with a suspended license. CP.

A jury convicted Mr. Ahmed as charged. CP 109-10.

D. ARGUMENT

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

RCW 46.61.502(1) provides a person is guilty of driving under the influence where they drive while: (1) having an alcohol concentration of 0.08 or higher within two hours after driving, (2) having a THC concentration of 5.00 or higher within two hours after driving; (3) being under the influence of any intoxicating liquor or drug, or (4) being under the influence of a combination of intoxicating liquor or any drug. Properly understood, RCW 46.61.502's third alternative requires the State prove either the person was under the influence of intoxicants or the person was under the influence of drugs.

Each statutory provision is intended to "effect some material purpose." *Vita Food Products, Inc. v. State,* 91 Wn.2d 132, 134, 587 P.2d 535 (1978). "The drafters of legislation . . . are presumed to have used no superfluous words and [courts] must accord meaning, if possible, to every word in a statute." *State v. Roggenkamp*, 153 Wn. 2d 614, 624, 106 P.3d 196 (2005) (Internal citations and brackets omitted.) The fourth statutory alternative addresses the combined effects of drugs and alcohol. RCW 46.61.502(1)(d). Thus, to give it independent meaning, the third alternative must mean something else.

To establish a person is under the influence, the State must prove the "ability to handle an automobile was lessened in an appreciable degree by the consumption of intoxicants or drugs." *State v. Wilhelm,* 78 Wn. App. 188, 193, 896 P.2d 105 (1995). To give independent meaning to the third alternative it must require the State prove a person was under the influence of intoxicants but not drugs, **or** that he was under the influence of drugs but not intoxicants. And they must establish one, but not the other, affected the person's driving to an appreciable degree. Or, arguably, the State could prove that each independently affected the person's ability to drive to an appreciable degree. But what the State cannot do is present evidence of the presence of both drugs and alcohol and simply that the person's driving was affected to an appreciable degree without establishing which caused that because that is what is meant by the "combined effects."

The State charged and the jury was instructed on both the under the influence of intoxicants or drugs alternative as well as the combined-influence alternative. CP 1, 123. 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 123. That instruction is directly contrary to the Court's repeated urging that trial courts should instruct on the requirement of unanimity for alternative means crimes. *Ortega-Martinez*, 124 Wn.2d at 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. Ahmed's conviction must be reversed unless each alternative is supported by sufficient evidence. *Owens*, 180 Wn.2d at 99. They are not.

Assuming for purposes of argument that the State proved Mr. Ahmed was under the combined effects of drugs and alcohol, it did not prove drugs independent of alcohol affected his driving, or that drugs independent of alcohol did so. The State presented evidence of both drugs and intoxicants in Mr. Ahmed's blood but did not offer any evidence that one but not the other affected his driving to an appreciable degree.

The State offered the trooper's observations of Mr. Ahmed's driving 80 mph in a 60 mph zone, crossing the fogline on one occasion by a single tire-width. 4/3/14 RP 33. The trooper testified that while other cars moved to the roadside in response to his emergency lights, Mr. Ahmed exited the freeway and continued though two intersections

before stopping in a parking lot. *Id.* at 34-36. The trooper estimated the total time between his activations of his lights and Mr. Ahmed stopping to be 35-45 seconds. *Id.* at 36.

Upon approaching the car, the trooper noted Mr. Ahmed's eyes were bloodshot, he was sweating, and there was an odor of alcohol. 4/13/14 RP 39. Regarding the trooper's observations, toxicologist Sarah Swenson testified "I think that they could be consistent with someone who is under the influence of alcohol and/or drugs." *Id.* at 73. However she allowed there are far fewer studies of the effects of marijuana on driving than on the effects of alcohol, and could not cite any studies concerning the combined effects. *Id.* at 77. Further, Ms. Swenson acknowledged that one would need to look at a number of different things to know if they were impaired at any given level of THC concentration. 4/13/14 RP 78.

Because the State did not offer sufficient evidence to support the alcohol or drugs 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.

E. CONCLUSION

As set forth above, this Court should reverse Mr. Ahmed's conviction

Respectfully submitted this 1st day of November, 2014.

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

STATE OF WASHINGTON, Respondent, v. MUSTAF AHMED, Appellant.	)))))))))	NO. 71937-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **OPENING 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] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] MUSTAF AHMED 315 19TH AVE #1 SEATTLE, WA 98112	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF NOVEMBER, 2014.

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