SUPREME COURT NO. 97278-8
COA NO. 35520-9-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CHAD ENGLEHARDT,
Petitioner.

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 M. Triplet, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Chad Englehardt, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Chad Englehardt seeks review of the Court of Appeals unpublished opinion entered on April 30, 2019. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

> **ISSUE:** 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. Did the Court of Appeals err by (upon finding insufficient evidence of DUI) 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?

IV. STATEMENT OF THE CASE

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.

Mr. Englehardt timely appealed. CP 180. He argued that there was insufficient evidence to convict him of DUI and that, accordingly, remand was required for a retrial on the Actual Physical Control charge. He also argued, in the alternative, that the court violated his right to a unanimous jury verdict. *See* Opinion, p. 4.

The Court of Appeals agreed that the court had violated Mr. Englehardt's right to a unanimous verdict and, as a result, found that it did not need to decide the insufficient evidence issue. *See* Opinion, p. 4. But the Court of Appeals did not remand for a retrial on the lesser charge. Opinion, p. 7. Instead, the Court ordered the trial court to enter a conviction for Actual Physical Control without a retrial. Opinion, p. 7.

Mr. Englehardt timely seeks discretionary review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

> Because the state presented insufficient evidence of DUI, Mr. Englehardt's case must be remanded for a retrial to see if the state can prove that he had actual physical control of the vehicle. The remedy ordered by Court of Appeals conflicts with This Court's ruling in *In re Heidari*.[1] This case also presents significant question of constitutional law, which is of substantial public interest and should be determined by the Supreme Court.

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).

Mr. Englehardt was charged with DUI, but the prosecutor presented jury instructions and extensive argument regarding "actual physical control" to the jury at trial.[2] CP 3; RP 630. In fact, the state and

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[1] *In re Heidari*, 174 Wn.2d 288, 274 P.3d 366, 368 (2012).

[2] "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.*

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, the error requires remand 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.*

As This Court outlined in *Heidari*, remand for entry of a conviction for a lesser-included offense is only permissible when, based upon a separate instruction for that offense, "the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense." *Id.* at 193 (*quoting State v. Green*, 94 Wn.2d 216, 234, 616 P.2d 628 (1980)).

In Mr. Englehardt's case, the jury did not receive a separate instruction on the offense of Actual Physical Control. CP 75-94. Indeed, the jury was not even informed that it constituted a separate offense from DUI. CP 86, 94. Given the fact that the state presented insufficient evidence to prove that Mr. Englehardt had driven the vehicle, this error requires remand for a new trial on the lesser charge. *Id.*

But the Court of Appeals did not order a new trial in Mr. Englehardt's case. *See* Opinion, p. 7. Instead, the Court remanded Mr. Englhardt's case "for correction for the judgment and sentence to reflect the offense of felony physical control…" Opinion, p. 7. The remedy ordered by the Court of Appeals is prohibited by This Court's ruling in *Heidari*. *Id.*

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

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. [3]

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.*

[3] 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. This Court reviews the evidence *de novo*. *Id.*

B. Because the jury did not necessarily dispose of the elements of Actual Physical Control, 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 Green*, 94 Wn.2d at 234-35).

At Mr. Englehardt's trial, the jury was not given a separate instruction recounting the elements of "actual physical control." CP 75-94. In fact, the jury was lead to believe that "actual physical control" and DUI constituted *the same offense*. CP 86, 94. Accordingly, the jury did not necessarily "dispose" of the elements of "actual physical control" 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. The Court of Appeals should have remanded Mr. Englehardt's case for a new trial to determine whether the state could prove beyond a reasonable doubt that he had "actual physical control" of the vehicle. *Id.*

This Court should accept review because the remedy ordered by the Court of Appeals directly conflicts with This Court's holding in

Heidari. RAP 13.4(b)(1). Additionally, this significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

VI. CONCLUSION

The issue here is significant under the State and Federal Constitutions. Furthermore, because it could impact a large number of criminal cases, it is of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

The remedy ordered by the Court of Appeals also conflicts with This Court's ruling in *Heidari*. The Supreme Court should accept review pursuant to RAP 13.4(b)(1).

Respectfully submitted May 30, 2019.

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

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

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

and I sent an electronic copy to

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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 May 30, 2019.

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

APPENDIX:

FILED
APRIL 30, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CHAD RICHARD ENGLEHARDT, Appellant.	)))))))))	No. 35520-9-III UNPUBLISHED OPINION

PENNELL, J.—The guilty verdict issued after Chad Englehardt's criminal trial was ambiguous in that it failed to specify whether Mr. Englehardt had been convicted of felony driving under the influence (DUI) or felony physical control of a vehicle while under the influence (physical control). Given this circumstance, the rule of lenity mandates an adjudication for physical control, since the elements of physical control are fully included within the elements of DUI. Because Mr. Englehardt was erroneously adjudicated guilty of felony DUI, instead of physical control, this matter is remanded for correction of the judgment and sentence, and resentencing.

FACTS

Mr. Englehardt was charged with felony DUI. At trial, the jury was instructed not only on this offense, but also the included offense of felony physical control.

The court issued two instructions regarding DUI and physical control, both of which had been proposed by Mr. Englehardt. Instruction 8 stated:

> 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 liquor or while he or she has sufficient alcohol in his [or her] 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.

Clerk's Papers (CP) at 85.

Instruction 9 stated:

> To convict the defendant of the crime of felony driving while under the influence, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (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;

> and
>
> (3) That the defendant has four or more prior offenses within ten years.
>
> If you find from the evidence that element (1) and any of the alternative elements (2)(a) or (2)(b) and (3) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative in paragraph (2) has been proved beyond a reasonable doubt.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

Id. at 86.

The verdict form was also based on Mr. Englehardt's proposal. It stated:

> We, the jury, find the defendant, Chad Richard Englehardt, _____ of the crime FELONY DRIVING UNDER THE
> (write in "not guilty" or "guilty")
>
> INFLUENCE or BEING IN ACTUAL PHYSICAL CONTROL WHILE UNDER THE INFLUENCE as charged.

Id. at 94.

In issuing its verdict, the jury wrote the word "guilty" in the verdict form without indicating whether Mr. Englehardt's conviction was for felony DUI or physical control. *Id*.

At sentencing, Mr. Englehardt's offender score was calculated as a 9+ and his offense was classified as having a seriousness level of 5. Normally, the standard range in

this circumstance would be 72-96 months. RCW 9.94A.510. But because felony DUI was classified as a class C felony at the time of Mr. Englehardt's offense, his maximum sentence was limited to 60 months. RCW 9A.20.021(c). Thus, 60 months was deemed the standard range and the court sentenced Mr. Englehardt to 60 months' incarceration.

Mr. Englehardt timely appeals.

ANALYSIS

Mr. Englehardt makes two arguments on appeal. First, he claims the State presented insufficient evidence to support a conviction for DUI, as opposed to physical control, because there was not any evidence showing he had actually driven the vehicle associated with his offense. Second, Mr. Englehardt argues that the jury verdict failed to establish a conviction for DUI as opposed to a conviction for physical control. Because we largely agree with Mr. Englehardt's second argument, we need not address his first.

DUI and physical control are distinct crimes, governed by different statutes. *See* RCW 46.61.502, .504. Yet the two offenses are also closely related. The act of physical control is inherent in the act of driving. Thus, the elements of physical control are fully included within the crime of DUI. *See State v. Huyen Bich Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008). While physical control is considered an offense that is included within the offense of DUI, it was not, at the time of Mr. Englehardt's April 2016 arrest,

a *lesser* offense for purposes of sentencing. This is because the two offenses carried identical penalties (a 5-year statutory maximum and seriousness level of 5). Former RCW 46.61.502(6) (2012); former RCW 46.61.504(6) (2012); RCW 9A.20.021(c); former RCW 9.94A.515 (2007).[1]

The jury's completed verdict form failed to specify whether Mr. Englehardt was convicted of DUI or physical control. Because the verdict form was written in the disjunctive, it could have been generated in one of three different ways: (1) the jury might have unanimously found Mr. Englehardt guilty of felony DUI, (2) the jury might have unanimously found Mr. Englehardt guilty of felony physical control, or (3) the outcome might have been split, with some jurors finding Mr. Englehardt guilty of felony DUI and others only finding him guilty of felony physical control.

Where, as here, the jury renders an ambiguous verdict, we apply the rule of lenity. *State v. Kier*, 164 Wn.2d 798, 811, 194 P.3d 212 (2008). Given that physical control is fully included within the crime of DUI, the jury's guilty verdict was necessarily based on a unanimous determination that the State had proved all elements of felony physical control. Thus, the remedy for the ambiguity in Mr. Englehardt's verdict is for the trial

[1] On June 9, 2016, felony DUI was reclassified from a class C felony to a class B felony. Former RCW 46.61.502(6) (2012), *amended by* LAWS OF 2016, ch. 87. Felony physical control remains classified as a class C felony. RCW 46.61.504(6).

court to issue a judgment and sentence for felony physical control, as opposed to felony DUI.[2]

Rather than correcting the verdict, Mr. Englehardt argues that the proper remedy is remand for retrial because the jury was never provided an explanation of what it means to be in physical control of a vehicle. Mr. Englehardt's complaint goes to a definitional issue, not to the elements of his offense. *Compare* WPIC 92.02 (elements instruction) *with* WPIC 92.11 (definitional instruction).[3] The lack of a definitional instruction is not an error of constitutional magnitude that can be raised for the first time of on appeal. *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011). Here, Mr. Englehardt never objected to the trial court's failure to issue an instruction at trial defining the term "physical control." In fact, Mr. Englehardt's attorney stated she had made a strategic decision not to seek a definitional instruction. *See* Report of Proceedings (June 23, 2017) at 3. Given this circumstance, the lack of a definitional instruction is not something that warrants further review. RAP 2.5(a).

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[2] Because physical control is included within the offense of DUI, Mr. Englehardt's verdict does not raise unanimity problems, as might be the case in the context of an alternative means crime, where there is a possibility the jurors did not all find the same operative facts.

[3] 11A WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 92.02, 92.11, at 274, 287 (3d ed. 2008) (WPIC).

CONCLUSION

This matter is remanded for correction of the judgment and sentence to reflect the offense of felony physical control, and for resentencing. At resentencing, the trial court shall also consider whether it should strike the following from Mr. Englehardt's judgment and sentence: (1) the $200 criminal filing fee and $100 deoxyribonucleic acid (DNA) collection fee pursuant to recent changes to RCW 36.18.020(2)(h) and RCW 43.43.7541, and the Supreme Court's decision in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018); and (2) $352.46 in emergency response costs assessed under RCW 38.52.430.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

LAW OFFICE OF SKYLAR BRETT

May 30, 2019 - 11:14 AM

Transmittal Information

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