

NO. 71937-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MUSTAF AHMED,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE RICHARD MCDERMOTT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
AHMED’S RIGHT TO A UNANIMOUS VERDICT WAS PROTECTED WHEN SUFFICIENT EVIDENCE SUPPORTED BOTH ALTERNATIVE MEANS OF FELONY DUI PRESENTED TO THE JURY.....	2
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Jackson v. Virginia, 443 U.S. 307,
99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... 3, 6

Washington State:

In re Pers. Restraint of Jeffries, 110 Wn.2d 326,
752 P.2d 1338 (1988)..... 3, 4, 9

State v. Al-Hamdani, 109 Wn. App. 599,
36 P.3d 1103 (2001)..... 9

State v. Arndt, 87 Wn.2d 374,
553 P.2d 1328 (1976)..... 2, 3

State v. Camarillo, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 6

State v. Green, 91 Wn.2d 431,
588 P.2d 1370 (1979)..... 3

State v. Green, 94 Wn.2d 216,
616 P.2d 628 (1982)..... 3, 5

State v. Kitchen, 110 Wn.2d 403,
756 P.2d 105 (1988)..... 3

State v. Ortega Martinez, 124 Wn.2d 702,
881 P.2d 231 (1994)..... 4

State v. Owens, 180 Wn.2d 90,
323 P.3d 1030 (2014)..... 4

State v. Salinas, 119 Wn.2d 192,
829 P.2d 1068 (1992)..... 6

<u>State v. Shabel</u> , 95 Wn. App. 469, 976 P.2d 153 (1999).....	5
<u>State v. Smith</u> , 155 Wn.2d 496, 120 P.3d 559 (2005).....	6
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	4
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	2
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	6
<u>State v. Whitney</u> , 108 Wn.2d 506, 739 P.2d 1150 (1987).....	3

Constitutional Provisions

Washington State:

Const. art. I, § 21.....	2
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Statutes

Washington State:

RCW 46.61.502	2, 5
RCW 46.61.540	5

A. ISSUE PRESENTED

Appellant Mustaf Ahmed was observed by a Washington State Patrol Trooper speeding at 80 miles per hour, crossing the fog line, and failing to respond or stop for an extended period of time after the trooper activated his emergency lights. Ahmed exhibited watery bloodshot eyes, slurred speech, and the odor of alcohol. An open, half-empty can of beer was located in his vehicle. Ahmed admitted to the trooper that he had been drinking. He admitted that he should not have been driving. Ahmed's blood alcohol level was .073. Ahmed's blood also contained 3.4 nanograms of THC, the active ingredient in marijuana. Was there sufficient evidence that Ahmed drove while under the influence of or affected by intoxicating liquor or a drug?

B. STATEMENT OF THE CASE

The State of Washington charged Ahmed with felony driving under the influence ("DUI") and first-degree driving with a suspended license. CP 1-2. The charge was a felony due to Ahmed's four previous convictions for DUI-related offenses. CP 79, 141. A King County jury found Ahmed guilty as charged. CP 109-10; 04/08/14 RP 3. On May 15, 2014, the Honorable Judge Richard McDermott sentenced Ahmed to a standard-range sentence of fifteen months incarceration and 12 months of

community custody. CP 138-39; 05/15/14 RP 12. Ahmed filed a timely notice of appeal. CP 148-49.

C. **ARGUMENT**

AHMED'S RIGHT TO A UNANIMOUS VERDICT WAS PROTECTED WHEN SUFFICIENT EVIDENCE SUPPORTED BOTH ALTERNATIVE MEANS OF FELONY DUI PRESENTED TO THE JURY.

Ahmed contends that he was denied the right to a unanimous jury verdict because the State produced insufficient evidence of one alternative means of committing felony DUI – that he drove while under the influence of or affected by intoxicating liquor *or* a drug. CP 122-23; RCW 46.61.502(1)(c). Ahmed is wrong. Sufficient evidence was presented such that a rational juror could find Ahmed was affected by alcohol or marijuana.

Initially, Ahmed misstates the law as it relates to jury unanimity in alternative means cases. In Washington, criminal defendants have the right to a unanimous jury verdict. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Where a single offense is committed in more than one way, so long as “there is substantial evidence to support each of the alternative means . . . unanimity of the jury as to the mode of commission is not required.” State v. Arndt, 87 Wn.2d 374, 376, 553 P.2d 1328 (1976). The Washington Supreme Court applied

the Arndt rule to a sufficiency of the evidence challenge in State v. Green, 91 Wn.2d 431, 442, 588 P.2d 1370 (1979) (Green I), reversed on rehearing, 94 Wn.2d 216, 616 P.2d 628 (1982) (Green II). There, the defendant was found guilty of aggravated murder based on the State's alternative allegations that the crime was committed in the course of a rape or a kidnapping. The court initially determined that there was sufficient evidence of kidnapping. Green I, 91 Wn.2d at 442-43. Later, based on an intervening decision of the United States Supreme Court relating to the appropriate standard of review for sufficiency of the evidence,¹ the court found the evidence of kidnapping insufficient. Green II, 94 Wn.2d at 232. Because the evidence of kidnapping was insufficient under the Jackson standard, the court found Green's right to jury unanimity was violated. Green II, 94 Wn.2d at 221-22, 232. In so holding, the court carefully distinguished Arndt and the situation where sufficient evidence supported each means presented to the jury. Id. at 232.

Over the years, the court has repeatedly reaffirmed its conclusion that unanimity as to alternative means is *unnecessary* when sufficient evidence supports each means presented to the jury. State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987); State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988); In re Pers. Restraint of Jeffries, 110 Wn.2d 326,

¹ Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

338, 752 P.2d 1338 (1988); State v. Ortega Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007); State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

Ahmed incorrectly asserts that a particularized expression of unanimity as to means is always required, and when it is absent, the “error” is “harmless” when there is sufficient evidence to support each alternative presented to the jury. None of the cases Ahmed cites can be read in such a manner. Rather, as made clear in the above cases, unanimity as to the *charged* crime is all that is required. When sufficient evidence exists for each mode of commission, there is no error in failing to require unanimity as to the means relied on. A problem arises only when there is insufficient evidence of one or more of the alternative means presented to the jury. In such a situation, if there is no particularized expression from the jury regarding which alternative it relied on, there is no way to be sure that the jury unanimously agreed on *a means properly supported by sufficient evidence*. See e.g., Smith, 159 Wn.2d at 783 (no right to a unanimous jury determination as to the alleged means used to carry out the charged crime, but in order to protect the right to a unanimous verdict on the charged crime, substantial evidence of each alternative must be presented). Thus, error occurs *only* when one or more of the presented alternatives is not supported by sufficient evidence, *and*

the jury does not return a specialized verdict indicating unanimity as to a properly supported means.

Here, it is apparent that no error occurred because sufficient evidence supported both alternative means presented to the jury. There are four alternative means of committing a felony DUI: driving a vehicle (1) with an alcohol breath or blood concentration of 0.08 or higher; (2) with a THC blood concentration of 5.00 or higher; (3) while under the influence of or affected by intoxicating liquor, marijuana, or any drug; or (4) while under the combined influence of or affected by intoxicating liquor, marijuana, and any drug. RCW 46.61.502(1);² State v. Shabel, 95 Wn. App. 469, 473, 976 P.2d 153 (1999). The State presented the jury with the two alternative means of “being under the influence of or affected by intoxicating liquor or a drug,” and “being under the combined influence of or affected by intoxicating liquor and a drug.” CP 1, 122-23.

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Green II, 94 Wn.2d at 220-22

² Prior to December 6, 2012, RCW 46.61.502(1)(b) and (c) read “while under the influence of or affected by intoxicating liquor or any drug,” and “while under the combined influence of or affected by intoxicating liquor and any drug.” The version of the statute that became effective on December 6, 2012 added the “per se” legal limit for THC in subsection (1)(b), and added the specific references to marijuana in subsections (1)(c) and (1)(d). Although Ahmed’s offense occurred in 2013, the information and jury instructions did not specifically reference “marijuana.” CP 1; CP 122-23. This had no practical effect on Ahmed because marijuana is a “drug” as that term is defined in RCW 46.61.540.

(citing Jackson v. Virginia, 443 U.S. at 318). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court reverses for insufficient evidence only when no rational trier of fact could conclude that the State proved the elements of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). It is strictly within the province of the jury to resolve conflicts in the testimony and to evaluate the credibility of witnesses and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Ahmed concedes that the evidence was sufficient to support the "combined influence" alternative means. Instead, he argues that the evidence was insufficient to establish that he was affected by alcohol alone, marijuana alone, or each independently of the other. Brf. of Appellant at 4-5. However, based on the evidence, a rational juror could have easily concluded that Ahmed was impaired by alcohol *or* marijuana (or both).

Ahmed was observed speeding at a rate of 80 miles per hour in a 60-mph zone. 04/03/14 RP 33. His vehicle drifted over the fog line of the shoulder by approximately one tire's width before coming back into the

lane of travel. Id. After Trooper Gruener activated his emergency lights behind Ahmed's vehicle, Ahmed did not slow down, did not brake, and did not respond at all; he just continued along on the freeway. 04/03/14 RP 34. Approximately six blocks later, Ahmed took the off ramp and exited the freeway. Id. As Trooper Gruener followed Ahmed with his lights activated, other cars began pulling to the shoulder in recognition of Gruener's presence. 04/03/14 RP 34-35. Ahmed did not pull over. Instead, he turned left at the end of the off ramp and continued along the surface streets, with Trooper Gruener still behind him with lights flashing. 04/03/14 RP 35. Despite the presence of a large shoulder in which to pull over, Ahmed did not stop, and instead traveled through another traffic light before finally turning into a gas station parking lot a quarter to a half-mile from the freeway. 04/03/14 RP 35-36.

Ahmed's eyes were bloodshot and watery. 04/03/14 RP 39. He was sweating heavily, with sweat dripping from his face. Id. Trooper Gruener smelled a very strong odor of alcohol coming from the vehicle, and later, from Ahmed himself. 04/03/14 RP 39-40. Ahmed's speech was slurred. 04/03/14 RP 55. There was an open can of beer in the car. 04/03/14 RP 40. Ahmed admitted to drinking. 04/03/14 RP 44-45.

When Gruener took Ahmed to the hospital to have his blood drawn, Ahmed told him, "I know I fucked up, I shouldn't have been

driving.” 04/03/14 RP 43. Ahmed exhibited severe mood swings during the contact. He alternated between being calm and yelling. 04/03/14 RP 44. An analysis of Ahmed’s blood revealed an ethanol level of 0.073 +/- .006 grams per milliliter, and a THC level of 3.4 nanograms per milliliter. 04/03/14 RP 70-71.

Forensic Toxicologist Sarah Swenson testified that if a person has ingested both alcohol and marijuana, you will see the effects of both, not just one or the other. 04/03/14 RP 81-82. She explained that although THC and alcohol are both sedatives and share some common effects, they also exhibit differing effects. 04/03/14 RP 71, 81-82. Specifically, she indicated that THC affects time and space perception in a way that alcohol normally does not; for instance stopping too short at a stop sign. 04/03/14 RP 71.

A rational conclusion from the evidence is that Ahmed’s ability to drive was lessened to an appreciable degree due to his ingestion of marijuana. The THC level in his blood was 3.4 nanograms per milliliter, and his perception of time and space was distorted when he took 35-45 seconds and quite some distance before pulling his vehicle over in response to Trooper Gruener’s flashing lights. An equally reasonable conclusion from the evidence is Ahmed was impaired by alcohol; the level of alcohol in his blood was .073, he swerved his vehicle over the fog line,

he exhibited an odor of alcohol, watery, bloodshot eyes, and slurred speech, and he admitted to drinking. Additionally, forensic toxicologist Swenson testified that in her expert opinion, the indicators of impairment displayed by Ahmed (being non-responsive to emergency lights, bloodshot eyes, slurred speech, odor of alcohol, etc.) were “consistent with someone who is under the influence of alcohol and/or drugs.” 04/03/14 RP 72-73 (emphasis added). The jury was entitled to rely on her testimony to find Ahmed was under the influence of alcohol or marijuana.

Based on this evidence and all reasonable inferences drawn from it, a rational juror could easily conclude that Ahmed’s ability to drive was lessened in an appreciable degree by his alcohol consumption alone, his marijuana consumption alone, or each of them independently of the other. This Court cannot say that no rational trier of fact could have found the “alcohol or drug” prong beyond a reasonable doubt.

Ahmed’s claim that the State must prove *which* substance impaired him (to the exclusion of the other) is akin to an argument that the “alcohol or drug” DUI prong itself contains two additional alternative means of committing the offense – impairment by alcohol *or* impairment by drugs. Such “means within means” argument has been explicitly rejected. See e.g., Jeffries, 110 Wn.2d at 339-4 (the three ways in which petitioner could have satisfied one alternative aggravating circumstance were not

themselves alternatives for which sufficient evidence of each required); State v. Al-Hamdani, 109 Wn. App. 599, 606-07, 36 P.3d 1103 (2001) (victim's inability to consent to intercourse by reason of being physically helpless *or* mentally incapacitated not two alternative means of committing rape, and sufficient evidence of both not required). Likewise here, the State was not required to produce sufficient evidence that Ahmed's ability to drive was lessened in an appreciable degree due to alcohol alone *and* due to marijuana alone. In order to convict Ahmed, the evidence need only rationally establish that Ahmed was under the influence of one or the other, or both. As outlined above, the facts adduced at trial were more than sufficient to meet this standard.³

When Ahmed was observed speeding, drifting out of the lane of travel, taking 35-45 seconds before stopping his vehicle, smelled of alcohol, had watery, bloodshot eyes, slurred his speech, had an open container in his vehicle, admitted drinking, admitted he should not have been driving, had a blood alcohol level of .073, and had a THC blood level of 3.4, the State presented sufficient evidence by which a rational juror

³ In fact, although the prosecutor argued to the jury that the evidence demonstrated Ahmed was impaired by alcohol and drugs, he focused much of his presentation on why the jury should find that Ahmed was under the influence of or affected by alcohol *alone*. See 04/07/14 RP 58 (“[A]ll the State has to prove is that he was affected by intoxicating liquors”); 04/07/14 RP 59 (“Let’s go through the evidence that we have in this case to show why the State believes the Defendant was affected by intoxicating liquors”); 04/07/14 RP 61-62 (“Very rarely do you have just one question that you need to ask and answer. And that is: Was he affected by alcohol in an appreciable degree?”).

could find beyond a reasonable doubt that either alcohol or marijuana lessened his ability to drive in an appreciable degree.

D. CONCLUSION

For all of the above reasons, the jury was not required to unanimously determine which particular substance (or which combination of substances) Ahmed was affected by when he drove. His felony DUI conviction should be affirmed.

DATED this 23rd day of February, 2015.

Respectfully submitted,

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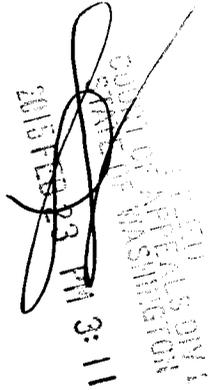
Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. MUSTAF AHMED, Cause No. 71937-8 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23 day of February, 2015



Name
Done in Seattle, Washington



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