

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find reversal is required with respect to Count I, Driving Under the Influence.

With respect to proposition one, we find plain error occurred when Appellant did not receive a jury instruction for the crime of driving while impaired, 47 O.S. Supp.1999, § 761, as a lesser-included offense to the charged crime of driving under the influence of alcohol.¹ *Penny v. State*, 765 P.2d 797, 800 (Okl.Cr.1988); *Lashley v. State*, 757 P.2d 845, 846 (Okl.Cr.1988); *Bernhardt v State*, 719 P.2d 832, 833-34 (Okl.Cr.1986); *Shrum v. State*, 991 P.2d 1032, 1035 (Okl.Cr.1999); *Yell v. State*, 856 P.2d 996, 997 (Okl.Cr.1993); and 47 O.S.Supp.1999, § 753. The error was not harmless. *Simpson v. State*, 876 P.2d 690, 702 (Okl.Cr.1994). Propositions two and three are thus moot.

DECISION

The judgment and sentence on Count I, driving under the influence of alcohol, is hereby **REVERSED** and the matter is **REMANDED** to the District Court of Oklahoma for a new trial with proper instructions. The judgment and sentence on Count II is hereby **AFFIRMED**.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE DAVID M. HARBOUR, SPECIAL JUDGE

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¹ The jury was, however, instructed on the definition of "impaired ability," but was not given any guidance as to why that definition was included in the instructions. We find this situation confusing, from a juror's perspective.

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OPINION BY: LUMPKIN, J.
JOHNSON, P.J.: DISSENT
LILE, V.P.J.: CONCUR IN RESULT
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR

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