



made an erroneous “acquittal first” argument, and the trial judge failed to correctly answer the jury’s question of whether they could consider Driving While Impaired if they could not get a unanimous vote on Driving Under the Influence.

- II. Plain reversible error occurred when the trial court’s definition of the term “impaired” was incorrect.
- III. Appellant was denied his constitutional rights on Count I to a fair and impartial jury trial and against self incrimination under Article II §§ 7, 20, 21 and the Fifth, Sixth and Fourteenth Amendments when the trial court, over objection, improperly admitted his incriminating statement in response to custodial interrogation, that “I’ve had four beers and I won’t pass [the breathalyzer test].”
- IV. The State presented insufficient evidence to prove beyond a reasonable doubt the Appellant was under the influence of alcohol.
- V. Plain reversible error occurred when the trial court failed to follow OUJI-CR 2d 10-25 (1996) and provide the jury with a single verdict form that included the lesser-included offense of Driving While Impaired.
- VI. Trial errors, cumulatively, denied Appellant Due Process and require reversal, or, in the alternative, a sentence modification.

### **DECISION**

We find merit in Appellant’s first proposition in which he complains that that because instruction OUJI-CR 10-27 was not given, the jury did not understand that they did not have to unanimously agree that the greater crime was not proven beyond a reasonable doubt before they could consider the lesser-included offense. This argument is support by the record, which reflects, in a note submitted by the jury to the trial court, that they harbored

this precise misunderstanding. The trial court erroneously responded to this note by advising the jury that they had before them, all of the law and evidence proper for their consideration. As a result, the jury was prohibited from considering the lesser-included offense - in a situation where such consideration was clearly warranted - by the trial court's initial failure to give OUJI-CR 10-27 and then by the court's failure to properly answer the jury's question. The trial court's failure to give OUJI-CR 10-27 constituted plain error which requires reversal of Count I, Driving Under the Influence. See *Graham v. State*, 2001 OK CR 18, ¶¶ 3-7, 27 P.3d 1026, 1027-28. We would direct the trial court, upon retrial, to instruct the jury using the modified version of OUJI-CR 10-27 as promulgated in *Graham v. State*, 2001 OK CR 18, at ¶ 7 n. 5.

We have not addressed the issues raised in any of the remaining five propositions as they concern only Appellant's conviction on Count I which must be reversed and remanded for a new trial pursuant to error raised in Proposition I. Appellant's conviction on Count II has not been challenged and is affirmed.

The Judgment and Sentence of the trial court on Count I is **REVERSED** and **REMANDED** for a **NEW TRIAL** and Count II is **AFFIRMED**.

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**OPINION BY: STRUBHAR, J.**  
LUMPKIN, P.J.: CONCUR IN RESULTS  
JOHNSON, V.P.J.: CONCUR  
CHAPEL, J.: CONCUR  
LILE, J.: CONCUR IN RESULTS

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**LUMPKIN, PRESIDING JUDGE: CONCUR IN RESULTS**

I concur in the results reached by the Court based on my separate writing in *Graham v. State*, 27 P.3d 1026 (Okl.Cr.2001).