96747-4

SUPREME COURT NO. _____
COA NO. 77045-4-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEN V. WU,

Petitioner.

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

The Honorable Ken Schubert, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Ken Wu asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Wu requests review of the published decision in State v. Ken V. Wu, Court of Appeals No. 77045-4-I (slip op. filed December 17, 2018), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Where involvement of drugs or alcohol must be proven by the State to establish that prior convictions for reckless driving qualify as "prior offenses" elevating the crime of DUI from a gross misdemeanor to a felony, whether involvement of drugs or alcohol is a fact that must be found by the jury under the Sixth Amendment as opposed to a threshold legal question to be determined by the judge?

2. Whether the State failed to prove the prior convictions for reckless driving involved drugs or alcohol because the conviction itself does not establish the fact and the original DUI charge is not proof of the fact?

3. Assuming the evidence was sufficient, whether the court erred in failing to instruct the jury that it needed to find the prior reckless

driving offenses involved drugs or alcohol in order to return a verdict on "prior offenses" because this was a factual matter for the jury to decide?

D. STATEMENT OF THE CASE

The State charged Wu with driving while under the influence of an intoxicating liquor (DUI). CP 58. The DUI count was elevated to a felony based on the allegation that Wu had "at least four prior offenses within ten years of the arrest for the current offense, as defined under RCW 46.61.5055(14)." CP 58.

The case proceeded to a jury trial, where the State introduced documentary evidence that Wu had one prior DUI conviction, one prior conviction for first degree negligent driving, and two prior convictions for reckless driving. Ex. 9. After the State rested its case, the defense moved to dismiss the DUI charge because the evidence was insufficient to show the two prior reckless driving convictions involved alcohol or drugs. RP[1] 672-81. The court denied the motion, reasoning whether the prior offenses involved drugs or alcohol was a question of law for the court to decide, not a question of fact for the jury. RP 684-88. The court found the prior offenses involved alcohol or drugs based on the documents admitted as Exhibit 9. RP 685-90.

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[1] The verbatim report of proceedings is referenced as follows: RP - eight consecutively paginated volumes consisting of 5/1/17, 5/12/17, 5/22/17,5/25/17, 5/30/17, 5/31/17, 6/1/17, 6/23/17.

Defense counsel also argued the jury needed to be instructed on the requirement that the prior offenses involved alcohol or drugs. RP 681, 692-93; CP 123 (proposed instruction). The court disagreed based on its prior ruling. RP 692-94. The jury found Wu guilty and returned a special verdict that Wu had four prior offenses. CP 117-19

On appeal, Wu argued (1) the Sixth Amendment right to a jury trial required the State to prove to the jury that the prior reckless driving convictions involved use of drugs or alcohol; (2) the evidence was insufficient to prove drugs or alcohol was involved; and (3) the court erred in failing to instruct the jury on the drug/alcohol requirement.

In a split decision, a majority held that whether the prior reckless driving convictions qualified as "prior offenses" was a threshold question of law for the court to decide, and that the evidence was sufficient to show those convictions were originally charged as a DUI and involved alcohol. Slip op. at 7, 9-10. The majority disagreed with Division Two's contrary decision in State v. Mullen, 186 Wn. App. 321, 329, 345 P.3d 26 (2015), which held the drug/alcohol requirement is an element of the crime that must be submitted to the jury for decision. Id. at 4, 7. In dissent, Judge Becker maintained whether those prior convictions involved alcohol was a question of fact for the jury to decide and the evidence was insufficient to

prove that fact because a charge filed by the prosecutor is not proof of the facts alleged. Slip op. at 1, 11 (dissent).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. IN CONSIDERING WHAT QUALIFIES AS A "PRIOR OFFENSE" ELEVATING A DUI FROM A MISDEMEANOR TO A FELONY, REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH ANOTHER DECISION REGARDING WHETHER INVOLVEMENT OF DRUGS OR ALCOHOL IS A QUESTION OF FACT FOR THE JURY TO DECIDE.

To sustain a conviction for felony DUI, the State must prove "prior offenses" as defined by statute. Based on Supreme Court precedent, there must be evidence that the prior offenses involved drugs or alcohol. This was a question of fact for the jury to decide, as mandated by the Sixth Amendment right to a jury trial. Mullen is on point and supports Wu's argument. A 2-1 majority in Wu's appeal disagreed with Mullen, holding the trial court has authority to determine the question. There is now a split in the law that should be resolved by the Supreme Court. Review is warranted under RAP 13.4(b)(2).

a. The State must prove "prior offenses," including the fact that prior convictions for reckless driving involved drugs or alcohol, in order to convict for felony DUI.

Generally, DUI is a gross misdemeanor. RCW 46.61.502(5). The offense becomes a Class B felony if "[t]he person has four or more prior

offenses within ten years as defined in RCW 46.61.5055." Former RCW 46.61.502(6)(a) (2016).[2] A "prior offense" is defined by statute in multiple ways. Former RCW 46.61.5055(14)(a) (2016). As relevant here, the statute provides a conviction for reckless driving qualifies as a "prior offense" if it is the result of a charge that was originally filed as a violation of the DUI statute. Former RCW 46.61.5055(14)(a)(xii) (2016).

Where criminal statutes raise the level of a crime from a misdemeanor to a felony based upon the defendant's prior convictions, those convictions are elements of the charged crime that the State must prove beyond a reasonable doubt. State v. Roswell, 165 Wn.2d 186, 189, 196 P.3d 705 (2008). In that circumstance, "[t]he prior conviction is not used to merely increase the sentence beyond the standard range but actually alters the crime that may be charged." Id. at 192.

The State must prove involvement of alcohol or drugs as part of a "prior offense" originally charged as a DUI but amended to another charge. Mullen, 186 Wn. App. at 332. This conclusion flows from City of Walla Walla v. Greene, 154 Wn.2d 722, 724-26, 116 P.3d 1008 (2005), cert. denied, 546 U.S. 1174, 126 S. Ct. 1339, 164 L. Ed. 2d 54 (2006), where the Supreme Court addressed a due process challenge to the DUI statute

[2] This is the version of the statute applicable to Wu. The legislature has since amended RCW 46.61.502(6)(a) to reduce the number of prior offenses to three. Laws of 2017, ch. 335, § 1.

that increased the mandatory minimum sentence for a current DUI conviction based on a "prior offense" of first degree negligent driving.

Greene cited In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) for the proposition that "every element of a crime must be proved beyond a reasonable doubt in the context of a criminal proceeding." Id. at 728. It rejected Greene's argument that the statute relieved the State of proving a prior DUI charge by interpreting the statute to require proof that drugs or alcohol were involved in the prior offense. Id. at 726-28. The definitional statute "limits applicability to those convictions where DUI was the predicate charge, thus requiring alcohol or drugs to be involved with the convicted driving offense." Id. at 727. "Accordingly, the statute requires the State to establish that a prior driving conviction involved use of intoxicating liquor or drugs. Thus, due process is satisfied for the purposes of this mandatory enhancement if the prior conviction exists and the prosecution can establish that intoxicating liquor or drugs were involved in that prior offense." Id. at 727-28 (footnote omitted, emphasis added).

The Court of Appeals in State v. Shaffer, 113 Wn. App. 812, 55 P.3d 668 (2002) "thus erred in concluding that the due process protections articulated in Winship rendered the statute unconstitutional." Id. at 728. "For Greene, the fact that she was convicted of first degree negligent

driving is sufficient to satisfy her due process protections because all elements of that offense are established by virtue of the conviction itself. Accordingly, we hold that here, RCW 46.61.5055(12)(a)(v) survives constitutional challenge." Greene, 154 Wn.2d at 728 (emphasis added).

Wu's case involves a prior conviction for reckless driving, not negligent driving, as in Greene. In dissent, Judge Becker grasped the distinction: "A reckless driving conviction does not inherently involve alcohol or drugs. Greene does not hold that an accusation equals proof." Slip op. at 6 (dissent). As recognized by Division Two, Greene "establishes the involvement of alcohol or drugs as part of the definition of a prior offense" and "that it is an element of the crime." Mullen, 186 Wn. App. at 332. Following Greene, unless alcohol or drugs were involved in his two prior reckless driving convictions, Wu "could not have been charged with felony DUI and, therefore, it is an essential element of the offense of felony DUI." Id.

b. Where the question of whether a prior conviction qualifies as a prior offense requires a factual determination, the Sixth Amendment right to a jury trial mandates that the jury, not the court, decide the issue.

The Court of Appeals majority agreed the State needs to prove drug or alcohol involvement: "under Greene, to demonstrate a prior conviction for reckless driving meets definition of a 'prior offense' under

RCW 46.61.5055(14)(a)(xii), the State must establish that intoxicating liquor or drugs were involved in the event leading to the reckless driving conviction." Slip op. at 8. But it disagreed about who has the authority to make that determination. The majority held "it was a threshold question for the trial court to determine if Wu's prior convictions for reckless driving involved intoxicating alcohol or drugs." Slip op. at 9.

The majority is mistaken. As recognized by Judge Becker in dissent, facts elevating a misdemeanor to a felony must be found by a jury to comply with the Sixth Amendment, and whether a prior offense involved alcohol or drugs is such a fact. Slip op. at 1 (dissent). That determination cannot be made as a matter of law. It is not a legal question to be decided by the court, but a factual question to be decided by the jury.

In Mullen, Division Two rejected the State's argument that whether alcohol or drugs were involved is a threshold legal question for the trial court to decide. Mullen, 186 Wn. App. at 328. Rather, the State must prove beyond a reasonable doubt that a prior conviction for reckless driving involved alcohol or drugs in order to use that conviction as a prior offense to elevate a misdemeanor DUI to a felony. Id. at 325-26.

Relying on Greene and cases analyzing the Sixth Amendment right to a jury trial, Mullen held that because "the legislature's intent was to charge defendants who are guilty of prior *alcohol- or drug-related*

offenses with felony DUI, the involvement of alcohol or drugs in prior convictions is an essential element that must be proved to a jury where it was not an essential element of the prior conviction itself." Id. at 329. Because involvement of alcohol or drugs is an essential element of first degree negligent driving, the State in Greene needed to prove only the existence of the prior offense. Greene, 154 Wn.2d at 728. But the involvement of alcohol or drugs is not an essential element of a prior reckless driving conviction, so "the State must prove both the existence of the prior offense and the fact of alcohol or drug involvement." Mullen, 186 Wn. App. at 333.

Traditionally, questions of "pure historical fact" are for the jury to decide, as are mixed questions of law and fact where the jury applies the facts to the legal standard to render a verdict. United States v. Gaudin, 515 U.S. 506, 512-14, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). The court only retains authority to decide "pure questions of law." Id. at 513. Whether a prior offense involved alcohol or drugs is a factual determination, not a legal one. The issue cannot be decided as a matter of law because the existence of a conviction for reckless driving does not in and of itself prove that the offense involved drugs or alcohol. As pointed out in Mullen, the elements of reckless driving do not require drug or alcohol involvement. See RCW 46.61.500(1) ("Any person who drives

any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.").

Whether drugs or alcohol were involved in Wu's conduct is a question of pure historical fact that cannot be decided without looking to evidence outside of the conviction itself. "[T]he *existence* of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt." State v. Olsen, 180 Wn.2d 468, 473, 325 P.3d 187, (emphasis added), cert. denied, 135 S. Ct. 287, 190 L. Ed. 2d 210 (2014). "But when it comes to the question of what facts were established by a prior conviction," courts "may assess 'only facts that were admitted, stipulated to, or proved beyond a reasonable doubt' during the prior proceeding." State v. Allen, __Wn. App. 2d__, 425 P.3d 529, 533 (2018) (quoting Olsen, 180 Wn.2d at 473-74).

Wu did not stipulate or admit to drug or alcohol being involved in in connection with his prior reckless driving convictions, nor was the fact proved beyond a reasonable doubt during the prior proceedings. The existence of a prior conviction for reckless driving does not by itself prove involvement of drugs or alcohol because that factual predicate is not an element of the crime. "[B]ecause the involvement of alcohol or drugs is not an essential element of a prior reckless driving conviction, the State must prove both the existence of the prior offense and the fact of alcohol

or drug involvement." Mullen, 186 Wn. App. at 333. "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013); accord State v. Allen, __Wn.2d__, 431 P.3d 117, 121 (2018). Wu therefore had the right to have the jury decide this issue of fact. The Sixth Amendment right to a jury trial does not allow the court to usurp the function of the jury and decide the matter on its own authority.

The majority in Wu's case relied on a line of cases holding whether a prior conviction qualifies as a predicate conviction for a current offense is a question of law for the court to decide. Slip op. at 5-7. In each of those cases, however, there was no factual determination at issue. They all involved pure legal issues, so the Sixth Amendment right to a jury trial was not implicated.[3]

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[3] State v. Boss, 167 Wn.2d 710, 718-19, 223 P.3d 506 (2009) (lawfulness of a custody order was not an essential element of custodial interference, but rather a threshold issue to be determined by the trial court as a matter of law); State v. Case, 187 Wn.2d 85, 92, 384 P.3d 1140 (2016) (legal validity of prior convictions; i.e., whether they were based on violations of protection orders issued under one of the qualifying statutes, was for court to decide); State v. Carmen, 118 Wn. App. 655, 662-64, 77 P.3d 368 (2003) (same), review denied, 151 Wn.2d 1039, 95 P.3d 352 (2004); State v. Gray, 134 Wn. App. 547, 556, 138 P.3d 1123 (2006) (same), review denied, 160 Wn.2d 1008, 158 P.3d 615 (2007); State v. Cochrane, 160 Wn. App. 18, 27, 253 P.3d 95 (2011) (whether two prior Seattle Municipal Court DUI convictions qualified as violation of "an equivalent local

State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005) is the genesis of this line of cases. There, the Supreme Court held the existence of previous convictions for violation of a no-contact order is an element of current felony violation of a no-contact order, but the question of whether a prior conviction meets the definition and qualifies as a predicate offense under is a threshold question of law for the court. Miller, 156 Wn.2d at 30. Miller addressed a challenge to the legal validity of the prior conviction, concluding "issues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court." Id. at 31. The basis for its holding was that "issues concerning the validity of an

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ordinance" was a legal question for the court to decide); State v. Chambers, 157 Wn. App. 465, 468, 472-73, 237 P.3d 352 (2010) (whether out-of-state convictions qualified as "prior offenses" was a question for court to decide where the comparison was done under the legal prong of the comparability analysis), review denied, 170 Wn.2d 1031, 249 P.3d 623 (2011); State v. Bird, 187 Wn. App. 942, 943, 352 P.3d 215, review denied, 184 Wn.2d 1013, 360 P.3d 818 (2015) (reversing trial court's order of dismissal because there was sufficient information by which a court could determine that the guilty plea to vehicular assault referred to the DUI means of committing that offense); Allen, 425 P.3d at 531 (whether prior vehicular assault conviction qualified as "prior offense" under DUI statute was for court to decide as matter of law where the court looked at records to determine the conviction was based on the statutory alternative means involving intoxication).

order normally turn on questions of law. Questions of law are for the court, not the jury, to resolve." Id.

"Any time a judge's authority to prescribe a particular sentence depends on an additional fact other than the fact of a prior conviction, that fact must be proven by the jury's verdict or admitted by the defendant." Slip op. at 1 (dissent) (citing Blakely v. Washington, 542 U.S. 296, 305, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)). Wu did not admit or stipulate to the underlying facts alleged as part of the complaints associated with the reckless driving convictions. The fact of drug or alcohol involvement therefore needed to be proven to a jury to comply with the Sixth Amendment.

The majority refused to describe the drug/alcohol requirement as an "essential element of the crime" or "aggravating factor," instead characterizing it as part of the definition of "prior offense." Slip op. at 9 n.4. When it comes to the right to a jury trial, the label one attaches makes no difference. "'[T]rial by jury has been understood to require that *the truth of every accusation*, where proferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbours' . . . Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466,

477-78, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).

Accordingly, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). In deciding the question of what facts must be subject to a jury finding, "the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 530 U.S. at 494.

The required finding here is that the prior offense involved drugs or alcohol. That finding exposes Wu to an increased penalty — elevation of the crime from a gross misdemeanor to a felony. As such, it needs to be found by a jury to comply with the Sixth Amendment.

c. There was insufficient evidence to support a finding that the prior reckless driving offenses involved drugs or alcohol.

The trial court ruled the evidence was sufficient to show the prior reckless driving offenses involved drugs or alcohol because Wu was originally charged with a DUI. RP 685-91. The Court of Appeals, too, opted to find sufficient evidence based on the charge itself, holding the

trial court did not err in concluding the prior convictions for reckless driving were "originally charged as a DUI *and involved alcohol.*" (emphasis added). Slip op. at 10. For evidentiary support, the Court of Appeals pointed to the complaint signed by the prosecutor in one case and a police citation in the other, both of which alleged Wu had a breath alcohol content of 0.08 or higher. Id. These are mere accusations which the State never proved and Wu never admitted or stipulated to.

The State doesn't establish such a fact simply by making an accusation. See Tot v. United States, 319 U.S. 463, 469, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943) (legislature could not "validly command that the finding of an indictment . . . should create a presumption of the existence of all the facts essential to guilt."). "[T]he statute requires the State to establish that a prior driving conviction involved use of intoxicating liquor or drugs." Greene, 154 Wn.2d at 727-28. An unproven charge of DUI does not establish that intoxicating liquor or drugs were involved in that prior offense. Neither the Court of Appeals majority nor the State cite a single case for the proposition that a charge equals proof of the facts alleged. "Filing a charge is only an accusation. It is not proof." Slip op. at 11 (dissent).

In assessing sufficiency of the evidence, it does not matter whether involvement of drugs or alcohol is labeled an element of the crime or

merely a definitional aspect of an element. "The difference between a definitional statutory requirement and an element is generally pertinent to issues such as the adequacy of an information or the court's 'to convict' instructions." State v. Crowder, 196 Wn. App. 861, 869, 385 P.3d 275 (2016), review denied, 188 Wn.2d 1003, 393 P.3d 361 (2017). "But the same is not true when it comes to a sufficiency challenge. The State is obliged to present sufficient evidence to establish that a defendant's conduct falls within the scope of a criminal statute, regardless of whether the statute's requirements are elemental or definitional." Id. Where, as here, the evidence does not establish that the prior reckless driving convictions involved drugs or alcohol, the State failed to prove that those prior convictions satisfy the definition of "prior offense" found in the statute. Greene, 154 Wn.2d at 727-28; Mullen, 186 Wn. App. at 332.

d. Alternatively, the trial court committed reversible error in not instructing the jury that it must find the prior reckless driving convictions involved drugs or alcohol.

Relying on Mullen, defense counsel proposed a jury instruction that defined "prior offense" as involving drugs or alcohol. RP 681, 692-93: CP 121. The trial court refused to give the instruction based on its disagreement with Mullen. RP 692-94. The failure of the court to instruct the jury violated Wu's right to due process of law.

Under Mullen, the trial court was required to instruct the jury that a prior conviction for reckless driving, in order to qualify as a "prior offense," must involve drugs or alcohol. Mullen, 186 Wn. App. at 324. "Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless." State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). Such error is harmless only when (1) uncontroverted evidence supports the element at issue and (2) the reviewing court concludes beyond a reasonable doubt that the jury verdict would have been the same absent the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The evidence related to drug or alcohol involvement with the prior reckless driving convictions was, if not insufficient, at best thin. The only relevant evidence consisted of the fact that a prosecutor made a DUI allegation. A reasonable jury could readily find that an allegation, without supporting facts ever proven in a court of law, did not meet the State's burden of proof. The instructional error is therefore not harmless.

Further, trial courts must define technical words and expressions used in jury instructions. In re Detention of Pouncy, 168 Wn.2d 382, 390, 229 P.3d 678, 682 (2010). Terms of art require definition to ensure jurors are not "forced to find a common denominator among each member's individual understanding" of the term. State v. Allen, 101 Wn.2d 355,

362, 678 P.2d 798 (1984). A term is technical when its meaning differs from common usage. Pouncy, 168 Wn.2d at 391. One could hardly imagine a more technical term than "prior offense" as used in the DUI statute. See Former RCW 46.61.5055(14)(a). An instruction defined the term "prior offense," but the definition was incomplete because it did not notify the jury that drugs or alcohol needed to be involved in the prior offense. CP 130. Without instruction that the prior offense must involve drugs or alcohol, the jury has no way of knowing of the requirement based on ordinary understanding. The failure to appropriately instruct was prejudicial because the jury, in the absence of such instruction, had no way of knowing of the factual requirement.

F. CONCLUSION

For the reasons stated, Wu requests that this Court grant review.

DATED this 16th day of January 2019.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. KEN V. WU, Appellant.	)	No. 77045-4-I DIVISION ONE PUBLISHED OPINION FILED: December 17, 2018

MANN, J. — Under former RCW 46.61.502(6)(a), driving under the influence (DUI) is elevated from a gross misdemeanor to a felony if the defendant has "four or more prior offenses within ten years as defined in RCW 46.61.5055." Under RCW 46.61.5055(14)(a)(xii), a qualifying "prior offense" includes a conviction for reckless or negligent driving, "if the conviction is the result of a charge that was originally filed as a [DUI]."

Ken Wu appeals his felony DUI conviction. He contends that he was deprived of the right to a jury trial because the trial court concluded as a threshold matter that his prior two convictions for reckless driving were qualifying "prior offenses." Alternatively, Wu argues that even if the trial court had authority to make the threshold determination,

there was insufficient evidence to demonstrate the prior offenses involved drugs or alcohol. We affirm.

I.

On August 1, 2016, a Washington State Trooper conducted a traffic stop after observing a truck driven by Wu weaving between lanes on I-5. Wu was alone in the driver's seat and had bloodshot watery eyes. Wu's speech was thick and he had difficulty retrieving his registration. Wu agreed to attempt a field sobriety test but performed very poorly. Wu was arrested and transported to the police station. Wu submitted two breath samples with a breath alcohol content (BAC) of 0.072 and 0.068 respectively.

The State charged Wu with felony DUI, violating an ignition lock requirement, and driving with a suspended license.[1] The felony DUI charge was based on the State's claim that Wu had four "prior offenses" under RCW 46.61.502(6).

The trial court granted Wu's motion to bifurcate the trial. The first phase of trial determined whether Wu was guilty of DUI for the August 1, 2016, arrest. The jury found Wu guilty of DUI.

The second phase of trial determined whether Wu had four prior offenses within 10 years which would elevate the DUI to a felony DUI and whether Wu was guilty of driving with a suspended license.

During the second phase of trial, the State offered evidence of the following four prior convictions:

[1] The State dismissed the ignition interlock violation at the beginning of trial.

- April 29, 2014, conviction by the Marysville Municipal Court for first degree negligent driving, based on a September 29, 2013 citation for DUI.
- October 13, 2015, conviction by the Snohomish County District Court for reckless driving based on an October 9, 2013, citation for DUI.
- July 22, 2015, conviction by the Snohomish County District Court for DUI based on an October 15, 2013, citation for DUI.
- March 29, 2016, conviction by the Marysville Municipal Court for reckless driving based on a May 2, 2015, citation for DUI.

After the State rested, Wu moved to dismiss the felony DUI charge on the grounds that the State presented no evidence that Wu's two prior convictions for reckless driving involved alcohol or drugs. After reviewing the evidence supporting the four convictions and relevant case law, the trial court concluded that each of the prior convictions involved the use of alcohol and denied Wu's motion to dismiss.

Wu then unsuccessfully proposed a jury instruction that would have required the State to prove that a "prior offense" was related to alcohol or drugs beyond a reasonable doubt. The trial court declined Wu's proposed instruction because it had already found that Wu's prior offenses involved alcohol.

The jury found that Wu had four or more "prior offenses" within 10 years of August 1, 2016. The trial court sentenced Wu to 23 months of confinement on the DUI count and 90 days for driving with a suspended license. Wu appeals.

II.

A.

Wu's primary contention is that the State must prove to a jury, beyond a reasonable doubt, that each of the four prior convictions used to elevate a gross misdemeanor DUI to a felony DUI meet the statutory definition of a "prior offense." Wu contends that our Supreme Court's opinion in City of Walla Walla v. Greene, 154 Wn.2d 722, 116 P.3d 1008 (2005), and Division Two of this court's decision in State v. Mullen, 186 Wn. App. 321, 345 P.3d 26 (2016), requires the jury, not the court, to determine that the "prior offenses" involved alcohol or drugs as an element of the crime. We disagree.

We review questions of law de novo. State v. Chambers, 157 Wn. App. 465, 474, 237 P.3d 352 (2010). Due process requires the State to prove each essential element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, Sec. 22; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). The legislature defines the elements of a crime. Chambers, 157 Wn. App. at 475 (citing State v. Williams, 162 Wn.2d 177, 183, 170 P.3d 30 (2007)). "Proof of the existence of the prior offenses that elevate a crime from a misdemeanor to a felony is an essential element that the State must establish beyond a reasonable doubt." Chambers, 157 Wn. App. at 475.

B.

RCW 46.61.502(1) defines the elements of the crime of DUI.[2] Chambers, 157 Wn. App. at 475. A DUI is generally a gross misdemeanor. RCW 46.61.502(5). But in certain circumstances it can be elevated to a felony. Under former RCW 46.61.502(6)(a), "[i]t is a class B felony . . . if . . . [t]he person has four or more prior offenses within ten years as defined in RCW 46.61.5055."[3] Former RCW 46.61.5055(14) defines a "prior offense" to include

> [a] conviction for a violation of . . . [RCW] 46.61.500 [reckless driving], or 9A.36.050 [reckless endangerment] or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 [DUI].

RCW 46.61.5055(14)(a)(xii)

C.

We first address the question of whether the court or jury must determine if a person has the requisite "prior offenses" necessary to elevate a misdemeanor DUI to felony DUI. In Chambers, 157 Wn. App. at 477, we explained that

> under two other nearly identical statutory schemes, our appellate courts have held that while the existence of a prior conviction is an essential

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[2] RCW 46.61.502 provides "[a] person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or

(c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or

(d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

[3] Although both Wu and the State agree that the version of RCW 46.61.502(6) in place when Wu committed his crime elevated his DUI to a "Class C" felony, this appears to be incorrect. In March 2016, the legislature amended RCW 46.61.502(6) so that a DUI would become a "class B" felony, and this amendment became effective on June 9, 2016. Laws of 2016, Ch. 87, § 1(6): LAWS OF 2016, at ii. Wu committed this crime on August 1, 2016. The legislature since amended RCW 46.61.502(6)(a) to reduce the number of prior offenses to three. LAWS OF 2017, Ch. 335, § 1(6)(a).

> element that must be proved to the jury beyond a reasonable doubt, the question of whether a prior conviction qualifies as a predicate offense for purposes of elevating a crime from a misdemeanor to a felony is a threshold question of law for the court to decide.

Chambers, 157 Wn. App. at 477. After analyzing State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003) (elevating violation of no-contact order to felony based on previous violations of certain statutes); State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005) (approving the holding in Carmen); and State v. Boss, 167 Wn.2d 710, 718-19, 223 P.3d 506 (2009) (concluding the validity of a custody order under the first degree custodial interference statute was not an element of the crime but a threshold decision for the trial court); we concluded:

> While the State must prove beyond a reasonable doubt the existence of four or more prior DUI offenses within 10 years in order to convict a defendant of felony DUI in violation of former RCW 46.61.502(6), whether a prior offense meets the statutory definition in former RCW 46.61.5055(13) and qualifies as a predicate offense, is a threshold determination to be decided by the trial court.

Chambers, 157 Wn. App. at 481.

We confirmed our holding from Chambers in State v. Cochrane, 160 Wn. App. 18, 253 P.3d 95 (2011). In Cochrane, we concluded that while the existence of the four prior DUIs as defined by statute is an essential element of the crime that must be proved beyond a reasonable doubt, the threshold question of whether a prior conviction qualifies as a predicate offense is a threshold question of law for the court. 160 Wn. App. 26-27. We further concluded, that the specific details of the prior offenses are not essential statutory elements that must be alleged in the information. Cochrane, 160 Wn.2d at 25. More recently, we reconfirmed the holding from Chambers in State v. Bird, 187 Wn. App. 942, 945, 352 P.3d 215 (2015) (disagreeing with Mullen).

Thus, under our established precedents the existence of four or more prior DUI offenses within 10 years is an essential element of felony DUI, and must be proven beyond a reasonable doubt. But, whether a prior conviction meets the statutory definition in former RCW 46.61.5055(13), and thus qualifies as a "prior offense," is a threshold question of law to be decided by the trial court.

D.

Wu relies primarily on Mullen, a recent split decision from Division Two of this court. Patrick Mullen appealed his conviction for felony DUI, arguing that the jury should have been instructed that the State needed to prove beyond a reasonable doubt that alcohol or drugs were involved in his prior conviction for reckless driving. Mullen, 186 Wn. App. at 324. Relying on Greene, 154 Wn.2d at 727-28, the majority in Mullen concluded that the involvement of drugs or alcohol in the prior reckless driving conviction is an essential element of the crime of felony DUI and thus a question for the jury to decide. We respectfully disagree that Greene created a new essential element for the crime of felony DUI.

In Greene, the court interpreted "prior offenses" for the purpose of determining mandatory minimum sentences. Greene claimed that the statute establishing a harsher minimum sentence based on the definition of a "prior offense" was unconstitutional because each element of her prior DUI-related charge was not proved beyond a reasonable doubt. 154 Wn.2d at 724-25. The district court, relying on State v. Shaffer, 113 Wn. App. 812, 818-20, 55 P.3d 668 (2002), overruled by Green, 154 Wn.2d at 722, agreed.

In Shaffer, this court held that RCW 9.94A.310(7), a statute that required a sentence for a vehicular homicide conviction to be enhanced by two years if the defendant also had a "prior offense" of reckless driving that was originally charged as a DUI, violated due process. 113 Wn. App. at 818-19. The Shaffer court "reasoned that since the statute does not require any proof that an earlier DUI was committed, it violates due process." Greene, 154 Wn.2d at 726.

In Greene, our Supreme Court overruled Shaffer and held that RCW 46.61.5055(12)(a)(v) was constitutional. 154 Wn.2d at 727-28. In doing so, the court concluded:

> The statutory definition requires a conviction for negligent driving, or other listed offense, originating from a DUI charge. RCW 46.61.5055(12)(a)(v). Accordingly the statute requires the State to establish that a prior driving conviction involved the use of intoxicating liquor or drugs. Thus, due process is satisfied for the purposes of this mandatory enhancement if the prior conviction exists and the prosecution can establish that intoxicating liquor or drugs were involved in that prior offense.

Greene, 154 Wn.2d at 727-28 (footnote omitted). Thus, under Greene, to demonstrate a prior conviction for reckless driving meets definition of a "prior offense" under RCW 46.61.5055(14)(a)(xii), the State must establish that intoxicating liquor or drugs were involved in the event leading to the reckless driving conviction.

But contrary to the majority opinion in Mullen, nothing in Greene altered the legislature's definition of the essential elements of the crime of felony DUI. As the dissent in Mullen summarized:

> While the fact that a person has four prior DUI offenses is an essential element of the crime of felony DUI under RCW 46.61.502(6) that must be proved to the jury beyond a reasonable doubt, whether a prior offense meets the statutory definition in RCW 46.61.5055(13) is not an

> essential element of the crime. Rather, the question of whether a prior offense meets the statutory definition is a threshold question of law to be decided by the trial court before admitting a prior offense into evidence at trial.

Mullen, 186 Wn. App. at 339 (Melnick, J., dis) (citing State v. Chambers, 157 Wn. App. 465, 468, 237 P.3d 352 (2010); Cochrane, 160 Wn. App. at 27).

We had the opportunity to consider Mullen in State v. Bird, 187 Wn. App. 945, 352 P.3d 215 (2015). The defendant in Bird was charged with felony DUI based on the predicate offense of vehicular assault. Under RCW 46.61.502(6)(B)(ii) and RCW 46.61.5055(4)(b)(ii), a DUI charge can be elevated to a felony DUI when a person has previously been convicted of vehicular assault while under the influence of alcohol. On appeal, we disagreed with Mullen, and in reliance on Chambers and Cochrane, held that whether a prior conviction qualifies as a predicate offense is a threshold question of law for the court.[4] 187 Wn. App. at 945-46. We agree with Bird, Chambers, and Cochrane, and continue to hold that it was a threshold question for the trial court to determine if Wu's prior convictions for reckless driving involved intoxicating alcohol or drugs.[5]

The trial court did not err in making the threshold determination of whether Wu's

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[4] Like the majority in Mullen, the dissent argues that under Greene the question of whether alcohol was involved in the prior reckless driving convictions is an additional aggravating factor that must be separately proven as a question of fact. Dissent at 9-10. We respectfully disagree. While Greene recognized that due process is satisfied if "the prosecution can establish that intoxicating liquor or drugs were involved in the prior offense," the Court did not elevate the involvement of liquor of drugs to an aggravating factor. Nor did the Court conclude that the involvement of liquor or drugs was an essential element of the crime. Greene, 154 Wn.2d at 727-28. Whether a prior offense meets the statutory definition in RCW 46.61.5055(14)(a) is not an essential element of the crime. Instead, whether a prior offense meets the statutory definition is a threshold question of law to be decided by the trial court prior to admitting the evidence to the jury.

[5] The trial court considered both Mullen and Bird and concluded that the dissent in Mullen and this court's decision in Bird were persuasive.

four prior convictions qualified as "prior offenses" before submitting the convictions to the jury.

III.

Wu argues alternatively that if the trial court did have the authority to make the threshold determination, there was insufficient evidence to demonstrate his two prior convictions for reckless driving involved intoxicating alcohol or drugs. We disagree.

We first consider Wu's reckless driving conviction from the Snohomish County District Court. The State presented certified copies of the original criminal complaint and the district court's judgment and sentence. The original complaint, signed under penalty of perjury by the deputy prosecuting attorney, states that the police reports indicated that within two hours after driving Wu had "an alcohol concentration of 0.08 or higher as shown by analysis of the defendant's breath or blood made under RCW 46.61.506". The judgment and sentence indicates that the original charge was DUI and that it was amended to reckless driving. The trial court did not err in concluding that the Snohomish County District Court conviction for reckless driving was originally charged as a DUI and involved alcohol.

We next consider Wu's reckless driving conviction from the Marysville Municipal Court. The State presented a certified copy of the police citation and the court's finding and sentence. The original citation shows that Wu submitted a breath sample during the incident that resulted in a BAC of 0.095. The district court's finding and sentence indicates that the original charge was DUI and that it was amended to reckless driving. The trial court did not err in concluding that the Marysville District Court conviction for reckless driving was originally charged as a DUI and involved alcohol.

We affirm Wu's conviction for felony DUI.

Mann, J.

WE CONCUR:

Leach, CJ

State v. Wu, No. 77045-4-I

BECKER, J. (dissenting) – I respectfully dissent. This court should follow the analysis of RCW 46.61.5055(14)(a)(xii) used in State v. Mullen, 186 Wn. App. 321, 337, 345 P.3d 26 (2015) and foreshadowed in City of Walla Walla v. Greene, 154 Wn.2d 722, 116 P.3d 1008 (2005), cert. denied, 546 U.S. 1174, 126 S. Ct. 1339, 164 L. Ed. 2d 54 (2006). The penalty for a current conviction for driving under the influence (DUI) cannot be enhanced merely because a prior reckless driving conviction was originally filed as a DUI. Any time a judge's authority to prescribe a particular sentence depends on an additional fact other than the fact of a prior conviction, that fact must be proven by the jury's verdict or admitted by the defendant. Blakely v. Washington, 542 U.S. 296, 305, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Absent an admission by the defendant, due process requires that the involvement of alcohol or drugs in a reckless driving conviction must be proved by the State as a fact in addition to the conviction itself.

Appellant Ken Wu's 2016 violation of the DUI statute, ordinarily a gross misdemeanor, would become a felony if the State could prove Wu had four "prior offenses" within 10 years. Former RCW 46.61.502(5), (6)(a) (2016).[1] Many types of convictions fit within the definition of "prior offense." RCW 46.61.5055(14)(a). The State offered Wu's two prior convictions for reckless

[1] Three convictions, not four, are required under the current version of the statute as the result of an amendment in 2017. Former RCW 46.61.502(6)(a) (2016) was amended by LAWS OF 2017, ch. 335 § 1 (eff. July 23, 2017).

46.61.5055(14)(a). The State offered Wu's two prior convictions for reckless driving and his two prior convictions for DUI. Only his two prior convictions for reckless driving are at issue here.

The statute provides that a conviction for reckless driving qualifies as a "prior offense" if it is the result of a charge that was originally filed as a violation of the DUI statute. RCW 46.61.5055(14)(a)(xii).[2] Wu's prior convictions for reckless driving on October 13, 2015 and March 29, 2016 were each originally filed as a DUI.

Wu moved to dismiss the felony DUI charge, citing Mullen.[3] The trial court denied the motion. Mullen, a split decision from Division Two, is the leading case on the use of prior reckless driving convictions as enhancements. The trial court found the dissent in Mullen more persuasive and also more consistent with a Division One opinion, State v. Bird, 187 Wn. App. 942, 943, 352 P.3d 215, review denied, 184 Wn.2d 1013, 360 P.3d 818 (2015).[4] The trial court counted Wu's

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[2] "A 'prior offense' means . . . [a] conviction for a violation of RCW 46.61.5249 [first degree negligent driving], 46.61.500 [reckless driving], or 9A.36.050 or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522." RCW 46.61.5055(14)(a)(xii).

[3] In Mullen, the statute at issue was former RCW 46.61.5055(14)(a)(x); for purposes of this opinion it remains the same though it is now codified as RCW 46.61.5055(14)(a)(xii).

[4] When conflicting Court of Appeals decisions exist, a superior court need not consider itself bound by the opinion from the division in which the superior court sits, but should instead use its judgment to attempt to determine which opinion the Supreme Court would agree with. See Mark DeForrest, In the Groove or in a Rut? Resolving Conflicts between the Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 Gonz. L. Rev. 455 (2012/13), cited with approval in Grisby v. Herzog, 190 Wn. App. 786, 809, 362 P.3d 763 (2015).

reckless driving convictions as "prior offenses" based on documents showing that each case had originally been filed as a DUI.[5]

To understand how the uncertainty has developed, one must go back to State v. Shaffer, 113 Wn. App. 812, 55 P.3d 668 (2002), a Division One opinion. The defendant in Shaffer was convicted of vehicular homicide. He had a prior conviction for reckless driving that was originally filed as a DUI. The State argued for a mandatory 24-month sentence enhancement based on the reckless driving conviction being a "prior offense."[6] Shaffer rejected this argument. "Because the sentence enhancement deprives Shaffer of his liberty based on an unproven allegation of DUI in a criminal case resulting in a reckless driving conviction, we hold that the statute is unconstitutional and violates Shaffer's due process rights." Shaffer, 113 Wn. App. at 822.

The issue next arose in Greene, 154 Wn.2d 722. The defendant in Greene, convicted of DUI, had a prior conviction for first degree negligent driving that was originally filed as a DUI. A conviction for first degree negligent driving counts as a "prior offense" under the statute defining that term.[7] But unlike a conviction for reckless driving (the fact pattern in Shaffer), a conviction for first degree negligent driving necessarily requires proof beyond a reasonable doubt that the driver exhibited the effects of alcohol or drug use. Compare RCW

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[5] Report of Proceedings at 688-90.
[6] In Shaffer, the statute at issue was former RCW 46.61.5055(11)(a)(v); for purposes of this opinion, it remains the same though it is now codified as RCW 46.61.5055(14)(a)(xii).
[7] In Greene, the statute at issue was former RCW 46.61.5055(12)(a)(v); for purposes of this opinion, it remains the same though it is now codified as RCW 46.61.5055(14)(a)(xii).

46.61.500(1) (reckless driving), with RCW 46.61.5249(1)(a) (first degree negligent driving). The State argued for a mandatory 24-month sentence enhancement based on the negligent driving conviction being a "prior offense." The trial court rejected this argument, following Shaffer. On direct review, the Supreme Court reversed. The court did not say the result in Shaffer was wrong, but the court overruled Shaffer's blanket holding that the statute defining "prior offense" to include an unproven charge of DUI was unconstitutional. "Subject only to the constraints of the constitution, the legislature may define and punish criminal conduct." Greene, 154 Wn.2d at 727. The court concluded that the definition of "prior offense," currently codified as RCW 46.61.5055(14)(a)(xii), satisfies due process under two conditions: if the prior conviction exists and if "the prosecution can establish that intoxicating liquor or drugs were involved in that prior offense." Greene, 154 Wn.2d at 727-28. On the facts in Greene, there was no due process violation because proving the elements of first degree negligent driving necessarily proved the involvement of liquor or drugs:

> For Greene, the fact that she was convicted of first degree negligent driving is sufficient to satisfy her due process protections because all elements of that offense are established by virtue of the conviction itself. Accordingly, we hold that here, RCW 46.61.5055(12)(a)(v) survives constitutional challenge.

Greene, 154 Wn.2d at 728 (emphasis added).

Mullen was the next case to consider the due process implications of the statute discussed in Shaffer and Greene.[8] The defendant's violation would have

[8] In Mullen, the statute at issue was former RCW 46.61.5055(14)(a)(x); for purposes of this opinion it remains the same though it is now codified at RCW 46.61.5055(14)(a)(xii).

been a misdemeanor, but he was convicted of felony DUI because he had a prior conviction for reckless driving that was originally filed as a DUI. The Mullen majority followed Greene's holding that the State had to prove Mullen's reckless driving conviction involved alcohol or drugs in order to satisfy due process. But the majority distinguished Greene on the basis that the prior conviction used for enhancement in Greene was first degree negligent driving, not reckless driving. "The difference in Mullen's case is that the State cannot prove that alcohol or drugs were involved merely by virtue of his conviction for reckless driving." Mullen, 186 Wn. App. at 334.

The State argued in Mullen, as it does in the present case, that counting the reckless driving conviction as a "prior offense" satisfied the statute because a docket sheet confirmed that Mullen was originally charged with DUI, and it satisfied due process because a motion to suppress the blood alcohol test results in the reckless driving case showed that the reckless driving conviction was alcohol or drug related as required by Greene. Mullen, 186 Wn. App. at 334. The court rejected the State's argument for three sound reasons:

> First, it ignores the Greene court's reasoning in overruling Shaffer. The court overruled Shaffer because it disagreed that the felony DUI statute required the State to prove the underlying DUI. Greene, 154 Wn.2d at 727. The court held that the legislature sought to apply felony DUI only to those defendants who were convicted of multiple alcohol- or drug-related offenses. Greene, 154 Wn.2d at 727-28. The way to accomplish this is to prove that alcohol or drugs were involved in the prior offense and does not require the State to reprove the offense.
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> Second, the State's argument is misguided because if the Greene court sought merely to require the State to prove that (1) the prior conviction existed and (2) the prior conviction was originally charged as a DUI, the Greene court could have relied

> solely on the language of the statute. See RCW 46.61.5055(14)(a)(x). Instead Greene states that due process requires the State to "establish" that alcohol or drugs were involved. 154 Wn.2d at 728.
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> Finally, the State's argument ignores the fact that the defendant in Greene pleaded guilty to first degree negligent driving and that alcohol or drugs are an essential element of that offense. RCW 46.61.5249; see also 154 Wn.2d at 728. This is an important difference from Mullen's case because Greene was convicted beyond a reasonable doubt of an alcohol- or drug-related offense. Mullen, in contrast, pleaded guilty to a non-alcohol- or non-drug-related prior offense, reckless driving, which the State now seeks to use to convict him of a more serious alcohol- or drug-related offense.

Mullen, 186 Wn. App. at 335.

For the reasons given in Mullen, we should reject the virtually identical argument the State makes in Wu's case. As the State interprets Greene, a prior reckless driving conviction will enhance the penalty for a current DUI conviction if the State shows that the prior offense was initially filed as a DUI. Br. of Resp't at 9. This is wrong. A reckless driving conviction does not inherently involve alcohol or drugs. Greene does not hold that an accusation equals proof.

The State's position is unsatisfactory practically as well as legally. First, it creates a dubious template for the drafting of future statutes. For example, the State's reasoning would support a "three strikes" statute that counted a prior conviction for shoplifting as a strike merely because it was initially filed as a robbery. Second, allowing the State's initial accusation to serve as proof creates an incentive to overcharge and then amend to a lesser charge that can be proved.

The majority relies on a line of cases holding that the fact of a prior conviction is a threshold question for the judge to decide. See, e.g., Bird, 187 Wn. App. at 943; State v. Cochrane, 160 Wn. App. 18, 27, 253 P.3d 95 (2011); State v. Chambers, 157 Wn. App. 465, 468, 237 P.3d 352 (2010), review denied, 170 Wn.2d 1031, 249 P.3d 623 (2011). These cases are applicable when an enhanced penalty depends solely on the existence and legal nature of a prior conviction. State v. Allen, ___ Wn. App. ___, 425 P.3d 529, 532 (2018). But the statute we are concerned with uses the defined term "prior offense," a term that is broader than a conviction. Allen, 425 P.3d at 532. The majority overlooks this distinction.

Allen was governed by the same statute as Bird—under RCW 46.61.502(6)(b)(ii), a conviction for DUI is elevated from a misdemeanor to a felony if the person was ever previously convicted of vehicular assault while under the influence. Vehicular assault can be committed by three alternative means, only one of which requires proof that the defendant was under the influence. RCW 46.61.522(b). In both Bird and Allen, the DUI defendant had a prior conviction for vehicular assault as the result of a guilty plea. In each case, the defendants argued that the record of the prior conviction for vehicular assault did not clearly show the offense was committed by the means requiring proof of operating under the influence. In each case, the appellate court analyzed that argument by looking at the prior guilty plea. In each case, the prior guilty plea encompassed all three charged means of vehicular assault, including the means necessary for a later DUI enhancement. In each case, the appellate court held

that determining whether the vehicular assault conviction could be admitted for enhancement purposes was a question of law for the court.

There is a critical distinction between enhancing a DUI sentence with a prior conviction for vehicular assault under RCW 46.61.502(6)(b)(ii), as was done in Bird and Allen, and enhancing a DUI sentence with a "prior offense" of reckless driving under RCW 46.61.5055(14)(a)(xii)—the fact pattern in Mullen and Wu's case. To enhance the penalty for a current DUI, a prior conviction for vehicular assault does not have to be originally filed as a DUI. RCW 46.61.502(6)(b)(ii); see also RCW 46.61.5055(14)(a)(i) (a vehicular assault conviction does not have to be originally filed as a DUI to be a "prior offense"). The Allen court noticed and explained the distinction, and in doing so cited Mullen with approval:

> Whether a prior vehicular assault conviction qualifies to elevate a DUI charge from a misdemeanor to a felony involves issues of fact and law. Factually, the State must prove the conviction exists and pertains to the defendant. But once this burden is satisfied, the rest of the inquiry is purely legal. The nature of a prior conviction, and the facts established thereby, are set at the time of a verdict or guilty plea. Descamps v. United States, 570 U.S. 254, 269-70, 133 S. Ct. 2276, 186 L .Ed. 2d 438 (2013); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005). They cannot be altered or revisited at a subsequent evidentiary hearing or trial.
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> Our inquiry would be different had the penalty statute at issue in this case not been limited in application to a prior "conviction." For example, RCW 46.61.502(6)(a) currently permits elevating a DUI from a misdemeanor to a felony based on three or more "prior offenses." The term "prior offense" is broader than a conviction. RCW 46.61.5055(14)(a). It includes (among other things) convictions accompanied by additional aggravating facts. Id. Additional aggravating facts are matters that can be the subject of a new fact finding proceeding. State v. Mullen, 186 Wn. App. 321, 334, 345 P.3d 26 (2015) (citing State v. Roswell, 165 Wn.2d 186, 194, 196 P.3d 705 (2008)). But when it comes to the core issue of what was

> established by a prior conviction, no additional factual inquiry applies.
>
> Because the nature of a prior conviction is a legal matter, it is something for the court to decide, not a jury. See State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005).

Allen, 425 P.3d at 532.

Bird is consistent with Allen in stating, correctly, that the nature of a prior conviction is purely a legal matter. "Whether a prior conviction qualifies as a predicate offense is a threshold question of law for the court, and not an essential element of the crime of felony DUI." Bird, 187 Wn. App. at 945. But Bird follows up this statement with an unnecessary and inaccurate criticism of Mullen: "In Mullen, a divided court held that the trial court erred in not instructing a jury that the State was required to prove beyond a reasonable doubt that alcohol or drugs were involved in the prior conviction for reckless driving. But the issue of whether that conviction qualifies is a question of law, not fact." Bird, 187 Wn. App. at 945. Bird misstates the holding of Mullen as if it turned on the use of a prior conviction for enhancement without any other facts. What Mullen holds is that a prior conviction for reckless driving qualifies as a "prior offense" for enhancement purposes only when it is accompanied by the additional aggravating fact that it was for a violation initially filed as a DUI. RCW 46.61.5055(14)(a)(xii).

Ultimately, all three cases—Mullen, Bird, and Allen—reach correct results that are consistent with Greene. In Greene, the State did not have to prove that the "prior offense" of first degree negligent driving involved alcohol or drugs because that fact was "established by virtue of the conviction itself." Greene, 154

Wn.2d at 728. In Bird and Allen, the State had only to prove a prior conviction for vehicular assault; no additional aggravating fact was required to satisfy due process. In Mullen, the State had to prove an additional aggravating fact and failed to do so.

Cochrane and Chambers are the other cases cited by the majority for the proposition that a "prior offense" is always a threshold question of law for the court to decide. Cochrane and Chambers are not on point. They do not address the unique definition of "prior offense" that allows a prior conviction for reckless driving to be used for enhancement based solely on how it was originally charged, regardless of whether drugs or alcohol were involved. Because the predicate offenses were all prior DUI convictions, Greene was not discussed. Like the first degree negligent driving conviction in Greene, a DUI conviction inherently establishes the use of alcohol or drugs that is why Wu does not challenge the use of his two prior DUI convictions. The issue here is what the State must additionally prove when the predicate offense does not inherently establish the use of alcohol or drugs and its admissibility for enhancement depends on what charge the State originally filed. That issue was not present in Cochrane or Chambers.

The additional fact necessary to make a prior reckless driving conviction qualify as a "prior offense" can be established by jury fact-finding, as the defendant proposed in Mullen and as Wu proposed in the present case. Or in some cases it can be determined by the court as a matter of law, but only if the record of that prior conviction shows that the defendant stipulated or admitted to

involvement of drugs or alcohol. Cf. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Otherwise, allowing a court to discern drug or alcohol involvement from the underlying facts of the reckless driving conviction "proves problematic." Lavery, 154 Wn.2d at 258. Here, the trial court did not submit the issue to the jury. And the documents with which the State attempted to establish admissibility of the two "prior offenses" of reckless driving did not include Wu's stipulation or admission to drug or alcohol involvement. The documents merely showed that the reckless driving convictions were originally filed as DUIs. Filing a charge is only an accusation. It is not proof.

The correct result in the present case, under Greene and Mullen, is to reverse the felony DUI conviction. The prosecution did not "establish that intoxicating liquor or drugs were involved" in Wu's prior reckless driving convictions. Greene, 154 Wn.2d at 728.

The parties agree that if the felony conviction is reversed, it is appropriate to remand for entry of a DUI misdemeanor conviction, as was done in Mullen, 186 Wn. App. at 337. The jury was instructed on and found the elements for gross misdemeanor DUI in the initial phase of Wu's bifurcated trial. See In re Pers. Restraint of Heidari, 174 Wn.2d 288, 293-94, 274 P.3d 366 (2012). The case should be remanded for entry of a conviction for misdemeanor DUI.

Becker, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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