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NO. 96747-4-I

THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

KEN WU,

Appellant.

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

THE HONORABLE KEN SCHUBERT, JUDGE

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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A. INTRODUCTION

RCW 46.61.5055 defines those convictions which qualify as “prior offenses” for the purpose of elevating Driving While Under the Influence (DUI) from a gross misdemeanor to a felony. The statute allows for some non-DUI convictions to function as “prior offenses” if originally charged as DUI. Division One and Division Two of the Court of Appeals both assume that alcohol involvement is a necessary component of a “prior offense,” but disagree on whether it is a question of law for the court or fact for the jury. This debate, however, ignores a more fundamental issue: whether the fact of alcohol involvement need be shown at all when the statute plainly does not require it.

Wu assumes that City of Walla Walla v. Greene, *infra*, requires proof of alcohol use. The State respectfully suggests that the relevant language in Greene does not clearly address why this should be a constitutional mandate in the absence of any statutory obligation. The statute only requires, and the jury in this case found, evidence of a prior conviction that was originally charged as DUI. Because this arrangement is within the legislature’s plenary power to define crimes and punishments, there was no error in Wu’s case.

**B. ISSUE PRESENTED**

Wu was convicted of felony DUI based in part on two convictions for reckless driving that were originally charged as DUI. Was it within the plenary power of the legislature to designate these convictions as “prior offenses?”

**C. STATEMENT OF THE CASE**

**RELEVANT FACTS.**

The State charged Ken Wu with felony DUI, violating an ignition interlock requirement, and first degree driving with a suspended license. CP 1-2. The felony DUI charge was based on Wu having four “prior offenses” as defined by RCW 46.61.5055(14)(a). CP 1. The court granted Wu’s motion to bifurcate the trial so that the jury would consider his conduct on the date of arrest before discovering his criminal history. RP 98-100.

The jury first considered the elements of gross misdemeanor DUI. CP 117. After convicting Wu of DUI, the jury then heard evidence regarding Wu’s four prior offenses, along with the suspended license charge. RP 98-100, 248-49.<sup>1</sup> The State presented documentary evidence that Wu had four prior offenses within the past ten years: one conviction

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<sup>1</sup> The State dismissed the ignition interlock violation at the beginning of trial. CP 56.

for DUI, one conviction for first degree negligent driving, and two convictions for reckless driving. Ex. 9. The reckless driving and first degree negligent driving convictions were each originally charged as DUI. Ex. 9.

Wu moved to dismiss the felony DUI after the State rested, arguing in part that the prosecution had failed to present sufficient evidence that his reckless driving convictions “involved alcohol.” RP 672-76. The court denied Wu’s motion, noting that it had already admitted the predicate offenses as a threshold question of law. RP 684-91. The court then made further findings that each prior offense was alcohol-related. *Id.* The court refused to instruct the jury that it needed to find each prior offense involved alcohol. CP 121, 123; RP 692.

The jury found by special verdict that Wu had four prior offenses, and also convicted him of driving with a suspended license. RP 732. The court sentenced Wu within the standard range on the felony DUI, and imposed 90 days confinement on the suspended license charge. CP 172-76, 181-83. Wu appealed, arguing that the trial court erred by declining to task the jury with deciding if each prior offense was alcohol-related.

Division One of the Court of Appeals affirmed Wu’s conviction in a split decision. *State v. Wu*, 6 Wn. App. 2d 679, 431 P.3d 1070 (2018). The majority opinion held that whether Wu’s prior convictions qualified

as predicate offenses for felony DUI was a question of law for the court, and that the pertinent issue for the jury was whether the prior convictions existed. Id. at 687-89. This Court granted Wu's petition for review.

**D. ARGUMENT**

**THE STATE IS NOT REQUIRED TO PROVE THAT PRIOR RECKLESS DRIVING CONVICTIONS INVOLVED ALCOHOL BECAUSE IT IS NOT AN ELEMENT OF FELONY DUI.**

Wu argues that a jury must find that the conduct underlying his reckless driving convictions involved alcohol. Wu is incorrect because alcohol use in prior offenses is not an element of felony DUI. When a reckless driving conviction is used as a "prior offense," the legislature requires only that the State prove the charge was originally filed as DUI. Because alcohol-relatedness is not an element of the crime, it need not be found by either a judge or jury at trial.

**1. The Legislature Intended For Reckless Driving Convictions Originally Filed As DUI To Count As "Prior Offenses."**

Due process requires that the State prove each element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The legislature defines these elements through the enactment of statutes. State v. Chambers, 157 Wn. App. 465, 475, 237 P.3d 352 (2010). It is presumed that the legislature intends to

enact valid laws, and courts have a duty to “discern and implement the legislature’s intent.” State v. Williams, 171 Wn.2d 474, 476, 251 P.3d 877 (2011); State v. Bryan, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980).

A person is guilty of DUI if they operate a motor vehicle while under the influence of or affected by intoxicating liquor. RCW 46.61.502(1)(c). DUI is typically a gross misdemeanor. RCW 46.61.502(5). However, DUI becomes a Class C felony if an individual has been convicted of four or more “prior offenses” within 10 years. Former RCW 46.61.502(6)(a) (amended 2017).<sup>2</sup> RCW 46.61.5055(14)(a) defines what constitutes a “prior offense.” In addition to DUI itself, the definition includes several crimes that commonly result from plea bargaining:

“[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 [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...

RCW 46.61.5055(14)(a)(xii).

The legislature amended RCW 46.61.5055 in 1998 to count convictions for reckless driving as “prior offenses” if originally charged as DUI. 1998 Wash. Legis. Serv. ch. 211 (S.S.B. 6166) (West). Testimony

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<sup>2</sup> RCW 46.61.502 has since been amended to reduce the required number of prior offenses to three. 2017 Wash. Legis. Serv. ch. 335, § 1 (S.B. 5037) (West). It is undisputed that Wu’s arrest predated this amendment.

surrounding this legislation emphasized that reduction to reckless driving was a common plea bargain, and that including these convictions would thus punish a more complete universe of DUI offenders. WA H.R. B. Rep., 1998 Reg. Sess. S.B. 6166 (1998).

The legislature did not limit the application of this principle to misdemeanor reckless driving. For example, convictions for vehicular homicide and vehicular assault under the “reckless manner” prong count as prior offenses if originally charged under the DUI prong. RCW 46.61.5055(14)(a)(x)-(xi). Presumably, any ruling in this case will affect all similar subsections of the prior offense statute.

**2. Nothing In The Statutory Language Of RCW 46.61.5055 Requires The State To Prove That A Prior Offense Of Reckless Driving Was Alcohol-Related.**

The parties do not dispute that the existence of prior convictions is an essential element of felony DUI that must be found by the jury. E.g., Wu, 6 Wn. App. 2d at 683. The fault line in our jurisprudence exists at Division One’s holding that alcohol involvement relates to the applicability of a prior conviction, and is thus a preliminary question of law for the court. Compare Wu, 6 Wn. App. 2d at 686 with State v. Mullen, 186 Wn. App. 321, 336, 345 P.3d 26 (2015). But although Division One reached the correct practical result, both Wu and Mullen

have misconstrued the statute. RCW 46.61.5055(14)(a)(xii) requires only that a reckless driving conviction be originally filed as DUI. It does not require any additional showing that the reckless driving conviction involved alcohol. Id.

Courts do not add content to an unambiguous statute, and assume the legislature “means exactly what it says.” State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). If the legislature had wished to require proof that a prior offense was alcohol-related, then the statutory language would have stated as much. This Court should not “second-guess the elements of the offenses the legislature has unambiguously written,” nor should it impose a burden unwarranted by the statutory language. State v. Hancock, 190 Wn. App. 847, 856, 360 P.3d 992 (2015); State v. Abbott, 45 Wn. App. 330, 334, 726 P.2d 988 (1986).

Courts can create implied elements, but they generally do not do so if legislative intent is clear. State v. Miller, 156 Wn.2d 23, 28, 123 P.3d 827 (2005); see State v. Bradshaw, 152 Wn.2d 528, 539-40, 98 P.3d 1190 (2004) (Court declined to add implied *mens rea* element to drug possession after considering legislative history). While Washington courts have in the past found elements implied based on “longstanding principles of law,” this was typically done to incorporate common-sense legal standards into offenses with archaic common law origins. See Miller, 156

Wn.2d at 28. This Court has, for example, found that property being taken from another's possession was an implied element of robbery. Id. at 28 (citing State v. Hall, 154 Wash. 142, 144, 102 P. 888 (1909)). It would be improper to judicially imply an element for felony DUI because the statute is plainly written. Furthermore, the concepts of felony DUI and "prior offenses" are relatively new, and do not have the venerable common law roots of crimes like burglary and robbery.

3. **City Of Walla Walla v. Greene Did Not Add Any Additional Elements To The Felony DUI Statute.**

Both Mullen and Wu rely heavily on City of Walla Walla v. Greene, 154 Wn.2d 722, 116 P.3d 1008 (2005). The defendant in Greene argued it was unconstitutional to enhance her sentence for DUI based on a past conviction for first degree negligent driving.<sup>3</sup> Id. at 724-25. Relying on State v. Shaffer, 113 Wn. App. 812, 818-20, 55, P.3d 668 (2002) (overruled by Greene, 154 Wn.2d at 725), the trial court determined that the relevant definition of "prior offense" violated due process because it increased Greene's sentence based on an unproven DUI charge. Id.

Greene ultimately reversed the trial court, overruling Shaffer in the process. Shaffer addressed a sentencing enhancement for vehicular homicide predicated on a conviction for reckless driving that was

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<sup>3</sup> A conviction for first degree negligent driving also counts as a "prior offense" if originally charged as DUI. RCW 46.61.5055(14)(a)(xii).

originally charged as DUI. Shaffer, 113 Wn. App. at 814. Shaffer's argument, essentially identical to Wu's, was that a criminal penalty cannot be increased based on an unproven charge. Id. at 817. Division One agreed, holding that the enhancement was unconstitutional because it effectively "elevate[d] a prior reckless driving conviction to a DUI conviction without any proof" of DUI. Id. at 818.

This Court overruled Shaffer in its entirety. Greene, 154 Wn.2d at 727-28. This is noteworthy because Greene could have simply distinguished Shaffer on the basis that it involved a reckless driving prior offense while Greene involved a conviction for negligent driving. Instead, Greene criticized Shaffer for taking inferential liberties with the statutory language. Id. at 727. The Court then continued:

[The applicability of 46.61.5055 is limited] to those convictions where DUI was the predicate charge, thus requiring alcohol or drugs to be involved with the convicted driving offense. No parties dispute the statute is constitutional without this limiting DUI element. It follows that with the limiting element, the legislature is simply clarifying those alcohol or drug-related prior offenses to be considered. While the Shaffer court might be correct if the statutory definition of prior offenses listed only unproven charges, here, the statute specifies the prior convictions being applied to impose an enhanced punishment for a later offense. Subject only to the constraints of the constitution, the legislature may define and punish criminal conduct.

Greene, 154 Wn.2d at 727. This language suggests that the statutory scheme is sound because any increased penalty is ultimately grounded in a

proven conviction. Greene did not purport to add to the elemental burden enumerated by the legislature. Id.; Wu, 6 Wn. App. 2d at 687.

Wu and Mullen both seize on the following language from Greene to support their argument:

The statutory definition requires a conviction for negligent driving, or other listed offense, originating from a DUI charge. 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.

Greene, 154 Wn.2d at 727-28 (internal citations omitted); Mullen, 186 Wn. App. at 332-33. This passage suggests that the legislature intended to require alcohol relatedness in all prior offenses. Greene, 154 Wn.2d at 727. But while that was likely the *spirit* of the statute, the legislature's intended policy goal does not by itself generate additional elements. State v. Alvarez, 74 Wn. App. 250, 258, 872 P.2d 1123 (1994). Shaffer's rejection of RCW 46.61.5055(14)(a) was incorrect because the statute ultimately relies on proven convictions to enhance a sentence. Id. Adopting Wu's position would essentially reanimate Shaffer, a result at direct odds with the holding of Greene.

Additional context can be deduced from the Greene dissent. While a dissenting opinion is not law, e.g., General Construction Company v.

Public Utility District No. 2 of Grant County, 195 Wn. App. 698, 708-09, 380 P.3d 636 (2016), it is noteworthy that the dissent was advocating for Wu's position:

The majority concludes the State is required to demonstrate the first conviction was alcohol related. This is so, the majority reasons, because the statute requires a DUI charge. But that is the problem. The first conviction could have been charged as DUI even if the charge was inaccurate and could not be proved. The result is a mandatory sentence enhancement based on a conviction that may not have involved alcohol.

Greene, 154 Wn.2d at 729 (J. Sanders, dissenting) (internal citations omitted). Wu relies on a favorable interpretation of Greene's majority opinion. But Wu's argument cannot be supported by both the majority *and* the dissent. Because the Greene dissent explicitly incorporates Wu's argument, it logically follows that the majority rejected it.

Both Mullen and the Wu dissent argue that Greene is distinguishable because it involved first degree negligent driving. Wu, 6 Wn. App. 2d at 697 (J. Becker, dissenting); Mullen, 186 Wn. App. at 332; RCW 46.61.5249. These authorities concede it is constitutionally permissible for a court to determine first degree negligent driving is a "prior offense" because that crime by definition involves alcohol.<sup>4</sup> Id. But

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<sup>4</sup> "A person is guilty of negligent driving in the first degree if he or she operates a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any

the distinction makes little sense in this context. DUI requires proof of alcohol *impairment*, while first degree negligent driving only requires evidence of *consumption*. RCW 46.61.502; RCW 46.61.5249; State v. Gillenwater, 96 Wn. App. 667, 669-70, 980 P.2d 318 (1999) (A person cannot be convicted of DUI after merely consuming alcohol). Thus both reckless driving and negligent driving constitute “prior offenses” without proof of DUI. The State respectfully requests this Court clarify Greene to avoid interpretations that create elements not required by the legislature.

**4. RCW 46.61.5055(14)(a)(xii) Is Within The Legislature’s Constitutionally Permissible Plenary Power To Define Crimes.**

The legislature’s power to define criminal acts is constrained only by the constitution. It is undisputed that the legislature would have the ability to declare all prior convictions for reckless driving to be “prior offenses.” If the legislature can make a law affecting an entire class of convictions, it logically follows it can pass a law implicating a portion of that class, so long as there is a rational basis for distinguishing the two. Because such a basis exists in this case, RCW 46.61.5055(14)(a)(xii) is an appropriate exercise of legislative power.

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person or property, and exhibits the effects of having consumed liquor...” RCW 46.61.5249.

The power of the legislature to define crimes is plenary, limited only by the constitution. State v. O'Dell, 183 Wn.2d 680, 700-01, 358 P.3d 359 (2015); Chicago, B. & Q. Ry. Co. v. U.S., 220 U.S. 559, 578, 31 S. Ct. 612, 55 L. Ed. 582 (1911). Thus, a statute may impose different penalties upon different classes of criminals as long as it does not exceed the bounds of equal protection. See Doe v. Edgar, 721 F.2d 619, 622 (7th Cir. 1983) (rational basis existed to impose harsher licensing consequences on twice-convicted DUI defendants than those convicted of other serious traffic crimes).

In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d. 435 (2000), the U.S. Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” The Supreme Court authored a significant clarification to Apprendi in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The defendant in Blakely pled guilty to second degree kidnapping, which carried a standard range of 49-53 months. Id. at 299. However, the judge imposed a 90-month exceptional sentence after determining *sua sponte* that an aggravating factor existed. Id. at 300. Blakely argued this sentence violated Apprendi since his plea did not admit the aggravating factor. Id. at 301. The State

rebutted that Apprendi did not apply because the sentence did not exceed the statutory maximum. Id. at 303. The Court clarified that the statutory maximum for Apprendi purposes “is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Id. at 303. The sentence in Blakely was invalid because the stipulated facts justified only a standard range sentence. Id.

Blakely is implicated “[o]nly where the *exact facts* of a prior offense are used to increase the statutory maximum sentence...” State v. Jordan, 180 Wn.2d 456, 463, 325 P.3d 181 (2014) (emphasis original). But the legislature’s definition of felony DUI does not require that the specific details of the prior offense be proven beyond a reasonable doubt. State v. Cochrane, 160 Wn. App. 18, 25, 253 P.3d 95 (2011). Arguing that the State must prove alcohol involvement in prior offenses conflates the legislature’s practical goal with elemental requirements. The legislature could have, but did not, demand proof that a prior offense involved alcohol, and instead required only that a proven conviction have originated from a DUI charge.

RCW 46.61.5055(14)(a)(xii) would unquestionably be constitutional if it designated all reckless driving convictions as prior offenses. See Greene, 154 Wn.2d at 727 (“No parties dispute [RCW

46.61.5055] is constitutional without this limiting DUI element.”). But charges originally filed as DUI simply comprise a discrete subset of offenders already part of this constitutionally permissible category. It is rational, indeed salutary, that the legislature chose to focus prosecutorial resources on offenders, like Wu, whose conduct implicates the philosophical point of the statute.

The trial judge in Blakely improperly increased that defendant’s punishment based on unproven facts. But the only fact that mattered in this case, the fact of a reckless driving conviction originally charged as DUI, was found by the jury beyond a reasonable doubt. CP 130. Thus, Wu’s felony sentence derives wholly from the jury’s verdict. Blakely, 542 U.S. at 306. Mullen and Wu are distracted by the concept that whether a prior offense involved alcohol is a “fact.” But because whether a prior offense involved alcohol is not an element of felony DUI, it need not be found at all.

Finally, there is no constitutional reason why the legislature cannot require disparate treatment of those reckless driving offenders whose convictions were originally charged as DUI. The Equal Protection Clause of the Fourteenth Amendment, and article I, section 12 of the Washington Constitution, both require that “persons similarly situated with respect to

the legitimate purpose of the law must receive like treatment.<sup>5</sup> State v. Langstead, 155 Wn. App. 448, 453, 228 P.3d 799 (2010). Variant classifications of criminal offenders are subject to rational basis scrutiny, so long as they do not implicate any suspect class. State v. Jagger, 149 Wn. App. 525, 531-32, 204 P.3d 267 (2009).

DUI offenders are not a suspect class, and thus rational basis review is appropriate in this case. See State v. Shawn P., 122 Wn.2d 553, 560, 859 P.2d 1220 (1993). “A legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives.” Id. at 561. The defendant bears the burden of proving beyond a reasonable doubt that a legislative classification is unconstitutional. Id.

There is a rational basis for treating offenders whose crime was originally charged as DUI differently from other reckless drivers. Courts have long acknowledged and lamented the tragic consequences of intoxicated driving. E.g., South Dakota v. Neville, 459 U.S. 553, 558, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983). As previously noted, the State does not dispute that the practical goal of RCW 46.61.5055(14)(a)(xii) is to capture within the felony DUI statute those offenders who reduce the

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<sup>5</sup> The state constitution does not provide greater protection than its federal counterpart in the equal protection context. E.g., State v. Smith, 117 Wn.2d 263, 281, 814 P.2d 652 (1991).

seriousness of their conviction through plea bargaining. Rather than simply classify all reckless driving convictions as prior offenses, it was reasonable for the legislature to direct limited prosecutorial resources towards a subset of those convictions most likely to enhance the relevant public safety goal.

It is true that, at least theoretically, this classification could be over-inclusive and contain defendants whose underlying conduct did not involve alcohol. The legislature might have determined that this possibility was outweighed by other considerations, such as the practical difficulties in litigating facts from misdemeanor convictions that are often years-old. But a statute does not fail the rational basis test simply because it is imperfect or could have been drafted with greater clarity. Shawn P., 122 Wn.2d at 565-66. It is within the power of the legislature to use the fact of a prior charge that resulted in a variant conviction, if found by the jury, as an element of a crime.

**E. CONCLUSION**

The State respectfully requests this Court affirm Wu's conviction for felony DUI. If the Court overturns Wu's felony charge, the case should be remanded for imposition of a gross misdemeanor DUI conviction. In re PRP of Heidari, 174 Wn.2d 288, 293-94, 274 P.3d 366 (2012).<sup>6</sup>

DATED this 3 day of May, 2019.

Respectfully submitted,

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<sup>6</sup> The jury was instructed on gross misdemeanor DUI during the first phase of the trial. CP 145.

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