

65125-1

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No. 65125-1-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

**STATE OF WASHINGTON,
Respondent,**

v.

**JASON O'GRADY
Appellant.**

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JANET M. HARRIS

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether under a liberal, post-verdict, standard of review, all the essential facts and elements of felony DUI were included in the information in order to give the accused notice of the charge.
2. Whether taking the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find O'Grady committed the essential elements of felony DUI beyond a reasonable doubt.
3. Whether the judgment and sentence should be corrected to reflect that the total time served, including community custody, cannot exceed the statutory maximum.

C. STATEMENT OF THE CASE

1. Substantive Facts.

On November 4, 2009, at approximately 11 p.m., appellant Jason Henry O'Grady collected Meghan Protheroe at her home on Forest Street in Bellingham, Washington. RP 206. Appellant O'Grady drove them toward Fred Meyers. RP 206, 207. While en route, Trooper Lipton observed that O'Grady's car only had one functioning headlight. RP 19. Trooper Lipton alerted Trooper Hintz, who was driving behind appellant O'Grady's vehicle, about the burned out headlight. CP 13.

Trooper Hintz pulled behind appellant O'Grady's vehicle and activated his patrol car's emergency lights. RP 96. Appellant O'Grady had observed the police vehicle before the emergency lights were activated. RP 207. Appellant O'Grady was concerned about being contacted by the police because his driver's license was suspended. RP 207. O'Grady told his passenger that he was concerned about doing 30 days in jail because his license was suspended. CP 14.

Trooper Hintz contacted O'Grady. RP 97. Hintz noted that O'Grady was extremely jittery, had a raspy voice, bloodshot and watery eyes and extremely constricted pupils. RP 99; CP 14. In response to Trooper Hintz's request for a valid driver's license, O'Grady stated that he did not have one. RP 100, 101, 174; CP 15. O'Grady did produce a Washington State Identification (WSI) card, which identified the appellant as Jason Henry O'Grady. RP 101. In court, Trooper Hintz confirmed that the appellant and the Jason Henry O'Grady he contacted the evening of November 4, 2009 were one and the same. RP 97.

Trooper Hintz took O'Grady's WSI card and ran the appellant's name through dispatch. RP 102. Trooper Hintz confirmed what appellant O'Grady had already volunteered, that O'Grady had a suspended license. RP 102; CP 15. Trooper Hintz also learned that O'Grady had four prior convictions for driving under the influence (DUIs). RP 102; CP 15.

Trooper Hintz asked O'Grady to step out of his vehicle and to perform field sobriety tests, which O'Grady failed. RP 103-118. Trooper Hintz informed O'Grady that he was under arrest for driving while under the influence and for driving with a revoked driver's license. RP 119. Trooper Hintz read O'Grady his constitutional rights and excluded the warning exclusive to juveniles because Trooper Hintz had noted O'Grady's birth date to be August 6, 1970. RP 125.

Upon searching O'Grady, Trooper Hintz found green vegetable material, which O'Grady confirmed was marijuana and a scale with trace amounts of heroin. RP 65, 119. Appellant then volunteered that he had eaten some heroin and injected a gram of heroin approximately one hour before the contact with Trooper Hintz. RP 126, 127. O'Grady also disclosed that he had smoked marijuana and methamphetamine and ingested Klonopin and Valium. RP 128.

O'Grady was taken to the hospital and read the implied consent warnings. RP 131. O'Grady consented, and blood was drawn. RP 131. O'Grady's blood tested positive for the presence of morphine, codeine, diazepam, nordiazepam, methamphetamine and carboxy-THC. RP 145, 146.

2. Procedural Facts.

On November 10, 2009, Jason Henry O'Grady was charged with one count of felony DUI, one count of unlawful possession of heroin, one count of driving with a suspended license in the first degree and one count of unlawful possession of marijuana. CP 37-39. Prior to trial, the State dismissed the charge of unlawful possession of marijuana. RP 11. Appellant waived his right to a jury trial and proceeded with a bench trial. CP 31-32.

During trial, certified copies of four prior DUI judgments with attached pleas were admitted into evidence to prove that O'Grady had four prior convictions for driving under the influence. RP 189-191. The documents reflect that on April 23, 2003, in the Bellingham Municipal Court, O'Grady was sentenced for driving under the influence; that on June 24, 2004, in the Ferndale Municipal Court, O'Grady was sentence for driving under the influence; that on October 11, 2004, in Whatcom County District Court, O'Grady was sentenced for driving under the influence; and that on June 14, 2007, in Whatcom County District Court, O'Grady was sentence for driving under the influence and driving with a suspended license in the first degree. Ex 14-17. All of the judgments and sentences bear O'Grady's signature. Ex 14-17. Furthermore, the two judgments and sentences from Whatcom County District Court and the one from

Bellingham Municipal Court all list O'Grady's date of birth as August 6, 1970. Supp. CP, Sub Nom. ____, Ex. 15-17. The judgment and sentence from Ferndale Municipal Court does not list O'Grady's date of birth, but it does specify that the "Jason O'Grady" being sentenced on June 25, 2004, was 33 years old. Ex.14.¹ Lastly, the two judgment and sentences from Whatcom District Court and the one from Ferndale Municipal Court bear the defendant's assertion that he has a 12th grade education. Ex. 14, 16, 17.

At the conclusion of the State's case, the defense moved to dismiss the felony DUI charge. RP 194. Relying upon State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005), O'Grady argued that the State must provide evidence independent of the proffered documents affirmatively identifying appellant as the "Jason H. O'Grady" referred to in those documents. RP 195, 200-01.

In response, the State argued that Trooper Hintz had testified that appellant was born on August 6, 1970, and three of the judgments identified the same date of birth. RP 201-04. The State argued that this provided a distinct identifying trait sufficient to establish the appellant was

¹ On June 24, 2004, Appellant Jason Henry O'Grady would have been 33 years old.

the subject of those judgments. RP 201-04. The State further argued that once the identity was established pertaining to those documents, the trial court could compare the signature on those documents with the one on the document without the date of birth, but with the defendant's affirmation that he was 33 years old, and conclude that appellant was the same Jason Henry O'Grady referred to in that judgment. RP 196-97, 201-04; Ex. 14-17.

The trial court denied the motion to dismiss. RP 204. At the end of trial, the defense again challenged the sufficiency of the evidence offered by the State to prove the required four prior DUI convictions. RP 269-70. The trial court concluded there was sufficient independent evidence to tie the four prior convictions to appellant. RP 290-91.

Appellant was sentenced on March 17, 2010. On Count I, O'Grady was sentenced to 60 months confinement. CP 22-25. He was also sentenced to a term of community custody of 9-18 months. CP 25. The trial court did not explicitly state that the combined amount of time must not exceed the statutory maximum of 60 months. CP 21-30.

D. ARGUMENT

- 1. The information was sufficient as it alleged all the essential elements of felony DUI and under the liberal, post-verdict, standard of review, the information sufficiently apprised O’Grady of the charge.**

- a. All essential elements are contained within the information.*

All essential elements of a crime, statutory or nonstatutory, must be included in the charging document in order to give the accused notice of the nature of the allegations so that a defense can be properly prepared. State v. Kjorsvik, 117 Wn.2d 93, 97-102, 812 P.2d 86 (1991). The essential elements rule is of constitutional origin and is also embodied in a court rule. Const. art. I, § 22 (amend. 10); U.S. Const. amend. VI; CrR 2.1(b); Kjorsvik, 117 Wn.2d at 102-04; State v. Grant, 104 Wn.App. 715, 720, 17 P.3d 674 (2001).

A charging document challenged for the first time on appeal is liberally construed in favor of its validity. Kjorsvik, 117 Wn.2d at 93.

The Court has adopted a two-prong test:

- (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document;
- and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wash.2d at 105-06. As the Court explained in Kjorsvik:

The first prong of the test--the liberal construction of the charging document's language--looks to the face of the charging document itself. The second or "prejudice" prong of the test, however, may look beyond the face of the charging document to determine if the accused actually received notice of the charges he or she must have been prepared to defend against. It is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges. This 2-prong standard of review strikes a balance: on the one hand it discourages the defense from postponing a challenge to the charge knowing the charging document is flawed; on the other hand, it insures that the State will have given fair notice of the charge to the defendant.

Kjorsvik, 117 Wash.2d at 106, 812 P.2d 86 (footnote omitted). The remedy for a charging document that omits an essential element is reversal and dismissal of the charges without prejudice. State v. Vangerpen, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995).

As noted by appellant, felony DUI is committed when a person (1) drives a vehicle within this state, (2) is under the influence of intoxicants, and (3) has four or more qualifying prior offenses or has previously been convicted of vehicular homicide or vehicular assault. RCW 46.61.502(1), (6); State v. Castle, 156 Wn. App. 539, 543, 234 P.3d 260 (2010). An articulation of what qualifies as a "prior offense" is set forth in RCW 46.61.5055. When a "qualifying prior offense" is too remote, the legislature has precluded such a prior conviction from operating to elevate the offense. Castle, 156 Wn. App. 544. A prior conviction is too remote

when it is more than 10 years old. Id. at 544; RCW 46.61.502(6). Proof that the prior offenses occurred within 10 years of the pending charge is not an essential element, but rather a threshold issue to be determined by the trial court. State v. Chambers, 157 Wn. App. 465, 477, 237 P.3d 352 (2010).

In Chambers, 157 Wn. App. 465, 477, 237 P.3d 352 (2010), the court analyzed whether a court or a jury must determine if a person has four or more prior offenses that qualify as predicate offenses necessary to elevate a misdemeanor DUI to a felony. The court held that the existence of four prior DUI offenses is an essential element of the crime of felony DUI that must be proved to a jury beyond a reasonable doubt. Chambers, 157 Wn. App. at 479. However, whether a prior offense meets the statutory definition and qualifies as a predicate offense under felony DUI is not an essential element of the crime, but rather, a threshold question of law for the court to decide. Chambers, 157 Wn. App. at 479. In arriving at this decision, the court analogized felony DUI to felony violation of a no contact order and first-degree custodial interference. *See*, State v. Miller, 156 Wn.2d 23, 30, 123 P.3d 827 (2005); State v. Boss, 167 Wn.2d 710, 223 P.3d 506 (2006).

In Miller, the Washington Supreme Court held that the existence of a previous conviction for violation of a no-contact order is an element of

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 the felony violation of a no contact order statute is a threshold question of law for the Court. Miller, 156 Wn.2d at 30. Similarly, in Boss, the Washington Supreme Court held that the lawfulness of a custodial order was not an essential element of the crime of custodial interference, but rather, a threshold issue to be determine by the trial court as a matter of law. Boss, 16 Wn.2d at 718-719.

Here, the information charged:

That on or about the 4th day of November, 2008, the said defendant, JASON HENRY O'GRADY, then and there being in said county and state, did drive a vehicle ... under the influence of or affected by an intoxicating liquor or drug...; And further, that the Defendant has four (4) or more prior offenses for Driving Under the Influence of Alcohol or Drugs as defined in RCW 46.61.5055; contrary to the Revised Code of Washington 46.61.502(1) & (6), which violation is a Class C felony.

CP 38. The information tracked the statutory language of felony DUI. The information informed appellant that he 1) drove a vehicle within this state, (2) under the influence of intoxicants, and (3) had four or more qualifying prior offenses. Appellant was informed that qualifying offenses were defined in RCW 46.61.5055 and he was provided reference to the statutory section he had violated, RCW 46.61.502(1), (6). The absence of language setting forth the legislature's determination of what makes a

“qualifying prior offense” too remote does not constitute a material omission. Under a liberal construction, the information sufficiently apprised O’Grady of the charge against him. Furthermore, O’Grady does not claim any prejudice resulting from the information’s language. Accordingly, the charge is not subject to dismissal without prejudice.

b. If not explicitly stated, all essential elements are implied within the information, thereby satisfying the liberal, post-conviction standard of review.

In State v. Brosius, 154 Wn. App. 714, 225 P.3d 1049 (2010), defendant Brosius was charged with one count of failure to register as a sex offender under the former RCW 9A.44.130(7). The former section required registered sex offenders with a fixed residence and a risk level classification of II or III to report in person to the sheriff of his or her county of registration every 90 days.² Brosius, 154 Wn. App. 717.

When Brosius, a level III sex offender, failed to report as required, the State charged him with one count of failure to register as a sex

² Former RCW 9A.44.130(7) stated in pertinent part as follows:

All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person every ninety days to the sheriff of the county where he or she is registered.

offender. Id. at 718. The State filed an amended information that read in pertinent part as follows:

By this Amended information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of FAILURE TO REGISTER AS A SEX OFFENDER, which is a violation of RCW 9A.44.130(7) ... in that defendant on or about December 20, 2006, in Lewis County, Washington then being a person required to register as a sex offender in Lewis County, did knowingly and unlawfully fail to comply with the statutory registration requirements by failing to report on the required days for the 90 days reporting requirement as required by RCW 9A.44.130(7).

Brosius, 154 Wn. App. 718.

On appeal, Brosius challenged the sufficiency of the information alleging that the information failed to include the essential element of his classification as a level II sex offender. Id. at 721. Applying the Kjorsvik two prong test, the Court of Appeals affirmed Brosius' conviction. The court reasoned that while the charging information did not expressly state that Brosius had a level II or III risk classification, the information did state that he had failed to report during the 90-day period as required by RCW 9A.44.130(7). Brosius, 154 Wn. App. at 772. The court concluded that Brosius' offender level was necessarily implied because only level II or III sex offenders are required to report under RCW 9A.44.130(7). The court also noted that Brosius did not claim any prejudice resulting from the information's language. The Court held that the charging information

provided sufficient notice of the element of Brosius' risk level classification. Brosius, 154 Wn. App. at 772.

Here, as in Brosius, the fact that all four DUIs had all occurred within the preceding 10 years is implied, because only those convictions that occurred within the preceding 10 years can serve as the basis for alleging the charge. With an information that apprised O'Grady of all essential elements and no claim of any prejudice resulting from the information's language, under the liberal, post-conviction standard of review, the information should be deemed sufficient.

2. Taking the evidence in the light most favorable to the State there was sufficient evidence for a rational trier of fact to find O'Grady guilty of felony DUI beyond a reasonable doubt.

Under a sufficiency of the evidence analysis, the test is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Findings of fact challenged on appeal are evaluated for substantial evidence; unchallenged findings are deemed verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Where, as here, none of the findings of fact are challenged, the only issue is

whether any rational trier of fact could have found the elements from the findings.

In applying the test, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” Joy, 121 Wn.2d at 339. Such a challenge admits the truth of the State’s evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). The [trier of fact] “is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference.” State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999) (*quoting State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)).

Appellant, relying upon State v. Huber, 129 Wn.App. 499, 502, 119 P.3d 388 (2005), argues that the conviction should be overturned because there was insufficient proof appellant was the same Jason H. O’Grady referenced in the judgments proffered by the State to prove the necessary prior convictions. The case at bar is distinguishable from Huber.

In Huber, the defendant was charged with bail jumping. Huber, 129 Wn. App. at 500. In the State’s case in chief, it introduced certified copies of an information charging Huber with violation of a protection

order and tampering with a witness; a written court order requiring Huber to appear in court on July 10, 2003; the clerk's minutes indicating that Huber had failed to appear on July 10; and a bench warrant commanding Huber's arrest. Id. at 500-01. The State, however, did not call any witnesses or otherwise attempt to show that the exhibits related to the same Wayne Huber who was then before the court. Huber, 129 Wn. App. 501.

In reversing the trial court and remanding with directions to dismiss, the Court of Appeals reasoned that the State must do more than authenticate and admit a document; it must also show beyond a reasonable doubt "that the person named therein is the same person on trial." Huber, 129 Wn. App. at 502. Unlike Huber, in this case there is sufficient evidence tying appellant Jason H. O'Grady to the underlying offenses.

When O'Grady first noticed the trooper's vehicle, O'Grady told his passenger that he was concerned because he was driving on a suspended license. RP 207; CP 14. At the scene, O'Grady informed Trooper Hintz that he did not have a driver's license. RP 100-01. The Washington State Identification card appellant provided Hintz identified appellant as Jason Henry O'Grady. RP 101. Trooper Hintz noted O'Grady's date of birth as August 6, 1970. RP 125. Dispatch confirmed what O'Grady had already volunteered, which was that O'Grady had a suspended license. RP 102.

Dispatch also disclosed to Trooper Hintz the basis of the licensure suspension was four prior convictions for driving under the influence (DUIs). RP 102; CP15.

At the conclusion of his investigation, Trooper Hintz advised O'Grady that he was being placed under arrest for DUI and for driving with a revoked driver's license.³ RP 119. At trial, Trooper Hintz identified appellant as the Jason Henry O'Grady he contacted on November 4, 2009. RP 97.

The certified copies of the judgment and sentences proffered by the State identify the defendant in those underlying actions as being Jason Henry O'Grady. Ex 14-17. Three of the documents contain appellant's date of birth, August 6, 1970, and all the documents bear the same signature, that of Jason H. O'Grady. Ex. 14-17. Furthermore, three of the documents consistently represent in the defendant's handwriting that the defendant has a 12th-grade education. Ex. 14, 16, 17.

Applying all reasonable inferences from the evidence in favor of the State and interpreting it most strongly against the defendant, the

³ There is no evidence that O'Grady ever challenged or assert that he was not the Jason Henry O'Grady and/or that he did not have a revoked driver's license.

obvious inference is that appellant, whose name is Jason Henry O'Grady and whose date of birth is August 6, 1970, who admitted to Hintz that he did not have a license and who informed his passenger that he was concerned that he would be facing jail time for driving on a suspended license is the same Jason Henry O'Grady reflected in the certified judgments and sentences submitted by the State. Furthermore, interpreting the evidence most strongly against the appellant, the name, date of birth, signatures and reference to defendant's age contained within the certified judgments and sentences makes apparent that the State's exhibits all pertain to the same individual, the appellant Jason Henry O'Grady.

In this case, the testimony was sufficiently corroborative of the judgments and sentences to establish a prima facie case. At that point, it became O'Grady's burden to produce evidence that would cast doubt on the identity of the person named in the four prior judgments and sentences. *See, State v. Hunter*, 29 Wn.App. 218, 222, 627 P.2d 1339 (1981)⁴.

⁴ In *Hunter*, the court held that where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant submitting to the jury a prior judgment of conviction. There must be independent evidence that the person whose former conviction is proved is the defendant in the current action. However, after the State introduces this evidence, the burden rests on the defendant to come forward with evidence casting doubt on the identity of the person named in the documents. *Hunter*, 29 Wn. App. at 221.

O'Grady did not do so. Accordingly, that evidence is sufficient to support the court's determination.

3. The judgment and sentence should be corrected to reflect that the total time served, including community custody, cannot exceed the statutory maximum of 60 months.

Under the Sentencing Reform Act, a court may not impose a sentence in which the total time of confinement and community custody served exceeds the statutory maximum. RCW 9.94A.505(5). When a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence to explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum. In Re Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

The statutory maximum period of confinement for felony DUI, a class C felony, is 5 years or 60 months. RCW 9A.20.021(1)(c). Furthermore, classified as a crime against persons pursuant to RCW 9.94A.411, a conviction for felony DUI carries with it a determinative community custody term of 12 months.⁵ Here, the court imposed 60

⁵ The State notes that the community custody term imposed by the court appears to be in error.

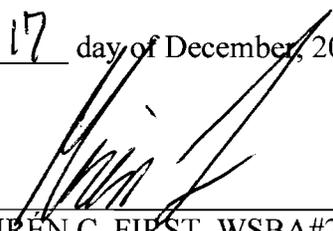
months incarceration and 9 to 18 months of community custody. The court did not specify that the total period of incarceration combined with the term of community custody could not exceed the statutory maximum.

The State concedes that the matter should be remanded for entry of an amended judgment and sentence to reflect a determinative community custody term of 12 months and, in accordance with Brooks, to expressly state that the combination of confinement and community custody shall not exceed the statutory maximum of 60 months.

E. CONCLUSION

Based on the foregoing, the State respectfully requests that O'Grady's conviction for felony DUI be affirmed. The case should be remanded for entry of an amended judgment and sentence to reflect a determinative community custody term of 12 months and to state explicitly that the combination of confinement and community custody shall not exceed the statutory maximum of 60 months.

Respectfully submitted this 17 day of December, 2010.

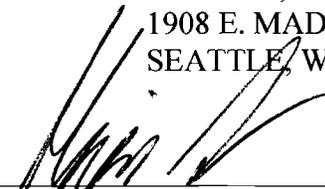


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CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court Appellant's counsel, Jennifer L. Dobson and Dana M. Lind, addressed as follows:

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Miren C. First

12/17/10

Date