

64126-3

64126.3

NO. 64126-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD COCHRANE,

Appellant.

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

The Honorable Catherine Shaffer

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

The State concedes it failed to properly charge Donald Cochrane with felony driving while under the influence (DUI) by failing to allege that his four prior qualifying offenses occurred within the last ten years. Brief of Resp. at 5. Because the State properly charged Mr. Cochrane with the lesser-included misdemeanor DUI and proved each and every element of that offense beyond a reasonable doubt, the proper remedy is to reverse the felony conviction and sentence and remand for entry of a conviction for the misdemeanor.

In light of the State's concession, other issues raised by Mr. Cochrane are now moot, but the Court may review them nonetheless. First, the information was further deficient in that it failed to identify the four prior convictions which elevated the DUI from a misdemeanor to a felony. Because a conviction for felony DUI requires proof that those four prior offenses were of the types designated in RCW 46.61.5055(14)(a), that fact is an essential element of felony DUI which must be included in the information. The State's failure to specify those prior offenses in the information was error; an error which was compounded by the fact a scrivener's error directed the reader to the wrong statute to define the prior

offenses. Finally, the State presented insufficient evidence that two of the four prior convictions, which were charged and tried under the Seattle Municipal Code instead of the RCW, were equivalent to the relevant sections of the RCW. Thus, even if it were properly charged, the felony conviction could not stand.

1. BECAUSE THE STATE PROPERLY CHARGED AND PROVED THE MISDEMEANOR DUI, BUT NOT THE FELONY, THIS COURT SHOULD REVERSE THE FELONY CONVICTION AND REMAND FOR ENTRY OF THE MISDEMEANOR.

The State concedes “the information was defective in failing to allege the essential element that the four prior offenses were within ten years.” Brief of Resp. at 5 (internal citations omitted). The State then relies solely on State v. Vangerpen, 125 Wn.2d 791, 888 P.2d 1177 (1995) to argue the proper remedy for its own charging error is dismissal without prejudice. However, Vangerpen presents a very different factual scenario than the one presented here. Furthermore, its legal reasoning indicates that the proper remedy for the State’s charging error is to reverse the felony DUI conviction and remand for entry of a misdemeanor DUI.

a. Vangerpen poses a factually different question from the present case. In Vangerpen, the State’s error in the

charging document did not constitute a separate crime that was proven beyond a reasonable doubt. *Id.* at 785.

The defendant here was not really charged with attempted murder in the second degree because the charging document was ambiguous on its face... And perhaps even more importantly, upon proper instructions for both first and second degree attempted murder, *the jury* found the defendant guilty of attempted murder in the first degree.

Id. at 792 (emphasis in original). Accordingly, altering the conviction to account for the charging error would have gone against the weight of the evidence.

In the present case, the errors in the charging document affected only the felony DUI, not the lesser-included misdemeanor DUI. CP 1; CP 35-36 (FF25-26, CL 4). Mr. Cochrane was properly charged with the misdemeanor and the evidence from trial proved he was guilty of the misdemeanor beyond a reasonable doubt. CP 1; CP 35-36 (FF25-26, CL 4); 8/26/09RP 69-79; RCW 46.61.5055(14)(a). As the State concedes, the trial court erred in ruling the requirement of four prior convictions within ten years was not an essential element of felony DUI. CP 1; CP 35-36 (FF25-26, CL 4); 8/26/09RP 69-79; 8/26/09 RP 58; RCW 46.61.502(6)(a); 46.61.5055(14)(a). Because the charging document was not “insufficient” to charge Mr. Cochrane with the misdemeanor DUI he

was shown to have committed, this Court should reverse the felony conviction and enter a conviction for misdemeanor DUI. RCW 46.61.5055(14)(a); Vangerpen, 125 Wn.2d at 792-793.

b. The legal reasoning in Vangerpen supports entry of a conviction for the lesser-included crime where, as here, the lesser-included crime was proven beyond a reasonable doubt. In Vangerpen the Court “decline[d] the invitation to find the defendant guilty of attempted murder in the second degree, because that is not the crime which the jury found the defendant had committed.” Id. at 794 (emphasis removed). Therefore, it logically follows that if the jury *had* found the defendant guilty of attempted murder in the second degree, the Court would have entered a guilty verdict for that crime. Here, the State proved all the elements of misdemeanor DUI beyond a reasonable doubt. Remand for entry of a conviction for misdemeanor DUI is therefore consistent with the evidence at trial, the trial court’s findings, and the Supreme Court’s reasoning in Vangerpen.

This Court has held, when the evidence is “insufficient to convict” of the crime the State attempted to charge but “sufficient to support conviction of a lesser degree crime” appellate courts may remand for entry of judgment and sentence on the lesser degree.

State v. Atterton, 81 Wn.App. 470, 473, 915 P.2d 535, 537 (1996).

In the present case, the evidence was “insufficient to convict” Mr. Cochrane of felony DUI but “sufficient to support conviction” of misdemeanor DUI. Id. Accordingly, the proper remedy for this Court is to “remand for entry of judgment and sentence” on the misdemeanor DUI. Id.

2. THE INFORMATION WAS further DEFICIENT IN FAILING TO IDENTIFY THE FOUR PRIOR CONVICTIONS WHICH WOULD ELEVATE THE CHARGED DUI FROM A MISDEMEANOR TO A FELONY.

Although conceding the information was deficient in its failure to allege the prior convictions occurred within ten years, the State nonetheless urges this Court to rule that the information did not need to provide notice of the specific prior convictions. Mr. Cochrane points out this issue is moot in light of the State’s concession. However, if this Court nonetheless decides to review the issue, it should find the four prior convictions are essential elements which elevate the misdemeanor to a felony, and that the information failed to apprise Mr. Cochrane of that element.

A recent decision of the Supreme Court is instructive. State v. Nonog, ___ P.3d ___, 2010 WL 2853913 (July 22, 2010). Nonog challenged the information charging him with interfering with the

reporting of domestic violence under RCW 9A.36.150, arguing it was insufficient because 1) the fact the, and 2) the information failed to identify the underlying crime(s). Id. at 1, 2. As in the instant case, the information merely cited to the statute that defines the underlying crime, without identifying the specific offense underlying the charge. Because (unlike Mr. Cochrane) Nonog failed to raise this objection pre-verdict, the Court applied the liberal construction required by State v. Kjorsvik, 117 Wn.2d 93, 105-08, 812 P.2d 86 (1991). Critically, the Court was not persuaded by the State's argument that "the specific underlying crime is not an essential element." Nonog, 2010 WL 2853913 at 4-5. Instead, the Court

assume[d], without deciding, that the underlying domestic violence crime is an element of the interfering with reporting offense. This means that, to be constitutionally sufficient, the information as a whole needed to reasonably apprise Nonog of the underlying crime.

Id. at 5 (citing Kjorsvik, 117 Wn.2d at 109-11). The logic behind the Court's assumption applies with equal force here. In Nonog, the defendant violated RCW 9A.36.150 *only if* the underlying crime was a crime of domestic violence. If he had interfered with the reporting of any other crime, RCW 9A.36.150 would not apply and

he could not be convicted of that offense. Here, Mr. Cochrane committed felony DUI *only if* his four prior convictions within ten years were of the type designated in RCW 46.61.5055. Twenty prior convictions of any other type would not suffice to elevate his DUI to a felony and he could not be convicted of that offense. In both cases, the specific underlying crimes are clearly an essential element in the common understanding of the term.

Contrary to the State's assertion, defense counsel brought this error to the court's attention before the verdict. In closing, counsel argued the information was deficient on multiple grounds, including the one which the State concedes as well as the scrivener's error and lack of notice. 8/26/00RP 50-54, 56-59. The identification of the specific four qualifying offenses was necessary to provide adequate notice. With no such identification and a scrivener's error directing the reader to the wrong statute, there was no functional notice regarding the prior offenses. Even if the statutory citation had been correct, that would not necessarily have cured the information. "More than merely listing the elements, the information must allege the particular facts supporting them. Nonog, 2010 WL 2853913 at 3 (citing State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)).

Thus, here, unlike in Nonog, the Court must strictly construe the information. Kjorsvik, 117 Wn.2d at 106. Having determined that the specific underlying offenses constitute an essential element, the omission of that element from the information renders the information irreparably deficient.

But even under the more liberal construction utilized in Nonog, the reasoning in that case explains why the information was insufficient here. In Nonog, the Court considered whether the elements “appear in any form, or by fair construction can they be found in the charging document;” i.e. whether, read as a whole, the information provided sufficient notice that the “interfering with reporting” charge” referred to the two domestic violence accounts which occurred on the same day. Id. at 3 (quoting Kjorsvik, 117 Wn.2d at 105). The Court found it did, for a reason not found in Mr. Cochrane’s case. Nonog’s information alleged

on or about March 30, 2006, *having committed a crime of domestic violence* as defined by RCW 10.99.020, [Nonog did intentionally prevent or attempt to prevent Nanette Estandian, the victim of that crime, from calling a 911 emergency communication system.

Id. at 4 (emphasis added). This language apprised Nonog that the underlying crimes were crimes of domestic violence which occurred earlier on March 30, 2006. The information also stated the

“interfering with reporting” charge was “of the same or similar character and *based on the same conduct* as another crime charged” in the information, reiterating the connection between this offense and the others which occurred on the same day. Id. (emphasis added). Thus, the information as a whole contained all the essential elements.

Here, of course, the information gets no such assistance from the other charge. The underlying offenses in question occurred years prior, and the charging document provides no information about them whatsoever. The Nonog Court relied entirely on that factor find the charging document sufficient in that case. Id. at 4-5. Following Nonog, the logical conclusion is that the information in this case omitted another essential element and is therefore constitutionally deficient.

3. BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE EACH ELEMENT OF FELONY DUI, THIS COURT SHOULD REVERSE AND DISMISS THE FELONY CONVICTION.

To sustain a conviction for felony DUI, the State was required to prove beyond a reasonable doubt that Mr. Cochrane’s Seattle Municipal Court convictions were “equivalent local ordinance[s]” to the crimes designated by RCW 46.61. RCW

46.61.502(6)(a); 46.61.5055(14)(a); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000).

a. The issue of the local ordinance's equivalence to the crimes designated by RCW 46.61 is a question of fact. The State argues it did not have to prove Mr. Cochrane's prior convictions were "equivalent" because that was a question of law, not a question of fact. Brief of Resp. at 19. This argument is unavailing. By statute, the equivalence of foreign convictions to the offenses designated by RCW 46.61 is an element of the crime. By definition "the elements of a crime are those *facts* that the prosecution must prove to sustain a conviction." State v. Miller, 156 Wn. 2d 23, 27, 123 P.3d 827 (2005) (citing Black's Law Dictionary 559 (8th ed. 2004); emphasis added). The equivalence of the local ordinance conviction in this case is therefore an issue of fact.

RCW 46.61.502(6)(a) states that it is a class C felony for a person to drive under the influence if "the person has four or more prior offenses within ten years as defined in RCW 46.61.5055", which defines prior offenses as "a conviction for a violation of RCW 46.61.504 or an equivalent local ordinance". Because the prior convictions' equivalence to RCW 46.61.504 turns the crime of driving under the influence into a felony, it is an element of the

crime that the State must prove beyond a reasonable doubt in order to sustain a felony conviction. Apprendi, 530 U.S. at 490.

The State attempts to rely on Miller to argue the question of the local ordinance's equivalence is strictly a legal question. Brief of Resp. at 19 (citing Miller, 156 Wn.2d 23). However, the State's analogy does not suffice. The issue before the Miller Court was whether the validity of a no-contact order was an element of the crime of violating the order; the Court held that the order's existence was an element of the crime requiring proof beyond a reasonable doubt, but its *validity* was a matter of law to be decided by the court. Id. at 24. Here, neither party disputed the existence or validity of Mr. Cochrane's prior convictions. Instead, the issue before the trial court was whether the convictions were "equivalent" to those specified by RCW 46.61. RCW 46.61.502(6)(a); 46.61.5055(14)(a). Because the Miller Court addressed a separate issue, its holding cannot be applied to the instant case.

Further, Miller held the no-contact order's validity was not an element of the crime based on statutory construction. In Miller the relevant statute states, "whenever an order is granted and the person to be restrained knows of the order, a violation is a class C felony if the offender has at least two prior convictions." Id. at 27

(citing RCW 26.50.101(1), (5)) (internal citations omitted). Nothing in the statute or legislative history indicated that the validity of the order was intended to be an element of the crime. The statute in this case is quite different. The statute clearly establishes prior qualifying offenses are elements which elevate the misdemeanor to a felony, and RCW plainly defines such prior offenses as “conviction[s] for a violation of RCW 46.61.504 or an equivalent local ordinance.” RCW 46.61.502(6)(a), 46.61.5055 (14)(a). The Legislature has expressed its intent to require proof of equivalence of prior convictions under local ordinances. If the State cannot prove the prior convictions’ equivalence, then the evidence is insufficient to sustain a felony conviction.

b. The State presented insufficient evidence to prove Mr. Cochrane’s prior convictions were equivalent to those designated by RCW 46.61. Even if this Court finds Miller applicable, it still does not further the State’s argument. The Miller Court held,

an order is not applicable to the crime charged if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order...Orders that are not applicable...should not be admitted. If no order is admissible, the charge should be dismissed.

Miller, 156 Wn.2d at 31. Applying that standard to the present case, the dockets offered by the State to prove Mr. Cochrane's prior convictions were "not statutorily sufficient [and were] vague [and] inadequate on [their] face[s]" because they did not state the elements of the crimes the State was required to prove. CP 35-36 (FF 25-26, CL 4); 8/26/09RP 69-79. Merely providing Mr. Cochrane's name, the Seattle Municipal Code citations, and a few words about the statutes cannot possibly constitute enough information for a court to determine whether a docket proves statutory equivalence to the RCW *on its face*. Accordingly, by the State's own analogy the Seattle Municipal Code dockets were not applicable and should not have been admitted into evidence.

The State also argues State v. Johnson, 33 Wn.App. 534, 656 P.2d 1099 (1982) is instructive to show the evidence was sufficient to sustain Mr. Cochrane's conviction. Br. of Resp. at 21. Johnson is easily distinguished. There, the issue was the *existence*, not the equivalence of a prior conviction. Id. at 537-538. The evidence included "(1) a certified copy of the judgment and sentence dated January 3, 1973, (2) a certified copy of the findings of fact and conclusions of law relating to the conviction, (3) a copy of an order vacating the January 3, 1973 Judgment and

Sentence... and (4) copy of a new judgment and sentence entered on January 22, 1973.” Id. at 537. Based on these documents, the Johnson Court properly found enough evidence to prove Mr. Johnson had a prior felony conviction.

Again, in this case the State only offered the Seattle Municipal Court dockets. CP 35-36 (FF 25-26, CL 4); 8/26/09RP 69-79. If, as in Johnson, the question was only whether Mr. Cochrane had a prior criminal record, the dockets could have been sufficient. 33 Wn.App. at 537. However, the dockets alone cannot prove Mr. Cochrane’s prior convictions were “equivalent” to those designated by RCW 46.61. RCW 46.61.5055(14)(a). The only way to make an “equivalence” finding is to view the statutory language of Mr. Cochrane’s convictions under the Seattle Municipal Code and compare that to the statutory language of the RCW. Id. The State never provided either the statutory language of the Seattle Municipal Code provisions under which Mr. Cochrane was cited, or the statutory language of RCW 46.61 to serve as a comparison. Without that evidence, the trial court had no rational basis to decide the convictions were “equivalent”. RCW 46.61.5055(14)(a).

Now the State argues for the first time that Mr. Cochrane’s Seattle Municipal Court convictions were “equivalent” to the crimes

designated by the RCW. Id.; Br. of Resp. at 18-19. If the State had evidence to support its position during trial, it could and should have been presented then. The issue before this Court is not whether the convictions actually were “equivalent” but whether the State presented sufficient evidence during trial to support the felony DUI conviction. RCW 46.61.5055 (14)(a); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Because the State presented insufficient evidence to support Mr. Cochrane’s felony DUI conviction, this Court should reverse and dismiss that conviction.

The State further suggests that because Mr. Cochrane did not challenge the Seattle Municipal Code convictions’ equivalence to those designated by RCW 46.61, he cannot raise the issue on appeal. Br. of Resp. at 19. Mr. Cochrane may always challenge the sufficiency of the State’s proof on direct appeal because a conviction on insufficient evidence is a manifest constitutional error. RAP 2.5; State v. Young, 50 Wn.App. 107, 111, 747 P.2d 486

(1987).¹ Because the State did not provide sufficient evidence to prove the convictions' equivalence, it failed to meet its burden whether or not Mr. Cochrane addressed the issue during trial.

Mr. Cochrane requests this Court reverse and dismiss his conviction for felony DUI.

B. CONCLUSION

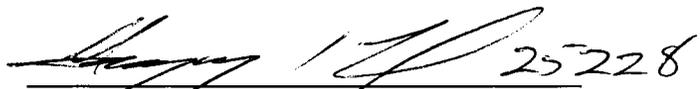
For the reasons stated above and in his opening brief, Mr. Cochrane respectfully requests this Court find the State failed to provide sufficient evidence to sustain a felony DUI conviction, and reverse and dismiss that conviction.

In the alternative, he requests this Court accept the State's concession of error and reverse the felony DUI conviction. He further requests this Court reverse that conviction with prejudice and remand for entry of a conviction for the lesser-included misdemeanor DUI.

DATED this 31st day of July, 2010.

Respectfully submitted,

¹ The State always carries the burden of proof in criminal matters. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This court reviews the sufficiency of evidence claims to determine whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

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STATE OF WASHINGTON,)	
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Respondent,)	
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DONALD COCHRANE,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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