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NO. 66622-3-1

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

REC'D  
JUL 18 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DAILEY,

Appellant.

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

The Honorable Douglas A. North, Judge

OPENING BRIEF OF APPELLANT

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 JUL 18 PM 4:03

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A. ASSIGNMENTS OF ERROR

1. The information did not include all essential elements for vehicular assault while driving under the influence (DUI) of prescription drugs.

2. The to-convict instruction relieved the state of its burden to prove all the elements of the offense beyond a reasonable doubt.

Issues Pertaining to Assignments of Error

1. Appellant took doctor-prescribed medication before driving his car. While driving, he blacked out and collided with a car in front of him. Officers believed appellant was under the influence of drugs while driving. Appellant was ultimately charged with vehicular assault under the DUI prong. Case law establishes that one who takes medication as prescribed by a doctor cannot be convicted under a DUI statute for being under the influence of that drug, unless he had knowledge of the harmful qualities of the medication. Under such circumstances, knowledge is an essential element of the crime. The information did not include this element. Was it constitutionally deficient?

2. The to-convict instruction also omitted the knowledge element. Was it constitutionally deficient?

B. STATEMENT OF THE CASE

On October 1, 2009, appellant Christopher Dailey took medication proscribed to him by a doctor to help him manage the pain and tremors he suffered as a result of severe burns and skin grafts. 3RP 22, 34-37; 5RP 52. That afternoon, he was at a Seattle hospital when he received devastating news about his mother's medical condition. 7RP 11.<sup>1</sup> With his mother's permission, he drove her car from the hospital to go see his mental health counselor. 7RP 11, 17.

While driving, Dailey blacked out or fell asleep. 3RP 18; 4RP 73, 94. His car rear-ended the car in front of him and then veered into a telephone pole. 4RP 24, 57, 74. Although not speeding, Dailey's car hit the car in front of him with enough force to break the passenger's vertebra.<sup>2</sup> 4RP 33, 144, 155. After hitting the telephone pole, Dailey awakened and attempted to check on

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<sup>1</sup> The transcripts are referred to as follows: 1RP (October 25, 2010); 2RP (December 20, 2010); 3RP (December 21, 2010); 4RP (December 22, 2010); 5RP (December 27, 2010); 6RP (December 28, 2010); 7RP (January 21, 2011).

<sup>2</sup> The passenger had a pre-existing back condition that contributed to severity of the injury. CP 39-40.

the condition of the people in the other car. 3RP 19. Someone else was helping them, so Dailey returned to his car. 4RP 58, 62.

Officer Brian Shaw responded to the incident. 4RP 73. Given the damage to the vehicles, he was surprised Dailey only suffered a few cuts to his arms and seat-belt burns. 4RP 78, 88, 95. He observed Dailey pacing around. 2RP 13. Shaw also noted Dailey's speech was slurred and he was making repetitive statements. 2RP 15, 28; 4RP 88. Shaw asked Dailey if he had taken any medication or narcotics. 4RP 99. Dailey told Shaw he had taken 1 ml. of Benztropine and 300 ml. of Gabapentin – the medication he had been prescribed. 2RP 14, 99-100. Shaw was concerned Dailey was under the influence of something, so he called for a drug recognition expert (DRE). 2RP 17, 25.

Officer Lisa Mosley arrived to conduct a DRE screening. 2RP 51, 9. Dailey agreed to participate in field sobriety tests. 5RP 12. Mosley noted Dailey's speech was slurred, he was sluggish, and he swayed when standing. 2RP 56; 5RP 11. She also observed he had droopy eyelids and blood shot eyes. 2RP 56. She concluded he was under the influence of some drug and was impaired while driving. 2RP 56; 5RP 29.

Mosley arrested Dailey and located the prescription medication bottles in his pocket. 2RP 57; 5RP 23. Dailey also said he had used "meth" two days prior, but not that day. 2RP 81; 6RP 24. Mosley checked the labels on the prescription drug bottles to confirm the medication was prescribed to Dailey, and she wrote down the names of the drugs. 2RP 59; 5RP 33. However, she did not take pictures or preserve the bottles for evidence. 2RP 82. Mosley also did not count the pills in the bottle or check the date to determine whether Dailey had taken his medication as prescribed. 5RP 38. Instead, she handed the bottles back to Dailey. 2RP 82. Mosley requested Dailey participate in a blood draw, but he refused. RP 622, 64. Mosley drove Dailey back to his home and released him. 2RP 82.

On April 4, 2010, the King County Prosecutor charged Dailey with vehicular assault under the DUI prong. CP 1-5; RCW 46.61.522(1)(b), RCW 46.61.502. On December 20, 2010, the charge was amended with the State adding, as alternative means, the reckless-driving prong and the disregard-of-safety prong under RCW 46.61.522(1)(a) and (c). CP 15. However, the jury only found Dailey guilty under the DUI prong. CP 92-93; CP \_\_\_ (sub no.

58). Dailey was sentenced to 84 months. CP 99-107. He appeals.  
CP 108-18.

C. ARGUMENT

I. THE INFORMATION DID NOT ALLEGE ALL  
ESSENTIAL ELEMENTS OF THE CHARGED  
OFFENSE.

All essential elements of a crime, statutory or otherwise, must be included in a charging document to afford notice to an accused of the nature and cause of the accusation against him. Const. art. 1, § 22 (amend. 10). “Essential elements are those necessary to establish ‘the very illegality’ of the crime itself.” State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

Appellate courts review a charging document challenged for the first time on appeal under a liberal standard. Johnson, 119 Wn.2d at 149-50. But even under that standard, the necessary elements must appear in some form. State v. O’Neal, 126 Wn. App. 395, 414, 109 P.3d 429 (2005). If an information fails to include all essential elements, prejudice is presumed. State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)).

Here, the charging language did not include all the

necessary elements of vehicular assault while driving under the influence of prescribed medication.<sup>3</sup> RCW 46.61.522 provides that a person is guilty of vehicular assault if he drives while under the influence of any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another. RCW 46.61.502(1)(b) provides that a person is guilty of DUI if the person drives a vehicle while under the influence of or affected by any drug.

In terms of intoxication by prescription medication, a patient is entitled to assume a physician would not prescribe an intoxicating dose and would warn of harmful side effects. People v. Hari, 822 N.E.2d 889, 897, 355 Ill.App.3d 449 (2005) (citing Perkins v. United States, 228 F. 408, 415 (4th Cir.1915)), overruled on other grounds in People v. Hari, 218 Ill.2d 275, 843 N.E.2d 349 (2006). While the fact that a person is entitled to use a drug under

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<sup>3</sup> The information charged:

That the defendant CHRISTOPHER DAILEY in King County, Washington, on or about October 1, 2009, did drive or operate a vehicle in a reckless manner with disregard for the safety of others and while under the influence of intoxicating liquor or any drugs, as defined by RCW 46.61.502, caused substantial bodily harm to Renee Batrom.

CP 46.

the laws of this state does not constitute a defense against a charge of DUI,<sup>4</sup> where a physician prescribed the medication that caused intoxication, there is an additional element needed to establish culpability.

When a person takes medication as prescribed by a doctor, he cannot be found guilty of DUI unless the State proves he had knowledge of the medications harmful qualities. Kaiser v. Suburban Transportation System, 65 Wn.2d 461, 466, 398 P.2d 14 (1965). In Kaiser, a doctor did not warn his patient, who was a bus driver, that the drug he had proscribed caused drowsiness and lassitude. 65 Wn.2d at 462. After taking the drug and going to work, the bus driver blacked out or fell asleep and drove the bus into a telephone pole. Id. at 463. In determining liability, the Washington Supreme Court had to decide whether the bus driver was guilty of driving under the influence. Id. at 466. It held the driver could not be found guilty of driving under the influence unless he first had “knowledge of the pill’s harmful qualities.” Without such knowledge, reasoned the Court, the State would be punishing someone who is not culpable. Id. Thus, the driver could not be found guilty of DUI. Id.

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<sup>4</sup> RCW 46.61.502(2).

Even though the Legislature has amended the DUI statutes since Kaiser and made them stricter, the Kaiser knowledge element is still necessary. For as one Supreme Court Justice explained when reviewing the stricter DUI statutes: “the legislative scheme reflects a judgment that the drinking driver is culpable for **willfully** creating the risk that he might cause serious harm to others.” State v. MacMaster, 113 Wn.2d 226, 778 P.2d 1037 (1989) (Durham, J., concurring), overruled on other grounds in State v. Rivas, 126 Wn.2d 443, 896 P.2d 57 (1995) (emphasis added and citations omitted). If a person has no knowledge of the harmful side effects of prescribed medication and he takes the medication according to the doctor’s prescription, then he cannot be said to have “willfully” or “knowingly” created a risk. Therefore, his conduct does not fall within that conduct the DUI laws were intended to reach.

Because the State’s case was predicated on the fact that appellant blacked out or fell asleep while driving under the influence of prescription medication, knowledge was an essential element of the crime. The information does not include this element even under a liberal standard of review. Consequently, this Court should reverse Dailey’s conviction and dismiss the charge. O’Neal, 126 Wn. App. at 415.

II. THE TO-CONVICT INSTRUCTION DID NOT CONTAIN ALL ESSENTIAL ELEMENTS.

All of the elements of a crime must appear in the to-convict instruction because it is the yardstick the jury uses to measure the evidence and determine guilt. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). If the jury instructions are silent on an element of a crime, the State is impermissibly relieved of its burden to prove beyond a reasonable doubt that the defendant committed all essential elements. State v. Williams, 136 Wn. App. 486, 492–93, 150 P.3d 111 (2007). Failure to define every element of a charged offense is an error of constitutional magnitude that may be raised for the first time on appeal. Id.

Here, the to-convict instruction provided in relevant part:

- (1) That on or about October 1, 2009, the defendant drove a vehicle;
- (2) That the defendant's driving proximately caused substantial bodily harm to another person;
- (3) That at the time the defendant  
...  
(b) was under the influence of drugs  
...  
(4) That this act occurred in the State of Washington.

CP 81. The trial court also gave an instruction defining "under the influence":

A person is under the influence or affected by the use of any drug when the person's ability to drive

a motor vehicle is lessened in any appreciable degree as a result of any drug.

The fact that a person is or has been entitled to use such drug under the laws of this state does not constitute a defense.

CP 83. Neither of these instructions informs the jury that if it finds the defendant was under the influence of medication taken as prescribed by a doctor, it must also find that the defendant knew of the potential side effects of the medication. Thus, they do not include the Kaiser knowledge element.

Given the instructions, the jury could have found appellant guilty even though he took the medication as prescribed and did not have knowledge of its side effects. This is especially so give the State's argument suggesting these factors were irrelevant to a determination of guilt.<sup>5</sup> As explained above, this is not what the Legislature intended.

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<sup>5</sup> The State argued :

...the heart of the case, clearly, clearly, is whether [Dailey] was driving impaired or under the influence of a drug. Any drug. It doesn't matter if you are legally prescribed the drug.... It doesn't matter if you take your prescription according to doctor's orders.

5RP 87.

Based on the facts of this case, the omission of this element was not harmless. An omission of an essential element from the jury instructions may be harmless when it is clear that the omission did not contribute to the verdict. State v. Brown, 147 Wn. 2d 330, 340–41, 58 P.3d 889 (2002). That is not the case here.

The record shows Dailey was taking his prescription medication and that drowsiness was a common side effect. CP 41, 47. Dailey told officers he took his medicine on the day of the collision and that he blacked out right before the crash. There was no evidence indicating he had been given warnings about the side effects or that he was warned not to drive. Although Doctor Beda testified that a prescription bottle “usually” contains a warning, there was no evidence Dailey had actually received such a warning. The State did not offer the medication bottles or pictures of the medication bottles found on Dailey. Based on this record, a reasonable juror could have -- if properly instructed -- decided that there existed a reasonable doubt as to whether Dailey had prior knowledge his medication caused drowsiness that could interfere with driving.

In response, the State may argue the omission of the Kaiser knowledge element was harmless because there was also

evidence Dailey had used methamphetamines several days before the incident. Although there was testimony from Officer Mosley suggesting Dailey might have been suffering the affects of coming off of the methamphetamines while he was driving (5RP 25), she also testified she could not identify exactly what drug was causing Dailey's intoxication. 5RP 26. Moreover, Dr. Beda testified one could not determine whether someone would continue to be affected by methamphetamines even a day after using it. CP 50.

Given this record, a reasonable juror could have reasonably doubted Dailey's prior methamphetamine use caused him to be impaired on the day of the incident and could have convicted based solely on the fact that he was under the influence of prescription drugs.<sup>6</sup> Therefore, the omission of the Kaiser knowledge element was not harmless and the conviction should be reversed.

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<sup>6</sup> In fact the State argued the jury could convict based solely on evidence of Daily's use of prescription drugs that day:

...And when the expert comes in, she says, oh, yeah, he's impaired. And what does the doctor say? The doctor says, well, yeah, these drugs that he admitted to make you drowsy. And you know what, that's all consistent with what his driving was. It's all consistent with how he even says the crash happened. I blacked out. I fell asleep.

5RP 124.

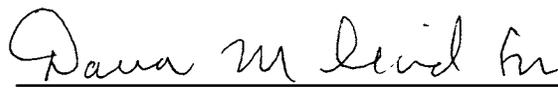
D. CONCLUSION

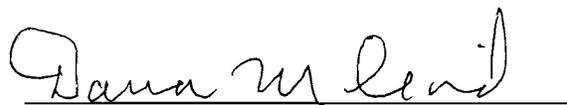
For the reasons stated above, appellant respectfully asks this Court to reverse.

Dated this 18<sup>th</sup> day of July, 2011.

Respectfully submitted

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66622-3-III
	)	
CHRISTOPHER DAILEY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18<sup>TH</sup> DAY OF JULY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTOPHER DAILEY  
DOC NO. 989190  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

**SIGNED** IN SEATTLE WASHINGTON, THIS 18<sup>TH</sup> DAY OF JULY, 2011.

x *Patrick Mayovsky*

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