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71838-0

NO. 71838-0-1

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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.

BRIAN MICHAEL SHELLEY,

Appellant.

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

The Honorable Alan R. Hancock, Judge  
Superior Court Cause No. 13-1-00089-1

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BRIEF OF RESPONDENT

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SUPERIOR COURT  
ISLAND COUNTY  
WA  
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**I. STATEMENT OF THE ISSUES**

- A. Whether the appellant's conviction should be upheld when the charging document included all essential elements of the crime of vehicular assault and the appellant was not prejudiced by any inartful language.
- B. Whether the appellant's sentence should be upheld when he affirmatively acknowledged his offender score.

**II. STATEMENT OF THE CASE**

**A. Substantive Facts**

On May 16, 2013, the appellant drove his white 1999 Isuzu Amigo on Ewing Road in Langley, Washington. RP 307, 310. He lost control coming around a sharp corner, slid into the opposite lane of travel, and collided with a red 2009 Mini Cooper driven by Leland and Berta Long. RP 76. As result of the collision, both vehicles travelled off the roadway, through a fence, down an embankment, and into a field. RP 77. The appellant spoke very briefly to Mr. Long, saying, "I'm in jail," before collecting a backpack and beer bottle from the car and walking away, across the field and into a wooded area. RP 58-59, 81, 114-15, 126. Other witnesses, including members of Mr. Long's family and a passing bicyclist also saw the appellant walk away from the scene. RP 59-61, 115, 126-28.

Island County Sheriff's Deputies arrived at the collision scene, and the witnesses showed them the direction the appellant had left and described the location where he would most likely be found. RP 134-35, 185-86. Deputy Darren Crownover found the appellant at a nearby farm and placed him in handcuffs. RP 187-90. The appellant appeared to be disheveled and in a stupor; he was bleeding from scrapes to his legs and forehead, and he had a bump on his forehead. RP 188. There was a strong odor of intoxicants on his breath, his eyes were bloodshot and watery, and his face was flushed. RP 190. The appellant immediately said, "I was going to contact the other driver and make it good." RP 189. He also admitted he was driving the vehicle at the time of the collision, that he had drunk one beer, and that he had smoked marijuana earlier in the day. RP 191, 197.

Mrs. Long was treated at the Whidbey General Hospital and diagnosed with a broken right thumb she suffered as a result of the collision. RP 96, 102, 156. Dep. Crownover applied for and received a search warrant for the appellant's blood. RP 200. The blood testing found 0.079 g ethanol per 100 mL of the appellant's blood, and 9.8 ng THC per mL of the appellant's blood. RP 263-64, 275.

**B. Statement of Procedural History**

The appellant was originally charged with Hit and Run, Driving under the Influence, and Driving while License Suspended in the Third Degree. CP 63-65. The charges were modified via Amended Information to Hit and Run and Vehicular Assault.<sup>1</sup> CP 55-57. The Amended Information described the charge of Vehicular Assault as:

On or about the 16th day of May, 2013, in the County of Island, State of Washington, the above-named Defendant did operate or drive a vehicle (a) in a reckless manner, and cause substantial bodily harm to another, to-wit: Berta G. Long; and/or (b) while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and cause substantial bodily harm to another, to-wit: Berta G. Long; and/or (c) with disregard for the safety of others and cause substantial bodily harm to another, to-wit: Berta G. Long; contrary to Revised Code of Washington 46.61.522(1).

CP 56.

The appellant made no objection to the Amended Information, entered a plea of not guilty, and proceeded to a jury trial. RP 2/18/2014 4-5. Following the jury trial, the appellant was found guilty as charged. CP 46-47.

At sentencing, the State calculated the appellant's offender score as 7 on the charge of Hit and Run and 6 on the charge of Vehicular Assault. RP 3/28/2014 7. The State recommended a standard range sentence of 57

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<sup>1</sup> The Amended Information also charged the appellant with Bail Jumping; however, that charge was dismissed post-trial, following a Motion for Arrest of Judgment. See CP 5, 14-15.

months, based on those offender scores. RP 3/28/2014 7. Appellant argued for a sentence of 43 months, “the bottom of the range.” RP 3/28/2014 15. Before imposing a sentence, the sentencing court confirmed both the offender scores and standard sentencing ranges with the appellant. RP 3/28/2014 22. The appellant affirmatively agreed with the State’s calculation of his offender score. RP 3/28/2014 22. After confirming the ranges and scores, the court imposed the State’s recommended, standard-range sentence. RP 3/28/2014 25.

The appellant now timely appeals. CP 1.

### III. ARGUMENT

**A. The appellant’s conviction should be affirmed because the charging document included all essential elements of the charge of vehicular assault and because the appellant was not prejudiced by any inartful language.**

The appellant’s conviction should be affirmed because the Amended Information informed him of the nature and cause of the accusation of vehicular assault. All criminal defendants have the right to be informed of the nature and cause of the accusation against him. U.S. CONST. amend. VI. To that end, a criminal indictment or Information must be a plain, concise, and definite statement of the essential facts constituting the offense charged. CrR 2.1(a)(1). A charging document satisfies these requirements when it includes all the essential elements of the crime charged. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86

(1991). A challenge to the sufficiency of the charging document is reviewed de novo. *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). An Information which is not challenged until after the verdict is liberally construed in favor of validity and is sufficient if the necessary facts appear in any form, or by fair construction can be found in the charging document. *Kjorsvik*, 117 Wn.2d at 102-05. If the essential elements can be found, the conviction must be upheld unless the appellant can show he was nonetheless actually prejudiced. *Id.* at 106. The appellant's conviction in this case should be upheld because the essential elements of vehicular assault were in the Amended Information and the appellant was not prejudiced by any inartful language.

1. *The charging language contained all the essential elements of the crime of vehicular assault.*

A court's liberal construction of a charging document requires only "some language in the information giving notice of the allegedly missing element(s)". *Id.* It has never been necessary to use the exact words of a statute or of a case law element. *Id.* at 108-09. Instead, words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied. *Id.* at 109. Therefore, the appropriate question is whether all the words used in a charging document would reasonably apprise the appellant of the elements of the crime

charged. *Id.* If the essential elements can be found, the conviction must be upheld unless the appellant can show he was nonetheless actually prejudiced. *Id.* at 106. The appellant's conviction in this case should be upheld because the Amended Information contained all the essential elements of vehicular assault.

It is sufficient to charge in the language of a statute if the statute defines the offense with certainty. *Id.* at 99. A person commits vehicular assault when he or she operates or drives any vehicle in a reckless manner, while under the influence of intoxicating liquor or any drug, or with disregard for the safety of others and causes substantial bodily harm to another. RCW 46.61.522(1). Vehicular assault also includes a nonstatutory element of proximate cause between a defendant's driving and the victim's substantial bodily harm. *See State v. Sanchez*, 62 Wn.App. 329, 331, 814 P.2d 675 (Div. 3, 1991) (holding proximate cause is an essential element of vehicular homicide) and *State v. Roggenkamp*, 115 Wn.App. 927, 935, 64 P.3d 92 (Div. 1, 2003), *aff'd*, 153 Wn.2d 614 (2005) (noting elements of vehicular homicide are equally applicable to vehicular assault). However, charging language that links the victim's injury and the defendant's driving is sufficient to allege all the essential statutory and nonstatutory elements of vehicular homicide or assault. *State v. Tang*, 77 Wn.App. 644, 647-48, 893 P.2d 646 (Div. 1, 1995). The language of the

Amended Information in this case mirrored the language of the vehicular assault statute. *Compare* CP 56 and RCW 46.61.522(1). Specifically, the Amended Information included accusations that the appellant's driving caused substantial bodily harm to another person. See CP 56.

A common sense reading of the charging language, read as a whole, contains all of the elements of vehicular assault. The descriptions of all three manners of driving are followed immediately by "and cause substantial bodily harm." Nothing in the charging language suggests that the harm was or could have been caused by anything other than the appellant's driving. And, for all three alternative means of committing the crime, the appellant's driving is clearly linked to the victim's injury. Thus, by any fair construction, the necessary elements of vehicular assault can be found in the Amended Information, and the appellant's conviction should be upheld.

2. *The appellant was not prejudiced by any inartful language in the Amended Information*

The appellant's conviction should further be affirmed because he cannot show prejudice from the charging language. If the necessary facts of a crime are included in the charging language, a conviction must be upheld unless the defendant was actually prejudiced by inartful language. *State v. Kjorsvik*, 117 Wn.2d at 105-06. The appellant bears the burden of

raising and demonstrating prejudice. *State v. Lindsey*, 177 Wn.App, 233, 246, 311 P.3d 61 (Div. 2, 2013), *review denied*, 180 Wn.2d 1022 (2014). In this case, the charging language exactly matched the statutory definition of vehicular assault, so there was no inartful language from which the appellant can claim prejudice. Additionally, the fact that the Amended Information did not include the word “proximate” did not prejudice the appellant because he could adequately prepare his defense.

The appellant cannot show prejudice when he received timely notice of the nature of the charges. The court may look outside the information to determine whether the defendant suffered actual prejudice. *Kjorsvik*, 117 Wn.2d at 106. The appellant’s preliminary hearing included a probable cause narrative report that alleged the appellant caused the collision by travelling at a high rate of speed, sliding across the centerline and striking the car driven by the victims. CP 71-72. The probable cause report also described injuries suffered by the victims as a result of the collision. CP 70. Thus, the appellant clearly received notice of both the nature of the charges and specific facts underlying those charges.

The appellant also received significant notice of the proposed Amended Information, which allowed more than enough time to prepare his defense. Although the Motion to Amend was heard by the trial court on February 18, 2014, that motion was filed November 13, 2013, giving

the appellant three full months to prepare his defense prior to trial or to demand clarification of any vagueness within the charging language. In fact, that lengthy notice was acknowledged by defense counsel at the motion to amend. 2/18/14 RP 4 (“this is also a matter that the defense was on notice of for quite some time, in fact, I think for months.”). Where an information states each statutory element of a crime but is vague as to some other matter, the proper remedy is a request for a bill of particulars; a defendant may not challenge such a charging document if he failed to request a bill of particulars. *State v. Leach*, 113 Wn.2d 679, 687, 782 P.2d 552 (1989). The appellant made no demand for a bill of particulars in this case.

Finally, the charging language did not prevent the appellant from arguing a superseding event. A defendant may avoid responsibility for an injury resulting from his driving if the injury was caused by a superseding, intervening event. *State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57 (1995). However, circumstances that are reasonably foreseeable are not superseding causes; at most, those circumstances constitute concurring causes. *State v. Roggenkamp*, 115 Wn.App. 927, 945-47, 64 P.3d 92 (Div. 1, 2003), *aff'd*, 153 Wn.2d 614 (2005). Unlike a superseding event, a concurring cause does not shield a defendant from a vehicular assault conviction. *State v. Roggenkamp*, 153 Wn.2d 614, 631, 106 P.3d 196

(2005). The jury received evidence about the nature of the road around the collision location. RP 48, 71, 163, 310. However, none of the descriptions of the roadway included anything that was unforeseeable, and any claim that the road was so unsafe as to constitute a superseding event would have run contrary to the appellant's admission that he was driving too fast to navigate the corner and that he did not have complete control of his vehicle. RP 310, 311, 326.

Most tellingly, the appellant did attempt to provide a superseding cause for the collision. He did not blame the roadway; instead, he argued the collision occurred because he was attempting to avoid a bicyclist. RP 438-39.

The appellant cannot bear his burden to show prejudice from inartful language in the Amended Information. The charging language exactly mirrored the statute leaving no inartful language. The appellant was given notice of the proposed amendment three months prior to trial and made no demand for clarification. And, the appellant was not denied an opportunity to present a defense based on a superseding cause. In fact, the appellant made such an argument. Therefore, the appellant's conviction should be affirmed.

**B. The appellant's sentence should be affirmed because the sentencing court imposed a standard-range sentence based on an offender score the appellant affirmatively acknowledged.**

The trial court did not err in imposing sentence in this case because the appellant affirmatively acknowledged his offender score. At sentencing, the State bears the burden to prove an offender's prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005), *superseded by statute on other grounds*, Laws of 2008, ch. 231, § 1, *as recognized in State v. Jones*, No. 89302-1 2014 WL 6687186 (Wash. Sup. Ct., Nov. 26, 2014). In determining a sentence, the court must rely on no more information than is admitted by a plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. RCW 9.94A.530(2). If a defendant has been erroneously sentenced, his case is remanded to the sentencing court for resentencing. *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). If a case is remanded for resentencing, the parties have the opportunity to present all relevant evidence regarding criminal history, including criminal history not previously presented. RCW 9.94A.530(2); *State v. Jones*, No. 89302-1 2014 WL 6687186 (Wash. Sup. Ct., Nov. 26, 2014). However, the sentence in this case should be affirmed because the sentencing court

considered an offender score that was affirmatively acknowledged by the appellant.

A defendant is not required to disclose any prior convictions. *State v. Ammons*, 105 Wn.2d 175, 184, 713 P.2d 719 (1986). But, a defendant can affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Acknowledgment includes not objecting to information stated in presentence reports and not objecting to criminal history presented at the time of sentencing. RCW 9.94A.530(2).

The appellant did not object at sentencing to the State's presentation of his criminal history or calculation of his offender score. 3/28/14 RP 7. In addition, he does not challenge the existence of his prior convictions now. Instead, he argues only that, "the State failed to prove that one of [the appellant's] convictions for second degree malicious mischief had not washed out." Appellant's Brief at 17. However, the sentencing court specifically asked the appellant about the State's calculation of his sentencing range, and the appellant affirmatively acknowledged score. 3/28/14 RP 22. The court then imposed a standard range sentence using the offender score acknowledged by appellant. 3/28/14 RP 22; CP 2-11.

The State must prove a defendant's offender score by a preponderance of the evidence, but the defendant may obviate that burden by affirmatively acknowledging his criminal history. In this case, the appellant did not object at sentencing, so the proper remedy if error is found, is to remand for resentencing and allow the State to prove the appellant's offender score. However, the appellant affirmatively acknowledged his offender score before the sentencing court imposed a standard range sentence. Therefore, the court properly considered the appellant's acknowledged offender score, and his sentence should be affirmed.

#### **IV. CONCLUSION**

The appellant's conviction should be upheld because the charging language included all essential elements of the crime of vehicular assault. In addition, the appellant's sentence should be upheld because he affirmatively acknowledged his correct offender scores.

Respectfully submitted this 5th day of December, 2014.

GREGORY M. BANKS  
ISLAND COUNTY PROSECUTING ATTORNEY

By:   
\_\_\_\_\_  
DAVID E. CARMAN  
DEPUTY PROSECUTING ATTORNEY  
WSBA # 39456

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRIAN MICHAEL SHELLEY,

Defendant/Appellant.

NO. 71838-0-I

DECLARATION OF SERVICE

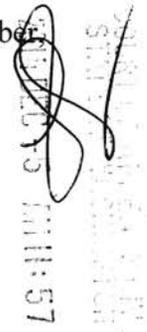
I, Jennifer Wallace, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 4th day of December, 2014, a copy of Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Richard W. Lechich  
Washington Appellate Project  
1511 3<sup>rd</sup> Ave., Suite 701  
Seattle, WA 98101

Signed in Coupeville, Washington, this 4th day of December  
2014.

  
Jennifer Wallace

  
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COURT OF APPEALS FOR THE STATE OF WASHINGTON  
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