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DIVISION II

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STATE OF WASHINGTON

No. 45013-5-II

BY Cm IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
Deputy DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

PATRICK MULLEN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorables Katherine Stolz (trial) and John A. McCarthy (motion),
Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The felony DUI conviction must be reversed because the trial court erred in finding that a reckless driving conviction qualified as one of four required “prior convictions” to support a felony DUI.
2. The trial court erred and violated the state and federal due process rights of appellant Patrick Mullen by failing to require the prosecution to prove that the prior conviction for reckless driving involved use of alcohol or drugs, as required under City of Walla Walla v. Greene, 154 Wn.2d 722, 116 P.3d 1008 (2005).
3. In interpreting RCW 46.61.502 and RCW 46.61.5055 to allow increased punishment for uncharged, unproven misconduct, the trial court violated Mullen’s state and federal due process rights.
4. A judge cannot make factual findings under RCW 46.61.5055 about whether a prior offense involved the use of alcohol or drugs unless those facts are admitted or proved beyond a reasonable doubt, without violating the state and federal rights to trial by jury and proof beyond a reasonable doubt, as set forth in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004).
5. Mullen assigns error to the trial court’s Order Denying Defendant’s Motion to Exclude Prior Offense, which provided:
 - (1) defendant’s 2008 Chelan District Court conviction for Reckless Driving, RCW 46.61.500, is a prior offense as defined in RCW 46.61.5055(14)(a)(v), because it is the result of a charge that was originally filed as [a] DUI, RCW 46.61.402[.]CP 36.
6. Mullen assigns error to the trial court’s decision to give instruction 9 instead of a proposed defense instruction. Instruction 9 provided:

A “prior offense” means any of the following:

 - (1) A conviction for a violation of RCW 46.61.502 (Driving Under the Influence) or an equivalent local ordinance;
 - (2) A conviction for a violation of RCW 46.61.504

(Physical Control) or an equivalent local ordinance;

(3) A conviction for a violation of RCW 46.61.5249 (Negligent Driving in the First Degree), RCW 46.61.500 (Reckless Driving), or RCW 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 (Driving Under the Influence) or RCW 46.61.504 (Physical Control).

CP 102. The proposed defense instruction would have added at the end of (3) “and the State has proven beyond a reasonable doubt that the prior incident was alcohol or drug related.” CP 83.

7. Mullen’s state and federal constitutional rights to confrontation were violated when the court admitted testimonial evidence which was used against Mullen even though he was not given the chance to cross-examine the declarant.
8. The prosecutor’s serious, flagrant misconduct in telling the jurors that they were not supposed to give Mullen the “benefit of the doubt” compels reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant cannot be convicted of felony DUI unless he has four “prior offenses” as defined in RCW 46.61.5055(14). That statute allows a conviction for reckless driving to amount to a “prior offense” if the charge was originally filed as a DUI.

In State v. Shaffer, 113 Wn. App. 812, 814, 55 P.3d 668 (2002), overruled by Greene, supra, the language used in RCW 46.61.5055(14) was found to violate due process by elevating the severity of a DUI to a felony based upon the mere filing of an accusation without requiring actual proof.

In Greene, the Supreme Court overruled Shaffer, finding that the relevant language actually required the prosecution to prove not only the existence of the prior conviction but also that the crime for which the defendant was actually convicted involved drugs or alcohol, rather than just having been charged as a DUI.

Did the trial court err, violate Mullen’s due process rights and violate the mandates of Greene in finding that Mullen’s prior conviction for reckless driving qualified as a “prior

conviction” simply because it was initially charged as a DUI, without requiring proof that the reckless driving conviction involved alcohol and drugs?

Further, because the only remaining evidence is the docket, was there insufficient evidence to support a finding beyond a reasonable doubt about the underlying facts of the reckless driving offense? In addition, would it violate the rights to trial by jury and proof beyond a reasonable doubt to allow a trial judge to make factual findings in order to decide whether an offense qualifies as a “prior offense” to support an increased crime?

2. At trial, over defense objection, the prosecution was allowed to admit and use against Mullen several documents which were summaries of his driving record and of a prior conviction, without Mullen having any opportunity to cross-examine the preparers. Did the admission and use of this testimonial evidence violate Mullen’s state and federal confrontation clause rights?
3. Did the prosecutor commit serious, flagrant misconduct by telling the jury that the law of reasonable doubt did not mean that jurors gave the defendant “the benefit of the doubt?” Further, did the trial court err in refusing to grant Mullen’s motion for a mistrial or even attempting to take steps to mitigate the incredible harm that misconduct caused to Mullen even after the prosecutor himself conceded?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Patrick J. Mullen was charged by information with felony driving under the influence of intoxicants and second-degree driving while license suspended or revoked. CP 1-3; RCW 46.20.342(1)(b); RCW 46.61.61.502(1) and (6). After a motion hearing before the Honorable Judge John A. McCarthy on June 10, 2013, trial was held before the Honorable Judge Katherine Stolz on June 11-14 and 17, 2013, after which a jury found Mr. Mullen guilty as charged. 1RP 1, 2RP

1, 3RP 1, 4RP 1.¹

On June 19, 2013, Judge Stolz ordered Mullen to serve a standard-range sentence. CP 116-28. Mullen appealed and this pleading follows. See CP 135.

2. Testimony at trial

On March 2, 2013, Trooper Cliff Roberts of the Washington State Patrol responded to a dispatch about a “possible DUI” traveling southbound on Interstate 5 at about 5:30 at night. 2RP 80, 87-89. Roberts traveled to the area and saw a pickup truck “drift” over the “fog line,” then move back and forth a few times. 2RP 89. Roberts got behind the truck and activated his emergency lights. 2RP 89. After a few moments, the truck’s right turn signal activated and it swerved onto the right shoulder but did not slow down, going about 60 miles per hour and “weaving from side to side.” 2RP 89-90. The truck then swerved back into the lane next to it, “overshooting” a little and crossing partially into the second lane of traffic. 2RP 90. The trooper said the truck continued “weaving” and the two vehicles took an exit, after which the truck slowed almost to a stop right in the middle of a lane of traffic, then slowly moved over to the right shoulder and stopped. 2RP 90.

The trooper stated that, when he approached the truck on the passenger side, the window was already rolled down and the officer could

¹The verbatim report of proceedings in this case consists of four volumes, which will be referred to as follows:

motion proceedings of June 10, 2013, as “1RP;”
June 11-13, 2013, as “2RP;”
voir dire proceedings of June 12, 2013, as “3RP;”
June 13 (continued), 14, 17 and 19, as “4RP.”

smell a “really strong odor of liquor” coming from inside. 2RP 91. The officer also said the driver had “bloodshot, watery eyes, a flushed face” and “extremely droopy” eyelids. 2RP 91. The driver’s responses were slurred and his movements slow. 2RP 91. The officer also thought that it appeared the driver was trying to block the officer’s view of the center console inside the stopped car but the officer nevertheless noticed that there appeared to be a beer can “stuffed in” there. 2RP 92.

According to the officer, the driver had difficulty finding his identification and fumbled when turning off the ignition. 2RP 93. The driver was unable to provide his driver’s license or other identification. 2RP 93. The officer also said that, when he asked the driver his name, the man’s speech was so slurred the officer did not understand what was said. 2RP 93.

When the man got out of the truck, he stumbled, and he had difficulty standing. 2RP 94. The officer saw a large wet spot around the man’s crotch and thought it appeared the man urinated. 2RP 95. After conducting one field sobriety test, the officer became concerned that the man was so intoxicated that, if they continued, “he would end up falling and hurting himself.” 2RP 96.

The officer then arrested the driver and read him his rights. 2RP 96. At that point, the officer went back to the truck and found a wallet, inside of which was a driver’s license identifying the driver as Patrick Mullen. 2RP 98-99. The officer also looked at the beer can in the center console and said it was partially full. 2RP 98. At the police station, Mullen later gave a breath test, the first of which was .322 and the second,

.319. 2RP 109, 4RP 14-15. During the test Mullen said he had “[p]robably four” drinks and had started drinking about 7 that morning. 2RP 112.

Joseph Templeton, a supervisor and “custodian of record” at the Department of Licensing (DOL) testified about an abstract of Mullen’s driving record and said it showed Mullen had previously had his driving privileges suspended or revoked and that they were in that status at the time of the incident. 4RP 40-45.

D. ARGUMENT

1. THE TRIAL COURT ERRED, VIOLATED MULLEN’S DUE PROCESS RIGHTS AND FAILED TO FOLLOW CONTROLLING PRECEDENT AND THE FELONY DUI CONVICTION MUST BE REVERSED

In general, the crime of driving under the influence of intoxicants is a gross misdemeanor. See RCW 46.61.502(5). Under RCW 46.61.502(6), however, the offense becomes a Class C felony if “[t]he person has four or more prior offenses . . . as defined in RCW 46.61.5055” within the previous ten years. See State v. Castle, 156 Wn. App. 539, 541, 234 P.3d 260 (2010).

Thus, for a DUI to amount to a felony, the prosecution must prove not only the essential elements required for proving a misdemeanor DUI but also the “additional element” that the defendant has the required prior convictions. As Division One has declared, “[b]y a plain reading of the statute,” the provision for a felony charge “adds an additional element to the list of elements” for the base misdemeanor. Castle, 156 Wn. App. at 542-43.

In this case, Mullen's felony conviction for DUI should be reversed, because the lower court erred, violated Mullen's due process rights and acted contrary to the mandates of Greene in finding that Mullen's prior conviction for reckless driving amounted to a "prior conviction" to support the felony DUI. Further, the error was exacerbated rather than cured even though the issue was submitted to the jury, because the jury was improperly instruction on the issue. There was also insufficient evidence to prove the required facts and remand with orders to comply with the requirements of Greene in this case would require the trial judge to make factual finding in violation of Mullen's state and federal rights to trial by jury and proof beyond a reasonable doubt under Blakely, supra.

a. Relevant facts

Prior to trial, Mullen filed a motion arguing that, under Greene, due process required the prosecution to prove that his 2008 Chelan County conviction for reckless driving involved "intoxicating liquor or drugs" before that conviction could be used as a "prior conviction" to support the charged felony DUI. CP 6.

On June 10, 2013, the parties before Judge McCarthy on the issue. 1RP 3. Counsel argued that the issue was whether the prosecution had sufficient evidence to prove that the Chelan county prior conviction for reckless driving was a qualifying "prior offense" as required to support the charged felony DUI. 1RP 3. The plea agreement, charging documents and judgment and sentence for that offense had been destroyed by Chelan County and the only remaining evidence of that offense was a "docket."

1RP 4-5.

Counsel noted that, in Greene, the Supreme Court had interpreted the language of RCW 46.61.5055(14) and held that, while that statute appeared to allow reliance on an unproven charge of DUI, in order to comply with due process the statute had to be interpreted to require the state to prove that the actual crime of conviction involved alcohol or drugs. 1RP 3-4. He noted that the prior conviction here was for reckless driving, a crime which does not include an element requiring the use of alcohol or drugs, and argued that the only evidence available to prove the Chelan County conviction was insufficient to support the required finding. 1RP 4-5. Further, counsel noted, it would be improper for the court to make factual findings itself beyond facts to which the defendant had admitted or which had been proven beyond a reasonable doubt, because only a jury could properly make such findings. 1RP 11.

The prosecutor admitted that the docket had “no proof of alcohol or drugs being involved” in the reckless driving conviction. 1RP 5-6. He argued, however, that the information contained on the docket was enough to show that the reckless driving conviction involved alcohol and that the court could make the required factual findings, because the prior case was originally charged as a DUI and the docket showed a motion to suppress a “breath test.” 1RP 6. The prosecutor also declared he had “corroborating information” in a “certified copy of Department of Licensing” documents. 1RP 8-9.

In ruling, Judge McCarthy did not address whether there was sufficient evidence to prove the reckless driving involved drugs or alcohol

or whether it was proper for him to make factual findings on that issue. 1RP 11. Instead, he declared, the docket sheets were “clear” that the charge was originally filed as a DUI, which the judge thought was enough so that the prior conviction “counts.” 1RP 11. Judge McCarthy later entered a written order reflecting that the reckless driving amounted to a “prior offense” for purposes of supporting the felony DUI charge, “because it is the result of a charge that was originally filed as [a] DUI, RCW 46.61.502.” CP 36.

Before trial began in front of Judge Stolz, counsel again raised the issue, also arguing the sufficiency of the docket to prove the prior offense. 2RP 11-14. Judge Stolz told counsel “you don’t get to make an argument” because the issue had already been decided by Judge McCarthy, could not be overruled by Judge Stolz and could only be changed by a motion “for reconsideration” in front of Judge McCarthy. 2RP 11-14.

Two days later, after the jury was empaneled, the issue was discussed again. 2RP 61. Judge Stolz noted that it was “a question of law” whether the prior conviction qualified and told counsel the issue was “not to be argued to the jury.” 2RP 61. Counsel again argued that the question was a “fact question that is required by the due process clause” about whether the Chelan County case involved alcohol or drugs, arguing that Judge McCarthy had erred and not followed Greene in holding the issue was a legal question alone. 2RP 63-64. Judge Stolz again reminded counsel, “Judge McCarthy has ruled on this,” then said the issue was a “legal question” and precluded argument on the issue. 2RP 68-69.

At trial, over defense objection, the prosecutor was allowed to

elicit from the DOL witness that the documents indicated that the reckless driving conviction was originally charged as “DUI, and it was amended down,” and that this meant that the reckless driving conviction was a predicate conviction supporting the felony DUI. 4RP 84.²

In discussing jury instructions, the court declined to give the defense “prior offense definition” which was identical to the instruction the court ultimately gave, Instruction 9, except it would have told the jury that the prosecution was not only required to prove that the reckless driving conviction was charged as a DUI initially but also “beyond a reasonable doubt that the prior incident was alcohol or drug related.” 4RP 94. Again, the judge declared that the issue of whether the prior conviction qualified was “a legal question.” 4RP 94-95.

The court later declined to reconsider its ruling or grant counsel’s request “not to offer the State’s instruction.” 4RP 102. Counsel objected that the state’s version was not “a correct statement of law,” would “violate due process” and would allow Mr. Mullen to “potentially be found guilty for an offense that was not proven beyond a reasonable doubt to be a qualifying offense.” 4RP 106.

In closing argument, the prosecutor relied on the instruction as given and told jurors the prosecution’s burden was only to show that the reckless driving “was originally filed as a violation of driving under the influence.” 4RP 127-28.

²The impropriety of allowing such testimony under the confrontation clause is discussed in more detail, *infra*.

b. The court erred and reversal and dismissal is required

Reversal and dismissal of the felony DUI is required, because the prosecution failed to meet its burden of proving the reckless driving conviction amounted to a “prior conviction” as required, the error was not “cured,” the evidence was insufficient and the judge could not constitutionally make the missing findings.

First, Judge McCarthy erred in ruling that Mullen’s conviction for reckless driving qualified as a “prior offense” to support the felony DUI. RCW 46.61.5055(14) defines a “prior offense” for those purposes. See RCW 46.61.5055(4). For this case, the relevant subsection defines a “prior offense,” in relevant part, as including a conviction for reckless driving, “if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 [DUI] or 46.61.504 [being in physical control of a motor vehicle while under the influence][.]”

By its plain language, the statute appears to allow an increased punishment for DUI based solely upon allegations unproven in relation to a prior conviction. In Shaffer, the appellate court interpreted the language in that fashion and then struck it down as unconstitutional and in violation of due process. 113 Wn. App. at 814.

First, the Shaffer Court examined the language of the statute, noting that the provision applied simply “if the [prior] conviction is the result of a charge that was originally filed” as a DUI. 113 Wn. App. at 822. The Court then held that allowing a defendant to lose his liberty based upon “an unproven allegation of DUI in a criminal case resulting in

a reckless driving conviction” rendered the statute unconstitutional, in violation of the defendant’s state and federal rights to due process. Shaffer, 113 Wn. App. at 822. The statutory language improperly allowed a court to “elevate a prior reckless driving conviction to a DUI conviction without any proof,” the Court noted, based solely on a decision by a police officer to issue a citation, rather than requiring actual proof. 113 Wn. App. at 818.

Thus, the interpretation of the statute used by Judge McCarthy here was applied in Shaffer, and the result was that the statute was found to violate a defendant’s rights to due process.

In Greene, supra, however, the Supreme Court overruled Shaffer. In order to reach that conclusion, the Greene Court first rejected the interpretation of the statute applied in Shaffer - and here. More specifically, the Greene Court rejected the Shaffer Court’s interpretation that the statute unconstitutionally allowed reliance on “unproven charges.” Greene, 154 Wn.2d at 727.

Instead, the Supreme Court interpreted the statute to find that, based upon all of its provisions, the statute actually required proof that the prior driving offense of *conviction* involved alcohol or drugs. Greene, 154 Wn.2d at 727. The Greene Court did not find that the statute allowed increased punishment based solely on the fact that a charge started out as a DUI but instead interpreted the statute as “simply clarifying those alcohol or drug-related prior offenses to be considered.” Id. The Court concluded that the statute actually required proof of not only the existence of the prior conviction but also that it was alcohol or drug related. Id. The Court

declared, “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 728.

Thus, in Greene, the Supreme Court interpreted the same language as relevant here, holding that it required proof not only of the existence of the prior conviction but also that “intoxicating liquor or drugs were involved in that prior offense.” Id.

The Greene requirement that of some proof that alcohol or drugs were “involved with the *convicted* [not charged] driving offense,” was all that saved the relevant part of RCW 46.61.5055(14) from being unconstitutional. See Greene, 154 Wn.2d at 727-29. Further, more than 80 years ago, the U.S. Supreme Court condemned as unconstitutional the idea that a Legislature can “validly command” that bringing charges “should create a presumption of the existence of all the facts essential to guilt.” Tot v. United States, 319 U.S. 463, 469, 63 S. Ct. 1241, 87 L. Ed. 2d 151 9 (1943).

Instead of holding the prosecution to the burden the Greene Court detailed as required under the statute, Judge McCarthy here simply relied on the fact of the conviction having been charged as a DUI. CP 36; IRP 11. Put simply, he did not believe it was required for the state to prove anything other than that the reckless driving charge was filed as a DUI, even though the filing of a charge does not amount to proof of a fact beyond a reasonable doubt.

But that is the very interpretation of the statutory language that the

Court found unconstitutional in Shaffer. Shaffer, 113 Wn. App. at 818. And it is the very same interpretation of the statutory language that the Supreme Court *rejected* in Greene, in order to uphold the statute as constitutional. The mandate of Greene is clear: more than mere proof of the existence of a prior conviction for reckless driving is required. Judge McCarthy erred in holding to the contrary and in allowing the reckless driving conviction to be used as a “prior offense” to support the felony DUI without the required proof. And that error was not “cured” at trial, because, while the jury was instructed that it had to find the existence of the required four “prior offenses,” it was so instructed based upon the same interpretation of the statute used by Judge McCarthy - that only proof of the prior charging decision was required.

It appears that Judge McCarthy (and, by extension, Judge Stolz) relied on the prosecution’s citation to State v. Chambers, 157 Wn. App. 465, 467, 237 P.3d 352 (2010), in holding that the requirement of proving that a prior conviction met the statutory definition of RCW 46.61.5505 was a “threshold question of law,” despite the holding of Greene. See CP 10-36.

Chambers, however, did not apply. The decision in Chambers involved a *different* subsection of RCW 46.61.5055 - one which did not require making factual findings. In Chambers, the trial court applied a part of the definition of a “prior offense” which was not at issue here or in Greene but instead defined certain actual DUI convictions as prior offenses if they were “comparable” to a Washington state DUI. Chambers, 157 Wn. App. at 472. Under that different provision of RCW

46.61.5055, the trial court had looked at the out-of-state DUI and concluded that it was “legally comparable” to a DUI in Washington state. 157 Wn. App. at 472-73. On review, Division One decided that the issue of whether the prior conviction in that case met the definition of the specific subsection involved was “legal” because the trial judge had only conducted “a legal analysis comparing the elements” of the California and Washington crimes. 157 Wn. App. at 472-73. In *that* context, the Chambers Court declared that the question of whether a prior offense amounted to a “prior conviction” was in general a “threshold question of law.” 157 Wn. App. at 477.

Thus, the Chambers decision was based on an entirely different subsection of RCW 46.61.5055 than the one at issue here - or in Greene. . As a result, the Chambers Court had no opportunity to consider the potential constitutional problems with having a trial court make factual findings in addition to conducting legal analysis. Nor did it control on the issue of whether the prosecution had a due process burden of proof under Greene.

In any event, had Judge McCarthy applied the correct standard or Judge Stolz corrected the error, the prior conviction for “reckless driving” nevertheless could not have been found to be a “prior offense” supporting the felony DUI in this case. The plea and other documents had been destroyed and all that remained was a docket. See 1RP 4-5. That docket, however, could not establish the required facts regarding the reckless driving offense, beyond a reasonable doubt. Not only does the “docket” reflect only what someone typed into the record as reflecting what

documents were in the court file (thus amounting to hearsay and raising confrontation clause issues, *infra*). The docket also shows only that there was a motion to suppress a breath test but also a separate motion to suppress and dismiss under CrR 3.6. See CP 17-20. The notation of a hearing being held and a court's ruling denying a defense motion does not show anything about the substance of the motion. See CP 19-20. These cursory notations do not prove, beyond a reasonable doubt, that the prior conviction for reckless driving actually involved alcohol or drugs but simply show that Mullen was charged initially with DUI and there was a breath test, the results of which are not showed.

In addition, even if the docket could have been seen as providing evidence to make the required missing findings, it would not be proper for a judge to do so. It is now nigh-irrefutable that the defendant has a Sixth and Fourteenth Amendment right to a jury determination of all facts that increase the punishment to which he might otherwise be exposed. See Blakely, supra; Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 2162, 186 L. Ed. 2d 314 (2013) (the Sixth Amendment requires that any finding of fact which "alters the legally prescribed punishment so as to aggravate it" and thus forms a part of the higher offense has to be submitted to a jury and proven beyond a reasonable doubt).

Indeed, the U.S. Supreme Court has recently reaffirmed the holding of Blakely in a context similar to this one. In Descamps v. U.S., ___ U.S. ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), the Court examined an enhancement which was mandatory if a defendant had three prior convictions "for a violent felony," which included certain convictions for

“burglary, arson, or extortion.” 133 S.Ct. at 2281. The Descamps Court looked at whether it was proper for a trial judge to determine whether a conviction qualified as a prior conviction for a “violent felony” under the statute if a statute “criminalizes a broad swath of conduct.” Id. The issue was if a trial court could decide, “based on information about a case’s underlying facts,” that the defendant’s prior conviction qualifies as a “violent felony” predicate “even though the elements of the crime” by themselves would not prove that status. Id. The Descamps trial court had held that it was proper to look at the record of the plea colloquy and other documents to determine whether Descamps “had admitted the elements” of the burglary in a way that involved what would be a “violent felony.” 133 S. Ct. at 2282-83. *En banc*, the 9th Circuit Court of Appeals had agreed, finding it constitutional for a trial court to “scrutinize certain documents to determine the factual basis of a the conviction” and make the required determination of whether the prior conviction met the definition and thus supported the enhancement. Id.

The U.S. Supreme Court disagreed. The “prior conviction” exception did not allow such factual findings, the Court found, because that exception only allowed “the fact of the prior conviction” to increase the penalty beyond the statutory maximum without being subject to the requirements of jury trial and proof beyond a reasonable doubt. Descamps, 133 S. Ct. at 2288. Because the lower court’s “finding of a predicate offense indisputably increases the maximum penalty,” the Court noted, “[a]ccordingly that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior

conviction.” Id. The Court noted that a sentencing court cannot “make a disputed” determination about what the defendant, prosecution and judge “must have understood as the factual basis of the prior plea” or what the jury must have, in a previous trial, concluded were the facts of the case. Id. (quotations omitted).

Indeed, the Supreme Court chastised the 9th Circuit’s ruling in Descamps that the judge had properly engaged in “factfinding beyond the recognition of a prior conviction.” Id. The Court noted that the 9th Circuit ruling

authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant’s underlying conduct. **And there’s the constitutional rub.** The Sixth Amendment contemplates that a jury - not a sentencing court - will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting the elements of the offense - as distinct from amplifying but legally extraneous circumstances.

133 S. Ct. at 2288 (emphasis added) (citation omitted).

Just as in Descamps, here it is the prior conviction’s “underlying facts” which may elevate it to a “prior offense.” The conviction for reckless driving alone would not satisfy the requirement of proving, as required under Greene, that the prior conviction involved alcohol or drugs. And as the prosecution itself admitted, there was nothing in the docket which established that there was a stipulation to or agreement by the defendant that the reckless driving involved drugs or alcohol. IRP 5-6.

Notably, in Descamps, the Supreme Court held that a defendant entering a plea has waived his right to a jury’s verdict on the facts relating “only [to] that offense’s elements.” 133 S. Ct. at 2288-89. The Court

further declared that, “whatever [the defendant]. . . says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.” 133 S. Ct. at 2288-89. The Court concluded that, when the district court had found that Descamps had effectively admitted a relevant “fact” by not denying the prosecutor’s statement at the plea hearing regarding that fact, that lower court had done “just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant’s maximum sentence.” 133 S. Ct. at 2289.

Just as in Descamps, here the relevant statute as interpreted by our highest Court in Greene increases the crime from a misdemeanor to a felony based not on the actual crime of conviction - reckless driving - but on the “case’s underlying facts” - that it involved drugs or alcohol. Under Descamps, the required factual determination had to be made by a jury and proven by the state, beyond a reasonable doubt.

The trial court erred in finding that the reckless driving offense could be used as a “prior offense” to support a felony DUI based solely upon the fact that the reckless driving was initially charged as a DUI. The decision violated Mullen’s due process rights under Greene. Further, the only evidence of the reckless driving which remained was insufficient to establish the missing fact beyond a reasonable doubt. Finally, the trial court could not make the required factual findings based on the remaining evidence without violating Mr. Mullen’s rights to trial by jury and proof beyond a reasonable doubt as noted in Descamps and Blakely. Because the prosecution failed to prove the essential fourth prior conviction met the requirements to support the conviction, reversal and dismissal is required.

2. MR. MULLEN'S STATE AND FEDERAL RIGHTS TO CONFRONTATION WERE VIOLATED

Both the state and federal constitutions guarantee the right to confrontation. See State v. Lui, ___ Wn.2d ___, 315 P.3d 493 (2014). In this case, Mr. Mullen's confrontation clause rights were violated when the trial court repeatedly allowed the prosecution to rely on and admit testimonial evidence without giving Mullen a chance to cross-examine the declarant.

a. Relevant facts

At trial, over defense objection, Trooper Roberts was allowed to testify that he had called in a "records check" and was told that Mullen's driver's license status on the day in question was "revoked second degree." 4RP 15.

Later, when the prosecution sought to have a witness from the Department of Licensing (DOL) admit a "certified copy of the drive record," counsel objected on confrontation clause grounds, arguing that the exhibit was duplicative and "testimonial." 4RP 49-52. The prosecutor conceded that the document was prepared in "anticipation of litigation" but argued that it was still admissible because it was just a "reflection of the records on a particular date." 4RP 51. The court allowed admission of the document, which was relied on by the DOL witness, Templeton, in testifying that Mullen's license was revoked or suspended when he drove the day of the incident. 4RP 40-45. In addition, over defense objection, Templeton testified about what he said the records showed about the reckless driving conviction, i.e., that it had originally been charged as a

DUI and that this meant it qualified as a prior conviction to support the DUI. 4RP 84. In closing argument, in declaring that it had met its burden of proof, the prosecution relied on Templeton's testimony and "the certified record of Mr. Mullen's driving record that stated that his license was revoked in the second degree on March 2, 2013." 4RP 130-31.

b. Mullen's confrontation rights were violated and the prosecution cannot prove the constitutional error harmless

Recently, the U.S. Supreme Court has been working to clarify the scope of the federal right to confront and cross-examine witnesses, especially in the context of reports prepared for and admitted at trial. Prior to Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), our state Supreme Court had held that it was not a violation of confrontation rights to admit into evidence a "certification attesting to the existence or nonexistence of public records," even if the person preparing that certification was not available to cross-examine. See Lui, 315 P.3d at 100.

In State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012), however, our Supreme Court looked at the issue following Melendez-Diaz and concluded that our state's previous decisions were no longer good law. In Jasper, each of the defendants in the consolidated cases was convicted of an offense which required proof of a status of some kind, i.e. not having a particular license, or driving while his license was suspended or revoked. Jasper, 174 Wn.2d at 103-204. In fact, similar to this case, in one of the Jasper cases, the defendant was convicted of driving while license suspended or revoked based upon a "certified copy of driving record" from

DOL, a declaration from a DOL records custodian that the document was “true and correct” and a declaration that the computer files at DOL indicated that the defendant had not reinstated his diving record and was “suspended /revoked.” 174 Wn.2d at 104.

On review, the Supreme Court held that such certifications were testimonial, as they were created “and in fact used, for the sole purpose of establishing critical facts at trial.” 174 Wn.2d at 114-15. Such evidence did not just show the existence of public records but in fact “furnish, as evidence for the trial of a lawsuit, [the clerk’s] interpretation of what the record contains or shows, [and] certify to its substance or effect.” Jasper, 174 Wn.2d at 115, quoting, Melendez Diaz, 129 S. Ct. at 2539 (quotations omitted). As a result, it was a violation of the defendants’ confrontation clause rights to admit these “testimonial” documents without giving the defendants the right to cross-examine the person who created them. Jasper, 174 Wn.2d at 115.

Just as in Jasper, here the admission of the “driving record,” the testimony of the DOL custodian and the trooper’s declaration of what he was told the record said about Mullen’s status were all in violation of Mullen’s confrontation clause rights. The admission of such testimonial evidence with intent to use that evidence against Mullen was done without giving him an opportunity to cross-examine the person who prepared the “driving record” or conducted the “records check” and reported the result to the trooper.

Further, just as in Jasper, these constitutional errors were not harmless. In Jasper the Court found that the constitutional error was not

harmless beyond a reasonable doubt, because the unconstitutionally admitted evidence was a part of the evidence used against the defendants. 174 Wn.2d at 117-18. Similarly, here, the prosecution cannot show the constitutional errors harmless beyond a reasonable doubt. The “docket” was used against Mullen by the DOL witness not only to establish that a prior conviction for reckless driving existed but also to declare that conviction amounted to a proper “prior” to support the felony DUI. The trooper’s testimony and “driving abstract” was the evidence upon which Mullen was convicted of the driving while license suspended offense. See 4RP 130-31. As a result, the prosecution cannot prove beyond a reasonable doubt that every reasonable jury would necessarily have convicted Mullen of both the felony DUI and the suspended license crimes, absent the errors. This is especially so because the prosecutor also told the jury that they did not have to give Mullen “the benefit of” any doubt. See Argument 3, *infra*. Even if the conviction for felony DUI was not already being reversed because of the errors regarding the prior conviction, reversal of both that conviction and the suspended license conviction would be required because of the violations of Mullen’s confrontation clause rights. This Court should so hold.

3. IN THE ALTERNATIVE, REVERSAL AND REMAND FOR A NEW TRIAL ON BOTH COUNTS IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT

Prosecutors have special duties not imposed on other attorneys, including a duty to seek justice instead of acting as a “heated partisan” in an effort to win a conviction. See State v. Charlton, 90 Wn.2d 657, 664-

65, 585 P.2d 142 (1978); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor fails in this duty, he not only deprives the defendant's of the due process right to a fair trial but also denigrates the integrity of the prosecutor's role. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. at 18. Ordinarily, when counsel fails to object to misconduct below, the issue is waived for appeal unless the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction. See State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001). Here, counsel immediately moved for a mistrial, and further, even the prosecutor admitted the misconduct was highly improper. The trial court erred in denying Mullen's motion for a mistrial and refusing to do so or even give a curative instruction when requested by the prosecutor.

a. Relevant facts

In closing argument, counsel said the prosecution had a "high burden" to "foreclose any reasonable doubt about its claim for a fourth offense." 4RP 133. He told the jury that, whether they liked Mr. Mullen or not, whether "he is entitled to your respect or your kindness or your empathy, he is entitled to the benefit of the doubt in this case." 4RP 133.

Counsel also argued for a lesser of misdemeanor driving under the influence, telling the jurors that there was “no reasonable doubt about whether” Mr. Mullen was under the influence that night, but that there were “reasons to doubt the felony offense.” 4RP 139.

In rebuttal closing argument, the prosecutor said:

Counsel stated the benefit of the doubt to Mr. Mullen. It’s reasonable doubt. **It’s not the benefit of the doubt.** You are to apply the law and the instructions as given to you. A reasonable doubt, as it states in the instructions, is a doubt for which a reason exists. I submit to you that you can believe in the abiding truth of the charges based off of the evidence.

4RP 147-48 (emphasis added).

After the jury was excused, defense counsel moved for a mistrial based on, *inter alia*, the prosecutor’s argument in rebuttal closing argument about reasonable doubt. 4RP 150. Counsel pointed out that the prosecutor had said, “quite clearly, reasonable doubt does not mean the defendant gets the benefit of the doubt; and that’s been found to be clear prosecutorial misconduct.” 4RP 150-51.

The court denied the motion, saying it was “argument” and the general jury instructions told jurors to disregard anything that was not supported by the evidence. 4RP 151. Before the verdict was read, however, the prosecutor asked if he could “address something.” 4RP 155. The prosecutor then conceded that his argument about the “benefit of the doubt” had been wrong and counsel was right that the argument was improper under the caselaw (including a case called “Warren”). 4RP 156.

The prosecutor suggested “perhaps a curative instruction or perhaps instructing the jury on the presumption of innocence or reasonable

doubt” should be done. 4RP 156. He admitted, however, that he was unsure if that could happen this late in the proceedings. 4RP 156.

Judge Stolz stated the jurors had been given proper instruction defining reasonable doubt. 4RP 156. She also said it was “a little late at this point for additional curative instructions.” 4RP 156. The prosecutor apologized to the court, counsel and Mr. Mullen but the judge opined that the prosecutor’s arguments did not really “matter” because the jury was instructed on the law. 4RP 156-57.

- b. The arguments were flagrant, prejudicial misconduct and a mistrial should have been granted or some effort made to cure

There can be no question that the prosecutor’s argument was serious, prejudicial misconduct. See State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). It is significant misconduct for a prosecutor, with all the weight of the prosecutor’s office behind him, to misstate the applicable law. State v. Fleming, 83 Wn. App. 209, 214-16, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). It is even more egregious when the prosecutor’s misstatements specifically relieve the prosecutor of his constitutionally mandated burden. See Warren, 165 Wn.2d at 26. Under both the state and federal due process clauses, the prosecution must prove each element of its case, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); Sixth Amend.; Fourteenth Amend.; Article I, § 22.

In Warren, the Supreme Court condemned the same argument made here as “particularly grievous” misconduct. 165 Wn.2d at 757. The

Warren Court noted that a prosecutor enjoys the status of “quasi-judicial” officer and was very concerned that such an officer would

so mislead the jury regarding the bedrock principle of the presumption of innocence, the foundation of our criminal justice system.

165 Wn.2d at 26-27. Further, the Court made it clear that it would not countenance similar arguments in the future:

Had the trial court not intervened to give an appropriate and effective curative instruction, we would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error.

165 Wn.2d at 26-27.

Here, the same “remarkable misstatement” was made by the prosecutor when he declared counsel wrong for saying the standard of reasonable doubt meant Mullen was given the benefit of the doubt and when the prosecutor then told jurors they were not to give Mullen such a benefit. 4RP 147 (“[c]ounsel stated the benefit of the doubt to Mr. Mullen. It’s reasonable doubt. **It’s not the benefit of the doubt**”) (emphasis added). Further, Warren was decided several years before the trial in this case, making the extreme impropriety of such argument patently clear. See Warren, 165 Wn.2d at 26-27.

To his credit, ultimately, the prosecutor below realized the gravity of his misconduct and apologized. But the damage had already been done. The trial court had already discounted the severity of the misconduct by simply declaring it “argument.” The judge had already decided that there was no need for any action, let alone an attempt at a cure. And the jury had already come to its conclusion and was ready to render its verdicts.

At that point, the only possible remedy was a mistrial. The jury had already conducted and completed its deliberations with the incredibly improper idea that it should not give Mullen the benefit of the doubt - an incredibly serious misstatement of the law of reasonable doubt. Further, because Mullen *admitted* to misdemeanor driving while intoxicated but was arguing there was reasonable doubt that the prosecution had met its burden of proof for the felony, the serious misconduct in this case could very well have impacted the jury's decision to find Mullen guilty of that felony.

As the Warren Court noted, where no corrective action is taken after a prosecutor tells the jury that the defendant is not entitled to the "benefit of the doubt," an appellate court should not "hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error." 165 Wn.2d at 26-27.

Nor could counsel be faulted for failing to ask for a mistrial again, when the first request had been denied. By that point, the only remedy which could suffice would be a mistrial, as the jury had already reached a conclusion in the case under the extremely corrosive influence of the prosecutor's claim that Mullen was *not* entitled to any "benefit of the doubt." Thus, while the trial prosecutor is to be commended for his candor and apology, neither cured the incredible prejudice the prosecutor's highly improper argument in this case had caused.

Even if the two convictions were not already subject to reversal based upon the other arguments contained *infra*, reversal and remand for a new trial should be granted, because the prosecutor committed highly

prejudicial misconduct which, under Warren, required a cure or reversal. The trial court's failure to grant a mistrial and to even attempt to minimize the incredibly corrosive misconduct was error, and this Court should grant Mr. Mullen a new trial on this basis even if it does not grant relief on the other grounds argued herein.

F. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the conviction for felony DUI. In addition, the convictions were gained in violation of Mr. Mullen's confrontation clause rights. Finally, in the alternative, reversal of both charges is required based upon the extremely improper and prejudicial misconduct in this case.

DATED this 14th day of February, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Kit Proctor, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402; to Patrick Mullen, DOC 315370, Olympic CC, 11235 Hoh Main Line, Forks, WA. 98331.

DATED this 14th day of February, 2014.

Respectfully submitted,

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