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No. 96747-4

COA NO. 77045-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEN V. WU,

Appellant.

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

The Honorable Ken Schubert, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's Sixth Amendment right to have the jury find a fact that elevates the crime of driving under the influence (DUI) from a misdemeanor to a felony.

2. The evidence was insufficient for the jury to convict appellant of a felony DUI.

3. The court erred in failing to instruct the jury that it needed to find the prior reckless driving offenses involved drugs or alcohol in order to return a verdict that appellant had four "prior offenses."

4. The court erred in ruling, as a matter of law, that the prior reckless driving offenses involved drugs or alcohol.

5. The court erred in admitting documentary evidence associated with the prior reckless driving convictions into evidence.

Issues Pertaining to Assignments of Error

1. Where involvement of drugs or alcohol must be proven by the State to establish that prior convictions for reckless driving qualify as "prior offenses" elevating the crime of DUI from a gross misdemeanor to a felony, whether involvement of drugs or alcohol is a fact that must be found by the jury under the Sixth Amendment as opposed to a legal question to be determined by the judge?

2. Whether the State failed to prove beyond a reasonable doubt that the prior convictions for reckless driving involved drugs or alcohol where the conviction itself does not establish the fact and the evidence presented to the jury established no more than that the prosecutor's office had originally charged the offense as a DUI?

3. Whether the court erred in failing to instruct the jury that it needed to find the prior reckless driving offenses involved drugs or alcohol in order to return a verdict that appellant had four "prior offenses" because this was a factual matter for the State to prove and the jury to decide?

4. Even if the court rather than the jury had authority to determine whether the prior reckless driving convictions qualified as "prior offenses" under the DUI statute, whether the evidence was insufficient to show those prior offenses involved drugs or alcohol?

5. Whether the court erred in admitting evidence of prior driving reckless convictions into evidence because they were irrelevant, as the evidence failed to establish they qualified as "prior offenses" under the definitional statute?

B. STATEMENT OF THE CASE

The State charged Ken Wu with driving while under the influence of an intoxicating liquor (DUI) and first degree driving with a

suspended/revoked license. CP 58-59. The DUI count was elevated to a felony based on the allegation that Wu had "at least four prior offenses within ten years of the arrest for the current offense, as defined under RCW 46.61.5055(14)." CP 58.

The case proceeded to a jury trial, where the State introduced documentary evidence that Wu had one prior DUI conviction, one prior conviction for first degree negligent driving, and two prior convictions for reckless driving. Ex. 9. After the State rested its case, the defense moved to dismiss the DUI charge because the evidence was insufficient to show the two prior reckless driving convictions involved alcohol or drugs. RP¹ 672-81. The court denied the motion, reasoning whether the prior offenses involved drugs or alcohol was a question of law for the court to decide, not a question of fact for the jury. RP 684-88. The court found the prior offenses involved alcohol or drugs based on the documents admitted as Exhibit 9. RP 685-90.

Defense counsel also argued the jury needed to be instructed on the requirement that the prior offenses involved alcohol or drugs. RP 681, 692-93. The defense proposed the following instruction:

¹ The verbatim report of proceedings is referenced as follows: RP - eight consecutively paginated volumes consisting of 5/1/17, 5/12/17, 5/22/17,5/25/17, 5/30/17, 5/31/17, 6/1/17, 6/23/17.

"Within ten years" means that the arrest for a prior offense occurred within ten years before the arrest for the current offense.

"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 46.61.5249 (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) and the State has proven beyond a reasonable doubt that the prior incident was alcohol or drug related. CP 121.

The defense also proposed this instruction:

Four separate prior offenses have been alleged. You must decide independently whether the State has proven beyond a reasonable doubt that each offense is alcohol-related. Your decision on one prior offense should not control your decision on any other prior offense. You cannot use the fact that one or more prior offenses is alcohol-related, or that the defendant has been convicted of Driving Under the Influence in this trial, to infer that any other offense is alcohol-related. CP 123.

The court denied the defense request for the instructions based on its prior ruling that the question of whether the prior offenses involved drugs or alcohol was for the court to decide. RP 692-94.

The jury found Wu guilty as charged. CP 117-18. In the bifurcated portion of the trial, the jury was instructed that it needed to

decide whether Wu "has four or more prior offenses within ten years of August 1, 2016." CP 126. The jury was further instructed:

"Within ten years" means that the arrest for a prior offense occurred within ten years before the arrest for the current offense.

"A prior offense" means

a conviction for driving under the influence; or

a conviction for negligent driving in the first degree if the conviction is the result of a charge that was originally filed as driving under the influence or physical control while under the influence; or

a conviction for reckless driving if the conviction is the result of a charge that was originally filed as driving under the influence or physical control while under the influence.

CP 130.

The jury returned a special verdict that Wu had four prior offenses.

CP 119. The court sentenced Wu to 26 months of confinement on the DUI count and 90 days on the other count, to run consecutively. CP 175.

Wu appeals. CP 181, 184-97.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT WU OF THE FELONY OFFENSE BECAUSE A FACT NEEDED TO ELEVATE THE OFFENSE TO A FELONY WAS NOT PROVEN BY THE STATE.

To sustain a conviction for felony DUI, the State must prove four "prior offenses" as defined by statute. Based on Supreme Court precedent interpreting the requirements of the definitional statute, there must be evidence that the prior offenses involved drugs or alcohol. In Wu's case,

the State failed to prove two prior convictions for reckless driving qualified as "prior offenses" because it produced no evidence that those offenses involved drugs or alcohol. This was a question of fact for the jury to decide, as mandated by the Sixth Amendment right to a jury trial. Due process requires reversal of the conviction due to insufficient evidence.

- a. **The State needed to prove four "prior offenses," including the fact that prior convictions for reckless driving involved drugs or alcohol, in order to convict Wu for felony DUI.**

Generally, the crime of driving under the influence of intoxicants is a gross misdemeanor. RCW 46.61.502(5). The offense becomes a Class C felony if "[t]he person has four or more prior offenses within ten years as defined in RCW 46.61.5055." Former RCW 46.61.502(6)(a).²

A "prior offense" is defined by statute. Former RCW 46.61.5055(14)(a)³ It can be "[a] conviction for a violation of RCW 46.61.502 [DUI] or an equivalent local ordinance." Former RCW 46.61.5055(14)(a)(i). A "prior offense" is also defined as "[a] conviction

² Laws of 2016, ch. 87 § 1, eff. June 9, 2016. This was the version of the statute in effect on August 1, 2016, the date of the crime for which Wu was convicted. The statute has since been amended to require only three or more prior offenses. RCW 46.61.502(6)(a) (Laws of 2017, ch. 335 § 1, eff. July 23, 2017).

³ Laws of 2016 sp.s., ch. 29 § 530, eff. April 1, 2016. The current version of the statute is the same in all relevant respects.

for a violation of RCW 46.61.5249, 46.61.500, or 9A.36.050 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 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522." Former RCW 46.61.5055(14)(a)(xii). Converting the statutory citations to readily understood language, a "prior offense" means a conviction for a violation of first degree negligent driving (RCW 46.61.5249), reckless driving (RCW 46.61.500), or reckless endangerment (RCW 9A.36.050) or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of driving under the influence (RCW 46.61.502) or physical control while under the influence (RCW 46.61.504), or an equivalent local ordinance, or of vehicular homicide (RCW 46.61.520) or vehicular assault (RCW 46.61.522).

The prior convictions relied on by the State in Wu's case involved: (1) driving under the influence (district ct. no. 5653A-13D); (2) first degree negligent driving, originally charged as driving under the influence (case no. 44943); (3) reckless driving, originally charged as driving under the influence (case no. 5Z0568535); and (4) reckless driving, originally charged as driving under the influence (district ct. no. 5633A-13D). Ex. 9.

Where criminal statutes raise the level of a crime from a misdemeanor to a felony based upon the defendant's prior convictions,

those convictions are elements of the charged crime that the State must prove beyond a reasonable doubt. State v. Roswell, 165 Wn.2d 186, 189, 196 P.3d 705 (2008). In that circumstance, "[t]he prior conviction is not used to merely increase the sentence beyond the standard range but actually alters the crime that may be charged." Id. at 192. Such is the case where a misdemeanor DUI is elevated to a felony offense due to prior convictions. The provision for a felony charge in the DUI statute "adds an additional element to the list of elements" for the base misdemeanor. State v. Castle, 156 Wn. App. 539, 542-43, 234 P.3d 260 (2010).

Of relevance to Wu's case, the State must prove involvement of alcohol or drugs as part of a "prior offense" originally charged as a DUI but amended to another charge. State v. Mullen, 186 Wn. App. 321, 332, 345 P.3d 26 (2015). This conclusion flows from City of Walla Walla v. Greene, 154 Wn.2d 722, 724-26, 116 P.3d 1008 (2005), cert. denied, 546 U.S. 1174, 126 S. Ct. 1339, 164 L. Ed. 2d 54 (2006), where the Supreme Court addressed a due process challenge to the DUI statute that increased the mandatory minimum sentence for a current DUI conviction based on a "prior offense" of first degree negligent driving. It rejected Greene's argument that the statute relieved the State of proving a prior DUI charge by interpreting the statute to require proof that drugs or alcohol were involved in the prior offense. Id. at 726-28. The definitional statute

"limits applicability to those convictions where DUI was the predicate charge, thus requiring alcohol or drugs to be involved with the convicted driving offense." Id. at 727. "Accordingly, the statute requires the State to establish that a prior driving conviction involved use of intoxicating liquor or drugs. Thus, 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." Id. at 727-28 (footnote omitted, emphasis added).

Greene "establishes the involvement of alcohol or drugs as part of the definition of a prior offense" and "that it is an element of the crime." Mullen, 186 Wn. App. at 332. Following Greene, unless alcohol or drugs were involved in his two prior reckless driving convictions, Wu "could not have been charged with felony DUI and, therefore, it is an essential element of the offense of felony DUI." Id.

The question then becomes who is to decide whether this requirement has been proved: the judge or the jury? As discussed below, Wu had the right to have the jury decide this issue of fact. The Sixth Amendment right to a jury trial does not allow the court to usurp the function of the jury and decide the matter on its own authority.

- b. Where the question of whether a prior conviction qualifies as a prior offense requires a factual determination, the Sixth Amendment right to a jury trial mandates that the jury, not the court, decide the issue.**

"Whether an issue presents a question of law or fact and, thus, whether the trial court has the authority to decide it, is a question of law that we review de novo." Mullen, 186 Wn. App. at 328 (citing State v. Chambers, 157 Wn. App. 465, 474, 237 P.3d 352 (2010), review denied, 170 Wn.2d 1031, 249 P.3d 623 (2011); State v. Miller, 156 Wn.2d 23, 27, 123 P.3d 827 (2005)). Division Two's decision in Mullen is on point and supports Wu's argument that the jury, not the judge, must decide whether a "prior offense" for reckless driving involved drugs or alcohol.

In Mullen, the trial court violated due process when it declined to give the defendant's proposed jury instruction requiring the State to prove beyond a reasonable doubt that alcohol or drugs were involved in a prior conviction for reckless driving. Mullen, 186 Wn. App. at 324. The Court of Appeals rejected the State's argument that whether alcohol or drugs were involved is a threshold legal question for the trial court to decide. Id. at 328. Rather, the State must prove beyond a reasonable doubt that a prior conviction for reckless driving involved alcohol or drugs in order to use that conviction as a prior offense to elevate a misdemeanor DUI to a felony. Id. at 325-26.

Relying on Greene and cases analyzing the Sixth Amendment right to a jury trial, Mullen held that because "the legislature's intent was to charge defendants who are guilty of prior *alcohol- or drug-related* offenses with felony DUI, the involvement of alcohol or drugs in prior convictions is an essential element that must be proved to a jury where it was not an essential element of the prior conviction itself." Id. at 329. "[A]fter Greene, unless alcohol or drugs were involved in his reckless driving conviction, Mullen could not have been charged with felony DUI and, therefore, it is an essential element of the offense of felony DUI." Id. at 332. Because involvement of alcohol or drugs is an essential element of first degree negligent driving, the State in Greene needed to prove only the existence of the prior offense. Greene, 154 Wn.2d at 728.⁴ But the involvement of alcohol or drugs is not an essential element of a prior reckless driving conviction, so "the State must prove both the existence of the prior offense and the fact of alcohol or drug involvement." Mullen, 186 Wn. App. at 333.

⁴ See RCW 46.61.5249(1)(a) ("A person is guilty of negligent driving in the first degree if he or she operates a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property, and exhibits the effects of having consumed liquor or marijuana or any drug or exhibits the effects of having inhaled or ingested any chemical, whether or not a legal substance, for its intoxicating or hallucinatory effects.").

In State v. Bird, 187 Wn. App. 942, 945, 352 P.3d 215, review denied, 184 Wn.2d 1013, 360 P.3d 818 (2015), Division One advanced the proposition that "[w]hether a prior conviction qualifies as a predicate offense is a threshold question of law for the court, and not an essential element of the crime of felony DUI." Bird disagreed with Mullen "holding otherwise." Id.

The Bird court's disagreement with Mullen is dicta because the issue in Bird was whether the trial court erred in granting the defense pre-trial motion to dismiss the felony DUI charge for failing to prove a prior offense for vehicular assault. Id. at 944, 947. Bird reversed the trial court's order of dismissal because there was sufficient information by which a trial court could determine that the guilty plea to vehicular assault referred to the DUI means of committing that offense. Id. at 945, 947. There was no argument advanced on appeal that the jury, rather than the judge, needed to make the requisite finding. This was not a dispute on appeal. Bird's comment about Mullen was unnecessary to the resolution of the issue before it and is therefore dicta. See In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case."). "Dicta is not binding authority." Protect the Peninsula's Future v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914, review denied, 178 Wn.2d 1022, 312 P.3d 651 (2013).

As Wu is litigating his appeal in Division One, it behooves him to show why the Bird dictum is incorrect. Wu's argument is based on Mullen but sharpens the analysis to capture the dispositive point: facts elevating a misdemeanor to a felony must be found by a jury, and whether a prior offense involved alcohol or drugs is such a fact. That determination cannot be made as a matter of law. It is not a legal question to be decided by the court, but a factual question to be decided by the jury, as required by the Sixth Amendment.

Under the Sixth Amendment right to a jury trial, any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 301-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Id. at 303-04. "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts that the law makes essential to the punishment, and the judge exceeds his proper authority." State v. Winston, 135 Wn. App. 400, 406-07, 144 P.3d 363 (2006) (citing Blakely, 542 U.S. at 304). To put it plainly, "[a]ny fact that, by law, increases the penalty for a crime is an

'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013).

As argued, drugs or alcohol must be involved in a prior reckless driving offense in order for a conviction for that offense to qualify as a "prior offense" under the DUI statute. The dispositive question, then, is whether the involvement of drugs or alcohol is an issue of fact or an issue of law. If it is a fact, then the jury must decide its existence under the Sixth Amendment because it elevates the crime from misdemeanor status to a felony.

Traditionally, questions of "pure historical fact" are for the jury to decide, as are mixed questions of law and fact where the jury applies the facts to the legal standard to render a verdict. United States v. Gaudin, 515 U.S. 506, 512-14, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). The court only retains authority to decide "pure questions of law." Id. at 513. "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981) (quoting Leschi Imp. Council v. Washington State Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774 (1974)). "This view has long been a part of the common law of this state." Leschi, 84 Wn.2d at 283.

Whether a prior offense involved alcohol or drugs is a factual determination, not a legal one. The issue cannot be decided as a matter of law because the existence of a conviction for reckless driving does not in and of itself prove that the offense involved drugs or alcohol. As pointed out in Mullen, the elements of reckless driving do not require drug or alcohol involvement. See RCW 46.61.500(1) ("Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving."). Whether drugs or alcohol were involved in Wu's conduct is a question of pure historical fact that cannot be decided without looking to evidence outside of the conviction itself.

In contrast, whether drugs or alcohol were involved for a "prior offense" involving first degree negligent driving can be decided as a matter of law because all elements of that offense, including the involvement of drugs or alcohol, are established by the conviction itself. Greene, 154 Wn.2d at 728. Bird is therefore correct that the court, rather than the jury, has the authority to decide whether a prior conviction for *vehicular assault under the DUI prong* qualifies as a predicate "prior offense" under the DUI statute. In that circumstance, the conviction itself proves the offense was committed while under the influence of alcohol or drugs. See RCW 46.61.522(1)(b) ("A person is guilty of vehicular assault if he or she operates or drives any vehicle: . . . While under the influence

of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another."). This is a pure legal question that requires no additional fact-finding.

Where Bird flies astray is in condemning Mullen for answering a different question: whether the jury, rather than the court, must decide whether a prior conviction for *reckless driving* qualifies as a predicate "prior offense" under the DUI statute. It must be a jury because whether a prior reckless driving offense involved drugs or alcohol is a fact to be found, not a legal conclusion flowing from the conviction itself. "[B]ecause the involvement of alcohol or drugs is not an essential element of a prior reckless driving conviction, the State must prove both the existence of the prior offense and the fact of alcohol or drug involvement." Mullen, 186 Wn. App. at 333; see also Descamps v. United States, 570 U.S. 254, 133 S. Ct. 2276, 2281, 2288-89, 186 L. Ed. 2d 438 (2013) (court could not decide facts underlying predicate conviction used to enhance sentence for current offense without raising serious Sixth Amendment problem, where proof of conviction did not by itself establish such facts).

There is a line of cases, some of them cited by Bird, that hold whether a prior conviction qualifies as a predicate conviction for a current offense is a question of law for the court to decide. In each of those cases,

there was no factual determination at issue. They all involved pure legal issues, so the Sixth Amendment right to a jury trial was not implicated.

The Supreme Court's decision in Miller is the genesis of this line of cases. There, the Court held the existence of previous convictions for violation of a no-contact order is an element of felony violation of a no-contact order (FVNCO) under RCW 26.50.110(5), but the question of whether a prior conviction meets the definition and qualifies as a predicate offense under the FVNCO statute is a threshold question of law for the court. Miller, 156 Wn.2d at 30. Miller addressed a challenge to the legal validity of the prior conviction, concluding "issues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court. Id. at 31. The basis for its holding was that "issues concerning the validity of an order normally turn on questions of law. Questions of law are for the court, not the jury, to resolve." Id.

Wu does not challenge the legal validity of the prior reckless driving convictions. That question of law is not at issue in Wu's case. Wu's case involves a simple factual determination: whether the prior reckless driving offenses involved drugs or alcohol. That is the province of the jury. The distinction holds with other cases.

Like Miller, State v. Carmen, 118 Wn. App. 655, 662-64, 77 P.3d 368 (2003), review denied, 151 Wn.2d 1039, 95 P.3d 352 (2004) and State v. Gray, 134 Wn. App. 547, 556, 138 P.3d 1123 (2006), review denied, 160 Wn.2d 1008, 158 P.3d 615 (2007) involved the legal validity of prior convictions; i.e., whether they were based on violations of protection orders issued under one of the statutes listed in RCW 26.50.110(5). Consistent with Miller, Carmen and Gray held that statutory authority for previously violated no-contact orders is a question of law for the court in its gate-keeping capacity, not an essential element for the jury. Carmen, 118 Wn. App. at 662-63; Gray, 134 Wn. App. at 556; accord State v. Case, 187 Wn.2d 85, 92, 384 P.3d 1140 (2016).

Whether the convictions relied upon by the jury were based on violations of protection orders issued under one of the requisite statutes was properly decided as a question of law for the court, so the Sixth Amendment protections of Blakely were not implicated. Gray, 134 Wn. App. at 556-57; Carmen, 118 Wn. App. at 662. In Gray and Carmen, the only fact that needed to be proved was the existence of two prior convictions for violating NCOs. Gray, 134 Wn. App. at 557; Carmen, 118 Wn. App. at 662.

But in Wu's case, the State needed to prove more than just the existence of the prior convictions. It also needed to prove the fact that the

reckless driving convictions involved drugs or alcohol. The fact that those prior convictions existed did not establish the fact that they involved drugs or alcohol. Wu's case therefore implicates the Sixth Amendment right to a jury trial under Blakely.

All the cases holding it is for the court to decide whether a prior conviction qualifies as a predicate offense for a current charge are limited to addressing true questions of law, not questions of fact. Consistent with Blakely, no court has held an issue of fact can be decided by the court in determining whether a prior conviction qualifies as a predicate offense that elevates the crime and punishment.

In State v. Boss, 167 Wn.2d 710, 718-19, 223 P.3d 506 (2009), for example, the Supreme Court considered the question of whether the validity of a custodial order under the first-degree custodial interference statute had to be proved to a jury beyond a reasonable doubt. Applying the reasoning of Miller, Boss held that the lawfulness of the custody order was not an essential element of the crime, but rather a threshold issue to be determined by the trial court as a matter of law. Id. at 718-19. "Whether the order itself was lawful, i.e., whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes, *is* a matter of law within the province of the trial court." Id. at 718.

In State v. Cochrane, 160 Wn. App. 18, 27, 253 P.3d 95 (2011), whether two prior Seattle Municipal Court DUI convictions qualified under RCW 46.61.5055(14)(a) as "an equivalent local ordinance" was a legal question for the court to decide. That issue could be decided as a matter of law by a judge. There was no issue of fact to be decided by a jury.

Chambers held the fact that a person has four prior DUI offenses is an essential element of the crime of felony DUI that must be proved to the jury beyond a reasonable doubt, but whether a prior offense meets the statutory definition and qualifies as a predicate offense is a "question of law to be decided by the court before admitting a prior offense into evidence at trial." Chambers, 157 Wn. App. at 468. The statutory definition at issue in that case defined out-of-state convictions as prior offenses if they were "comparable" to a Washington state DUI. Id. at 472. Under that provision, the trial court concluded the out-of-state DUI conviction was "legally comparable" to a Washington DUI. Id. at 472-73. It "ruled that as a matter of law, the elements of the California DUI crime and the Washington DUI crime were comparable and the California DUI conviction under California Vehicle Code § 23152(a) would have been a violation in Washington under RCW 46.61.502." Id. at 472-73. The Court of Appeals held this matter was for the court to decide "[b]ecause

the court engaged in a legal analysis in determining whether the California DUI conviction meets the definition under former RCW 46.61.5055(13) and would have been a DUI offense in Washington." Id. at 468. In that context, Chambers declared that the question of whether a prior offense amounted to a "prior conviction" was a "threshold question of law." Id. at 477.

Chambers involved a definitional subsection of RCW 46.61.5055 that did not require making a factual finding under the circumstances of that case. Chambers is therefore distinguishable from Wu's case.

Chambers had no opportunity to consider the constitutional problem with having a trial court make factual findings as opposed to conducting legal analysis. Courts "do not rely on cases that fail to specifically raise or decide an issue." In re Elec. Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994). "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Thus, "[w]here the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate

court's duty to accept the rulings of the Supreme Court." In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 599-600, 316 P.3d 1007 (2014) (quoting ETCO, Inc. v. Dep't of Labor & Indus., 66 Wn. App. 302, 307, 831 P.2d 1133 (1992)).

Chambers likened the comparability analysis called for by the DUI statute to that used in deciding the comparability of foreign offenses for sentencing purposes. Chambers, 157 Wn. App. at 480-81. In this respect, Chambers helps illuminate the Sixth Amendment issue presented by Wu's case.

There are two ways to prove comparability. One involves a pure legal question: whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005). Comparing the elements of the crime does not violate the Sixth Amendment right to a jury trial. State v. Olsen, 180 Wn.2d 468, 473-77, 325 P.3d 187 (2014), cert. denied, 135 S. Ct. 287, 190 L. Ed. 2d 210 (2014); State v. Jordan, 180 Wn.2d 456, 463, 325 P.3d 181 (2014).

If offenses are not legally comparable, it must be determined whether the offenses are factually comparable. State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). "In making its factual comparison, the sentencing court may rely on facts in the foreign record that are

admitted, stipulated to, or proved beyond a reasonable doubt." Id. The court can go no further due to limitations imposed by the Sixth Amendment right to a jury trial. State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007).

The trial court in Chambers did not run afoul of the Sixth Amendment because comparability was capable of being decided, and was decided, under the legal prong of the analysis. Chambers, 157 Wn. App. at 472-73, 480-81. But had the trial court decided the two offenses were factually comparable, that would have violated the Sixth Amendment and the decision in Chambers would have come out differently.

Mullen correctly found Chambers inapplicable because "[w]hether alcohol or drugs were involved in Mullen's prior offense is distinguishable from a comparison between the elements of a California and Washington DUI. Here, we are not comparing elements of two offenses but, instead, determining whether a fact that is used to elevate a crime from a misdemeanor to a felony, thereby increasing the penalty, is an essential element of the felony crime. *This is a factual determination more like the existence of a prior offense and not a legal question.*" Mullen, 186 Wn. App. at 336 (emphasis added). The same holds true for Wu's case, which

likewise involves prior reckless driving convictions used to elevate the present DUI offense to a felony.

Not every question of whether a predicate offense meets the statutory definition can be resolved as an issue of law. Mullen, and Wu's case, illustrate the principle. When the question of whether a prior conviction qualifies as a "prior offense" under the DUI statute involves a factual determination, the Sixth Amendment right to a jury trial requires the jury to make that finding.

c. The evidence was insufficient to allow the jury to find two of the prior offenses involved drugs or alcohol.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The sufficiency of the evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

As argued above, the State needed to prove that Wu's two prior reckless driving offenses involved drugs or alcohol in order to obtain a guilty verdict for felony DUI. Exhibit 9 is the only evidence introduced by the State to show four "prior offenses." The documentation related to one of the two reckless driving convictions consists of a criminal complaint and a judgment and sentence. Ex. 9 at p. 8-10. The documentation for the other reckless driving conviction consists of some sort of face sheet and a "finding and sentence." Ex. 9 at 1-3. The documentation at most shows the original charge was a DUI. It does not set forth any facts that show the reckless driving conviction involved drugs or alcohol.

The trial court thought the original DUI charge itself supplied sufficient proof that drugs or alcohol were involved. RP 686-90. But an accusation is not proof of the facts alleged, so there was no proof before the jury that those crimes involved drugs or alcohol. Greene compels this conclusion.

Some context is in order. State v. Shaffer, 113 Wn. App. 812, 822, 55 P.3d 668 (2002), overruled by City of Walla Walla v. Greene, 154 Wn.2d 722, 116 P.3d 1008 (2005) examined the language of the DUI definitional provision, noting it applied simply "if the [prior] conviction is the result of a charge that was originally filed" as a DUI. Shaffer 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 right to due process. Id. The statute improperly allowed a court to "elevate a prior reckless driving conviction to a DUI conviction without any proof." Id. at 818.

The Supreme Court in Greene subsequently 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 require proof that the prior driving offense involved alcohol or drugs. Id. Greene did not find that the statute allowed increased punishment based solely on the fact that a charge started out as a DUI, instead interpreting the statute as "simply clarifying those alcohol or drug-related prior offenses to be considered." Id. The Court concluded that the statute 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." Id. at 728. The requirement of 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. Id. at 727-29; see also Tot v. United States, 319 U.S. 463, 469, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943) (legislature could not "validly command that the finding of an indictment . . . should create a presumption of the existence of all the facts essential to guilt.").

Greene thus held "the fact that [the defendant] was convicted of first degree negligent driving is sufficient to satisfy her due process protections because all elements of that offense are established by virtue of the conviction itself." Greene, 154 Wn.2d at 728. As pointed out, the prior reckless driving convictions at issue in Wu's case cannot be resolved in this manner because the fact that drugs or alcohol was involved is not established by virtue of the conviction itself. Greene, meanwhile, shows the original DUI charge does not allow the State to meet its burden.

A prosecutor's accusation is not proof that someone's conduct involved drugs or alcohol. The criminal complaint for the reckless driving conviction under 5633A-13D therefore does not equal proof that Wu's conduct involved drugs or alcohol. Ex. 9 at 8-10. The documentation associated with the reckless driving conviction under 5Z0568535 does not even include a criminal complaint. Ex. 9 at 1-3. At most, the documentation shows the original charge was DUI, with no elements alleged in support of the charge.

Additional evidence needs to establish the fact of drug or alcohol involvement for both reckless driving convictions. That evidence is missing in Wu's case. The State did not prove beyond a reasonable doubt that the prior reckless driving offenses involved drugs or alcohol. Those two convictions therefore did not qualify as "prior offenses" under the DUI statute. As a result, the State could not constitutionally secure a conviction for felony DUI, which relied on those offenses to elevate the crime from a gross misdemeanor to a felony. Where insufficient evidence supports conviction, the charge must be dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). Wu's felony DUI conviction must be reversed and the charge dismissed with prejudice because the State failed to prove that offense.

2. ALTERNATIVELY, THE COURT COMMITTED REVERSIBLE ERROR IN NOT INSTRUCTING THE JURY THAT IT MUST FIND THE PRIOR RECKLESS DRIVING CONVICTIONS INVOLVED DRUGS OR ALCOHOL IN ORDER TO RETURN A VERDICT THAT WU HAD FOUR "PRIOR OFFENSES."

Relying on Mullen, defense counsel proposed a jury instruction that defined "prior offense" as involving drugs or alcohol. RP 681, 692-93; CP 121. The trial court refused to give the instruction based on its disagreement with Mullen. RP 692-94. The failure of the court to instruct

the jury on the drug and alcohol requirement violated Wu's right to due process of law.

The premise of this argument is that the jury, not the court, must determine whether the prior reckless driving conviction involved drugs or alcohol. This argument will need to be addressed if this Court agrees that this is a jury determination but disagrees that the evidence was insufficient to prove the fact.

Again, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, 397 U.S. at 364; U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3. "It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden" to prove every element of an offense. State v. Byrd, 125 Wn.2d 707, 714, 887 P.2d 396 (1995). The adequacy of jury instructions is a question of law reviewed de novo. State v. Clausing, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002).

Under Mullen, the trial court was required to instruct the jury that a prior conviction for reckless driving, in order to qualify as a "prior offense," needed to involve drugs or alcohol. Mullen, 186 Wn. App. at 324. "Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless." Clausing, 147 Wn.2d at 628. The

State has the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The error is harmless only when (1) uncontroverted evidence supports the element at issue and (2) the reviewing court concludes beyond a reasonable doubt that the jury verdict would have been the same absent the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The evidence related to drug and alcohol involvement with the prior reckless driving convictions was, if not insufficient, at best thin. The only relevant evidence consisted of the fact that a prosecutor made a DUI allegation. A reasonable jury could readily find that an allegation, without any supporting facts to back it up, did not meet the State's burden of proof. The instructional error is therefore not harmless beyond a reasonable doubt.

Further, trial courts must define technical words and expressions used in jury instructions. In re Detention of Pouncy, 168 Wn.2d 382, 390, 229 P.3d 678, 682 (2010). Terms of art require definition to ensure jurors are not "forced to find a common denominator among each member's individual understanding" of the term. State v. Allen, 101 Wn.2d 355, 362, 678 P.2d 798 (1984). A term is technical when its meaning differs from common usage. Pouncy, 168 Wn.2d at 391. One could hardly imagine a more technical term than "prior offense" as used in the DUI

statute. An instruction defined the term "prior offense," but the definition was incomplete because it did not notify the jury that drugs or alcohol needed to be involved in the prior offense. CP 130. Without instruction that the prior offense must involve drugs or alcohol, the jury has no way of knowing of the requirement based on ordinary understanding. The failure to instruct on a term's definition is harmless only if the error is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Pouncy, 168 Wn.2d at 391 (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). Here, the term in question implicated a fact that the State needed to prove. The failure to appropriately instruct in Wu's case was prejudicial because the jury, in the absence of such instruction, had no way of knowing of the drug and alcohol requirement.

3. EVEN IF THE COURT HAD AUTHORITY TO DECIDE THE ISSUE, THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT THE PRIOR RECKLESS DRIVING OFFENSES INVOLVED DRUGS OR ALCOHOL.

In the event this Court disagrees with Wu's argument that the question of whether the prior reckless driving convictions involved drugs or alcohol was for the jury to decide and the State failed to prove this fact, then it will be necessary to determine whether the trial court erred in ruling as a matter of law that those prior offenses involved drugs or

alcohol. The court did err because the evidence before it did not support this determination.

Before trial, defense counsel objected to admission of the charging documents associated with Exhibit 9, contending they were irrelevant because they were not proof of any fact, and the judgments would show the charge had been amended from an original DUI. RP 338-44. The trial court disagreed, ruling the charging documents were relevant because they established the dates of offense. RP 344. At the close of the bifurcated portion of the trial, the court admitted Exhibit 9 into evidence outside the presence of the jury, noting the previous defense objection. RP 668-69.

Defense counsel then moved the court to enter a finding that the State failed to prove the prior offenses because (1) the State did not prove four prior offenses occurred within 10 years of the current offense and (2) the State did not prove the prior reckless driving convictions involved drugs or alcohol under Mullen. RP 670-76. With reference to the drug/alcohol requirement, the State argued this was a threshold issue for the court to decide. RP 678-79. The State also said a reasonable juror could make a proper finding of when the offenses occurred. RP 679-80. In response, defense counsel reiterated the court should dismiss the prior offense allegation because the evidence was insufficient to show drug/alcohol involvement. RP 680-81.

The court ruled that the evidence was sufficient to show the dates of the prior offenses. RP 681-84. The court also ruled that whether the prior reckless driving convictions involved drugs or alcohol was a threshold question for the court to decide before admitting a prior offense into evidence. RP 684-85. The court noted it had already admitted the prior offenses into evidence but, "putting that aside for the moment," the evidence was sufficient to show that the prior reckless driving offenses involved drugs or alcohol. RP 685-91. With regard to the reckless driving offenses, the court reasoned the evidence was sufficient to show they involved drugs or alcohol because Wu was originally charged with a DUI. RP 686-90. After ruling, the court announced "for those reasons, as well as the reasons discussed pretrial, I think those - Exhibit 9 is admissible, so I'm going to admit Exhibit 9." RP 691. Following the denial of the motion to dismiss, both sides rested. RP 702.

The trial court's ruling that the evidence was sufficient rests on the proposition that a prosecutor's accusation itself established the fact. Instead of holding the prosecution to the burden required by Greene, the court here simply relied on the fact of the reckless driving convictions having been originally charged as a DUI. The court did not believe it was required for the State to prove anything more, even though the filing of a charge does not amount to proof of the allegation. That is the very

interpretation of the statutory language that the Court of Appeals found unconstitutional in 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. Greene, 154 Wn.2d at 727-28. The mandate of Greene is clear: more than mere proof of the existence of a prior conviction for reckless driving is required. The trial court erred in ruling to the contrary.

For the same reason, the court erred in allowing the reckless driving convictions to be used as "prior offenses" to support the felony DUI without the required proof. The documentation in Exhibit 9 associated with the reckless driving convictions should not have been admitted into evidence because it was irrelevant without proof that the convictions involved drugs or alcohol, as required by Greene and its interpretation of the statute defining a prior offense in this context. Where the relevancy of prior convictions depends upon whether they qualify as predicate convictions under the statute, the jury should not be permitted to consider them if they are not so qualified. Carmen, 118 Wn. App. at 664.

That being said, Wu does have a bone to pick with the idea that a sufficiency argument is waived if no objection is raised to the admission of prior conviction evidence, at least insofar as that principle is applied to the determination of whether a prior conviction fails to meet the statutory

definition of a "prior offense" due to lack of proof of drug/alcohol involvement. Compare Chambers, 157 Wn. App. at 480 ("because it is undisputed that Chambers did not object to admission of the evidence establishing her three prior DUI convictions in Washington, she waived any claim of error as to those convictions"); Gray, 134 Wn. App. at 557-58 (defendant waived right to challenge the applicability of his prior conviction by not objecting to the admission of the documents establishing the conviction).

A sufficiency of evidence challenge can be raised at any time. "In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State's case in chief, (c) at the end of all the evidence, (d) after the verdict, and (e) on appeal." State v. Jackson, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996) (footnotes omitted), review denied, 131 Wn.2d 1006, 932 P.2d 644 (1997). In no other context is it even suggested that the failure to object to evidence waives a sufficiency of evidence argument. Regardless of whether a piece of evidence was objectionable, if that evidence is admitted but nonetheless fails to establish an element of the State's case, the conviction cannot stand.

It is no answer to say the State need only prove the elements of its case, not the definitional requirement of an element, such as the definition

of a "prior offense" in the DUI statute. That is false. Whether an element is proven turns on the meaning of an element, i.e., whether the evidence satisfies the definition of an element. See, e.g., State v. Gray, 124 Wn. App. 322, 324-25, 102 P.3d 814 (2004) (evidence insufficient to convict for third degree assault where State did not prove victim met the definition of a "health care provider"); State v. Simms, 95 Wn. App. 910, 912-14, 977 P.2d 647 (1999) (evidence insufficient to prove kidnapping where State did not establish the conduct met the statutory definition of "restrain"); Rich, 184 Wn.2d at 904-05 (reckless endangerment conviction upheld because State presented sufficient evidence to meet statutory definition of recklessness); State v. McKague, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011) (second degree assault conviction upheld where State presented sufficient evidence to meet statutory definition of "substantial bodily harm").

In State v. Crowder, 196 Wn. App. 861, 867-72, 385 P.3d 275 (2016), review denied, 188 Wn.2d 1003, 393 P.3d 361 (2017), the evidence was insufficient to sustain a conviction for delivery of a controlled substance to a minor because the State failed to prove the substance at issue met the statutory definition of "marijuana." In so holding, the Court of Appeals recognized "[t]he difference between a definitional statutory requirement and an element is generally pertinent to

issues such as the adequacy of an information or the court's 'to convict' instructions." Id. at 869. "But the same is not true when it comes to a sufficiency challenge. The State is obliged to present sufficient evidence to establish that a defendant's conduct falls within the scope of a criminal statute, regardless of whether the statute's requirements are elemental or definitional." Id. (citing State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006) (characterization of a statutory requirement as definitional does not relieve State of burden of proof: "while sexual gratification is not an explicit element of second degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification.")).

Thus, whether the State provided sufficient evidence of a "prior offense" under the DUI statute turns on whether the evidence satisfies the definitional statutory requirement. The State cannot prove the existence of four "prior offenses" if one or more of those offenses fails to satisfy the definition of such an offense. Where, as here, the evidence does not establish that the prior reckless driving convictions involved drugs or alcohol, the State failed to prove that those prior convictions satisfy the definition of "prior offense" found in the statute. Greene, 154 Wn.2d at 727-28; Mullen, 186 Wn. App. at 332. For this reason, the evidence is insufficient to support a conviction for felony DUI.

D. CONCLUSION

For the reasons stated, Wu requests reversal of the felony DUI conviction.

DATED this 13th day of January 2018

Respectfully Submitted,

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