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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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.

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

The State disagrees with the interpretation of City of Walla Walla v. Greene, 154 Wn.2d 722, 116 P.3d 1008 (2005) advanced by Division Two in State v. Mullen, 186 Wn. App. 321, 345 P.3d 26 (2015). According to the State, to prove a reckless driving conviction qualifies as a "prior offense," the prosecution need only prove such offense was originally charged as a DUI. Wu, on the other hand, argues the State must prove not only the existence of the prior offense but that drugs or alcohol were involved in that offense, and that proof of filing a DUI charge does not establish the latter fact. If Wu is right, the State loses.

Greene, interpreting the "prior offense" statute, flatly stated "the statute requires the State to establish that a prior driving conviction involved use of intoxicating liquor or drugs." Greene, 154 Wn.2d at 727-28. Greene cited In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) for the proposition that "every element of a crime must be proved beyond a reasonable doubt in the context of a criminal

proceeding." Id. at 728. Due process is satisfied where "the prior conviction exists and the prosecution can establish that intoxicating liquor or drugs were involved in that prior offense." Id. The Court of Appeals in State v. Shaffer, 113 Wn. App. 812, 55 P.3d 668 (2002) "thus erred in concluding that the due process protections articulated in Winship rendered the statute unconstitutional." Id. at 728. Properly interpreted, the statute required not only proof of the prior conviction but also proof that drugs or alcohol were involved, thus complying with due process. "For Greene, the fact that she 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." Id. at 728. The statute therefore survived a constitutional challenge. Id.

Following this reasoning, had Greene been convicted of reckless driving rather than first degree negligent driving, her right to due process would have been violated if the State only proved she was originally charged with a DUI. This is so because, unlike first degree negligent driving, 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."). Mullen properly picked up on the distinction and, relying on Greene, correctly held the State must prove

drugs or alcohol were involved in prior offense where the conviction is for reckless driving. Mullen, 186 Wn. App. at 332.

According to the State, when Greene stated, "the statute requires the State to establish that a prior driving conviction involved use of intoxicating liquor or drugs," Greene, 154 Wn.2d at 727-28, it simply meant the State needed to establish the prior offense was originally charged as a DUI. Brief of Respondent (BOR) at 9. But Greene never dropped this bombshell.

Greene did not equate establishing a prior driving conviction involved use of intoxicating liquor or drugs with the fact that the prosecution originally charged a DUI. To accept that premise, Greene would have needed to hold that an allegation in a charging document is proof of the facts stated therein. Greene does not state an accusation equals proof. Such a proposition would be the antithesis of what the criminal justice system is all about. The State must prove necessary facts beyond a reasonable doubt. The State doesn't establish such a fact simply by making an accusation. See 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."). "[T]he statute requires the State to establish that a prior driving conviction

involved use of intoxicating liquor or drugs." Greene, 154 Wn.2d at 727-28. An unproven charge of DUI does not establish that intoxicating liquor or drugs were involved in that prior offense. The State cites no case for the proposition that a charge equals proof of the facts alleged therein.

Unlike a conviction, a charge need only be supported by probable cause. State v. Knapstad, 107 Wn.2d 346, 351, 729 P.2d 48 (1986); State v. Jefferson, 79 Wn.2d 345, 347, 485 P.2d 77 (1971); CrRLJ 2.1(b)(4). Sometimes charges are not even supported by probable cause and dismissed for that reason. Knapstad, 107 Wn.2d at 347. In any event, a certification of probable cause, written by a deputy prosecutor to support a charge, is an unreliable indicator to determine underlying facts of the crime committed. State v. Black, 86 Wn. App. 791, 794, 938 P.2d 362 (1997); see also State v. Hunley, 175 Wn.2d 901, 912, 287 P.3d 584 (2012) ("a prosecutor's assertions are neither fact nor evidence, but merely argument") (quoting State v. Ford, 137 Wn.2d 472, 483 n.3, 973 P.2d 452 (1999)).

Conversely, proof of a criminal charge beyond a reasonable doubt, meaning proof of all facts necessary to sustain a conviction, is constitutionally required. Winship, 397 U.S. at 362, 364. "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." Id. at

361. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." Patterson v. New York, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (quoting McFarland v. American Sugar Rfg. Co., 241 U.S. 79, 86, 36 S. Ct. 498, 60 L. Ed. 899 (1916)). To equate the filing of a DUI charge with proof that the offense involved drugs or alcohol impermissibly substitutes proof beyond a reasonable doubt for the say-so of the prosecution. An original DUI charge may be amended to another offense for various reasons. One reason is failure of proof, i.e, the prosecution determines it cannot prove drugs or alcohol were involved beyond a reasonable doubt. See State v. Harp, 43 Wn. App. 340, 342-43, 717 P.2d 282 (1986) ("Defendants will be held accountable for those crimes of which they are convicted, but not for crimes the prosecutor could not, or chose not to, prove.").

As Mullen points out, "if the Greene court sought merely to require the State to prove that (1) the prior conviction existed and (2) the prior conviction was originally charged as a DUI, the Greene court could have relied solely on the language of the statute. See RCW 46.61.5055(14)(a)(x). Instead Greene states that due process requires the State to 'establish' that alcohol or drugs were involved." Mullen, 186 Wn. App. at 335 (quoting Greene, 154 Wn.2d at 728). Even the dissent in Mullen agreed "Our Supreme Court held that it is not enough that the

original charge, prior to amendment, was DUI." Mullen, 186 Wn. App. at 339 (Melnick. J., dissenting). If the State is right, and proof of a DUI charge establishes that drugs or alcohol were involved, we would have expected to Greene to say just that. But it didn't. Instead Greene held "the fact that she 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. That holding only makes sense if the "elements" being referred to include establishment that drugs or alcohol were involved. Greene had just stated due process is satisfied where "the prior conviction exists and the prosecution can establish that intoxicating liquor or drugs were involved in that prior offense." Id.

"This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). If Mullen's analysis of Greene and the statute is flawed, as the State contends, then we would expect the legislature to have responded by amending or clarifying the statute to fix the misinterpretation. Enhanced penalties for drunk drivers have been a hot topic in Olympia in recent years, resulting in a series of amendments

to RCW 46.61.5055 since the Mullen decision issued. See Laws of 2017 ch. 336 § 6, eff. July 23, 2017; Laws of 2017 ch. 335 § 3, eff. July 23, 2017; Laws of 2016 ch. 203 § 17, eff. June 9, 2016; Laws of 2015 2nd sp.s. ch. 3 § 9, eff. Sept. 26, 2015. None of the changes address Mullen's interpretation of what Greene and the statute requires for proof. The legislature's failure to act supports Wu's argument that Mullen correctly interpreted Greene, and, by extension, the legislative intent analyzed in Greene. "Legislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence in that construction." Baker v. Leonard, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993).

Greene's interpretation of the statute — what the statute requires the prosecution to establish — is nothing more than an application of the principle that statutes are construed to avoid constitutional problems, if possible. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). Shaffer construed the statute to mean that the prosecution need only prove the prior conviction was originally charged as a DUI, without proof that drug and alcohol were involved. Shaffer, 113 Wn. App. at 818, 822. On this basis, Shaffer held the statute violated due process. Greene held the statute was constitutional because it construed the statute to include what Shaffer thought was missing. The legislature, through inclusion of the

requirement that the original charge be for DUI, expressed its intent that only those convictions involving drug or alcohol be included. Greene, 154 Wn.2d at 727. But the prosecution must still establish drugs or alcohol was involved to comply with due process. Id. at 728. The charge does not establish the fact. The Supreme Court "must construe statutes so as to render them constitutional." State v. Roberts, 142 Wn.2d 471, 502, 14 P.3d 713 (2000). That is what the Supreme Court did in Greene.

The State cites Justice Sanders's dissent in Greene in an attempt to graft his interpretation of the majority opinion onto the majority opinion itself. BOR at 10. The State's attempt is misplaced because "the meaning of a majority opinion is not found in a dissenting opinion." Cole v. Harveyland, LLC, 163 Wn. App. 199, 207, 258 P.3d 70 (2011).

The State's position is that the trial court can decide the issue of whether a prior reckless driving conviction qualifies as a "prior offense" as a matter of law. Its position is predicated on its erroneous belief that the filing of an original DUI charge equals proof beyond a reasonable doubt that the prior offense involved drugs or alcohol. The State's argument collapses once the fallacy of its predicate is exposed. Tellingly, the State does *not* argue that the court could decide the issue as a matter of law if the prosecution must prove more than the filing of a DUI charge to establish drug or alcohol involvement in the prior offense.

The best it can do is say "Greene never stated that a jury must find alcohol involvement in prior offenses." BOR at 6. This is true but does not illuminate the issue here. Greene did not have occasion to determine whether a jury needed to find alcohol involvement in the prior offense because its only task was to determine whether the trial court erred in ruling the statute was unconstitutional. Moreover, no argument was made that the Sixth Amendment right to a jury trial, as interpreted by Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), required the jury to make this finding. 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).

But taking the analysis further, the first degree negligent driving conviction itself established the fact of alcohol involvement because that is a statutory element of the offense. Greene, 154 Wn.2d at 728. The fact that a prior conviction exists is outside the Sixth Amendment right to a jury trial. State v. Witherspoon, 180 Wn.2d 875, 891, 329 P.3d 888 (2014). Because an element of first degree negligent driving involves being affected by drugs or alcohol while driving, the conviction on its own demonstrates the fact of drug or alcohol involvement was found by a jury or necessarily admitted as part of a guilty plea. RCW 46.61.5249(1)(a). The same does not go for a prior reckless driving conviction in this

context because alcohol involvement is not an element of that offense. RCW 46.61.500(1). The existence of that prior conviction does not establish drugs or alcohol was involved. The fact of drug or alcohol involvement, therefore, must be found by a jury as required by the Sixth Amendment.

"'[T]rial by jury has been understood to require that *the truth of every accusation*, where proferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbours' . . . Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 477-78, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). Accordingly, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). In deciding the question of what facts must be subject to a jury finding, "the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 530 U.S. at 494.

The required finding here is that the prior offense involved drugs or alcohol. That finding exposes Wu to an increased penalty — elevation of the crime from a gross misdemeanor to a felony. As such, it needs to be found by a jury to comply with the Sixth Amendment.

The State believes State v. Chambers, 157 Wn. App. 465, 474, 237 P.3d 352 (2010), review denied, 170 Wn.2d 1031, 249 P.3d 623 (2011) supports its position. It doesn't. Wu argued in his opening brief that the trial court in Chambers did not run afoul of the Sixth Amendment because comparability 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, the court would have violated the Sixth Amendment and the decision in Chambers would have come out differently.

The State dismisses Wu's comparison to establishing factual comparability because that determination is still made by the judge as a matter of law. BOR at 20-21. What the State fails to grasp is that while factual comparability is for the judge to decide, the Sixth Amendment right to a jury trial forbids the judge from finding his or her own facts. The only facts the judge can rely on in that context are those that were admitted or proven beyond a reasonable doubt *to a jury*. State v. Olsen, 180 Wn.2d 468, 476-77, 325 P.3d 187, cert. denied, 135 S. Ct. 287, 190 L.

Ed. 2d 210 (2014); State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007). Wu's point holds.

b. Remedy

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). As argued in the opening brief, Wu's felony DUI conviction must be reversed and that charge dismissed with prejudice because the State failed to prove that offense.

However, Wu agrees this Court could remand for entry of a conviction on the lesser offense of gross misdemeanor DUI. Remand for imposition of lesser offense is appropriate where the jury was instructed on and found the elements of the lesser offense. In re Pers. Restraint of Heidari, 174 Wn.2d 288, 293-94, 274 P.3d 366 (2012). The jury was instructed on and found the elements for gross misdemeanor DUI in the initial phase of the bifurcated trial. CP 145 (Instruction 8); CP 117 (verdict form); RCW 46.61.502(1), (5) (listing elements of gross misdemeanor DUI). Under these circumstances, there is no double jeopardy violation in remanding for entry of conviction for a gross misdemeanor DUI offense.

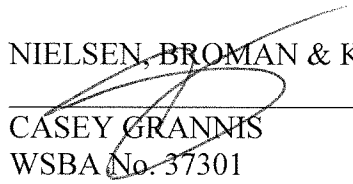
B. CONCLUSION

For the reasons stated above and in the opening brief, Wu requests reversal of the felony DUI conviction.

DATED this 5th day of April 2018

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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