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No. 96747-4

NO. 77045-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEN WU,

Appellant.

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

THE HONORABLE KEN SCHUBERT, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The trial court determined that Wu's prior offenses applied to his felony DUI charge under RCW 46.61.5055(14)(a). Did the court properly decide the relevance of the prior convictions before admitting them for the jury to determine their existence?

2. The jury found that Wu had four convictions for "prior offenses." Was this finding supported by sufficient evidence, and if, *arguendo*, the conviction was defective, is Wu's remedy remand for entry of a gross misdemeanor DUI conviction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Ken Wu with felony DUI, violating an ignition interlock requirement, and driving with a suspended license in the first degree. CP 1-2. The felony DUI charge was based on Wu having four convictions for "prior offenses" as defined by RCW 46.61.5055(14). CP 1. The State dismissed the ignition interlock violation at the beginning of trial. CP 56. The court granted Wu's motion to bifurcate the trial. RP 98-100. The jury first convicted Wu of the base DUI offense. CP 117. In the second part of the bifurcated trial, the jury heard evidence regarding Wu's four prior convictions, as well as the suspended license charge. RP 98-100, 248-49. The State presented documentary evidence that Wu had a prior

conviction for DUI, a prior conviction for negligent driving in the first degree, and two prior convictions for reckless driving. Ex. 9. The reckless driving and negligent driving in the first degree convictions were each originally charged as DUI. Ex. 9.

After the State rested in the second half of the bifurcated trial, Wu moved to dismiss, arguing in part that the State had failed to present sufficient evidence that his two prior reckless driving convictions involved alcohol. RP 672-76. The court denied Wu's motion, noting that it had already admitted the predicate offenses as a threshold question of law. RP 684-91. The court then made further findings that each prior offense involved alcohol. Id. The court declined Wu's proposed instruction requiring the jury to find each prior offense involved alcohol. CP 121, 123; RP 692.

The jury found by special verdict that Wu had four prior DUI-related convictions. RP 732. The jury also found Wu guilty of driving with a suspended license in the first degree. RP 732. The court sentenced Wu within the standard range on the felony DUI, and imposed 90 days confinement on the suspended license charge. CP 172-76, 181-83. Wu now appeals.

2. SUBSTANTIVE FACTS

Trooper Greydanus was on routine patrol when she saw a truck weaving both within and outside its lane of travel. RP 428-32. Trooper Greydanus conducted a traffic stop of the truck. RP 431. She found Ken Wu alone in the driver's seat. RP 435. Wu had bloodshot, watery eyes. RP 435. His truck smelled strongly of cigarette smoke. RP 435. Wu's speech was thick, and he had obvious difficulty retrieving his registration. RP 436-37. Wu admitted that he drank two beers that evening. RP 437. Wu agreed to attempt field sobriety tests, which he performed very poorly. RP 438-52. Trooper Greydanus arrested Wu and transported him to the police station. RP 453. At the station, Wu submitted two breath samples with a breath alcohol content (BAC) of .072 and .068 respectively. RP 525.

C. LEGAL ARGUMENT

1. **WHETHER A CONVICTION QUALIFIES AS A "PRIOR OFFENSE" FOR FELONY DUI IS A THRESHOLD QUESTION OF LAW FOR THE TRIAL COURT.**

Wu argues that he was entitled to have a jury find that the conduct underlying each prior offense "involved alcohol." Wu is incorrect because alcohol involvement in prior offenses is not an element of felony DUI. When a felony DUI charge is supported by a prior reckless driving conviction, the legislature requires only that the State prove the conviction existed, and was originally filed as DUI. Whether a prior offense is

admissible for the jury's consideration is a question of law for the trial court.

Due process requires that every essential element of a crime be proven to a jury beyond a reasonable doubt. State v. Chambers, 157 Wn. App. 465, 474-75, 237 P.3d 352 (2010). When a prior conviction elevates a crime from a misdemeanor to a felony, the existence of the conviction becomes an essential element. Id.

A person is guilty of DUI if they drive a vehicle while under the influence of or affected by intoxicating liquor. RCW 46.61.502(1)(c).¹ DUI is typically a gross misdemeanor. RCW 46.61.502(5). However, DUI is a Class C felony if an offender has four or more convictions for "prior offenses" within 10 years. Former RCW 46.61.502(6)(a) (amended 2017).² RCW 46.61.5055(14)(a) defines what constitutes a "prior offense." A conviction for reckless driving is a "prior offense" if the charge was originally filed as DUI. RCW 46.61.5055(14)(a)(xii).

In State v. Bird, 187 Wn. App. 942, 945, 352 P.3d 215 (2015), this Court expressly stated that "[w]hether a prior conviction qualifies as a predicate offense is a threshold question of law for the court, and not an

¹ There are several alternate methods of committing DUI, but RCW 46.61.502(1)(c) was the only one factually applicable to Wu.

² RCW 46.61.502 has since been amended to make felony DUI a Class B felony, and reduce the required number of prior convictions to three. 2017 Wn. Legis. Serv. ch. 335, sec. 1 (S.B. 5037) (West). The parties do not dispute that Wu's conduct predates this amendment.

essential element of the crime of felony DUI.” This principle emanated from this Court’s earlier opinion in Chambers, 157 Wn. App. at 481-82, which held that whether a DUI-related conviction qualifies as a prior offense “is a threshold determination to be decided by the trial court.” The Chambers Court concluded that the jury’s role is to find the *existence* of the prior offenses beyond a reasonable doubt. Id. at 481; State v. Cochrane, 160 Wn. App. 18, 27, 253 P.3d 95 (2011).

a. **Division Two’s Opinion In State v. Mullen Incorrectly Interpreted City of Walla Walla v. Greene, And Was Thus Itself Wrongly Decided.**

Wu urges this Court to abandon its precedent and adopt Division Two’s analysis from State v. Mullen, 186 Wn. App. 321, 337, 345 P.3d 26 (2015). This Court should decline to do so because Mullen is contrary to the intent of the legislature and our Supreme Court’s holding in State v. Miller, 156 Wn.2d 23, 27, 123 P.3d 827 (2005). This Court’s previous decision in Bird to reject Mullen’s analysis was sound.³

The Mullen Court found that “the legislature’s intent was to charge defendants who are guilty of prior *alcohol- or drug-related* offenses with felony DUI.” Mullen, 186 Wn. App. at 329 (emphasis original). Mullen extrapolated that alcohol involvement must be an essential element

³ “Whether 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. We disagree with Division Two’s recent opinion, State v. Mullen, holding otherwise.” Bird, 187 Wn. App. at 945 (internal citations omitted).

because the defendant could not be charged with felony DUI “unless alcohol or drugs were involved” in the prior offenses. Id. at 332.

However, Division Two improperly created an element that was neither intended by the legislature nor mandated by our Supreme Court. Mullen and Wu both rely heavily on City of Walla Walla v. Greene, 154 Wn.2d 722, 727-28, 116 P.3d 1008 (2005). They assert that Greene requires the State to establish that prior offenses not only exist, but involved alcohol. Mullen, 186 Wn. App. at 333.

Greene never stated that a jury must find alcohol involvement in prior offenses. This is unsurprising, as Greene dealt with sentencing for a gross misdemeanor DUI, not predicate convictions for a felony DUI. Id. at 724-25. Nonetheless, Division Two inferred that Greene required alcohol involvement to be found by a jury beyond a reasonable doubt. Mullen, 186 Wn. App. 333.

However, a careful and complete reading of Greene reveals that it does not support the position of Wu and Mullen.

- i. **Greene does not require the State to prove facts relating to alcohol use in a prior offense.**

In Greene, 154 Wn.2d at 724, the state supreme court addressed a constitutional challenge to RCW 46.61.5055’s definition of “prior

offenses.”⁴ The defendant in Greene was being sentenced for a gross misdemeanor DUI and had a prior conviction for negligent driving in the first degree that had originally been filed as DUI. Id. at 724-25. RCW 46.61.5055 defines this conviction as a “prior offense.” The State argued Greene should be sentenced as a second-time offender with the accordant harsher mandatory penalties. Greene argued that her due process rights were violated because the State did not prove the elements of DUI underlying her prior offense. Id. The trial court accepted Greene’s argument that “an unproven DUI charge, even if resulting in a variant conviction, cannot be used to deprive a person of liberty.” Id. at 726.

The trial court in Greene relied on State v. Shaffer, 113 Wn. App. 812, 55 P.3d 668 (2002) (overruled by Greene, 154 Wn.2d at 728), to support its ruling. In Shaffer, the Court addressed a sentencing enhancement predicated on a “prior offense” of reckless driving originally filed as DUI. Id. at 815. Shaffer held that the relevant defining provision of RCW 46.61.5055 was unconstitutional, because its effect was to “elevate a prior reckless driving conviction to a DUI conviction without any proof” of DUI. Id. at 818.

⁴ At the time Greene was decided, the definition of prior offenses was located at RCW 46.61.5055(12)(a). H.B. 2660, 58th Leg, Reg. Sess. (Wn. 2004). This provision was later moved to RCW 46.61.5055(14)(a) in 2015. H.B. 1276, 64th Spec. Sess. (Wn. 2015).

In Greene, the Supreme Court rejected Shaffer, and its basis for doing so is illuminating to Wu's appeal. The Court started with the proposition that the prior offense definition in RCW 46.61.5055 would unquestionably be constitutional if it simply penalized a prior reckless driving conviction. See Greene, 154 Wn.2d at 727 ("No parties dispute the statute is constitutional without this limiting DUI element."). The Court determined that by limiting the statute's definition of "prior offense" to charges originally filed as DUI, the legislature was simply specifying a subset of convictions it intended to sanction. Id. ("It follows that with the limiting element, the legislature is simply clarifying those alcohol or drug-related prior offenses to be considered."). Noting that the legislature's ability to "define and punish criminal conduct" was limited only by the constitution, the Court reasoned an enhancement would be invalid only if based solely on unproven charges. Id. RCW 46.61.5055 presents no constitutional issues because any enhancement is based on a proven conviction. Id.

Greene then stated:

The statutory definition requires a conviction for negligent driving, or other listed offense, originating as a DUI charge. Accordingly, [RCW 46.61.5055] 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 [sentencing] enhancement if the prior conviction exists and the

prosecution can establish that intoxicating liquor or drugs were involved in that prior offense.

The court in Shaffer erred in concluding that the due process protections articulated in Winship render RCW 46.61.5055(12)(a)(v) unconstitutional. Winship held that every element of a crime must be proved beyond a reasonable doubt in the context of a criminal proceeding. 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. Accordingly, we hold that here, RCW 46.61.5055(12)(a)(v) survives constitutional challenge.

Greene, 154 Wn.2d at 727-28 (internal citations omitted) (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

Mullen and Wu rely on this language to support their argument that Greene requires a jury to find that prior offenses involved alcohol. Mullen, 186 Wn. App. at 332-33.

Nowhere did Greene expressly state that the prosecution has to prove alcohol involvement separately from the fact of the original DUI charge. The State acknowledges that the first quoted paragraph above might appear to state this if read in isolation. However, in the context of the entire opinion, it merely recognizes that the legislature requires proof not just that a prior reckless driving conviction exists, but that it was originally filed as DUI. The second paragraph simply says that Greene's negligent driving conviction is sufficient because it was previously filed as DUI, and thus inherently fulfills the requirements of RCW 46.61.5055.

This reading is consistent with the intent of the Greene opinion. Greene overruled Shaffer's requirement that the State must prove the elements of DUI, including alcohol impairment, when a conviction for reckless driving originally filed as DUI serves as a "prior offense."

Greene, 154 Wn.2d at 727; see Shaffer, 113 Wn. App. at 819-22.

According to Wu, Greene requires the State to at least partially prove the underlying impairment element of DUI before using a variant conviction as a prior offense. It would make no sense for the Supreme Court to re-impose a substantially similar rule to the one it had literally just disposed of within the same opinion.

The intent of Greene can also be observed in the grievances raised by the dissent. The dissent remarked that:

The majority concludes the State is required to demonstrate the first conviction was alcohol related. This is so, the majority reasons, because the statute requires a DUI charge. But that is the problem. The first conviction could have been charged as DUI even if the charge was inaccurate and could not be proved. The result is a mandatory sentence enhancement based on a conviction that may not have involved alcohol.

Greene, 154 Wn.2d at 729 (J. Sanders, dissenting) (internal citations omitted); see id. at 729 (suggesting that without the Shaffer rule, the State "never has to prove alcohol was even involved in the previous conviction."). The dissent's interpretation of the majority opinion is that

the requirement of the original charge being DUI *is* the demonstration that the conviction was alcohol-related, and that, theoretically, a predicate offense could have no alcohol involvement and still be valid. It appears the contemporaneous understanding of Greene's effect was that a "prior offense" originally charged as DUI, without more, was constitutionally sufficient.

Wu argues that his felony DUI conviction was unconstitutional because it was based on an unproven allegation of alcohol use in a prior offense. This position is similar to the rule expressed in Shaffer, 113 Wn. App. at 822 ("Because the sentence enhancement deprives Shaffer of his liberty based on an unproven allegation of DUI in a criminal case resulting in a reckless driving conviction, we hold that the statute is unconstitutional . . ."). Greene expressly rejected this position. Wu's argument thus fails.

- ii. **Wu and Mullen's reading of Greene is contrary to the intent of the legislature, which did not define alcohol involvement in prior offenses as an element of felony DUI.**

The Greene Court found that the legal framework in current RCW 46.61.5055(14) was constitutional. Greene, 154 Wn.2d at 727-28 ("Accordingly, we hold that here, RCW 46.61.5055(12)(a)(v) survives constitutional challenge."). If the statute is constitutional, then the result in

this case depends only on the legislature's intent as expressed in the plain language of the statute. The Supreme Court criticized the Shaffer opinion for its inferential liberties with the statutory language in RCW 46.61.5055. Id. at 727 (“The problem with this analysis is that . . . the definition of prior offense does not contain the emphasized language that was added by the Court of Appeals.”). This language suggests that the Court intended for further analysis of RCW 46.61.5055 to adhere closely to the statutory language, and by extension to the intent of the legislature. As the legislature did not include any additional element relating to alcohol involvement in prior offenses, Wu's argument fails.

The elements of a crime are facts that the prosecution must prove to obtain a conviction. Miller, 156 Wn.2d at 27. To determine the elements of a particular crime, courts look to the relevant statutory language. Id. Courts also have the power to add non-statutory “implied” elements to a crime. Id. at 28. Courts generally add implied elements only to comport with long standing principles of law, or where the court has made a “reasoned judgment as to legislative intent.” See Id. (element that stolen property must be taken from another “implied by a near eternity of common law and the common understanding of robbery.”). Courts do not add implied elements where the intent of the legislature is clear. See State v. Bradshaw, 152 Wn.2d 528, 539-40, 98 P.3d 1190 (2004) (Court

declined to add implied mens rea element to drug possession after considering legislative history).

Courts also presume that the legislature “intends to enact effective laws.” State v. Bryan, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980). The courts have a duty to “discern and implement the legislature’s intent.” State v. Williams, 171 Wn.2d 474, 476, 251 P.3d 877 (2011). Accordingly, courts strive to construe statutes in a manner that upholds their constitutionality. Id.

Turning first to the express elements of felony DUI, it is plain that the statute does not require any finding that a prior offense was alcohol-related, other than the fact that it was originally charged as DUI. The statutory definition of “prior offense” requires only that the defendant be previously convicted of an enumerated crime, and, in some instances, an additional requirement that the crime must have been originally filed as DUI. RCW 46.61.5055(14)(a). The question then becomes whether alcohol involvement is an implied element of felony DUI.

Elements can be implied where the court infers that the element was intended by the legislature. Miller, 156 Wn.2d at 27. However, courts do not add language to an unambiguous statute. State v. Hancock, 190 Wn. App. 847, 855, 360 P.3d 992 (2015); State v. Abbott, 45 Wn. App. 330, 332, 726 P.2d 988 (1986) (“But the courts will not find an implied

element in the face of a legislative intent to the contrary.”). If the legislature had desired, it could have added an express element pertaining to the underlying facts of alcohol use in prior offenses. The legislature instead chose to require only the fact that the conviction was previously charged as DUI. This was the legislature’s prerogative, and its discretion in this subject matter is constitutionally permissible. Greene, 154 Wn.2d at 727. While the State must prove the *existence* of four prior offenses to the jury, the legislature never intended this burden of proof to encompass underlying details of the prior offenses beyond the crime charged and the conviction entered. See State v. Cochrane, 160 Wn. App. 18, 25, 253 P.3d 95 (2011) (“While the existence of the four prior DUI offenses...is an essential element of the crime...providing the specific details of each of these offenses is not an essential statutory element that must be alleged in the information.”). This Court should not “second-guess the elements of the offenses the legislature has unambiguously written,” nor should it impose a burden unwarranted by the statutory language. Hancock, 190 Wn. App. at 856; Abbott, 45 Wn. App. at 334.

Neither is Wu’s position consistent with longstanding legal principles. Elements implied on this basis have typically related to crimes that have been known to the common law for centuries, such as robbery or burglary. See Miller, 156 Wn.2d at 28 (element that stolen property must

be taken from another “implied by a near eternity of common law and the common understanding of robbery.”). Needless to say, felony DUI is a relatively recent innovation to the criminal law. There is no ancient understanding of alcohol involvement in prior offenses. Thus, it would be inappropriate to add an implied element based on “longstanding legal principles.”

Shortly after Greene, our Supreme Court decided State v. Miller. Miller involved a prosecution for felony violation of a court order. 156 Wn.2d at 25. The precise issue in Miller was whether the validity, as opposed to the mere existence, of the order the defendant violated was an essential element of the crime. Id. at 27. The Court first determined that the validity of the predicate order was not an express element. Id. at 31. In finding that validity was also not an implied element of the crime, the Court chose to analyze the predicate order in terms of “applicability” to the statute. Id. at 31; State v. Turner, 156 Wn. App. 707, 712-13, 235 P.3d 806 (2010). A prior order does not *apply* to the current charge, and is thus inadmissible, if it is not statutorily sufficient. Miller, 156 Wn.2d at 31.⁵

⁵ “...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. Collectively, we will refer to these issues as applying to the ‘applicability’ of the order to the crime charged. An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order.” Miller, 156 Wn.2d at 31.

Said differently, the issue is a legal question of admissibility and relevance, not one of elemental fact. State v. Carmen, 118 Wn. App. 655, 663, 77 P.3d 368 (2003). If relevant, prior convictions are admissible for the jury to consider whether their *existence* has been proven. Id.; see Miller, 156 Wn.2d at 30 (expressly approving of the analysis in Carmen). The jury does not determine legal questions of admissibility.

Factually, Miller related to the validity of the violated court order, not the two predicate offenses that elevated the violation to a felony. Miller, 156 Wn.2d at 31.⁶ However, in State v. Case, 187 Wn.2d 85, 92, 384 P.3d 1140 (2016), the Supreme Court clarified that the applicability and relevance of prior convictions is also controlled by the holding in Miller, noting that “[w]hether the prior convictions qualify under [the statute] is a substantially similar question to whether a prior no-contact order was valid – a question of law to be decided by a judge, not a jury.” Case, 187 Wn.2d at 92. This Court had already reached the same conclusion a decade earlier in State v. Gray, 134 Wn. App. 547, 555-56, 138 P.3d 547 (2006). In Gray, this Court, citing Miller and Carmen, held that whether prior court order violations counted as prior offenses “was a threshold determination of relevance, or applicability, properly left to the

⁶ “We hold that the validity of the underlying no-contact order is not an element of the crime of violating such order.” Miller, 156 Wn.2d at 31.

court.” Id. Only if the court determined that the prior offenses applied were they submitted to the jury to find their existence. Id.

Miller demonstrates that the validity of predicate convictions has not historically been considered an implied element. Like felony court order violations, felony DUI requires the existence of qualifying prior convictions.⁷ Wu does not challenge on appeal that his four convictions exist, but only whether they apply in the context of RCW 46.61.5055(14). Given that there is no basis to recognize an express or implied element of alcohol involvement in prior offenses, the question is simply whether the convictions are relevant to the statutory elements that are present. This is a threshold finding to be made by the court. Wu’s challenge fails.

b. U.S. Supreme Court Opinions Are In Accord With The State’s Position.

In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d. 435 (2000), the U.S. Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”

The Supreme Court authored a significant clarification to Apprendi in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d

⁷ A violation of a court order is normally a gross misdemeanor, but becomes a felony if a defendant has two or more prior court order violation convictions. RCW 26.50.110(1)(a)-(5).

403 (2004). In Blakely, the defendant pled guilty to second degree kidnapping. Id. at 299. The defendant's standard range based on his plea was 49-53 months. Id. However, the judge imposed an exceptional sentence of 90 months based on the court's *sua sponte* finding of an aggravator not contemplated by the plea agreement. Id. at 300. Blakely argued that the sentence violated the rule in Apprendi since he never admitted to, nor did a jury find, the aggravating factor. Id. at 301. The State rebutted that there was no violation of Apprendi because the sentence did not exceed the statutory maximum. Id. at 303.

The Court clarified that the "statutory maximum" for Apprendi purposes "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 303. Thus, any time a judge's authority to prescribe a particular sentence depends on an additional fact other than the fact of a prior conviction, that fact must be proven by the jury's verdict or admitted by the defendant. Id. at 305.

In Gray, 134 Wn. App. at 551, this Court took up the question of whether Blakely affected the court's ability to decide the applicability of prior offenses which are elements of the crime. Gray involved a prosecution for felony court order violation based on two prior convictions. Id. at 550-51. The defendant had moved to dismiss, arguing

that the State had not presented sufficient evidence to the jury that the prior convictions were valid. Id. The trial court disagreed, relying on Carmen, *supra*, to find that the validity of the prior orders was a question of law for the court. Id.

This Court clarified that Blakely did not affect the legal framework articulated in Carmen. Gray, 134 Wn. App. at 556. Blakely was “not implicated” because the “fact” that elevated the seriousness of the crime in Gray was the fact of the convictions themselves, which had been found by the jury. Id. Whether the prior convictions were legally applicable or valid remained a question of law for the court. Id. When this Court decided Chambers four years later in the context of DUI prior offenses, it favorably analogized the reasoning of both Gray and Carmen, noting that they considered “nearly identical statutory schemes.” Chambers, 157 Wn. App. at 477. Thus, this Court has previously determined that it accords with Apprendi and Blakely for a trial court to make a threshold legal finding regarding prior convictions.

Because the involvement of alcohol in prior offenses is not an element of the crime, the trial court need not make any factual findings to determine its presence. The only factual finding is whether the prior conviction exists, and this fact is found by the jury. The court determines

only if the prior convictions are valid and relevant. This gate-keeping function does not offend Blakely or Apprendi.

c. The Principle Expressed In Chambers, Bird, And The Mullen Dissent, Remains Sound.

In State v. Bird, 187 Wn. App. at 945, this Court reaffirmed that the applicability of a prior offense is a threshold question of law, and expressly disagreed with Mullen. This Court should adhere to Bird.⁸

Mullen attempted to distinguish Chambers by noting that the particular threshold issue in that case was the comparability of a California DUI conviction. Mullen, 186 Wn. App. at 335-36. Division Two reasoned that unlike legal comparability, whether a prior crime involved alcohol in the context of felony DUI is a factual question, and, because the answer determined the seriousness of the crime, it was an essential element. Id. But Mullen is answering the wrong question. Assuming without conceding that whether a prior offense involved alcohol is a factual question, the answer is irrelevant because it is not an element of felony DUI, and need not be found by a judge or jury.

Wu attempts to distinguish Chambers by conceding it was correct to analyze legal comparability as a threshold question, but would have

⁸ Wu argues that the relevant language in Bird should be ignored as dicta. However, even if this were true, the underlying point was the holding in Chambers, 157 Wn. App. at 481. In any event, “horizontal stare decisis” does not exist in Washington. Matter of Arnold, --- P.3d ---, No. 94544-6 (filed February 15, 2018), and this Court is not bound by a decision of Division Two.

been incorrectly decided had it permitted trial courts to assess factual comparability.⁹ But factual comparability of a prior conviction is still a question of law for the court, as it is merely the second part of a single analysis. State v. Thomas, 135 Wn. App. 474, 479-80, 144 P.3d 1178 (2006). No decision has tasked the jury with determining the factual comparability of a foreign offense, but that is the admitted end result of Wu's position. This Court should decline Wu's invitation to discard the sound precedent of Bird and its progenitors.

2. WU'S CONVICTIONS FOR RECKLESS DRIVING QUALIFIED AS "PRIOR OFFENSES" FOR FELONY DUI.

The jury found that Wu had four convictions for "prior offenses." This finding was supported by sufficient evidence, and Wu does not challenge the existence of the convictions on appeal. If, *arguendo*, Wu's felony DUI conviction was defective, his remedy would be remand for imposition of the lesser included offense of gross misdemeanor DUI.

Wu argues that the trial court improperly found that his prior reckless driving convictions involved alcohol. Wu categorizes his argument as a challenge to the sufficiency of the evidence. However, a sufficiency challenge asks whether a rational trier of fact could have found each essential element beyond a reasonable doubt. State v. Vasquez, 178

⁹ Def. Brief at 23.

Wn.2d 1, 6, 309 P.3d 318 (2013). To demonstrate sufficiency here, the State need only show evidence that the convictions existed, a fact Wu does not contest on appeal. Sufficiency is not the appropriate legal mechanism to evaluate a threshold question of law, such as the applicability of a “prior offense” under RCW 46.61.5055(14). Chambers, 157 Wn. App. at 481. Questions of law are reviewed *de novo*. Miller, 156 Wn.2d at 27.

Wu argues that the State must prove the definitional components of each element. But the statutory definition of a “prior offense” does not require an express finding of alcohol involvement. Rather, the prior offenses must have been originally charged as DUI. Wu cites to a number of cases examining definitions of elements in the context of a sufficiency challenge. However, because alcohol involvement is not an element of felony DUI, these cases are inapposite.

a. Wu’s Two Prior Reckless Driving Convictions Each Qualified As “Prior Offenses.”

Wu’s reckless driving conviction from Marysville Municipal Court #5Z0568535 was originally filed as DUI, but amended to reckless driving following plea negotiations. Ex. 9. The State presented certified copies of the police citation and the court’s “finding and sentence.” Ex. 9. The citation shows that Wu submitted a breath sample during this incident resulting in a BAC of .095, and the finding and sentence notes the charge

was originally DUI. Ex. 9. The trial court correctly found based on its evaluation of the court documents that this prior offense was originally filed as DUI. RP 687.

Wu's reckless driving conviction from Snohomish County #5633A13D was also originally filed as DUI. Ex. 9. The State presented certified copies of the charging document and the district court's judgment and sentence. Ex. 9. The original charging document indicated that the defendant had driven either with a BAC of .08 or higher, or while affected by intoxicating liquor. Ex. 9. When the charge was amended, the DUI caption language was crossed out by hand and replaced with "Reckless Driving." Ex. 9. A new prosecutor signed and certified the document. However, the rest of the charging document, including the alcohol and drug language, remained the same. Ex. 9. The trial court correctly found based on its evaluation of the court documents that this prior offense was originally filed as DUI. RP 685, 689.

A conviction for reckless driving is a "prior offense" if originally filed as DUI. RCW 46.61.5055(14)(a)(xii). Each of Wu's prior reckless driving convictions met this statutory definition. Wu does not contest his prior convictions for DUI and negligent driving in the first degree on

appeal. Thus, there was sufficient evidence that Wu had four convictions for prior offenses as required by former RCW 46.61.502(6)(a) (amended 2017).

b. If, *Arguendo*, The State Did Not Prove Four Relevant And Admissible “Prior Offenses,” The Court Should Remand For Entry Of A Gross Misdemeanor DUI Conviction.

Wu contends that if the State failed to show four valid prior offenses, he is entitled to have the charge dismissed with prejudice.¹⁰ This is incorrect. Even if Wu’s felony DUI conviction is not supported, Wu was still properly convicted of gross misdemeanor DUI, and his remedy would be remand for entry of the lesser charge.

If an appellate court finds insufficient evidence of a crime, but determines there was sufficient evidence of a lesser included offense, the court may remand for an entry of judgment on the lesser crime. State v. Atterton, 81 Wn. App. 470, 473-74, 915 P.2d 535 (1996). The Court may remand for entry of a lesser included offense only if the jury was instructed on the lesser crime and found each element beyond a reasonable

¹⁰ Def. Brief. at 28.

doubt. In re PRP of Heidari, 174 Wn.2d 288, 293-94, 274 P.3d 366 (2012).¹¹

i. Gross misdemeanor DUI is a lesser included offense of felony DUI.

A crime is considered a lesser included offense if: (1) every element of the lesser offense is also a necessary element of the greater offense, and (2) the evidence in a particular case supports an inference that the lesser crime was committed. State v. Gamble, 154 Wn.2d 457, 463, 114 P.3d 646 (2005); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The evidentiary requirement is met if the evidence would permit a rational factfinder to convict the defendant of only the lesser offense. State v. Laico, 97 Wn. App. 759, 764-65, 987 P.2d 638 (1999). The Court must also find that the lesser offense arose from the same course of conduct that supported the greater charge. State v. Nguyen, 165 Wn.2d 428, 435, 197 P.3d 673 (2008). Appellate courts review the evidence in the light most favorable to the proponent of the lesser included offense. State v. Henderson, 182 Wn.2d 734, 742, 344 P.3d 1207 (2015).

¹¹ In State v. Green, 94 Wn.2d 216, 234-35, 616 P.2d 628 (1980), the Court suggested that even if a lesser included instruction was not given, remand for entry of the lesser offense would still be appropriate if the trier of fact found each element of the lesser included offense. However, in Heidari, the Court seemed to clarify that this was essentially a two-part test, and there must be both an instruction on the lesser included offense and the jury must necessarily find all elements. See Heidari, 174 Wn.2d at 294 (“The fact that the issue might have been resolved on the basis of the second requirement alone does not mean that the first requirement was mere dictum.”).

It is indisputable that the offense of gross misdemeanor DUI arose from the same course of conduct as felony DUI. Felony DUI has the exact same elements as gross misdemeanor DUI, with the addition here that the defendant must have four or more “prior offenses” within ten years. Former RCW 46.61.502(6)(a) (amended 2017).¹² This extra element is not pertinent to Wu’s conduct on the date of violation for the current offense. The legal prong of the test is satisfied.

The evidence in this case could also support a rational inference that only the lesser crime was committed. Wu assigns no error on appeal to the conviction for DUI that occurred in the first part of the bifurcated proceeding. The jury convicted Wu of DUI independently of the predicate offenses. If the jury had declined to find the existence of each prior offense, Wu would still have been convicted of gross misdemeanor DUI. The factual prong is also satisfied.

Several courts have remanded felony DUI convictions for imposition of misdemeanor DUI under the same or similar circumstances, including Mullen, 186 Wn. App at 336;¹³ see State v. Santos, 163 Wn. App. 780, 785-86, 260 P.3d 982 (2011) (“The State’s evidence was

¹² There are several ways of committing both misdemeanor and felony DUI. RCW 46.61.502(1)(a)-(d), (6)(a)-(b). For clarity’s sake, the State has included only the statutory methods of committing DUI relevant to the facts present here.

¹³ “We, therefore, reverse Mullen’s conviction for felony DUI and remand to the trial court for entry of a misdemeanor DUI conviction.” Mullen, 186 Wn. App. at 337.

insufficient to establish the prior offenses element of felony DUI . . .

Mr. Santos does not challenge the sufficiency of the evidence supporting DUI's remaining element[s] . . . [w]e, therefore, reverse Mr. Santos's felony DUI conviction and remand for entry of a conviction . . . for gross misdemeanor DUI.”).

ii. The jury was instructed on gross misdemeanor DUI.

During the first phase of the bifurcated trial, the court submitted instruction number eight to the jury:

To convict the defendant of driving under the influence, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about August 1, 2016, the defendant drove a motor vehicle;
- 2) That the defendant at the time of driving a motor vehicle was under the influence of or affected by intoxicating liquor; and
- 3) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), and (3) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

CP 145. While this instruction was not presented as a lesser offense, this was for Wu's benefit, as he wished to litigate the DUI without the jury having knowledge of his prior convictions. RP 98-100. The jury was

instructed on gross misdemeanor DUI. Remand for imposition of that offense is appropriate if Wu did not have enough applicable offenses under RCW 46.61.5055 to support a conviction for felony DUI.

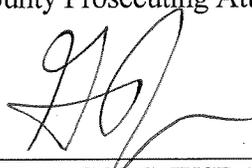
D. CONCLUSION

The State respectfully requests this Court affirm Wu's conviction for felony DUI.

DATED this 12 day of March, 2018.

Respectfully submitted,

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