

IN THE SUPREME COURT OF MISSOURI

No. 84718

STATE OF MISSOURI,

Respondent,

vs.

RICKY LEE EMERY,

Appellant.

**Appeal from the Circuit Court of Douglas County, Mo.
Circuit Division
The Honorable John Moody, Judge**

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of driving while intoxicated § 577.010, RSMo 2000, obtained in the Circuit Court of Douglas County, for which appellant was sentenced to six months in the Department of Corrections, and a conviction of assault in the second degree, §565.060, RSMo 2000, for which appellant was sentenced to seven years in the Department of Corrections. The Missouri Court of Appeals, Southern District, affirmed appellant's conviction and sentence in part, reversed appellant's conviction and sentence in part, and remanded the case for re-sentencing. State v. Emery, No. 24666, *Slip op.* (Mo.App.S.D. July 17, 2002). It denied appellant's motion for rehearing or transfer of the case on August 5, 2002.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On September 24, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Rick Lynn Emery, was charged by indictment in the Circuit Court of Douglas County with driving while intoxicated § 577.010, RSMo 2000, and assault in the second degree, §565.060, RSMo 2000 (L.F. 14-16, 34-35). On September 20, 2001, the case went to trial before a jury, the Honorable John G. Moody presiding (Tr. 2). The jury found appellant guilty as charged (Tr. 179-180).

Appellant does not challenge the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the evidence presented was as follows: On January 27, 2001, appellant and a group of his friends were at a party at Norma Gean's home in Mountain Grove (Tr. 31-32). The group drank beer and whiskey, and played cards from approximately 11:30 p.m. until 3:30 p.m. the next afternoon (Tr. 33, 44).

When they left Norma Gean's house, appellant and his friend, Bob Fullington got into Fullington's pickup truck (Tr. 34). Appellant got into the driver's seat, and Fullington got into the passenger seat, but Norma Gean had their keys. Gean refused to give them the keys because she felt that appellant was too intoxicated to drive (Tr. 34, 45). She noticed that appellant was having trouble walking and could hardly stand up (Tr. 34). To appease her, Fullington switched positions with appellant, got into the driver's seat, and the two drove away in the pickup truck (Tr. 35, 77).

Appellant and Fullington went to a nearby café, where they stopped and switched places again (Tr. 45). Appellant, now the driver, then drove the truck south on Route 95 (Tr. 46). As they approached the junction of Route 95 and JJ, a Chevy Tahoe driven by Cheryl

Todd, was traveling on JJ toward the intersection (Tr. 46). The intersection at Route 95 and JJ is a two way stop which required that the car on 95 stop and yield to traffic traveling on JJ (Tr. 60). Appellant ran the stop sign, and Fullington warned him about the approaching vehicle, stating “I don’t believe they’re gonna stop, Rick” (Tr. 46).

Appellant did not stop, and he struck the driver’s side of the approaching SUV, causing it to roll over multiple times (Tr. 60). Both vehicles eventually came to a stop, and Todd climbed out of the passenger side window (Tr. 61). She felt pain in her chest, head, arm, leg, neck and shoulders, and she was having difficulty breathing (Tr. 61).

Fullington, still inside the truck, briefly lost consciousness, and when he awoke, he was still in the passenger seat (Tr. 47). When appellant got out of the car, he staggered toward Todd, and immediately she smelled alcohol on his breath (Tr. 61-62). With broken sentences, appellant repeatedly said “I wasn’t driving,” but then he said, “the brakes went out on me” (Tr. 62). Fullington told Todd that he was sorry and he gave her a hug (Tr. 63).

A man from a nearby house noticed the accident and called the police (Tr. 61). When Deputy Sheriff Raleigh May arrived, he secured the scene (Tr. 76-77). He found that the front of Fullington’s pickup truck was “smashed in,” with most of the damage on the right side, and that the Tahoe had damage on the driver’s side and the front (Tr. 77-78). He then spoke to Todd to ensure that she was not too badly hurt and to see that she was then taken in an ambulance to St. John’s Hospital in Springfield (Tr. 64). It was later determined that she had fractured ribs and hematomas on her arm, leg and head (Tr. 64).

Next, the officer spoke to appellant (Tr. 79). Appellant said that he was not driving, but while explaining what happened, he said, “the damn brakes went out on me” (Tr. 79). Fullington told Officer May that he was not driving, and he indicated that appellant had been the driver (Tr. 80).

Trooper Dwayne Graham of the Missouri State Highway Patrol arrived next and concluded from appellant’s slurred speech, fragmented sentences, bloodshot eyes, unsteadiness, and alcohol odor, that appellant was “very intoxicated” (Tr. 90). Appellant was unable to recite the alphabet, and he failed the gaze nystagmus test (Tr. 91-92).

Graham concluded from the angle of the impact that the driver would have bumped his head on the dashboard while the passenger would have been cut because he would have hit the passenger side door and broken the glass in the passenger side window with his weight (Tr. 94). There was blood on the passenger seat and door panel in the truck (Tr. 94). Fullington was bleeding (Tr. 100). Appellant had two lumps on his forehead, but he was not bleeding and had no blood on him (Tr. 93). Graham sent blood samples taken from the passenger side of the truck to the lab and the results showed that it matched Bobby Fullington and not appellant (Tr. 137).

Trooper Graham also found boot prints on the driver’s side door, and appellant told him that he had kicked the door open to get out (Tr. 102-103). There were no prints on the passenger door (Tr. 102-103).

Appellant presented no witnesses at trial. His theory of defense was that he was not the driver at the time of the accident. At the close of all the evidence and arguments, the

jury deliberated and returned guilty verdicts against appellant on the charges of driving while intoxicated and assault in the second degree (Tr. 179-180). Appellant was sentenced to six months in the Department of Corrections for driving while intoxicated and seven years in the Department of Corrections for assault in the second degree to run consecutively (L.F. 55-56).

Appellant appealed from his conviction and sentences in the Southern District of the Court of Appeals. On appeal, the State conceded an error, and on July 17, 2002, the Court reversed the portion of the conviction that the State conceded had been in error, affirmed the rest of the trial court's rulings, and remanded the case for re-sentencing. State v. Emery, No. 24666, *slip op.* (Mo.App.S.D. July 17, 2002).

The Southern District of the Court of Appeals denied appellant's motion for rehearing or transfer of the case on August 5, 2002. This Court granted transfer of the case on September 24, 2002.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ENTERING A JUDGEMENT CONVICTING APPELLANT OF ASSAULT IN THE SECOND DEGREE AND DRIVING WHILE INTOXICATED BECAUSE CONVICTION OF THESE OFFENSES CONSTITUTES DOUBLE JEOPARDY IN THAT DRIVING WHILE INTOXICATED IS A LESSER INCLUDED OFFENSE OF ASSAULT IN THE SECOND DEGREE. THEREFORE, APPELLANT'S CONVICTION FOR DRIVING WHILE INTOXICATED SHOULD BE REVERSED (Responds to Points I and IV of appellant's brief).

Appellant argues in his fourth point on appeal that the trial court erred in convicting and sentencing him for driving while intoxicated and assault in the second degree because double jeopardy prohibits sentencing for both of these crimes when they arise from the same set of circumstances (App.Br. 17).¹ Respondent concedes that appellant's conviction of both offenses constitutes double jeopardy, and that appellant's conviction and sentence for driving while intoxicated should be reversed.

Where the State seeks to impose cumulative punishment under separate statutes, based on the same conduct, a two-step analysis must be utilized to determine if the resulting punishments imposed were not authorized by the legislature and therefore violate the Double Jeopardy Clause. First, an appellate court must determine if they expressly allow multiple

¹All citations to appellant's brief refer to appellant's substitute brief.

punishments. State v. Villa-Perez, 835 S.W.2d 897, 903 (Mo.banc 1992); State v. McTush, 827 S.W2d 184, 187 (Mo.banc 1992). If, as in the present case, the statutes are silent on that issue, recourse must be made to Missouri’s general “cumulative punishment statute,” §556.041, RSMo 2000. Villa-Perez, id.; McTush, id.

Section 556.041, states:

When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if

(1) One offense is included in the other, as defined in section 556.046...

Section 556.046, RSMo 2000, states:

A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when

(1) It is established by proof of the same or less than all the facts required to established of the offense charged...

In the present case, appellant was convicted and sentenced for both assault in the second degree, §565.060.1(4), RSMo 2000 and driving while intoxicated, §577.010, RSMo 2000 (L.F. 55). As charged, driving while intoxicated does not contain an element that assault in the second degree does not contain, and therefore prosecuting both charges violates

the double jeopardy clause. State v. Steck, 68 S.W.3d 625 (Mo.App., S.D. 2002); Rost v. State, 921 S.W.2d 629 (Mo.App., S.D. 1996). Sentencing appellant for both of these crimes in this situation would violate appellant's constitutional right against double jeopardy. Rost v. State, 921 S.W.2d 629 (Mo.App., S.D. 1996).

The proper remedy in this situation is to vacate the sentence for the lesser crime only. Reed v. State, 778 S.W.2d 313 (Mo.App., W.D. 1989). "In situations where a defendant's double jeopardy rights have been violated by the imposition of multiple sentences for convictions of [a greater offense and a lesser included offense], Missouri courts have affirmed the remedy of vacating the lesser sentence on the underlying felony, and leaving intact the greater sentence..." Id.

Appellant also claims in Point I of his brief that the trial court erred in sentencing him for felony driving while intoxicated because the State failed to prove that he was a prior and persistent DWI offender (App.Br. 7-8). This argument, while accurate, is rendered moot by the fact that appellant's conviction of driving while intoxicated must be reversed.

For the foregoing reasons, respondent requests that this Court vacate appellant's sentence for driving while intoxicated, and affirm appellant's conviction for assault in the second degree.

II.

THE TRIAL COURT ERRED IN SENTENCING APPELLANT BECAUSE THE STATE FAILED TO PROVE, AND THE COURT FAILED TO FIND, THAT APPELLANT WAS A PRIOR AND PERSISTENT OFFENDER. THEREFORE, TO REMEDY THE ERROR, THIS CASE SHOULD BE REMANDED FOR RE-SENTENCING TO DETERMINE WHETHER APPELLANT IS A PRIOR OFFENDER (Responds to appellant’s point II).

In his second point on appeal, appellant claims that the trial court erred in sentencing appellant without a sentence recommendation from the jury (App.Br. 10-11). Appellant argues that because he was not shown to be a prior or persistent offender, he was entitled to jury sentencing (App.Br. 10-11). He further contends that the remedy for this error is to “vacate both verdicts and sentences and order a new trial on the felony and discharge the defendant on the misdemeanor” (App.Br. 14).² Appellant concedes that he did not preserve this error for review, and requests plain error review (App.Br. 10).

Under §557.036.2, RSMo 2000, a defendant is entitled to be sentenced by a jury unless “the state pleads and proves the defendant is a prior offender, persistent offender...” In the case at bar, appellant was charged by the State in an information as a prior and persistent offender (L.F. 34). In this case, the State never proved appellant’s prior offenses, and, other than finding that appellant was a third offense felony DWI offender (L.F. 34), the

²With regard to the Driving While Intoxicated conviction, this issue is moot because respondent concedes that it should be vacated entirely.

Court never made a finding as to appellant's prior and persistent offender status. Therefore, the State concedes that the trial court erred in sentencing appellant without finding that appellant was a prior offender.

Respondent does not agree, however, with appellant's argument that the remedy for this error is to "vacate both verdicts and sentences and order a new trial on the felony [assault]..." (App.Br. 14). The error committed was harmless, and was one of punishment, not guilt. As this Court held in State v. Cobb, 875 S.W.2d 533 (Mo.banc 1994), the proper remedy in this situation is to remand for re-sentencing with instructions to permit the State to present evidence of appellant's prior offender status. "The cases are uniform in holding that provisions for repeat offender sentencing do not create an additional substantive offense or crime and that error associated with the charge, proof or court findings in this respect does not require an unconditional remand for a new trial on the issue of guilt or innocence." Vickers v. State, 956 S.W.2d 405, 407 (Mo.App., S.D. 1997) (quoting State v. Street, 735 S.W.2d 371, 373-74 (Mo.App., W.D. 1987)).

Appellant claims that because §558.021.2, RSMo 2000, dictates that the prior offenses should be "pleaded, established, and found prior to submission to the jury", giving the State the opportunity to prove appellant's prior offender status on remand is improper. However, the only purpose for the statute's scheduling order is to determine whether the sentencing will be addressed by the jury or by the trial court. See Hurse v. State, 527 S.W.2d 34, 35 (Mo.App., St.L.D. 1975). ("The purpose of having a prior hearing by the court under §566.280, the Second Offender Act, is to keep the matter of prior convictions away from the

jury by having the judge assess the penalty rather than the jury if a prior conviction has been found”). In this case, because appellant was alleged to be a prior offender and as such would not be entitled to jury sentencing, there is no harm to appellant in remedying the trial court’s error with a limited remand to allow the court to hear evidence and find appellant to be a prior offender. If the court does not find the prior offender status, only then will appellant be entitled to a new trial with jury sentencing.

This Court has held that “Procedural errors in prior offender hearings do not warrant reversal unless the defendant is shown to have been prejudiced. The failure to prove the defendant’s status as a prior offender before trial was procedurally defective but did not result in prejudice to the defendant.” State v. Kilgore, 771 S.W.2d 57 (Mo.banc 1989), *cert denied* 493 U.S. 874 (1989) (*citations omitted*). This Court has also held that remanding a case such as this one for re-sentencing, and to allow the State to prove appellant’s prior offense, does not violate double jeopardy. State v. Cobb, 875 S.W.2d 533 (Mo.banc 1994). Given that a limited remand would not violate any of appellant’s rights, this is the proper remedy.

Remanding for re-sentencing in this situation to determine appellant’s prior offender status is well settled in every district of the Court of Appeals. *See* State v. Herret, 965 S.W.2d 363, 365 (Mo.App., E.D. 1998) (“We need not address [appellant’s argument that his conviction should be reversed because the trial court took the issue of sentencing away from the jury] because the issue becomes relevant only if the state fails to establish that defendant is a prior offender at the re-sentencing hearing.”); State v. Jordan, 978 S.W.2d 36,

41-42 (Mo.App., E.D. 1998); State v. Jennings, 815 S.W.2d 434, 446-447 (Mo.App., E.D. 1991) (“the failure during trial to heed the order the statute prescribes for the reception of that proof does not violate due process”); State v. Tate, 752 S.W.2d 393, 394 (Mo.App., E.D. 1988) (“Because movant was, in fact, a prior offender he had no right to be sentenced by a jury, and thus his substantive rights were not violated by the tardy adjudication of his prior offender status”); State v. Greer, 879 S.W.2d 683 (Mo.App., W.D. 1994) (The appropriate remedy is to remand for re-sentencing based on evidence presented by the State of appellant’s prior offender status.); State v. Umphrey, 694 S.W.2d 816, 819 (Mo.App., W.D. 1985); State v. Tincher, 797 S.W.2d 794, 797-798 (Mo.App., S.D. 1990); State v. Lawson, *Slip op.* No. 24639, 11 (Mo.App., S.D. October 9, 2002) (The reason for requiring a defendant’s criminal history to be pleaded and proved before the case is submitted to the jury is to permit the question of punishment to be submitted to the jury should the criminal allegations not be proven. *Section 558.021.2* is a procedural device. It does not affect the substance of the criminal charge. Defendant was not prejudiced by the lack of compliance with this requirement.).

In State v. Wynn, the defendant claimed that the trial court erred in failing to conduct the persistent offender hearing before submission of the case to the jury as required under §558.021.2. Wynn, 666 S.W.2d 862 (Mo.App., E.D. 1984). In holding that such action was not prejudicial, the Eastern District stated as follows:

The failure to comply with the statutory procedure was more than a mere irregularity, it constituted error. The question

is whether the error was prejudicial. We have concluded that the procedure employed, although subject to censure, did not affect the substantial rights of appellant and is to be characterized as harmless error. It is difficult to see how defendant suffered any actual prejudice by reason of the fact that the persistent offender hearing was conducted after instead of prior to submission to the jury... The subsection [§558.021.2] does not provide what results shall follow after failure to comply with its terms, and generally in such case a statute is held to be directory and not mandatory, particularly in the case of a statute specifying a time within which an official act is to be performed, 'with a view merely to the proper, orderly and prompt conduct of business'. The State, by failing to introduce the persistent offender evidence at the prescribed time did not thereby waive its right to make proof thereof before sentencing. Nor was the state estopped to do so by reason of the manner in which the matter was handled. Defendant acquired no vested right to have the jury assess the punishment by reason of the failure to conduct the hearing at the prescribed time.

Id. at 864-865 (*Citations omitted*).

In fact, limited remand has been held to be the proper remedy for most, if not all, procedural defects. *See State v. Edwards*, 30 S.W.3d 226 (Mo.App., E.D. 2000) (The proper remedy for erroneously failing to hold a hearing on a motion to suppress a confession is to remand to the trial court for a post-trial hearing on the issue of voluntariness); *State v. Hayden*, 878 S.W.2d 883 (Mo.App., E.D. 1994) (Proper remedy for trial court's error in refusing to hear a Batson challenge is to remand for a hearing to determine if a reversal and retrial is required); *Williams v. State*, 800 S.W.2d 739 (Mo.banc 1990) (Remand for re-sentencing is the proper remedy when the trial court judge sentenced appellant on the mistaken belief that he was only allowed to give consecutive sentences); *State v. Young*, 969 S.W.2d 362 (Mo.App., E.D. 1998) (Limited remand to correct variance between oral sentence given and written sentence).

Appellant cites *State v. Cullen*, 39 S.W.3d 899 (Mo.App., E.D 2001), for the proposition that re-sentencing should not be allowed (App.Br. 14). He argues that Cullen holds that ordering a limited remand to allow the State a chance to prove, and the court a chance to find, appellant's prior offender status would be ordering the court to "commit error" by violating §557.036 (App.Br. 14). However, appellant has misinterpreted Cullen.

In *State v. Cullen*, the defendant was charged with driving while intoxicated, and was charged as a persistent DWI offender pursuant to §577.023.1.³ Cullen, 39 S.W.3d at 900. However, the State was unable to prove the prior convictions necessary to establish the

³The procedural timeliness portion of §557.023.1, RSMo 2000, is the same as that found in §558.021.2, RSMo 2000.

persistent offender status under §577.023.1. Id. at 901. At the close of all the evidence, the State moved to file an amended information to charge the defendant under §558.016, and proved the prior offenses in order to maintain judge sentencing. Id. The jury then found the defendant guilty and defense counsel asked the court for a finding as to whether appellant was a persistent DWI offender under §577.023, considering the fact that the State had failed to prove the prior DWI offenses. Id. at 902 The court concluded that the State would not be allowed to offer additional evidence on the defendant's prior DWI offender status because allowing such evidence after submission of the case to the jury would be a violation of §577.023. Id.

The State appealed the court's ruling, asking that the Court of Appeals to order the trial court to allow the State to prove the defendant's prior DWI status under §577.023. Id. The Eastern District of the Court of Appeals ruled that the judge had not committed error in following the timeliness provision of §577.023.6 and .14 and that ordering the judge to hear the evidence after submission to the jury would be ordering the judge to commit error. Id. 906.

The holding of Cullen does not apply to the present case. Whereas in Cullen, there was no error and therefore no reason to remand for re-sentencing, here there was an error and it needs a remedy. Here, the trial court erred in sentencing appellant, as opposed to allowing the jury to do so without first finding him to be a prior offender. Therefore, the proper remedy is to remand the case for re-sentencing in order to determine whether or not appellant is a prior offender. Then the trial court can cure the error, either through the judge re-

sentencing appellant as a prior offender, or by determining that appellant needs a new trial and jury sentencing. Furthermore, because Cullen was a case in which the court declined to remand for re-sentencing because there was no error to remedy, Cullen is specific to cases with the same situation, and none of the well settled cases of remanding to correct an error have been overruled.

The direction by §558.021.2, RSMo 2000, that states that appellant's status should be proven before submission of the case is relevant only to the extent that it points out the error that was committed by the trial court, but it does not affect the propriety of ordering a remand to cure the error. Appellant was charged as a prior and persistent offender, and if those can be proven he is not entitled to jury sentencing (L.F. 14-16, 34-35). Thus, while the court erred in not finding appellant's prior offender status prior to submission to the jury, it is unnecessary to order a new trial which would again be based on his status as a prior offender.

Remanding for re-sentencing is the more reasonable remedy because if, on remand, the State is able to prove the prior offense, appellant would not be entitled to the jury sentencing he seeks, and the court would stand by the sentence given to appellant after the trial. If the State is unable to prove the prior offenses then appellant is, without a doubt, entitled to a new trial. But if the State can prove appellant's prior offender status, it would be unreasonable to order a new trial now, and force the State into the difficult position of trying to re-present evidence of guilt that has likely diminished with time, when it will not earn appellant the jury sentencing he wants. This is especially true because there was no

error whatsoever in the guilty verdict, and vacating it is a highly un-tailored remedy for a sentencing error.

Therefore, this Court should remand the assault conviction for re-sentencing, and to give the State an opportunity to prove appellant's prior offense. Because respondent conceded that the conviction for driving while intoxicated should be vacated in Point I above, there is no need to remand the DWI conviction for re-sentencing.

III.

THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN NOT VACATING, *SUA SPONTE*, THE JURY'S VERDICT ON SECOND DEGREE ASSAULT BECAUSE THE RECORD PROVIDES NO BASIS FOR APPELLANT'S ASSERTION THAT THE JURY INFERRED THAT APPELLANT HAD PRIOR OFFENSES FROM THE FACT THAT APPELLANT WAS CHARGED WITH FELONY DRIVING WHILE INTOXICATED AND THE FACT THAT THEY WERE NOT INVOLVED IN SENTENCING (Responds to appellant's point III).

Appellant's third claim of error assumes, without the slightest support in the trial record, that the jury had the legal expertise to know that, because the issue of punishment was not submitted to them in the verdict directing instructions, and because it was a felony DWI case, appellant must have had prior felony convictions (App.Br. 9-10). He argues that he suffered manifest injustice because "[t]he informations were never changed and the judge never instructed the jury that there was no evidence of any prior convictions and, therefore, there should be no felony D.W.I. and no prior [or] persistent offender status" (App.Br. 10).

Because appellant does not cite any authority for his position whatsoever, he has abandoned this claim. State v. Khoshaba, 878 S.W.2d 472 (Mo.App., E.D. 1994). "Appellant's points must be developed by an argument in his brief, including "appropriate case law support." Where appellant's point is not developed in he argument portion of his brief, it is considered abandoned. Id. at 475 (*citations omitted*).

Furthermore, appellant does not cite any facts in the record to show that the jury was aware or had any way of becoming aware that appellant had prior offenses. Appellant must bear the burden of demonstrating plain error resulting in manifest injustice. State v. Kalagian, 833 S.W.2d 431, 434 (Mo.App., E.D. 1992). Absent any evidentiary basis whatever for appellant's claim that the jurors were aware of the existence and significance of this State's prior and persistent offender statutes, his argument is frivolous, and should not be reviewed.

If appellant's claim is reviewable at all, appellant concedes that it is reviewable only for plain error (App.Br. 15). "The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellant review." State v. Roberts, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied* 5?? 118 S.Ct. 711 (1998). An assertion of plain error places a much greater burden on a defendant than when he asserts claims of error which were properly raised before the trial court. State v. Hunn, 821 S.W.2d 866, 869 (Mo.App., E.D. 1991). A defendant must show that the error so substantially affected his rights that manifest injustice or a miscarriage of justice will inexorably result if left uncorrected. Roberts, *supra*. "A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice." State v. Varvera, 897 S.W.2d 198, 201 (Mo.App., S.D. 1995).

Appellant has not met his burden of showing that he suffered manifest injustice in this case. First, appellant claims that the jury knew that appellant had prior offenses because the information alleged that he had prior offenses (App.Br. 16). However, the jury never saw

the information filed in appellant's case. Appellant offers no explanation of why he believes the jury was aware of the prior offenses included in the information in this case.

Next, appellant argues that because the jury convicted him of a felony DWI, they must have known he had prior DWI offenses. Again, appellant offers no explanation of why he believes that the jury knew that he was charged with a felony as opposed to a misdemeanor, or how the jurors would know that a felony DWI offense means that appellant is a prior offender. If appellant's speculation that the jury knew he had prior convictions is correct, no jury can ever be allowed to deliberate on a felony DWI charge. But, in fact, evidence of prior convictions is carefully withheld from jurors.

The prior offenses that make up a DWI felony charge are not elements for the jury to decide. State v. Cullen, 39 S.W.3d 899 (Mo.App., E.D. 2001). Instead, the prior offenses are penalty enhancing, and as such are only to be seen and determined by the judge. State v. Ewanchen, 799 S.W.2d 607, 608 (Mo.banc 1990). Therefore, the jury in this case, as in all other DWI felony cases, was only aware of the information necessary to determine if appellant was guilty of driving while intoxicated. Then, only the trial court and the parties had knowledge of appellant's prior offenses. Appellant offers no information to show that the trial court conducted this process incorrectly thereby making the jury aware of appellant's prior offenses in this case. Therefore appellant's third point must fail.

CONCLUSION

For the foregoing reasons, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of November, 2002, to:

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