

No. SC90839

*In the
Supreme Court of Missouri*

STATE OF MISSOURI,

Respondent,

v.

FARON R. COLLINS,

Appellant.

**Appeal from Douglas County Circuit Court
Forty-Fourth Judicial Circuit
The Honorable R. Craig Carter, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Faron Collins (“Collins”) was convicted in Douglas County Circuit Court of driving while intoxicated (“DWI”) and driving with a revoked license (“DWR”). He was sentenced as a chronic offender to a total of five years of imprisonment.

Collins’s conviction was affirmed by the Southern District Court of Appeals in *State v. Collins*, No. SD29516 (Mo. App. S.D. March 29, 2010). This Court sustained Collins’s application for transfer on May 25, 2010. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Supreme Court Rule 83.04.

STATEMENT OF FACTS

Collins was charged in Ozark County Circuit Court as a chronic offender with one count of DWI (§ 577.010, RSMo Cum. Supp. 2006),¹ and one count of DWR (§ 302.321) (L.F. 8-10). At Collins's request, venue was transferred to Douglas County (L.F. 2, 19). On September 25, 2008, Collins waived his right to a jury trial and was tried by the Honorable R. Craig Carter (L.F. 25; Tr. 2-4). Before the State began its presentation of the evidence, Collins entered a guilty plea to the DWR charge (Tr. 6-7).

Collins does not challenge the sufficiency of the evidence to prove that he was driving while intoxicated. In the light most favorable to the verdict, the evidence showed:

On September 3, 2006, Ozark County Deputy Charles Bearden was on patrol when he received a dispatch that a car was coming his way and that the driver was reportedly intoxicated (Tr. 7-9). Shortly thereafter, the suspect's vehicle passed the parking lot where Deputy Bearden was waiting (Tr. 10). The deputy recognized the driver as Collins and asked the dispatcher to run a check on Collins's driving record (Tr. 10). The record check revealed that Collins's driver's license had been revoked

¹ Further statutory references are to RSMo Cum. Supp. 2006 unless otherwise noted.

(Tr. 10-11). Deputy Bearden pulled behind Collins's car and activated his emergency lights (Tr. 11).

Collins stopped his car, stepped out of the driver's seat, and walked toward Deputy Bearden's patrol car (Tr. 11). The deputy noticed that Collins swayed as he walked (Tr. 11). Deputy Bearden approached Collins and started to talk to him (Tr. 11). He noticed that Collins's eyes were bloodshot and glassy, and that Collins had a strong odor of alcohol on his breath (Tr. 11). Collins also had a wet spot on his trousers—apparently he had urinated on himself (Tr. 11).

Deputy Bearden asked Collins whether he had been drinking (Tr. 12). Collins replied that he had had two beers (Tr. 12). His speech was slurred (Tr. 12). The deputy asked Collins to take field sobriety tests, but Collins refused, explaining that he would not be able to do them (Tr. 12). Deputy Bearden arrested Collins for DWI and DWR (Tr. 13).

Deputy Bearden walked over to Collins's car to talk to a passenger (Tr. 14). When the deputy reached the car, he noticed alcohol inside (Tr. 14-15). Collins followed the deputy to the car (Tr. 27). As the deputy spoke to the passenger, Collins reached into the car, grabbed a can of beer, and took a drink (Tr. 22-23, 27). The deputy testified at trial that, based on his experience and training, he believed that Collins was intoxicated (Tr. 15).

The defense did not present any evidence at trial (Tr. 32).

During its case-in-chief, the State offered a certified copy of Collins's driving record as evidence of Collins's prior convictions (Tr. 13). The exhibit was received without objection (Tr. 13). The exhibit reflected eight prior convictions for DWI or for driving with excessive blood-alcohol content ("BAC") (St. Ex. 1 at 6-10). Four were state-court convictions, and the other four were municipal convictions (St. Ex. 1 at 6-10). Based on this record, the State asked the trial court to find that Collins was a chronic offender (Tr. 34). Collins did not argue that the State had not proven his prior convictions beyond a reasonable doubt (Tr. 37-42).

After hearing the evidence and argument, the trial court found that Collins was a chronic offender (Tr. 45). Appellant did not dispute or object to the court's finding (Tr. 45). The court found Collins guilty of the class-B felony of DWI (Tr. 45). The court also noted that Collins had pleaded guilty to DWR (Tr. 45). At Collins's subsequent sentencing hearing, the court sentenced him to five years of imprisonment for DWI and one year in jail for DWR, with the sentences to run concurrently (Tr. 57-58).

ARGUMENT

The trial court erred in finding beyond a reasonable doubt that Collins was a chronic offender as defined by § 577.023.1(2) because the evidence presented by the State was silent about whether Collins had been represented by counsel or had waived his right to counsel in his previous cases. Because this was not a jury-tried case, the proper remedy is to remand for resentencing with instructions that the State may present additional evidence at the sentencing hearing to prove Collins’s status as a chronic offender.

A defendant is a “chronic offender” for purposes of enhanced sentencing pursuant to § 577.023 if he or she “has pleaded guilty to or has been found guilty of four or more intoxication-related traffic offenses.” § 577.023.1(2)(a). Collins contends that the trial court erred in finding beyond a reasonable doubt that he was a chronic offender. App.Sub.Br. at 18-23. He challenges the court’s finding on three grounds. First, he argues that the State did not include “all essential facts” in the charging document because it did not specifically allege with respect to each prior conviction that Collins had been represented by counsel or had waived counsel. App.Sub.Br. at 19-20. Second, Collins claims that the driving record offered by the State failed to demonstrate that Collins had “pleaded guilty to or ha[d] been found guilty of” his prior offenses. App.Sub.Br. at 21-22. Third, Collins argues that the

driving record was insufficient to prove that he was represented by counsel or had waived counsel in each of the prior proceedings. App.Sub.Br. at 23.

Collins’s first two arguments lack merit. With respect to the third, however, he is correct. The evidence presented by the State was silent as to whether Collins was represented by counsel or had knowingly waived counsel when he was convicted in each of his eight prior DWI and BAC cases (St. Ex. 1 at 6-10). At the time of Collins’s trial, a prior conviction did not qualify as an “intoxication-related traffic offense” unless the defendant had been represented by, or had waived the right to, counsel. § 577.023.1(3).² Because the State’s proof was inadequate on this point, a remand for resentencing is appropriate. At the new sentencing hearing, the State should be permitted the opportunity to correct its error and establish with additional evidence that Collins is, in fact, a chronic offender.

A. Standard of Review

² Section 577.023 has since been amended such that a prior conviction’s qualification as an “intoxication-related traffic offense” no longer depends on whether the defendant was represented by or waived his right to counsel. *See* § 577.023.1(4), RSMo Cum. Supp. 2009.

Collins did not object to the trial court's finding that he was a chronic offender, nor did he raise the issue in his motions for judgment of acquittal (Tr. 45; L.F. 54-57). Thus, Collins's challenge to the trial court's finding is not preserved for appellate review and may be reviewed for plain error only. *State v. Broom*, 281 S.W.3d 353, 358 (Mo. App. E.D. 2009); Rule 30.20.

Collins characterizes his claim as a challenge to the sufficiency of the evidence, and contends that he preserved the point simply by filing a motion for judgment of acquittal. App.Sub.Br. at 15-16. But Collins's argument confuses a challenge to the sufficiency of the evidence to prove the elements of his offense (which he does not raise) with a challenge to the sufficiency of the evidence to prove his prior convictions (which he does raise). The prior convictions necessary to enhance a sentence for DWI pursuant to 577.023 are not additional elements of the underlying offense. *State v. Cullen*, 39 S.W.3d 899, 904-05 (Mo. App. E.D. 2001) (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)) (holding that a statutory provision specifying a greater penalty based on recidivism was merely a sentencing factor rather than defining a separate element of the underlying offense). Collins's motions for judgment of acquittal alleged that the "State has failed to prove *the elements of the crime* alleged in the information" (L.F. 54, 56) (emphasis added). This allegation did not preserve Collins's claim that the State's evidence was insufficient to prove the

prior convictions for purposes of sentencing enhancement. *See Broom*, 281 S.W.3d at 358.

Collins's reliance on *State v. Craig*, 287 S.W.3d 676 (Mo. banc 2009), *State v. Miller*, 153 S.W.3d 333 (Mo. App. S.D. 2005), and *State v. Coomer*, 888 S.W.2d 356 (Mo. App. S.D. 1994) is misplaced. In *Craig* and *Miller*, the defendants timely objected to the state's evidence of their prior convictions, properly preserving the issues for appeal. *See Craig*, 287 S.W.3d at 677-78; *Miller*, 153 S.W.3d at 336. Likewise, in *Coomer*, the defendant timely filed a motion for new trial in which he specifically challenged the sufficiency of the evidence to support a finding that he was a persistent offender. *Coomer*, 888 S.W.2d at 358. Collins did none of these things. The first time Collins ever challenged the sufficiency of the evidence to support the trial court's finding that he was a chronic offender was on appeal. Accordingly, Collins's claim is not preserved.

B. Analysis

Collins's claims that the charging document inadequately pleaded "all essential facts" and that the State failed to prove that he had "pleaded guilty to or had been found guilty of" four prior DWI or BAC offenses lack merit and should be rejected. However, because the State's evidence did not sufficiently prove that Collins was represented by, or waived, counsel in his previous cases, this Court should remand

Collins's case for resentencing with instructions that the State may offer additional evidence at the sentencing hearing to prove Collins's chronic-offender status.

1. Any alleged defect in the information was not prejudicial.

Missouri law requires that charging documents in criminal cases “[s]tate plainly, concisely, and definitely the essential facts constituting the elements of the offense charged, including facts necessary for any enhanced punishment.” Rule 23.01; *see also* § 577.023.7(1). “Essential facts” are those that establish the elements of the offense. *State v. Atterberry*, 659 S.W.2d 339, 341 (Mo. App. S.D. 1983). Collins claims that whether he was represented by or waived an attorney in each of his prior cases was an “essential fact” that the State was required to plead to establish his chronic-offender status. App.Sub.Br. at 19-20. Notwithstanding whether the prior representation constitutes an “essential fact” for purposes of § 577.023, Collins is not entitled to relief based on the alleged insufficiency of the information because he was not prejudiced by the omission.

“An indictment or information shall not be invalid, nor shall the trial, judgment, or other proceedings on the indictment or information be stayed, because of any defect that does not prejudice the substantial rights of the defendant.” Rule 23.11.³ When a

³ To the extent Collins may argue that the prejudice requirement expressed in Rule 23.11 is inconsistent with § 577.023.7(1), the Rule supersedes the statute. *See* Rule

defendant objects to the sufficiency of the charging document only after he has already been convicted, the charging document “will be deemed insufficient only if it is so defective that (1) it does not by any reasonable construction charge the offense of which the defendant was convicted, or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of acquittal are prejudiced.” *State v. Briscoe*, 847 S.W.2d 792, 794 (Mo. banc 1993) (quoting *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992)). “In either event, a defendant will not be entitled to relief based on a post-verdict claim that the information or indictment is insufficient unless the defendant demonstrates actual prejudice.” *Id.*

Where the prior convictions upon which the State relies to prove a defendant’s repeat-offender status are clearly identified in the charging document, the defendant is not prejudiced by the State’s failure to specifically allege in the charging document that the defendant was represented by counsel in the previous proceedings. *See State v. Brink*, 218 S.W.3d 440, 446-47 (Mo. App. W.D. 2006). In *Brink*, the defendant appealed the trial court’s finding that he was a persistent offender, claiming that the finding was invalid because the state’s information had failed to plead that attorneys

19.02 (“Rules 19 to 36, inclusive, are promulgated pursuant to authority granted this Court by Section 5 of Article V of the constitution of Missouri and supersede all statutes and court rules inconsistent therewith.”).

represented him or that he waived his right to counsel in his prior cases. *Id.* at 446. Assuming, without deciding, that these facts were “essential,” the Western District denied the defendant’s request for relief because the defendant did not and could not establish that he was prejudiced by the information’s alleged defects. *Id.* at 447. The court noted that the information notified the defendant of the precise cases on which the state relied in averring that he was a persistent offender, and there was no reason to believe that the alleged deficiency in the information prevented the defendant from preparing his defense. *Id.* Moreover, the court observed that because the prior convictions were used to enhance the defendant’s punishment, double jeopardy was not an issue. *Id.*

The Western District’s opinion in *Brink* is highly instructive in Collins’s case. Like the challenged information in *Brink*, the information in this case notified Collins of the “precise cases” upon which the State planned to rely in proving his status as a chronic-DWI offender (L.F. 8-9). Although the information did not specify the case numbers of the previous cases, it did include the date of conviction, the offense, and the respective court in which Collins was convicted (L.F. 8-9). Collins does not allege that his defense was in any respect prejudiced by the allegedly defective information. App.Sub.Br. at 19-21. Therefore, the alleged defects in the information do not provide a basis for granting Collins’s request for relief.

2. The evidence proved that Collins had “pleaded guilty to or had been found guilty of” each of the alleged prior offenses.

Collins argues that although the record admitted at trial showed that he had been “convicted” of DWI or BAC on at least four prior occasions, the trial court could not reasonably conclude that he had “pleaded guilty to or ha[d] been found guilty of” the prior offenses. App.Sub.Br. at 21-22. Collins’s argument ignores, however, that a “plea of guilty” or a “finding of guilt” is a necessary prerequisite to a “conviction.” In *State v. Frey*, 459 S.W.2d 359 (Mo. 1970), this Court recognized that “[t]he word ‘conviction’ has two meanings: its ordinary or popular meaning, which refers to a finding of guilt by plea or verdict, and its legal or technical meaning, which refers to the final judgment entered on plea or verdict of guilty.” *Id.* at 361 (citing 21 Am.Jur.2d, Criminal Law, § 618 at 568). Notably, according to either the ordinary or technical definition, a “conviction” requires a finding of guilt. *See id.* Definitions from other sources consistently show that a finding of guilt is a fundamental component of a “conviction.” *See* BLACK’S LAW DICTIONARY 384 (9th ed. 2009) (defining conviction as “[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty,” and “[t]he judgment (as by a jury verdict) that a person is guilty of a crime.”); § 302.700.2(8) (defining conviction, for purposes of the Uniform Commercial Driver’s License Act, as “an unvacated adjudication of guilt, including pleas of guilt and nolo contendere . . .”). Thus, the

State's evidence establishing that Collins was "convicted" of DWI or BAC on at least four prior occasions also necessarily established that Collins had pleaded guilty to or was found guilty of those offenses.

Collins protests that "[i]t is unknown as to how [the Department of Revenue ("DOR")] determined that the defendant had been convicted, or just exactly what DOR means by the term "convicted." App.Sub.Br. at 20. But, in fact, the certification letter included as the first page of Exhibit 1 explains exactly how DOR made this determination. In her cover letter, the DOR records custodian certified that the attached driver's record was an exact duplicate of the records lawfully filed with DOR pursuant to the provisions of RSMo chapters 302, 303, and 577 (St. Ex. 1). And § 577.051.1 provides that:

A record of the disposition in any court proceeding involving a violation of any of the provisions of section 577.005 to 577.023, or violation of county or municipal ordinances involving alcohol- or drug-related driving offenses shall be forwarded to the department of revenue, within seven days by the clerk of the court in which the proceeding was held.

§ 577.051.1. Thus, it is not unknown "how DOR determined" that Collins had been convicted of DWI and BAC on each of the previous eight occasions—the circuit or municipal clerk reported each conviction directly to DOR as required by statute. And

because the report came from the court, there is no reason to think that “conviction” means anything different to DOR than it means to Missouri courts.

Collins points out that pursuant to this Court’s decision in *State v. Turner*, 245 S.W.3d 826 (Mo. banc 2008), one cannot be sure that each of Collins’s municipal convictions qualified as an “intoxication-related traffic offense” for purposes of § 577.023. App. Br. at 20. In *Turner*, this Court held that, due to an ambiguity in the statutory language,⁴ “prior municipal offenses resulting in an SIS cannot be used to enhance punishment under § 577.023.” *Turner*, 245 S.W.3d at 829. Collins is correct that, based on the evidence presented by the State, it cannot be determined whether his prior municipal convictions resulted in suspended impositions of sentence (St. Ex. 6-10).

But because Collins had so many prior DWI and BAC convictions, he remains a chronic offender *even if each and every one of his municipal convictions is removed from the analysis*. As Exhibit 1 shows, Collins had four prior convictions for DWI or BAC in state circuit courts: a DWI conviction on September 10, 1992 in Howell

⁴ The statute has since been amended to resolve the ambiguity and clarify that prior municipal offenses *may* be used to enhance punishment, even if the offense resulted in an SIS. § 577.023.16, RSMo Cum. Supp. 2008. The controlling law at the time of Collins’s trial, however, was the pre-amendment version of the statute.

County Circuit Court; a DWI conviction on April 8, 1992 in Cole County Circuit Court; a DWI conviction on May 11, 1987 in Howell County Circuit Court; and a BAC conviction on March 7, 1985 in Howell County Circuit Court (St. Ex. 1 at 6-9). Each of these convictions were alleged as priors in the information (L.F. 8). These four convictions in state court, irrespective of the resulting sentences, were eligible to prove Collins's chronic-offender status.

Finally, Collins cites *State v. Craig* to support his argument that the State failed to prove his prior convictions beyond a reasonable doubt. App.Sub.Br. at 22. But *Craig* is squarely distinguishable from Collins's case. In *Craig*, this Court held that the state's proof with respect to one of the defendant's prior offenses was inadequate because the judgment that the state offered was "facially deficient"—the judgment form was blank in the space where "guilty" or "not guilty" should have been marked. *Craig*, 287 S.W.3d at 682. In Collins's case, on the other hand, the evidence presented by the State clearly and unambiguously established Collins's multiple prior convictions for DWI and BAC (St. Ex. 1 at 6-10). Thus, the evidence presented by the State was sufficient to prove beyond a reasonable doubt that Collins was found guilty of, or pleaded guilty to, four or more DWI or BAC offenses.

3. The evidence did not show that Collins was represented by or waived his right to counsel with respect to each of his prior offenses.

An “intoxication-related traffic offense,” for present purposes, is defined as “driving while intoxicated, [or] driving with excessive blood alcohol content. . . or driving under the influence of alcohol or drugs in violation of state law or a county or municipal ordinance, where the defendant was represented by or waived the right to an attorney in writing.” § 577.023.1(3). Collins argues that the State’s evidence was insufficient to prove that his prior offenses were “intoxication-related traffic offenses” because nowhere did the records show that Collins was represented by or waived his right to counsel with respect to any of the prior offenses. App. Br. at 23. He is correct. The records are silent as to the issue of representation by, or waiver of, counsel, and, as a result, the State’s evidence did not establish that Collins’s eight prior DWI and BAC convictions were “intoxication-related traffic offenses” as defined by § 577.023.1(3). For this reason, Collins’s sentence should be vacated and his case should be remanded for a new sentencing hearing with appropriate instructions to the trial court to allow the State an opportunity to present additional evidence to prove Collins’s chronic-offender status.

4. Under the plain language of section 577.023.9, the State should be permitted to offer additional evidence at the new sentencing hearing to prove that Collins is a chronic offender.

In cases where the State's evidence is deemed insufficient to prove a prior conviction for purposes of sentencing enhancement, "[t]he appropriate remedy is a limited remand for the purposes of permitting the state to amend the information [if necessary] and submit proof supporting repeat offender sentencing." *See Vickers v. State*, 956 S.W.2d 405, 407 (Mo. App. S.D. 1997). This Court has explicitly recognized that the constitutional prohibition against double jeopardy does not prevent the State from presenting "whatever evidence it may have at a resentencing to establish the defendant is, as he was charged and sentenced the first time, a persistent offender." *State v. Cobb*, 875 S.W.2d 533, 537 (Mo. banc 1994); *accord Monge v. California*, 524 U.S. 721, 734 (1998) ("[T]he Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context."). Since *Cobb* was decided, Missouri courts have routinely permitted the State to supplement its evidence and prove a defendant's repeat-offender status at resentencing if the proof presented at the original hearing was deemed insufficient on appeal. *See e.g. Vickers*, 956 S.W.2d at 407; *State v. Girdley*, 957 S.W.2d 520, 524 (Mo. App. S.D. 1997); *Dudley v. State*, 903 S.W.2d 263, 267 (Mo. App. E.D. 1995).

There is an important exception, however, to the general rule allowing the state to offer additional evidence of the defendant's repeat-offender status on remand. In *State v. Emery*, 95 S.W.3d 98 (Mo. banc 2003), this Court observed that the statute authorizing a sentencing enhancement based on prior offenses required that the state's

evidence be presented “before the case is submitted to the jury.” *Id.* at 101 (citing § 558.021.2).⁵ The defendant in *Emery* was tried by a jury, but the state failed to present any evidence to support the defendant’s persistent-offender status before the case was submitted. *Id.* at 100. Accordingly, the Court held that the state had failed to meet the statutory requirements and vacated the defendant’s conviction. *Id.* at 101-03.

The Court further held that the state would not be permitted to present additional evidence of the defendant’s persistent-offender status on remand. *Id.* at 101-02. It reasoned that any additional evidence presented by the state on remand would necessarily be presented “after the case [was] submitted to the jury,” and thus to allow further evidence to be adduced would violate the timing requirement of § 558.021.2 a *second time*. *Id.* at 101. Because the Court refused to “remand for further error,” it instructed the trial court to resentence the defendant free of the enhancement. *Id.* at 103. Thus, *Emery* established the following exception to the general rule: the state will not be permitted to adduce additional evidence to prove a defendant’s

⁵ Although *Emery* involved the application of a different recidivist statute—section 558.021—the repeat-DWI-offender statute at issue in Collins’s case—section 577.023—contains identical timing requirements. See *State v. Severe*, 307 S.W.3d 640, 648 n.4 (Mo. banc 2010) (Breckenridge, J., dissenting).

repeat-offender status for sentencing enhancement purposes if allowing the presentation of additional evidence would violate the timing requirement expressed in the enhancement statute. *See id.* at 101-02; *see also State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009) (“The plain language of section 558.021.2 imposes a mandate requiring that prior offender status be pleaded and proven prior to the case being submitted to the jury.”); *State v. Severe*, 307 S.W.3d 640, 645 (Mo. banc 2010) (“Allowing the state to present new evidence on remand would contravene the language of section 558.021.2, which requires that evidence of prior convictions be offered before the case is submitted to the jury.”).

Collins’s case is distinguishable from *Emery*, *Teer*, and *Severe* in a critical respect—Collins was tried by *the court*, not by a jury (Tr. 3-4). In a jury trial, the state is required to present its evidence to support the defendant’s repeat-offender status before the case is submitted to the jury. § 577.023.8. But “in a trial without a jury or upon a plea of guilty, the court may defer the proof in findings of such facts to a later time, but prior to sentencing.” § 577.023.9. In other words, if the defendant has a bench trial or pleads guilty, the state is permitted to present evidence of his repeat-offender status until the defendant receives his sentence. *Id.*

Collins asks this Court to vacate his sentence and to remand for resentencing. App.Sub.Br. at 17, 29-30. When a court vacates a sentence, the sentence is to be treated as though it never existed. *See Calvin v. Missouri Dept. of Corrections*, 277

S.W.3d 282, 288 (Mo. App. W.D. 2009) (when the plaintiff’s conviction was vacated, “it was a declaration that the sentence was to be regarded as though it had never existed”); *Hubbs v. Hubbs*, 870 S.W.2d 901, 905-06 (Mo. App. S.D. 1994) (“When an order is set aside or vacated the result is the destruction of the order in its entirety, its effectiveness is ended, the previously existing status is restored, and the effect is the same as though such order had never existed.”) (citation omitted); *Ex parte Lange*, 85 U.S. 163, 189-90 (1873) (Clifford, J., dissenting) (observing that after a criminal sentence was vacated, “the state of the case before the court was just the same as it would have been if no sentence had ever been passed”). Although Collins insists that in his case, “sentencing is over” (App.Sub.Br. at 27), he cites no authority to suggest that this Court should ignore the long-settled rule that a vacated sentence must be treated as non-existent. Thus, if this Court vacates Collins’s sentence, as both Collins and the State agree that it should, then legally Collins will not yet have been sentenced. Because Collins was tried without a jury, the State may present additional evidence of his prior-offender status without violating the timing requirements of the statute. § 577.023.9.

Nevertheless, Collins argues that because the State failed to prove his chronic-offender status during the original sentencing hearing, he must be sentenced for the class-B misdemeanor of DWI, as though this were his first intoxication-related traffic

offense. App.Sub.Br. at 23-30. But his argument is not supported by the cases upon which he relies.

First, Collins argues that the remedy ordered by this Court in *State v. Craig* “reveals” that, even in a non-jury case, the State is precluded from offering additional evidence of a defendant’s repeat-offender status on remand if the evidence is found to be insufficient on appeal. App.Sub.Br. at 24-25. But Collins reads too much into the *Craig* remedy, which was ordered without any discussion or analysis of whether giving the State the opportunity to adduce additional evidence would have been permissible under the statute.

In *Craig*, the defendant pleaded guilty to DWI, but disputed the State’s evidence offered to prove that he was an aggravated offender. 287 S.W.3d at 677-79. The trial court found beyond a reasonable doubt that the defendant had three qualifying prior offenses, but this Court reversed on appeal, finding that the judgment form offered to prove one of the prior offenses was facially defective and thus did not prove that offense. *Id.* at 682. Concluding that the State had proved only two prior offenses, this Court vacated the judgment, remanded the case, and ordered that the defendant be resentenced as a persistent offender. *Id.* at 682. Nothing in the Court’s opinion indicates that the State requested an opportunity to offer additional evidence on remand, and the Court did not discuss whether such a procedure would have been statutorily permissible.

The remedy in *Craig*, which was uncontested by the State and ordered without specific analysis by this Court, should not be construed as stating a rule of law. The Court in *Craig* did not cite to section 577.023.9, nor did it explain why the language of the statute would preclude the state from presenting additional evidence at the new sentencing hearing if such evidence was available. 287 S.W.3d at 682. Instead, it appears that the issue was not presented to this Court, and thus the Court declined to address it. But the disposition of *Craig* does not prevent this Court from squarely addressing the issue now.

In any event, to the extent the remedy ordered in *Craig* suggests that the state is forbidden from adducing additional evidence before a defendant is resentenced after an appeal of a non-jury case, it is contrary to the plain language of section 577.023.9. As explained above, if a defendant's sentence is vacated on appeal, it is deemed never to have existed as a matter of law. As a result, the state's presentation of additional evidence at a new sentencing hearing is necessarily "prior to sentencing," in compliance with the clear mandate of section 577.023.9.

Second, Collins argues that the remedy after appeal should be the same in a court-tried case as it is in a jury-tried case, where "the remedy is a remand for resentencing consistent with the number of priors correctly proven in the first instance." App.Sub.Br. at 13, 25-28. Relying heavily on this Court's opinion in

Severe, Collins argues that the State should not have the opportunity to take “two bites at the apple.” App.Sub.Br. at 26-28.

But again, Collins ignores the plain language of the applicable statute. Though he insists that there should be no difference between court-tried cases and jury-tried cases for purposes of the available remedy post-appeal, the legislature obviously believed that the different types of trials should be treated differently, as it imposed one timing requirement for jury-tried cases (§ 577.023.8) and a different requirement for court-tried cases and guilty pleas (§ 577.023.9). As Judge Fischer cautioned in his concurring opinion in *Teer*, courts should “restrain from judicial emasculation of legislative direction.” 275 S.W.3d at 263 (Fischer, J., concurring). To conclude that the two fundamentally different statutory timing requirements should be interpreted identically would “emasculate” the legislature’s unambiguous direction that, before a defendant is sentenced following a court-tried case or a guilty plea, the State may offer proof of his prior offenses for sentencing-enhancement purposes. § 577.023.9.

Collins’s reliance on *Severe* is misplaced for a similar reason. It is true that in *Severe*, this Court explained that precluding the State from offering additional evidence on remand would keep the State from taking “two bites at the apple.” 307 S.W.3d at 645. But this rhetoric was inseparable from the Court’s straightforward interpretation of section 577.023.8:

Because of the timing requirement of the statute—which requires the trial court to determine persistent offender status before the case is submitted to the jury—there is no opportunity for the state to have a twice-bitten apple.

...

[A]n exception [to this rule] would give the state “two bites at the apple” *when the statute allows only one bite.*

Severe, 307 S.W.3d at 641, 645 (emphasis added). It is thus strict adherence to the statute, not a general policy against allowing the State to correct mistakes on remand, that compelled this Court to hold in *Severe* that no exception would be made in *jury-tried* cases to permit the State to produce additional evidence of a defendant’s repeat-offender status on remand. Because a different statute applies in court-tried cases such as Collins’s case—a statute which allows the presentation of evidence up until the sentence is imposed—the Court’s analysis in *Severe* is inapplicable.

Neither the Double Jeopardy Clause nor any statute bars the State from presenting additional evidence of Collins’s prior offenses on remand if his sentence is vacated. To the contrary, the plain language of section 577.023.9 indicates that the State is permitted to offer its proof until Collins receives his sentence. This Court should adhere to the unambiguous direction of the legislature and remand with instructions that the State be allowed to offer additional evidence to prove Collins’s chronic-offender status as alleged in the charging document.

CONCLUSION

For the foregoing reasons, Collins's sentence should be vacated. His case should be remanded for a new sentencing hearing with instructions that the State be permitted to present additional evidence that Collins is a chronic offender.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,022 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 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 this 3rd day of August, 2010, to:

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APPENDIX

Sentence and Judgment.....A1