

FILED
Court of Appeals
Division II
State of Washington
12/14/2018 3:25 PM
NO. 51897-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint of:

SOPHEAP CHITH,

Petitioner.

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

AMENDED PERSONAL RESTRAINT PETITION

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Of Attorneys for Petitioner

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A. STATUS OF PETITIONER

Petitioner Sopheap Chith is currently serving a sentence of 206 months at Stafford Creek Correctional Center, 191 Constantine Way, Aberdeen, Washington 98520, and has petitioned this Court for relief from his unlawful conviction and sentence. As described below, Divisions II and III of this Court have affirmed his conviction and sentence in part. Mr. Chith remains in custody.

1. Trial court proceedings and direct appeal in cause no. 33002-8-III

The State alleged that on February 5, 2013, petitioner Sopheap Chith stole a Honda Civic from the parking lot of a Puyallup apartment complex and drove it to an apartment complex in Spanaway, where he, along with Sothea Chum and another person, began removing the Civics' tires before Mr. Chith left in the vehicle. A witness, Gabriel Colbern, testified that he saw Mr. Chith standing outside the Civic, which was stopped at a red light and that he appeared to be yelling at the person inside the car. When the light changed, Mr. Colbern followed Mr. Chith, and testified that he saw Mr. Chith fire two shots from the car, shattering the driver's side window. Mr. Colbern continued to follow Mr. Chith until he stopped in a center turn. He testified that he saw Mr. Chith fire two or three shots at or near Mr. Colbern in an attempt to scare him and then continue driving, and that he two more shots. Report of Proceedings at

293–94. Mr. Chith drove until his car was hit by a school bus, and then to drive. Another witness testified that she saw Mr. Chith driving aggressively and that he extended his arm out the driver's window and fire two shots into the air. *State v. Chith*, No. 33002–8–III, 2015 WL 4164803, July 9, 2015 (unpublished, cited for facts).

The State charged Sopheap Chith by amended information with 10 charges: (I) second degree assault with a firearm enhancement; (II) drive-by shooting; (III) unlawful possession of a stolen vehicle with a firearm enhancement; (IV) second degree unlawful possession of a firearm; (V) reckless driving; (VI) hit and run; (VII) third degree driving with a suspended license; (VIII) violation of a court order with a firearm enhancement; (IX) first degree taking of a motor vehicle without permission with a firearm enhancement; and (X) witness intimidation with a firearm enhancement.

A jury found Mr. Chith guilty of the following counts: (I) second degree assault with a firearm enhancement; (II) drive-by shooting; (III) unlawful possession of a stolen vehicle with a firearm enhancement; (IV) second degree unlawful possession of a firearm; (V) reckless driving; (VI) hit and run; (VII) third degree driving with a suspended license; (VIII) violation of a court order with a firearm enhancement; (IX) first degree taking of a motor vehicle without permission with a firearm enhancement; and (X) witness intimidation with a firearm enhancement. The trial court

dismissed count III, ruling it merged with count IX. *Chith*, No. 33002–8–III, 2 (Slip. Op. at *1-2).

The court sentenced Mr. Chith to concurrent standard range sentences on the felonies plus four firearm enhancements for a total sentence of 228 months. *Chith*, No. 33002–8–III (Slip. Op. at *2).

Following conviction, Mr. Chith appealed his witness intimidation and drive-by shooting convictions, arguing that (1) insufficient evidence supports his conviction for witness intimidation and alternatively that he received ineffective assistance of counsel because his counsel failed to argue same criminal conduct for his witness intimidation and second degree assault convictions, (2) a unanimity instruction was required on the drive-by shooting charge, and (3) the trial court erred in imposing substance abuse treatment as a community custody condition, an unpublished opinion, Division Three of this court reversed Chith's witness intimidation conviction for insufficient evidence, held that a community custody condition imposing a substance abuse condition was improper, and remanded to the trial court for resentencing on the community custody condition, and affirmed Mr. Chith's drive-by shooting conviction. *Chith*, No. 33002–8–III 2015 WL 4164803, (Slip. Op. at *5).

2. Cause No. 48913-9-II

The court sentenced Mr. Chith to a total of 206 months and entered Judgment and Sentence as To Count I, II, IV, VIII, and IX only on April

15, 2016. Mr. Chith appealed from his resentencing following his first appeal, arguing that (1) the sentences on four of his convictions exceed the statutory maximums for those offenses, (2) the trial court should have dismissed the possession of a stolen vehicle charge with prejudice rather than without prejudice after finding that double jeopardy barred the court from sentencing him on both his possession of a stolen vehicle and his first degree taking a motor vehicle without permission convictions, and (3) his amended judgment and sentence contains various scrivener's errors.

This Court found the sentences for the second degree assault, drive-by shooting, violation of a court order, and first degree taking a motor vehicle without permission exceeded their statutory maximums, and reversed the sentences and remanded to (1) resentence Mr. Chith on those counts, (2) to vacate the possession of a stolen vehicle conviction (Count III), and (3) to correct several scrivener's errors in the judgment and sentence. *State v. Chith*, 48913-9-II, 2017 WL 4251815, unpublished opinion dated September 26, 2017.

3. Cause No. 51897-0-II

The case came on for resentencing on February 9, 2018. Mr. Chith was sentenced to 204 months, which was subsequently modified to 202 months on February 14, 2018, and modified on September 12, 2018 to 204 months. Mr. Chith appealed from the sentence and is represented by undersigned counsel. Mr. Chith's opening brief in his direct appeal was

filed September 28, 2018.

4. Personal Restraint Petition

Prior to appointment of appellate counsel on August 2, 2018, Mr. Chith filed a pro se PRP and brief on April 23, 2018. Prior to appointment of counsel to represent Mr. Chith in the PRP, he submitted supplemental issues for his PRP to undersigned counsel. Mr. Chith's PRP was consolidated with his direct appeal in cause no. 51897-0-II on July 9, 2018.

After consolidation, undersigned counsel was appointed to represent Mr. Chith in the consolidated PRP on November 6, 2018. In the order of appointment, counsel was directed to file an amended Personal Restraint Petition. Pursuant to his appointment, counsel submits the following supplemental issues.

B. GROUNDS FOR RELIEF

Mr. Chith has established three grounds for relief in his pro se PRP, filed April 24, 2018.

1. Mr. Chith should be given a new trial or released from confinement pursuant to RAP 16.4(c)(2) because the state's evidence failed to prove every element of second degree assault beyond a reasonable doubt.
2. Mr. Chith should be given a new trial or released from confinement pursuant to RAP 16.4(c)(2) because the state's

evidence failed to prove every element of unlawful possession of a firearm in the second degree beyond a reasonable doubt.

3. Mr. Chith should be given a new trial or released from confinement pursuant to RAP 16.4(c)(2) because he was denied effective assistance of counsel regarding the second degree assault charge due to counsel's failure to propose an instruction for the lesser included offense of unlawful display of a weapon.

Mr. Chith adopts and incorporates these arguments, authority, and attachments "A" and "B" contained in his original PRP and brief in this amended personal restraint petition. In addition, he submits the following supplemental grounds for relief and accompanying argument in support of his request for trial or release from confinement pursuant to RAP 16.4(c).

4. **The firearm enhancements must be vacated due to instructional error that omitted an essential element and because insufficient evidence supported the special verdicts**

The Sentencing Reform Act permits additional time to be added to a standard range sentence upon a jury's finding that the defendant used a firearm in the commission of an offense. RCW 9.94A.533(3) A firearm is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(9). To support a firearm enhancement, the State is required to prove that a real

firearm was used. *State v. Tasker*, 193 Wn. App. 575, 373 P.3d 310 (2016).

A reviewing court evaluates jury instructions de novo as a whole to determine whether they allow counsel to argue the theory of the case, are not misleading, and accurately advise the jury of the applicable law. *State v. Harris*, 164 Wn. App. 377, 383, 263 P.3d 1276 (2012).

Due process requires that the State prove each essential element of the charge beyond a reasonable doubt. *State v. France*, 180 Wn.2d 809, 814, 329 P.3d 864 (2014). The “to convict” instruction “must contain all of the elements of the crime because it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence.” *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014) (quoting *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010)). Instructions that relieve the State of its burden to prove each element beyond a reasonable doubt are constitutionally defective and amount to reversible error. *Harris*, 164 Wn. App. at 383; *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007).

Jury instructions must contain all the essential elements of the charge and an omission that relieves the State of its burden of proof as to an element is reversible error. *Harris*, 164 Wn. App. at 383. Here, the jury instructions did not specify that a real firearm, rather than a toy or a

replica, must be used. Attachment C. The instruction provided:

A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

Instruction 16.

This omission served to lower the State's burden of proof that the device used was capable of firing a projectile by use of an explosive such as gunpowder. Although Mr. Chith's attorney did not propose an alternate instruction defining “firearm” for purposes of the enhancement, the error may be raised for the first time on review because it implicates Mr. Chith's due process right to instructions that hold the State to its burden to prove each element beyond a reasonable doubt. *Harris*, 164 Wn. App. at 383.

5. There was insufficient evidence to support the imposition of the firearm sentencing enhancements where the State failed to prove that Mr. Chith was armed with a firearm

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const, art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928. In addition, in order to prove the firearm enhancements, the State must present the jury with sufficient evidence to find that a firearm is operable under this definition. *State v. Pierce*, 155 Wn. App. 701, 714, 230 P.3d 237 (2010) (citing *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008)).

A defendant is subject to a firearm sentencing enhancement under RCW 9.94A.533 if the defendant or an accomplice was armed with a firearm during the commission of the underlying offense. The State must prove each element of the enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995).

As instructed in this case, for sentencing enhancement purposes, a firearm “is a weapon or device from which a projectile may be fired by an

explosive such as gunpowder.” [Instruction No. 16]. See *Recuenco*, 163 Wn.2d at 437 (“a jury must be presented with sufficient evidence to find a firearm operable... in order to uphold the enhancement”).

“A gun-like object incapable of being fired is not a ‘firearm’ under this definition.” *State v. Pam*, 98 Wn.2d 748, 754, 659 P.2d 454, 457 (1983) overruled on other grounds by *State v. Brown*, 113 Wn. 2d 520, 782 P.2d 1013 (1989). See RCW 9.41.010(9); see also *Pierce*, 155 Wn. App. at 714 (citing *Recuenco*, 163 Wn.2d at 437).

In *Pierce*, this Court held that where a firearm, as here, was not presented as evidence, there must be “other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes.” *State v. Pierce*, 155 Wn. App. 701, 714 n.11, 230 P.3d 237 (2010). In *Pierce*, this Court found there was insufficient evidence to establish the defendant was armed with an operable firearm. *Pierce*, 155 Wn. App. at 714. The witnesses in that case were awakened in their home and saw an intruder holding what appeared to be a handgun. *Id.* at 705. However, because no other evidence of operability was introduced, such as bullets found, gunshots heard, or muzzle flashes, the evidence was insufficient to support a firearm sentencing enhancement. *Id.* at 714 n.11. The *Pierce* court partially rejected the State's argument that it need not produce and test a weapon in order to support a firearm enhancement, stating:

This may be true when there is other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes. Although the evidence is sufficient to prove an element of the offense of robbery or burglary or a deadly weapon enhancement, where proof of operability is not required, the evidence here is insufficient to support the imposition of a firearm sentencing enhancement, where proof of operability is required.

Id. at 714 n. 11, 230 P.3d 237 (citing *Recuenco*, 163 Wash.2d at 437; *Pam*, 98 Wash.2d at 754–55).

In this case, no firearm was recovered in this case. See RCW 9.41.010(9) (firearm definition). Although witnesses stated that they saw a gun, Mr. Chith's co-defendant Chum was equivocal whether he saw a gun. RP at 505. Mr. Chith states in a declaration that will be filed in conjunction with this amended PRP that the weapon allegedly seen by the State's witnesses was a toy gun and that he broke the window of the Honda with a lug wrench. (Declaration of Chith, to be filed separately). No evidence of gunshot residue was presented. See RCW 9.41.010(9); see also *Pierce*, 155 Wn. App. at 714 (citing *Recuenco*, 163 Wn.2d at 437); *Pam*, 98 Wn.2d at 754.

As in *Pierce*, each firearm enhancements must be stricken and the case remanded for resentencing.

C. STATEMENT OF FINANCES

Mr. Chith remains unable to pay the filing fee. Undersigned

counsel is appointed through the Office of Public Defense. Mr. Chith respectfully requests this Court waive any fees imposed by the Court as a result of this amended petition.

D. REQUEST FOR RELIEF

Mr. Chith requests that this court;

1. Serve the State with a copy of this PRP and request a timely response;
2. Permit Mr. Chith to file a reply;
3. Determine whether an evidentiary hearing is required;
4. That the Court vacate his convictions or alternatively, the firearm enhancements.

DATED: December 14, 2018.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Sopheap Chith

ATTACHMENT C

INSTRUCTION NO. 16

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CERTIFICATE

I certify that a copy of the foregoing Amended Personal Restraint Petition of Petitioner was e-filed on December 14, 2018, by JIS link, Clerk of the Court, Court of Appeals, and to James Schacht, Pierce County Prosecuting Attorney and a copy was mailed by U.S. mail, postage prepaid, to Mr. Kevin Franklin at the following address:

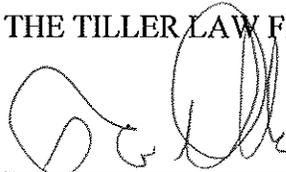
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 14, 2018.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

THE TILLER LAW FIRM

December 14, 2018 - 3:25 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51897-0
Appellate Court Case Title: State of Washington, Respondent v. Sopheap Chith, Appellant
Superior Court Case Number: 13-1-00554-1

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