

**FILED**

JANUARY 5, 2012

Court of Appeals

Division III

No. 29925-2-III State of Washington

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

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

DAVID ASHTON ROBERT CHESTER,  
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT  
Honorable Douglas Anderson, Judge *Pro Tem*

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to support the conviction for Unlawful Possession of a Firearm in the First Degree.

2. The trial court erred in finding that the respondent was adjudicated guilty of Residential Burglary on November 17, 2008 and of Assault in the Second Degree on January 26, 2009.<sup>1</sup>

3. The trial court erred in concluding as a matter of law that “[t]he [r]espondent had previously been adjudicated guilty as a juvenile of a serious offense.”<sup>2</sup>

4. The trial court erred in concluding as a matter of law that “[t]he evidence is sufficient beyond a reasonable doubt that the [r]espondent is guilty of Unlawful Possession of a Firearm in the First Degree.”<sup>3</sup>

*Issue Pertaining to Assignments of Error*

Was Mr. Chester’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove an essential element of the crime of unlawful possession of a firearm in the first degree—that the person named in the prior orders on adjudication and disposition was the same person on trial?

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<sup>1</sup> Finding of Fact ¶ 2.27 and ¶ 2.28, CP 57.

**B. STATEMENT OF THE CASE**

By Amended Information, the State charged Mr. Chester with unlawful possession of a firearm in the first degree or alternatively in the second degree. CP 5–6. An adjudicatory fact-finding hearing was held before the Honorable Douglas Anderson, Judge *Pro Tem*. RP 5–110; *see* JuCR 7.11.

To establish the prior offenses for purposes of unlawful possession of a firearm in the first degree, the prosecutor submitted prior Orders on Adjudication and Disposition from 2008 and 2009, as Exhibits 6 and 7,<sup>4</sup> and elicited the following testimony from Mr. Chester’s mother, Charlotte Caldwell (set forth here in its entirety).

PROSECUTOR: Ms. Caldwell, can you please state your name:

MRS. CALDWELL: Charlotte Caldwell.

Q: And can you spell your last name, please?

A: C-A-L-D-W-E-L-L.

Q: And could you provide your address for the record?

A: 2033 Road H.2 Northeast, Moses Lake, Washington.

Q: And do you recognize the young man in the green jumpsuit next to ... [defense counsel]?

A: Yes, I do.

Q: And how do you recognize him?

A: He’s my son.

Q: And what is his legal name?

A: David Ashton Robert Chester.

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<sup>2</sup> Conclusion of Law ¶ 3.2, CP 58.

<sup>3</sup> Conclusion of Law ¶ 3.3, CP 58.

<sup>4</sup> Contemporaneously with the filing of this brief, counsel is filing a supplemental designation of exhibits to have these two exhibits transferred to the Court of Appeal.

Q: And what name does he usually go by?

A: Ashton.

Q: And what was [sic] his date of birth?

A: 10/25/95.

PROSECUTOR: Your Honor, may I approach the witness?

THE COURT: Yes.

PROSECUTOR: For the record, Your Honor, I've handed the witness Plaintiff's – what's been marked as Plaintiff's Exhibit 7 and 6.

RP 10.

Q: And, Ms. Caldwell, do you know what those forms are? Are you familiar with them at all?

A: Well, it says they're findings.

Q: Okay.

PROSECUTOR: If I could, may I approach again, Your Honor?

THE COURT: Yes, you may.

Q: On Plaintiff's Exhibit 7, I'm going to turn to what's marked as page 9. Do you recognize your son's signature on that page?

A: It looks similar. He's been pretty much incarcerated for the last two-and-one-half years, but it looks pretty close.

Q: So does that appear to be his signature?

A: It looks like it.

Q: Okay. And, then moving to what's marked as Plaintiff's Exhibit 6, and turning to page 9, does that appear to be your son's signature, as well?

A: It looks like his signature.

PROSECUTOR: Your Honor, the State has no other questions for Ms. Caldwell.

THE COURT: [Defense counsel], any questions?

...

DEFENSE COUNSEL: ... I have no questions.

RP 11–12. Exhibits 6 and 7 were admitted into evidence. RP 49–50.

The State offered no further evidence regarding the prior orders on adjudication and disposition.

The court found Mr. Chester guilty of unlawful possession of a firearm in the first degree, and entered written findings of fact and conclusions of law. RP 138; *see* JuCR 7.11(d). This appeal followed. CP 40.

**C. ARGUMENT**

**Mr. Chester’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove an essential element of the crime of unlawful possession of a firearm in the first degree—that the person named in the prior orders on adjudication and disposition was the same person on trial.**

*Scope of Review.* As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a

reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

*Elements of unlawful possession of a firearm in the first degree.*

The question here is whether the State's showing is legally sufficient to support a necessary element of unlawful possession of a firearm in the first degree—whether Mr. Chester had previously been convicted of a

disqualifying crime. See State v. Gentry, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). The statute requires that the State prove that Mr. Chester “owns, has in his ... possession, or has in his ... control any firearm” and the person has “previously been convicted ... of any serious offense”. RCW 9.41.040(1)(a). A “serious offense” means any crime of violence. RCW 9.41.010(16). A “crime of violence” includes the crimes of second degree assault and residential burglary. RCW9.41.010(3). Exhibits 6 and 7 show a plea and/or finding of guilt to the qualifying crimes of second degree assault and residential burglary.

*Failure to object to admission of evidence is not invited error.*

While Mr. Chester objected to admission of Exhibits 6 and 7 on other grounds,<sup>5</sup> he did not object on the basis now asserted on appeal. But the State must prove every element beyond a reasonable doubt. In re Winship, 397 U.S. at 364. As such, Mr. Chester could not invite the error of the State presenting no further, independent evidence of the prior convictions simply by failing to object to the admission of the 2008 and 2009 orders on adjudication and disposition.

*Insufficient proof of identity.* In order for the evidence to be sufficient to sustain Mr. Chester’s conviction for unlawful possession of a

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<sup>5</sup> See RP 49–50.

firearm in the first degree, the state bore the burden of proving that the David Ashton Chester<sup>6</sup> named in the 2008 and 2009 Grant County, Washington Order(s) on Adjudication and Disposition was the same David A. Chester<sup>7</sup> on trial in the present action.

Depending on the context, there are two different standards in Washington for proving prior convictions. To calculate an offender score, the state need only prove the existence of a prior conviction by a preponderance of the evidence. State v. Ammons, 105 Wn.2d 175, 185-86, 713 P.2d 719 (1986); State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994); RCW 9.94A.500(1). To meet this standard of proof, an identity of names is sufficient proof, unless rebutted by the defendant who asserts under oath that he is not the same person. Ammons, 105 Wn.2d at 189.

However, in the second instance, when a prior conviction is an element of a crime, the state must prove the existence of that conviction beyond a reasonable doubt. In such a case, an identity of names is insufficient to prove such element beyond a reasonable doubt. Our State Supreme Court has maintained that rule since its holding in State v. Harkness, 1 Wn.2d 530, 96 P.2d 460 (1939). In Harkness, the defendant

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<sup>6</sup> See page 1 of both Exhibits 6 and 7.

was convicted of prescription drug forgery as a “habitual criminal” by the jury. Id. at 533. The court reversed and reduced Harkness’ conviction without the habitual criminal element. Id. The court explained:

There are two lines of decisions, one holding that identity of names alone is sufficient to make a prima facie case of identity of the person, the other holding that identity of names alone is not sufficient proof of identity of person to warrant the court in submitting to the jury a prior judgment of conviction, but that in addition to the identity of names, it must be shown, by evidence independent of the record of former conviction, that the person whose former conviction is proved is the defendant in the present action. We think the latter is the better rule, and supported by the weight of authority.

Id. at 542-43. Citing Harkness, and in accord, are State v. Hunter, 29 Wn. App. 218, 627 P.2d 1339 (1981) (explaining that identity of names alone is not sufficient proof to show identity of defendant on trial for escape with a person incarcerated) and State v. Brezillac, 19 Wn. App. 11, 573 P.2d 1343 (1978) (explaining that identity of names “Mitchell T. Brezillac” is insufficient proof of identity of prior conviction to prove habitual criminal, but prosecution meets its burden with photographic evidence of defendant).

The identity issue does not arise very often, one would imagine, because many defense attorneys quickly stipulate that their client is a

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<sup>7</sup> The Amended Information herein names “David A. Chester” as the Respondent. CP 29.

“convicted felon” to avoid having the felony named and thus allowing the jury to know the details of the prior offense. It is, of course, an abuse of discretion for a court to decline such a stipulation. Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed 574 (1997); State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998). Herein, however, Mr. Chester did not stipulate to either or both prior convictions.

There are established ways to prove identity of defendant with a previously convicted person. *See, e.g., State v. Courser*, 199 Wash. 559, 92 P.2d 264 (1939) (fingerprint records and pictures certified by prison warden); State v. Lee, 87 Wn.2d 932, 558 P.2d 236 (1976) (testimony of police officer familiar with defendant); State v. Hunter, *supra* (testimony of probation and parole officer).

In Hunter, the state charged defendant Hunter with attempted escape from the Cowlitz County Jail where he was being incarcerated pursuant to a felony conviction. In order to prove that Hunter was being held “pursuant to a felony conviction,” the state successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named “Dallas E. Hunter” as the defendant. Following conviction, Hunter appealed, arguing in part that the trial court erred when it admitted

the judgments because the state failed to present evidence that he was the person identified therein.

In addressing this argument, the court first noted that when the fact of a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant's name alone is neither competent evidence to go to the jury, nor is it sufficient to prove the prior conviction.

The court stated:

Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. State v. Harkness, 1 Wn.2d 530, 96 P.2d 460 (1939); State v. Brezillac, 19 Wn. App. 11, 573 P.2d 1343 (1978). *See See* State v. Clark, 18 Wn. App. 831, 832 n.1, 572 P.2d 734 (1977).

Hunter, 29 Wn. App. at 221. Ultimately, the court in Hunter affirmed because the state presented evidence from a probation officer from the Department of Corrections who had revoked Hunter from his work release program and had him incarcerated in the Cowlitz County jail pending his return to prison pursuant to his Lewis County felony convictions. Based upon this “independent” evidence to prove that Hunter was the person

named in the judgments, the Court of Appeals found no error in admitting the judgments. The court stated:

We hold that [the probation officer's] testimony was sufficient independent evidence to establish a prima facie case that defendant was the same Dallas E. Hunter as named in the certified judgments and sentences. After the State introduced this evidence, the burden was on defendant to come forward with evidence casting doubt on the identity of the person named in the documents. State v. Brezillac, *supra*.

Hunter, 29 Wn. App. at 221-22.

The facts in Hunter are in stark contrast to Mr. Chester's case. The state simply introduced copies of 2008 and 2009 Order(s) on Adjudication and Disposition into evidence. As discussed below, the sparse testimony elicited from Mr. Chester's mother was insufficient to establish the requisite identity beyond a reasonable doubt.

To sustain the burden of proving identity when criminal liability depends on the accused's being the person to whom a document pertains,

[T]he State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt 'that the person named therein is the same person on trial.' Because 'in many instances men bear identical names,' the State cannot do this by showing 'identity of names alone.' Rather, it must show, 'by evidence independent of the record,' that the person named therein is the defendant in the present action.

State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005), citing in part State v. Kelly, 52 Wn.2d 676, 678, 328 P.2d 362 (1958) and Gravatt v. United States, 260 F.2d 498, 499 (10th Cir.1958).

The Huber Court explained that the state can meet this burden in a variety of ways, such as producing otherwise-admissible booking photographs, booking fingerprints, eyewitness identification, or, arguably, distinctive personal information. Huber, 129 Wn. App. at 503. The court reiterated, however, that “the State does not meet its burden merely because the defense opts not to present evidence; if the State presents insufficient evidence, the defendant’s election not to rebut it does not suddenly cause it to become sufficient. Id.

Herein, there is no “identity of names” where a “David Ashton Chester” is named in the 2008 and 2009 Grant County, Washington Order(s) on Adjudication and Disposition, and “David A. Chester” is on trial in the present action. Even if the names could reasonably be considered similar, the state “must prove by evidence independent of the record of the former conviction that the person whose former conviction is proved is the defendant in the present prosecution. The state has the burden of producing evidence to prove such identity.” Harkness, 1 Wn.2d at 543

*The mother's testimony is not supported by personal knowledge.*

The state failed to show that the two persons were one and the same by eliciting testimony from Mr. Chester's mother as to the signatures on the two documents.

ER 701 provides in part that a lay witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are "rationally based on the perception of the witness." ER 701(a). This provision "makes it clear that the requirement of firsthand knowledge under Rule 602 applies even though the witness is allowed to testify in the form of an opinion." Tegland, K., 5B Wash. Prac., Evidence Law and Practice, § 701.3 (5<sup>th</sup> ed.). ER 602, in turn, provides that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

The "rule has been very clearly laid down that one who is familiar in the usual and ordinary course of trading or business with the signature of another is a competent witness upon the question of the genuineness or otherwise of the handwriting or signature. A case can hardly be imagined where a witness testifying to a familiarity with the handwriting of a particular person would not be competent to give his opinion. The weight of such testimony is, of course, for the jury." State v. Brunn 144 Wash.

341, 345, 258 P. 13 (1927) (citations omitted). *See also*, State v. Simmons, 52 Wash. 132, 100 P.269 (1909) (A witness, who testifies that she has seen a person write and knows his handwriting, is competent to identify his letters); State v. Miller, 80 Wash. 75, 141 P. 293 (1914) (One who testified to familiarity with the handwriting of accused was competent to testify that the signatures shown him were in the handwriting of accused).

Here, Ms. Caldwell testified only that the person on trial in the courtroom was her son, Mr. Chester. RP 10. She was shown pages 9 of Exhibits 6 and 7. When asked if she recognized her son's signatures on the two pages, Ms. Caldwell responded that "it looks similar", "[h]e's been pretty much incarcerated for the last two-and-one-half years, but it looks pretty close", "it looks like it" and "[i]t looks like his signature". RP 10–11. The state laid no basic foundation to show that Ms. Caldwell had firsthand knowledge of what Mr. Chester's handwriting or signatures looked like. Her testimony also suggests that she has had no exposure to Mr. Chester's signatures for the past two-and-one-half years. Further, the state asked no questions to establish that Ms. Caldwell was in fact familiar with her son's handwriting – e.g., that Mr. Chester had lived with her during his school years and she had monitored his homework assignments,

or that he'd given her signed Christmas and other holiday cards, or any other background that would support a finding of personal knowledge. Without such evidence of prior familiarity, the mother was not qualified to make a lay witness identification of signatures.

The State presented no evidence beyond two prior Orders on Adjudication and Disposition—bearing the same first and last names as the person on trial herein, but differing as to the middle name—to prove that the persons named in the prior orders are the same person as the respondent herein. The state's evidence does not rise to the level of *prima facie*, much less proof beyond a reasonable doubt. The evidence was insufficient to prove the necessary element of a prior qualifying conviction, and Mr. Chester's conviction for unlawful possession of a firearm must be reversed and dismissed with prejudice. Huber, 129 Wash. App. at 504.

*Remedy for insufficient proof is reversal.* The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. at 144.

**D. CONCLUSION**

For the reasons stated, the conviction should be reversed and dismissed with prejudice.

Respectfully submitted on January 5, 2012.

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**PROOF OF SERVICE (RAP 18.5(b))**

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 5, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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