

No. 61857-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Appellant,

v.

ERIN CHAMBERS,

Respondent.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove each element of the crime beyond a reasonable doubt.

2. Instruction 9 relieved the State of its burden of proof.

3. The trial court erred in refusing to provide the defense proposed instruction derived from California Vehicle Code section 305.¹

4. The trial court erred in refusing to provide the defense proposed instruction derived from California Vehicle Code section 23152(a).

5. The trial court erred in refusing to provide the defense proposed instruction derived from California Vehicle Code section 670.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 46.61.502 provides the crime of driving under the influence is a felony if the defendant has four prior qualifying offenses as defined in RCW 46.61.5055(13). The State argued and the trial court agreed that the existence of four prior offenses elevating Eryn Chambers's driving under

¹ Because the proposed instructions were not numbered, Ms. Chambers cannot comply with the requirements of RAP 10.3(g).

the influence charge from a misdemeanor to a felony were elements of the greater charge which the jury would determine. However, despite finding the priors were elements, the court did not require the State prove to the jury beyond a reasonable doubt that the priors were of the type specified in RCW 46.61.502(6) and RCW 46.61.5055(13). Did the State present sufficient evidence to prove each element of the offense beyond a reasonable doubt?

2. Instruction 9, the “to convict” instruction, required the jury find only that Ms. Chambers had “four prior offenses.” The instruction did not require the jury find Ms. Chambers had four prior offenses of the type specific in RCW 46.61.502(6) and RCW 46.61.5055(13). Did the jury instructions relieve the State of its burden of proof?

C. STATEMENT OF THE CASE

Ms. Chambers was arrested on August 27, 2007, for driving under the influence. After she refused a breath test, RP 486, a blood draw was obtained several hours later pursuant to a search warrant. RP 491 Results of that test indicated her blood-alcohol level at the time of the draw was .18. RP 626. By relying upon retrograde extrapolation, Ms.

Chambers blood alcohol level was determined to be about .22 two hours after driving. RP 652.

The State charged Ms. Chambers with felony driving under the influence, alleging she had four prior qualifying offenses in the 10 years preceding her arrest. RP 70-71. A jury convicted Ms. Chambers of driving under the influence. CP 146-47.

D. ARGUMENT

1. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO PROVE EACH ELEMENT OF THE CHARGE OF DRIVING UNDER THE INFLUENCE

a. Due Process requires the State prove each element of an offense beyond a reasonable doubt. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process

and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [she] is guilty of every element of the crime beyond a reasonable doubt.’” Apprendi, 530 U.S. at 476-77, quoting Gaudin, 515 U.S. at 510.

Where a prior conviction elevates an offense from a misdemeanor to a felony, that prior conviction is an element of the offense rather than merely a sentencing factor. State v. Roswell, 165 Wn.2d 186, 194, 196 P.3d 705 (2008).

RCW 46.61.502 provides in relevant part:

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; or

(c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

....

5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

6) It is a class C felony punishable under chapter 9.94A RCW . . . if: (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055

RCW 46.61.5055(13) defines “prior offenses” in relevant part as

(i) A conviction for a violation of RCW 46.61.502 or an equivalent local ordinance;

- (ii) A conviction for a violation of RCW 46.61.504 or an equivalent local ordinance;
- (iii) A conviction for a violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug;
- (iv) A conviction for a violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug;
- (vi) An out-of-state conviction for a violation that would have been a violation of (a)(i), (ii) (iii), (iv), or (v) of this subsection if committed in this state;

Because proof of four prior qualifying convictions elevates the crime of DUI from a misdemeanor to a felony, the qualifying prior convictions are elements of the charge. Roswell, 165 Wn.2d at 194.

b. The State did not prove beyond a reasonable doubt that Ms. Chambers had four prior qualifying convictions. To prove the three Washington prior convictions, the statute required the State prove they either violated (1) one of the four designated sections of RCW 46.61; (2) an equivalent local ordinance; or (3) were an out-of-state conviction that would have been a violation in this State. RCW 46.61.502; RCW 46.61.5055(13).

Had each of the priors been for violations of one of the four designated sections of RCW 46.61, the State could have submitted documents that noted for example that the offense was a violation of RCW 46.61.502. See e.g. Ex 27 (Docket of Snohomish County

District Court, Everett Division #C00331579) (listing charge as “46.61.502 DUI”). However, the other two Washington priors were from Seattle Municipal Court and presumably involved violations of the Seattle Municipal Code, although none of the documents submitted make this point clear. See Ex 21 (Judgment and Sentence for Seattle Municipal Court #370761) (listing charge as “physical control” without reference to a statute); EX 22 (Docket for Seattle Municipal Court #370761) (noting charge of “Physical Control While Intoxicated 11.56.020(B)"); Ex 23-24 (Judgment and Sentence for Seattle Municipal Court #450771) (noting charge of “DUI – affected by prong as amended); Ex 24 (Docket for Seattle Municipal Court #450771) (noting charge of “Persons under the Influence of Intxcnts/Drugs [sic] 11.56.020”). None of these records set forth the language of the relevant statute or provide any other means by which the jury could determine if the violations were of an “equivalent local ordinance.” Further, the State did not present the jury any additional evidence from which to make that determination.

Ignoring the fact that they are elements of the offense which must be proved to the jury, if the State wishes to now claim that the determination of the equivalency of the local statutes is a judicial task, the court here never made that determination. Nor was the

court presented evidence by which it could make that determination. There is no proof in the record that the named municipal code sections are equivalent statutes.

With respect to Ms. Chambers's California prior conviction, again the State did not submit any information from which the jury could find the violation would have been a violation in Washington. The State did not submit the facts of the California prior conviction to permit the jury to determine if those facts constituted a violation of the an equivalent Washington statute.

RCW 46.61.5055(6) requires more than mere proof that person has four prior offenses titled "Driving under the Influence" or some other similar title. With respect to Washington offenses the statute requires the State prove the violations would have been violations of either the designated sections of RCW 46.61 or an equivalent local statute. For convictions from other states, the statute requires the prove the out-of-state offense would have been an offense in Washington. The State understood that when it charged Ms. Chambers.

The Information properly alleged Ms. Chambers had committed the offense of driving under the influence and had "at least four prior offenses, as defined in RCW 46.61.5055(13)(a),

within ten years.” CP 70. The State did not meet this burden of proving that element.

The trial court refused to give the defense proposed instructions defining the offense of driving under the influence in California. CP 93, 95, 97. The defense argued these instructions were necessary because the jury had to determine whether the California offense “would have been a violation” of Washington law. RP 809-10. In refusing to submit the question to the jury, and thus failing to put the State to its burden, the trial court analogized the proof of the priors here to that of a “Three-Strikes” case, noting that in those circumstances the jury is not asked whether the defendant has two prior most serious offenses. RP 857.

Of course the obvious distinction is that priors in persistent offenders are not elements. State v. Wheeler, 145 Wash.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002); State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), cert denied, 541 U.S. 909 (2004). Here by contrast, because the prior convictions elevate the offense from a misdemeanor to a felony, the priors are elements. Roswell, 165 Wn.2d at 191-92; State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002). While there is an obvious conflict in the reasoning of Roswell and the three-strikes cases,

Roswell makes clear prior offenses which are elements are different than prior offenses which are sentencing factors.

But even ignoring that legal distinction, the court's analogy does not lead to the conclusion that proof of an element should be relaxed to the standard required of a sentencing factor. Rather the analogy leads to two possible conclusions, (1) prior offenses in persistent offender cases are elements which must be proved to the jury; or (2) prior offenses in felony DUI cases are not elements.² But what a court cannot do is conclude the prior offenses are elements which the jury must find, but than insulate the State from the necessity of proving those elements.

Even following the trial court's "three strikes" analogy, the comparability of a foreign offense is not simply a legal determination. Indeed, even in the sentencing context it is at best a mixed question of law and fact. State v. Ross, 152 Wash.2d 220, 95 P.3d 1225 (2004). Ross concluded a comparability challenge may be waived because it is a factual claim rather than a legal determination. 152 Wn.2d at 231 (distinguishing In re the Personal

² If the Court were to decide, contrary to Roswell, that the prior offenses here are not in fact elements, the admission of the priors over Ms. Chambers objection plainly violates ER 404 and warrants a new trial.

Restraint Petition of Goodwin, 146 Wn.2d 861, 877-78, 50 P.3d 618 (2002)).

The equivalency of the Seattle and California prior offenses is the factual question necessary to elevate Ms. Chambers's offense to a felony. It is not enough that she merely have four prior offenses of, say, third degree theft or even reckless driving. Instead the statute requires, and the jury must find, the four prior offenses are of the category listed in RCW 46.61.5055(13). The State did not offer any such proof to the jury.

Assuming the finding of the equivalency of the prior offenses is a judicial question, as an element of the offense it still must be proved by the State beyond a reasonable doubt. Here the State offered no evidence regarding the Seattle offenses nor the relevant Seattle Code sections necessary to determine if those prior offenses were of equivalent local ordinances.

Further in reaching its decision on the California prior offense, the Court placed the burden on the defense to disprove the offenses comparability; "I think its time for you to make an offer of proof" as to why the California offense is not comparable. RP 892. Finally, there is nothing in the record that suggests the Court made its finding beyond a reasonable doubt. In fact, because the court

erroneously equated the determination with that made at sentencing, and because it looked to the defense to disprove it, there is every reason to believe the court employed the standard of proof applicable at sentencing: a preponderance of the evidence.

Having determined that the prior convictions were elements of the offense, there was no basis to remove from the jury's consideration the facts necessary to prove that element. Roswell concluded that where a prior conviction is an element of the offense, a party is not entitled to a bifurcated proceeding on that element. 165 Wn.2d at 199. That is in essence what the trial court provided the State. But in doing so, the court violated Ms. Chambers's Sixth and Fourteenth Amendment rights to require the state prove to a jury beyond a reasonable doubt each of the elements of the offense.

d. The Court must dismiss Ms. Chambers's felony conviction. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969),

reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State failed to prove the elements that Ms. Chambers had four prior qualifying offenses the Court must reverse her felony conviction.

Because the jury was explicitly instructed on the elements of the lesser offense of misdemeanor DUI, CP 131-34 (Instructions 11-13) the Court may reform the verdict to a conviction on the lesser offense. Green. 94 Wn.2d at 234-35; State v. Argueta, 107 Wn.App. 532, 539, 27 P.3d 242 (2001).

2. INSTRUCTION 9 RELIEVES THE STATE OF ITS BURDEN OF PROOF

a. The right to due process and the right to a jury trial require the court instruct the jury on every element of the offense. The jury-trial guarantee of the Sixth Amendment and Article I, § 22 of the Washington Constitution, and the Fourteenth Amendment's Due Process Clause and the similar provisions of Article I, § 3 of the Washington Constitution, require the State prove each element to a jury beyond a reasonable doubt. Winship, 397 U.S. at 364; Apprendi, 530 U.S. at 476-77; State v. Mills, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury instruction relieves the State of its burden of proving each element

of the crime. Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

“The jury has a right to regard the ‘to convict’ instruction as a complete statement of the law and should not be required to search other instructions in order to add the elements necessary for conviction.” Oster, 147 Wn.2d at 147. Absent a few narrow exceptions, the Washington Supreme Court requires the “to convict” instruction to set forth each element of the offense. State v. Smith, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997) (citing State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)).

b. The jury was not instructed on each of the elements of the crime. The court instructed the jury:

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

- (1) That on or about 27th day of August, 2007, the defendant drove a motor vehicle;
- (2) That the defendant at the time of driving a motor vehicle;
 - (a) was under the influence of or affected by intoxicating liquor;

or

(b) had sufficient alcohol in her body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable test of the defendant's blood; and

[(3) That the defendant had four or more prior offenses within ten years; and]

(4) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (3), and (4) any of the alternative elements (2)(a), or (2)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), or (2)(b), or has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), [(3) and] (4), then it will be your duty to return a verdict of not guilty.

CP 129-30 (bracketed text denotes alterations of WPIC 92.02).

The "to convict" required only that the jury find Ms. Chambers had "four prior offenses." However, RCW 46.61.502(6) requires more than merely proof of "four prior convictions," it requires the state prove Ms. Chambers was convicted of four prior offenses of the type specified in RCW 46.62.5055(13). In fact the Information properly alleged Ms. Chambers had "at least four prior

offenses, as defined in RCW 46.61.5055(13)(a), within ten years.”

CP 70. Instruction 9 does not set forth that requirement.

As an example of a proper instruction where a prior offense is an element of the offense, the pattern instruction for first degree unlawful possession of a firearm requires the jury find not only that the person has a prior conviction, rather it tracks the statutory language and requires the jury find the person has a prior conviction of a “serious offense. Compare WPIC 133.01, RCW 9.41.040(1)(a). Instruction 9 does not track the statutory language of RCW 46.61.502 and relieved the State of its burden of proving Ms. Chambers had four prior convictions which satisfied the definition of RCW 46.61.5055(13).

c. The omission of an element from Instruction 9 requires this Court reverse Ms. Chambers’s conviction. Because Instruction 9 does not set forth each element of the offense, the Court must reverse Ms. Chambers’s conviction without regard to the remaining instructions. Smith, 131 Wn.2d at 262-63. But even if this Court looks to the remaining instructions, they do not properly inform the jury of the State’s burden to prove four qualifying prior offenses. Instruction 8 repeats that the State need only prove Ms. Chambers had “four prior offenses” without specifying the type of

offenses. CP 128. No other instruction properly informed the jury of the prior offense element.

The Washington Supreme Court has applied a harmless-error test to erroneous jury instructions. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). However, the Court has held “an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” Brown, 147 Wn.2d at 339 (citing Smith, 131 Wn.2d at 265); see also, State v. Reed, __ Wn.App. __ (2009 WL 1616502) (if “a jury instruction is erroneous but does not relieve the State of its burden to prove every essential element, then the error is harmless)” Because the instructions relieved the State of its burden of proof, the error cannot be harmless.

In any event, the State did not offer any evidence to the jury from which the jury could conclude Ms. Chambers had four qualifying offenses. The trial court refused to give the defense proposed instructions defining the offense of driving under the influence in California. CP 93, 95, 97. The defense argued these instruction were necessary because the jury had to determine whether the California offense “would have been a violation” of

Washington law. RP 809-10. The jury was not provided any means by which to find the prior offenses were prior offense under the statute. Thus, the State cannot prove beyond a reasonable doubt that the jury would have found the missing element if properly instructed and the error requires reversal. Neder, 527 U.S. at 15-18.

This Court must reverse Ms. Chambers's conviction.

E. CONCLUSION

The Court must reverse Ms. Chambers's conviction.

Respectfully submitted this 30th day of June, 2009.



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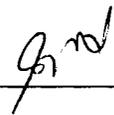
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I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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