

NO. 61857-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERYN CHAMBERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GLENNA HALL, JUDGE

**BRIEF OF RESPONDENT**

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A. ISSUES

1. Issues relating to the applicability of prior convictions to support a more serious charge in the present case are questions of law for the trial court, to be decided as part of the court's "gate-keeping" function. If a defendant believes that the prior convictions are not sufficient to support the charge, a timely objection must be raised; the failure to object until after the State has presented its evidence to the jury constitutes a waiver of such objection. Chambers did not challenge the applicability of any of her prior convictions to support the present charge of Felony Driving Under the Influence ("DUI") until after the State had presented evidence of the priors to the jury and had rested its case. Has Chambers waived any objection to the sufficiency of the prior convictions to support her present conviction of Felony DUI?

2. A "to convict" instruction must contain all elements of the crime charged. Where a defendant agrees to an instruction's wording, she cannot later challenge it on appeal. The "to convict" instruction in this case contained the element that elevated the charge to a felony – that Chambers had "four or more prior offenses within ten years." A different instruction defined "prior offense." Was the jury properly instructed on all elements of the crime

charged? Did Chambers waive any challenge to the "to convict" instruction by explicitly informing the trial court that she accepted the State's proposed "to convict" instruction, which the court ultimately gave?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Eryn Chambers was charged by information with Felony DUI (Driving Under the Influence); the State alleged that, on August 27, 2007, Chambers drove a vehicle while under the influence of intoxicating liquor, or had a blood alcohol level of 0.08 percent or more within two hours of driving, and that she had four prior convictions for DUI or Physical Control within the previous ten years. CP 1-5. By amended information, the State added a charge of Driving While License Suspended/Revoked in the First Degree. CP 70-71.

A jury found Chambers guilty of Felony DUI, and specifically found that she had a blood alcohol concentration of 0.15 or higher within two hours of driving, and that she had refused to submit to a

breath test. CP 146-47; RP<sup>1</sup> 953-54. Chambers waived a jury trial on the Driving While License Suspended charge, and the court found her guilty beyond a reasonable doubt of that crime as well. CP 81; RP 948-51.

The trial court sentenced Chambers to the high end of the standard range, 43 months, on the Felony DUI conviction; the court imposed 12 months, to be served concurrently, on the Driving While License Suspended conviction. CP 149-59; SRP 6-7.

## 2. SUBSTANTIVE FACTS.

At around 10:30 p.m. on August 27, 2007, Washington State Patrol Trooper James Arnold was on his way to a special traffic detail at a road closure for the Sound Transit project. RP 339, 346. Arnold was heading southbound on I-405 through Bellevue when he encountered road construction near the Wilburton Tunnel; the left two lanes were closed, and traffic slowed to 20-30 miles per hour. RP 346-47. Arnold's attention was drawn to a Land Rover; the car weaved onto the shoulder of the road, then jerked back into

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<sup>1</sup> The verbatim report of proceedings consists of seven volumes. The first six are numbered consecutively, and will be referred to simply as "RP." The last volume, containing the sentencing hearing, is numbered separately, and will be referred to as "SRP."

the traffic lanes, repeating this maneuver several times and braking erratically. RP 347-48. After nearly hitting the wall in the tunnel, the car briefly came to a stop in the travel lanes for no apparent reason. RP 349-50.

Concerned, Trooper Arnold activated his emergency lights just south of the tunnel; the Land Rover pulled over onto the shoulder without signaling. RP 350. As Arnold approached the car on the driver's side, he immediately smelled a strong odor of intoxicants and cigarette smoke. RP 355. When Arnold asked the driver (Chambers) for her license and registration, she had trouble getting her identification out of her wallet. RP 356-57. Arnold also noticed Chambers's slurred speech and bloodshot, watery eyes. RP 359. When asked how much she had had to drink that evening, Chambers responded that she had had two glasses of wine. RP 360.

Trooper Arnold believed, based on all that he had observed, that further investigation of possible DUI was warranted; since he himself was on the way to a traffic detail, he called for another patrol unit. RP 360-61. Trooper Brad Olsen responded, and took over the investigation. RP 361. Before he left the scene, Arnold watched Chambers get out of her car, swaying and losing her

balance, and stagger as she walked to the front of the car.

RP 361-62.

Trooper Olsen also noticed signs of intoxication. As Chambers stepped out of her car, she fell against the door; regaining her balance, she walked with her hand pressed against the side of the car all the way to the front. RP 464-65. Olsen also noticed the "strong and obvious" odor of intoxicants, and Chambers's bloodshot, watery eyes. RP 465-66. When he asked her how much she had had to drink, Chambers replied, "Too much." RP 465.

Trooper Olsen placed Chambers under arrest for DUI and took her to the Mercer Island Police Department. RP 466, 479-81. After being read the "Implied Consent Warning for Breath," Chambers refused to submit to a voluntary breath test. RP 484-86. Olsen then obtained a search warrant for Chambers's blood, and transported her to Harborview Medical Center for a blood draw. RP 490-96. Chambers's blood was drawn at 3:14 a.m. on August 28, 2007. RP 598. Using retrograde extrapolation, a forensic toxicologist from the Washington State Toxicology Laboratory estimated that, at 12:35 a.m. (about two hours after the traffic stop),

Chambers had a blood alcohol concentration of approximately 0.22.

RP 600, 651-52.

C. ARGUMENT

1. CHAMBERS WAIVED ANY OBJECTION TO THE APPLICABILITY OF HER PRIOR CONVICTIONS TO SUPPORT FELONY DUI BY FAILING TO OBJECT ON THIS BASIS WHEN THE STATE OFFERED ITS EVIDENCE.

Chambers argues that the State failed to provide sufficient evidence that she had four prior convictions for offenses that would support her present conviction for Felony Driving Under the Influence ("DUI"). Chambers waived this argument by failing to object to the applicability of her prior convictions at the time the evidence was offered. If the prior convictions were not of the type that could support Felony DUI, they were not relevant, and should not have been presented to the jury. The trial court, as "gatekeeper" on such evidentiary matters, was the proper entity to decide this legal question.

a. Relevant Facts.

The State alleged that Chambers had four prior qualifying offenses within ten years of her arrest for the current offense.

CP 1, 70; Supp. CP \_\_\_\_ (sub # 51A, State's Trial Memorandum, at 5); RCW 46.61.502(6). Specifically, the State presented documentation for the following convictions: **1)** DUI on November 28, 1997 (Municipal Court for the Oakland-Piedmont-Emeryville Judicial District, County of Alameda, State of California, No. 429392) (Ex. 28); **2)** DUI on September 30, 1999 (Snohomish County District Court, Everett Division, No. C331579) (Ex. 26, 27); **3)** Physical Control on November 7, 1999 (Seattle Municipal Court, No. 370761) (Ex. 21, 22); **4)** DUI on December 20, 2003 (Seattle Municipal Court, No. 450771) (Ex. 23, 24, 25).

At the outset, Chambers took the position that these prior convictions were not elements of the crime of Felony DUI, but rather sentencing enhancements, akin to prior offenses in support of a persistent offender finding: "[I]f this was a third-strike case, the State wouldn't be presenting the two priors of the Defendant at trial. It's the Defense's position this is tantamount to a three-strike case where if the – if the State gets their conviction for DUI, the next step is for them to prove on a preponderance of the evidence that there are at least four priors." RP 9-10. To this end, Chambers wanted a bifurcated trial. RP 7-8.

The trial court scheduled argument on this issue. The defense reiterated its argument that the four prior offenses were not elements of the current charge; rather, "it's an issue that should be decided on preponderance of evidence before the bench." RP 222. In the alternative, if the prior offenses had to be proved to the jury, the defense urged the court to bifurcate the trial. RP 222-23.

The State disagreed on both counts. The State maintained that the prior offenses were elements that must be proved to a jury beyond a reasonable doubt. CP 45-52. While the State recognized that the trial court had discretion to bifurcate the "to convict" instruction, and present the question of prior offenses to the jury in a special verdict form, the State urged the court not to bifurcate the trial itself. CP 52-54; RP 227-31.

The court concluded that the four prior convictions did not constitute a sentence enhancement, but were elements of Felony DUI that must be proved to the jury. RP 224-26. The court declined to bifurcate the trial. RP 231-32.

Trooper Olsen provided testimony that Chambers had prior convictions for DUI in 1999 from Everett District Court, DUI in 2003 from Seattle Municipal Court, and Physical Control in 1999 from Seattle Municipal Court. RP 515-17; Ex. 10. Olsen explained

Physical Control as "pretty much a DUI without any – the vehicle is not in motion." RP 516.

The State also presented testimony from Robert White, the Chief Clerk for Seattle Municipal Court. RP 558. Based on White's identification of the certified documents, the State offered Ex. 21 (Judgment and Sentence) and Ex. 22 (Docket), both relating to Chambers's conviction for Physical Control (violation date 11-7-99) under Seattle Municipal Court ("SMC") No. 370761. RP 564-66; Ex. 21, 22. The defense did not object to these exhibits. RP 565.

Based on White's identification of additional certified documents, the State offered Ex. 23 (Judgment and Sentence), Ex. 24 (Docket) and Ex. 25 (Conditions of Suspended Sentence), all relating to Chambers's conviction for DUI (violation date 12-20-03) under SMC No. 450771. RP 566-67; Ex. 23, 24, 25. The defense had no objection to these exhibits "[e]xcept for our standing objection from pretrial for – for all of these exhibits."<sup>2</sup> RP 567-68.

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<sup>2</sup> As detailed above, Chambers's pretrial objections to these exhibits were based solely on her argument that the prior convictions were not elements of the crime of Felony DUI, but sentencing enhancements, and thus should not be presented to the jury, but rather decided by the judge upon a preponderance of the evidence standard. Alternatively, she argued for a bifurcated jury trial. RP 7-10, 222-23.

White also identified certified documents contained in Ex. 26 (Judgment and Sentence) and 27 (Docket), both relating to Chambers's conviction for DUI (violation date 9-20-99) under Everett District Court No. C331579. RP 571-73; Ex. 26, 27. The defense had no objection to these exhibits. RP 571-72.

Finally, White identified another certified document, this one from the Municipal Court for the Oakland – Piedmont – Emeryville Judicial District, County of Alameda, State of California. RP 573-78; Ex. 28. This document contained a Complaint, under No. 429392, alleging that Eryn Chambers, on or about November 28, 1997, drove a vehicle while under the influence of an alcoholic beverage. Ex. 28. The exhibit also contained a Clerk's Docket and Minutes, an Order Granting Conditional Sentence (imposing a suspended sentence), and a DUI Waiver of Rights and Plea Form, all under that same cause number. Ex. 28. The defense had no objection to this exhibit. RP 576.

After the State had rested and the defense had completed the testimony of its own witnesses, the court began a discussion with the parties about proposed jury instructions. RP 802. The defense now argued that it was for the jury to determine whether the prior convictions were qualifying convictions under the Felony

DUI statute, and to that end proposed jury instructions specifically directed to Chambers's California conviction for DUI. RP 802-03, 807-10; CP 93-95, 97. The court disagreed, concluding that whether or not the prior convictions were "equivalent" to DUI or Physical Control was for the court to determine, not the jury. RP 808, 853, 895. The court declined to give the proposed jury instructions on California law. See CP 117-45.

b. The Applicability Of The Prior Offenses To Felony DUI Is For The Trial Court, As The Evidentiary Gatekeeper, To Decide.

The Washington Constitution provides that the court "shall declare the law." Const. art. IV, sect. 16; State v. Clausing, 147 Wn.2d 620, 629, 56 P.3d 550 (2002). "Questions of law are for the court, not the jury, to resolve." State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005).

Chambers was convicted of Felony DUI. CP 146, 151. The DUI statute provides that:

(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.

RCW 46.61.502(1).

DUI is ordinarily a gross misdemeanor. RCW 46.61.502(5).

The crime is a class C felony, however, if "[t]he person has four or

more prior offenses within ten years as defined in RCW

46.61.5055." RCW 46.61.502(6). A "prior offense" means, in

relevant part: 1) a conviction for a violation of RCW 46.61.502

("Driving under the influence") or an equivalent local ordinance;

2) a conviction for a violation of RCW 46.61.504 ("Physical control of vehicle under the influence") or an equivalent local ordinance; or

3) an out-of-state conviction for a violation that would have been a violation of RCW 46.61.502 or 46.61.504 if committed in this state.

RCW 46.61.5055(13)(a)(i), (ii), (vi).

The trial court here properly concluded that it was for the court, not the jury, to decide the legal question of whether the statutes or ordinances that Chambers was convicted of violating, in her two convictions from Seattle Municipal Court and her one

conviction from California, were "equivalent" to RCW 46.61.502 or RCW 46.61.504.<sup>3</sup>

The Washington Supreme Court was presented with an analogous question in State v. Miller, supra. When Miller violated a no-contact order, the crime was elevated to a felony because he had two prior convictions for violating such orders. Miller, 156 Wn.2d at 25. The court was asked to decide whether the validity of a no-contact order was an element of the crime that had to be proved to a jury beyond a reasonable doubt. Id. at 24. The court concluded that, while the *existence* of a no-contact order was an element of the crime, the *validity* of the order was a question of law that the trial court should decide as part of its "gate-keeping" function. Id. The court elaborated on its reasoning:

[I]ssues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court. Collectively, we will refer to these issues as applying to the "applicability" of the order to the crime charged. An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. The court, as part of its

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<sup>3</sup> Equivalence was not an issue as to Chambers's conviction for DUI in Everett District Court, because that conviction was explicitly under RCW 46.61.502. Ex. 27.

gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged. Orders that are not applicable to the crime should not be admitted.

Id. at 31.

The facts of State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003), review denied, 151 Wn.2d 1039 (2004), presented a similar situation. In that case, the defendant's crime of violation of a protection order was elevated to a class C felony based on prior convictions:

A violation of a court order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

RCW 26.50.110(5). The trial court rejected the defendant's request that the question of what statute an order was issued under be put to the jury, finding instead that it was the court's duty to resolve that question. Carmen, 118 Wn. App. at 659. The court accordingly instructed the jury that, to convict the defendant of felony violation of a no-contact order, it must find "[t]hat the defendant had twice

previously been convicted for violating the provisions of a no contact order." Id.

The Court of Appeals affirmed. Id. at 668. The court concluded that "the 'fact' that elevated Carmen's crime to a felony, two previous convictions for violation of a no-contact order, was found by the jury beyond a reasonable doubt." Id. at 662. The court elaborated on the trial court's proper role:

The only question determined by the trial court was whether the convictions relied upon by the jury actually were based on violations of protection orders issued under one of the statutes listed in RCW 25.50.110(5). This was properly a question of law for the court. . . . [T]he requirement contained in RCW 26.50.110(5) that the prior convictions be for violations of no-contact orders issued under one of the listed statutes, or for violation of a "valid foreign protection order," relates to the *admissibility* of the State's proof of the prior convictions, rather than to an essential element of the felony crime. . . . Put another way, RCW 26.50.110(5) raises an evidentiary barrier to the admission of evidence of the two prior convictions in order to prove the felony offense unless the prior convictions qualified as predicate convictions as defined in the statute. The very relevancy of the prior convictions depended upon whether they qualified as predicate convictions under the statute. If they had not so qualified, the jury never should have been permitted to consider them.

Carmen, 118 Wn. App. at 663-64 (italics in original).

Similarly, here, the question of whether the ordinances underlying Chambers's prior convictions were "equivalent" to

RCW 46.61.502 (DUI) or 46.61.504 (Physical Control) was properly a question of law for the trial court. The very relevancy of the prior convictions depended upon their being imposed under the listed statutes or under "equivalent" local ordinances. If they were not, the jury should not have been permitted to consider the prior convictions. The trial court was correct in considering the admission of these exhibits as part of its "gatekeeper" function.

If Chambers did not believe that the prior convictions were relevant (i.e., sufficient to support Felony DUI), it was incumbent upon her to raise a timely and specific objection to their admission when the State offered them. ER 103(a)(1); State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006), review denied, 160 Wn.2d 1008 (2007). She failed to do so. See RP 565, 567-68, 571-72, 576. By waiting until the State rested to object to the comparability of the California prior conviction, Chambers waived any objection on this basis. See Gray, 134 Wn. App. at 558; Carmen, 118 Wn. App. at 668.

In any event, the exhibits documenting Chambers's prior qualifying convictions were relevant, and thus properly admitted. Chambers raised no challenge, before or after the jury trial, to the applicability of her two prior convictions in the Seattle Municipal

Court. The reason these convictions went unchallenged is clear. The Physical Control conviction (11-7-99) was imposed under Seattle Municipal Code ("SMC") 11.56.020(B). Ex. 21, 22. Section B of that ordinance ("Physical Control") is identical to (almost word for word) RCW 46.61.504 ("Physical control of vehicle under the influence"). See Appendix A. The DUI conviction (12-20-03) was imposed under SMC 11.56.020. Ex. 23, 24. Section A of that ordinance ("Driving While Intoxicated") is identical to (again, almost word for word) RCW 46.61.502 ("Driving under the influence"). See Appendix A.

It is equally apparent why Chambers never challenged the applicability of her DUI conviction in Everett District Court (9-30-99). That conviction was imposed under RCW 46.61.502, so there is no issue regarding an "equivalent local ordinance." Ex. 26, 27.

Chambers did raise a challenge, albeit untimely, to the applicability of her California conviction for driving under the influence of an alcoholic beverage, and the trial court heard extensive argument on this issue before the case went to the jury. RP 809-25, 883-95; CP 108-15. The California ordinance under which Chambers was convicted, Section 23152(a) of the Vehicle Code of California, provides that "[i]t is unlawful for any person who

is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle." Appendix B. This section is virtually identical to RCW 46.61.502(1)(b), (c). The trial court correctly concluded that, based on analysis of the relevant statutes and case law, Section 23152 of the California Vehicle Code was equivalent to the Washington DUI statute; thus, the California conviction was admissible and would be sent to the jury. RP 895-96. There was no error here. See Carmen, 118 Wn. App. at 668 (trial court's post-trial examination of documentary evidence cured any evidentiary gap).

2. THE JURY INSTRUCTIONS DID NOT RELIEVE THE STATE OF ITS BURDEN OF PROOF AS TO EACH ELEMENT OF THE CRIME.

Chambers also challenges the "to convict" instruction, arguing that it omitted the element that makes her DUI a felony – four prior offenses for DUI or Physical Control, or equivalent local or foreign offenses. Chambers waived any challenge to this instruction by explicitly accepting the State's "to convict" instruction, which the trial court gave. In any event, there was no error. The "to convict" instruction included the element of "four or more prior

offenses within ten years," and a different instruction properly defined "prior offense."

a. Relevant Facts.

The State proposed a "to convict" instruction for Felony DUI that mirrored WPIC 92.02, except that it was modified to include the element that made the charge a felony under RCW 46.61.502(6). Supp. CP \_\_\_\_ (sub # 60, State's Instructions to the Jury, at 13-14).<sup>4</sup> This element was expressed as follows: "(3) That the defendant had four or more prior offenses within ten years." Id. at 13.

The State also proposed an instruction defining "prior offense":

A "prior offense" means any of the following:

- (1) A conviction for a violation of driving under the influence or an equivalent local ordinance; and
- (2) A conviction for a violation of physical control under the influence or an equivalent local ordinance; and
- (3) An out-of-state conviction for a violation that would have been a violation of driving under the influence or physical control under the influence of this subsection if committed in this state; and

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<sup>4</sup> The State's proposed instructions to the jury are not numbered. For ease of reference, the State has numbered the pages sequentially.

(4) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of driving under the influence, physical control under the influence, or an equivalent local ordinance.

Supp. CP \_\_\_\_ (sub # 60, at 21). See RCW 46.61.5055(13)(a)(i), (ii), (vi), (vii).

During discussion of the jury instructions, the court turned its attention to the "to convict" instruction, asking the defense for its position. RP 827. Defense counsel responded, "[W]e're accepting the State's to convict instruction." RP 828.

During subsequent discussion, the State pointed out that it had submitted alternate versions of the "to convict" instruction, one of which included the four prior offenses in the "to convict" form, while the other placed the prior offenses in a special verdict form. RP 867-68; Supp. CP \_\_\_\_ (sub # 63B, State's Alternative Proposed Instructions to the Jury). The State asked counsel which version the defense was in agreement with. RP 868. Defense counsel responded: "Defense does not concede its arguments that – that ten [sic] or more is – is not an element of the charge. We also don't – still object to a non-bifurcated trial. But based on the rulings of the Court, we believe the consolidated verdict form is appropriate." RP 868.

The court instructed the jury in accordance with the State's proposed "to convict" instruction, which included the prior offenses: "(3) That the defendant had four or more prior offenses within ten years." CP 129-30. The court also gave the State's proposed instruction defining "prior offense" in accordance with RCW 46.61.5055(13). CP 139.

b. Chambers Waived Any Objection To The "To Convict" Instruction.

A defendant may raise a claimed error for the first time on appeal if the error is a manifest one that affects a constitutional right. RAP 2.5(a)(3). An instructional error that relieves the State of its burden of proving an essential element is a manifest error of constitutional magnitude. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). Mere failure to object to an instruction does not constitute either waiver or invited error. State v. Corn, 95 Wn. App. 41, 54-56, 975 P.2d 520 (1999).

The invited error doctrine precludes a party from setting up an error at trial and then complaining of it on appeal. In re Personal Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). The doctrine requires some affirmative action by the defendant.

Id. at 724. Under the invited error doctrine, even where constitutional rights are involved, the appellate court will not review a jury instruction where the defendant proposed the instruction or agreed to its wording. State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005). The invited error doctrine has been applied even where the "to convict" instruction omitted an essential element of the crime. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002) (citing cases).

Here, Chambers explicitly accepted the State's proposed "to convict" instruction, which the trial court ultimately adopted. By taking this affirmative action, Chambers invited, or at the very least waived, any error based on this instruction.

c. The "To Convict" Instruction Did Not Relieve The State Of Its Burden Of Proof.

Where a prior conviction elevates a crime from a gross misdemeanor to a class C felony, the prior conviction is an element of the class C felony. State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002); State v. Roswell, 165 Wn.2d 186, 194, 196 P.3d 705 (2008). Chambers's prior convictions for DUI and Physical Control were thus elements of the Felony DUI charge.

The "to convict" instruction, as the "yardstick" by which the jury measures the evidence to determine guilt or innocence, must contain all elements essential to the conviction. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); State v. Smith, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997). Jurors may not be required to supply an element omitted from the "to convict" instruction by referring to other instructions. Smith, 131 Wn.2d at 262-63.

A claim that the "to convict" instruction did not contain every element of the crime charged alleges error of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5(a)(3). Mills, 154 Wn.2d at 6. The adequacy of a "to convict" instruction is subject to de novo review. Id. at 7.

The elements of Felony DUI are contained in RCW 46.61.502. Under the facts of this case, the State had to prove that Chambers drove a vehicle in the State of Washington and was at the time under the influence of or affected by intoxicating liquor, or had a blood alcohol concentration of 0.08 or higher within two hours after driving, and that she had "four or more prior offenses within ten years as defined in RCW 46.61.5055." RCW 46.61.502(1)(a), (b), (6). The "to convict" instruction given to the jury in Chambers's case set out the elements as follows:

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 the 27<sup>th</sup> 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.

CP 129 (Instruction No. 9).

The definition of "prior offense" is, as the statute points out, found elsewhere, specifically in RCW 46.61.5055. That statute provides, in relevant part, that "prior offense" means any of the following: "(i) A conviction for a violation of RCW 46.61.502 [DUI] or an equivalent local ordinance," or "(ii) A conviction for a violation of RCW 46.61.504 [Physical Control] or an equivalent local ordinance," or "(vi) An out-of-state conviction for a violation that

would have been a violation of (a)(i) [or] (ii) . . . of this subsection if committed in this state," or "(vii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502 [DUI], 46.61.504 [Physical Control], or an equivalent local ordinance." RCW 46.51.5055(13)(a)(i), (ii), (vi), (vii). This definition was set out in the jury instructions. CP 139 (Instruction No. 17).

Washington's appellate courts have drawn a distinction between elements of a crime and the definitions of those elements, noting that definitional terms are typically found in a different statutory section. For example, in State v. Lorenz, 152 Wn.2d 22, 25, 93 P.3d 133 (2004), the defendant was charged with, among other crimes, Child Molestation in the First Degree. One of the elements of that crime is that the defendant have "sexual contact" with another. RCW 9A.44.083(1). "Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). Lorenz argued that "sexual gratification" is an essential element of the crime that must be included in the "to convict" instruction. Lorenz, 152 Wn.2d at 30. The court found that "sexual gratification" is not an essential

element of Child Molestation in the First Degree, but a definitional term that clarifies the essential element of "sexual contact." Id. at 36. In rejecting Lorenz's argument, the court observed that the legislature chose to put the definition of "sexual contact" in a separate statutory section. Id. at 31.

Other courts have reached analogous conclusions. See State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (definition of "great bodily harm" does not add elements to the crime of Assault in the First Degree, but rather is intended to provide understanding); State v. Marko, 107 Wn. App. 215, 217-20, 27 P.3d 228 (2001) (definition of "threat" does not create additional means of committing the crime of Intimidating a Witness); State v. Strohm, 75 Wn. App. 301, 307-09, 879 P.2d 962 (1994) (definition of "traffic" does not create additional means of committing the crime of Trafficking in Stolen Property in the First Degree), rev. denied, 126 Wn.2d 1002 (1995).

Here, while further definition was necessary to provide the jury with an understanding of the types of prior offenses that would support a conviction for Felony DUI, the definition itself was not required to be included in the "to convict" instruction. That instruction included all of the elements of Felony DUI, including the

element of four prior offenses within ten years. The jury was properly instructed.

Nor did the jury lack sufficient evidence to support the "prior offenses" element. Evidence is sufficient to uphold a conviction if any rational trier of fact, accepting the truth of the State's evidence and drawing all reasonable inferences in the State's favor, could find that the elements of the crime were proved beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Chambers's prior convictions from Seattle Municipal Court and Everett District Court were all labeled either "DUI" or "Physical Control" -- exactly the crimes specifically named in Instruction 17, defining "prior offense." CP 139. This surely supports a "reasonable inference" of equivalence. The documentation supporting Chambers's prior California conviction told the jury that she drove a vehicle "while under the influence of an alcoholic beverage." Ex. 28. The jury was instructed specifically that this very behavior would support the crime of DUI in Washington. CP 132, 133. Again, the evidence supports a "reasonable inference" that the California conviction would have been a DUI violation in Washington.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Chambers's conviction for Felony DUI.

DATED this 25<sup>th</sup> day of September, 2009.

Respectfully submitted,

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# **APPENDIX A**



## City of Seattle Legislative Information Service

### Seattle Municipal Code

Information retrieved September 18, 2009 10:59 AM

Title 11 - VEHICLES AND TRAFFIC  
Subtitle I Traffic Code  
Part 5 Driving Rules  
Chapter 11.56 - Serious Traffic Offenses

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#### SMC 11.56.020 Persons under the influence of intoxicating liquor or any drug.

##### A. Driving While Intoxicated.

1. A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within the City:

a. And the person has, within two (2) 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.

2. The fact that any person charged with a violation of this subsection is or has been entitled to use a drug under the laws of this state shall not constitute a defense against any charge of violating this subsection.

3. It is an affirmative defense to a violation of subsection 1a of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two (2) hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

4. Analysis of blood or breath samples obtained more than two (2) hours after the alleged driving may be used as evidence that within two (2) hours after the alleged driving a person had an alcohol concentration of 0.08 or more in violation of subsection 1Aa of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsections 1Ab or 1Ac of this section.

5. Driving while under the influence of intoxicating liquor or any drug is a gross misdemeanor.

B. Physical Control.

1. A person is guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if the person has actual physical control of a vehicle within the City:

a. And the person has, within two (2) hours after being in actual physical control of the vehicle, 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.

2. The fact that any person charged with a violation of this subsection is or has been entitled to use a drug under the laws of this state shall not constitute a defense against any charge of violating this subsection. No person may be convicted under this subsection if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway.

3. It is an affirmative defense to a violation of subsection 1Aa of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of being in actual physical control of the vehicle and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two (2) hours after being in actual physical control of the vehicle. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

4. Analysis of blood or breath samples obtained more than two (2) hours after the alleged being in actual physical control of a vehicle

may be used as evidence that within two (2) hours after the alleged being in actual physical control of a vehicle a person had an alcohol concentration of 0.08 or more in violation of subsection B1a of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsections B1b or B1c of this section.

5. Being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug is a gross misdemeanor.

C. Minor Driving Or Being In Actual Physical Control Of A Motor Vehicle After Consuming Alcohol.

1. Notwithstanding any other provision of this title, a person is guilty of minor driving or being in actual physical control of a motor vehicle after consuming alcohol if the person:

a. Operates or is in actual physical control of a motor vehicle in the City;

b. Is under the age of twenty-one (21); and

c. Has, within two (2) hours after operating or being in actual physical control of the motor vehicle, an alcohol concentration of at least 0.02 but less than 0.08, as shown by an analysis of the person's breath or blood made under RCW 46.61.506.

2. It is an affirmative defense to a violation of this subsection which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving or being in actual physical control of the vehicle and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be at least 0.02 but less than 0.08 within two (2) hours after driving or being in actual physical control of the vehicle. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the earlier of (a) seven (7) days prior to trial; or (b) the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

3. Analysis of blood or breath samples obtained more than two (2) hours after the alleged driving or being in actual physical control of the vehicle may be used as evidence that within two (2) hours after the alleged driving or being in actual physical control of the vehicle a person had an alcohol concentration in violation of this subsection.

4. Minor driving or being in actual physical control of a motor vehicle after consuming alcohol is a misdemeanor.

D. Mandatory Appearance After Charging.

1. A defendant who is charged with a violation of this section shall be required to appear in person before a judicial officer within one (1) judicial day after the arrest if the defendant is served with a citation or complaint at the time of the arrest. The Municipal Court may by local court rule waive the requirement for an appearance within one (1) judicial day if it provides for the appearance at the earliest practicable day following arrest and establishes the method for identifying that day in the rule.

2. A defendant who is charged with a violation of this section and who is not served with a citation or complaint at the time of the incident shall appear in court for arraignment in person as soon as practicable, but in no event later than fourteen (14) days after the next day on which court is in session following the issuance of the citation or the filing of the complaint or information.

3. At the time of an appearance required by this subsection, the court shall determine the necessity of imposing conditions of pretrial release according to the procedures established by court rule for a preliminary appearance or an arraignment.

4. Appearances required by this subsection are mandatory and may not be waived.

5. Failure of the court to comply with the requirements of this subsection shall not be grounds for dismissal of any charge under this section nor the establishment of a constructive date of arraignment for purposes of Criminal Rule for Courts of Limited Jurisdiction 3.3.

(Ord. 121525 Sections 8, 9, 2004; Ord. 120481 Sections 4, 5, 2001; Ord. 120057 Section 1, 2000; Ord. 119636 Section 1, 1999; Ord. 119189 Section 6, 1998; Ord. 118992 Section 1, 1998; Ord. 118105 Section 4, 1996; Ord. 117734 Section 2, 1995; Ord. 117642 Section 1, 1995; Ord. 117155 Section 3, 1994; Ord. 116880 Section 1, 1993; Ord. 116872 Section 4, 1993; Ord. 113550 Section 1, 1987; Ord. 112959 Section 1, 1986; Ord. 112466 Section 1, 1985; Ord. 111859 Section 6, 1984; Ord. 111279 Section 1, 1983; Ord. 110967 Section 6, 1983; Ord. 109475 Section 1(part), 1980; Ord. 108635 Section 1, 1979; Ord. 108200 Section 2(11.56.020), 1979.)

Cases: Person could be charged with drunk driving even if he was not driving erratically. *City of Seattle v. Tolliver*, 31 Wn.App. 299, 641 P.2d 719 (1982).

Being in physical control of a motor vehicle while intoxicated is a lesser included offense of driving while intoxicated. *McGuire v. City of Seattle*, 31 Wn.App. 438, 642 P.2d 765 (1982).

Ordinance defining crime of driving while intoxicated as driving with a blood alcohol level of 0.10 or above did not create an unconstitutional presumption that a person with that blood alcohol

## **APPENDIX B**

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» [Section 23152](#)

## Driving Under Influence of Alcohol or Drugs

23152. (a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(c) It is unlawful for any person who is addicted to the use of any drug to drive a vehicle. This subdivision shall not apply to a person who is participating in a narcotic treatment program approved pursuant to Article 3 (commencing with Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code.

(d) It is unlawful for any person who has 0.04 percent or more, by weight, of alcohol in his or her blood to drive a commercial motor vehicle, as defined in Section 15210.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(e) This section shall become operative on January 1, 1992, and shall remain operative until the director determines that federal regulations adopted pursuant to the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. Sec. 2701 et seq.) contained in Section 383.51 or 391.15 of Title 49 of the Code of Federal Regulations do not require the state to prohibit operation of commercial vehicles when the operator has a concentration of alcohol in his or her blood of 0.04 percent by weight or more.

(f) The director shall submit a notice of the determination under subdivision (e) to the Secretary of State, and this section shall be repealed upon the receipt of that notice by the Secretary of State.

Repealed Ch. 708, Stats. 1990. Effective January 1, 1991. Operative January 1, 1992.

Amended Ch. 974, Stats. 1992. Effective September 28, 1992.

Amended Sec. 31, Ch. 455, Stats. 1995. Effective September 5, 1995.

NOTE: This section remains in effect only until notice by the Secretary of State, at which time it is repealed and the following section becomes effective.

23152 (a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle..

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(c) It is unlawful for any person who is addicted to the use of any drug to drive a vehicle. This subdivision shall not apply to a person who is participating in a narcotic treatment program approved pursuant to Article 3 (commencing with Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code.

(d) This section shall become operative only upon the receipt by the Secretary of State of the notice specified in subdivision (f) of Section 23152, as added by Section 25 of Chapter 1114 of the Statutes of 1989.

Amended Ch. 708, Stats. 1990. Effective January 1, 1991.

Amended Ch. 974, Stats. 1992. Effective September 28, 1992.

Amended Sec. 32, Ch. 455, Stats. 1995. Effective September 5, 1995.

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Gregory C. Link**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. ERYN CHAMBERS**, Cause No. 61857-1-I, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Name  
Done in Seattle, Washington

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