

No. 65518-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DWIGHT L.M., JR. (DOB 2/11/93),

Appellant.

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

The Honorable Chris Washington

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
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FILED
APR 11 2017
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DIVISION ONE
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A. ASSIGNMENT OF ERROR

The trial court abused its discretion when it allowed the State to reopen its case after the State and the defense had rested.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where all parties have rested, the court abuses its discretion when it allows a party to reopen its case to present additional evidence which results in prejudice to the other party. Here, after the parties had rested, the juvenile court allowed the State to reopen its case to prove an essential element of the charged offense it had omitted in its case-in-chief. Did the juvenile court abuse its discretion requiring reversal of Dwight's conviction?

C. STATEMENT OF THE CASE

On December 23, 2009, Seattle Police Officer John Marion, answering a 911 call, arrived at the Saar's Market on Rainier Avenue and saw a large group of men and women disbursing apparently following a disturbance. CP 9-10; RP 8-11. He happened to see a young man, later identified as Dwight, fumbling with an object in his waistband. CP 10; RP 13-14. The object fell to the ground, and Marion saw Dwight pick it up and throw it into a nearby trash can. CP 10; RP 14. Marion believed the item to be a handgun, which was confirmed when the handgun was retrieved

from the trash can. Marion subsequently arrested Dwight and determined he was a juvenile. CP 10-11; RP 16-18.

Dwight was charged with unlawful possession of a firearm in the first degree. CP 7. At the fact-finding hearing, in its case-in-chief, the State provided the evidence stated above. After the State rested, the defense also immediately rested. RP 65. The State realized it had omitted any proof that Dwight had suffered a prior conviction for a serious offense, an essential element of first degree unlawful possession of a firearm, and moved to reopen its case to provide proof of the prior conviction. RP 66. Over vehement defense objections, the juvenile court allowed the State to reopen its case and provide proof of the prior conviction. RP 67-68. The juvenile court subsequently found Dwight guilty as charged. CP 12; RP 89-91.

D. ARGUMENT

ONCE THE STATE AND DEFENSE RESTED, THE TRIAL COURT ERRED IN ALLOWING THE STATE TO REOPEN TO PROVE AN ESSENTIAL ELEMENT OF THE UNDERLYING CHARGED OFFENSE IT HAD OMITTED

“A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court.” *State v. Luvene*, 127 Wn.2d 690, 711, 903 P.2d 960 (1995), *quoting State v. Sanchez*, 60 Wn.App. 687, 696, 806 P.2d 782 (1991). A trial court's decision allowing a party to reopen its case will be reversed where it is a manifest abuse of discretion which results in prejudice to the complaining party. *State v. Brinkley*, 66 Wn.App. 844, 848, 837 P.2d 20 (1992).

An “[a]buse of discretion is discretion exercised on untenable grounds for untenable reasons.” *Sanchez*, 60 Wn.App. at 696, *citing State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The determination of whether the trial court erred in allowing the State to reopen its case turns on the potential for unfairness to the complaining party. Factors to consider include: whether rebuttal witnesses have been dismissed; whether the State deliberately waited until the last moment to present evidence;

whether the complaining party suffered more than if the evidence had been presented properly; and whether the complaining party has an adequate opportunity to rebut the additional evidence.

Brinkley, 66 Wn.App. at 850.

To prove unlawful possession of a firearm in the first degree, the State must prove that [a] person has in his possession, or in his or her control any firearm after having previously been convicted in this state or elsewhere of any serious offense. RCW 9.41.040(1)(a); *State v. Romero*, 113 Wn.App. 779, 798, 54 P.3d 1255 (2002). Here, in its case-in-chief, the State arguably proved Dwight possessed the firearm. But, the State failed to present any evidence that Dwight had suffered an adjudication for a serious offense, an essential element of the offense of first degree unlawful possession of a firearm. See RCW 9.41.040(1)(a). Otherwise the State merely proved *second* degree unlawful possession of a firearm, which does not require proof of a prior adjudication of a serious offense but only proof Dwight was a juvenile. See RCW 9.41.040(2)(a)(iii). Thus, the court could have gone ahead and considered the evidence from the State's case-in-chief and determined Dwight had committed the offense of second degree unlawful possession of a firearm. The juvenile court's actions to

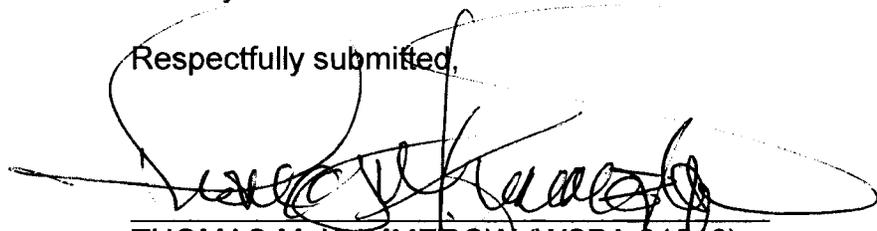
allow the State to reopen to submit the proof it failed to prove in its case-in-chief was an abuse of discretion. Dwight is entitled to a new trial.

E. CONCLUSION

For the reasons, stated, Dwight requests this Court reverse his conviction for unlawful possession of a firearm in the first degree:

DATED this 17th day of December 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read 'Thomas M. Kummerow'. The signature is written over a horizontal line and extends above and below it.

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Attorneys for Appellant

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v.)	
)	
D.M.JR.,)	
)	
Juvenile Appellant.)	

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2010, 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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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2010.

X _____ *GRJ*

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