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ADVANCE SHEET HEADNOTE  
September 12, 2022

2022 CO 41

**No. 21SC441, *Gorostieta v. People*— Defendant's Identity as Element of Crime or Sentence Enhancer.**

In this case, the supreme court considers what prosecutors must prove to establish a defendant's identity as the perpetrator of a prior crime when the defendant's conviction of that prior crime is an element or sentence enhancer of the present offense.

The court now concludes that in order for the prosecution to prove a defendant's identity in such a case, the prosecution must establish an essential link between the prior conviction and the defendant. This, in turn, requires the prosecution to present some documentary evidence combined with specific corroborating evidence of identification connecting the defendant to the prior felony conviction. Applying this test to the specific facts presented, the court concludes that, under the relatively lenient standard of review that applies to sufficiency of the evidence challenges, the prosecution presented sufficient

evidence to allow a reasonable jury to find that the defendant had been convicted of the prior felony at issue here.

The court thus affirms the judgment of the division below.

**The Supreme Court of the State of Colorado**  
2 East 14<sup>th</sup> Avenue • Denver, Colorado 80203

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**2022 CO 41**

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**Supreme Court Case No. 21SC441**  
*Certiorari to the Colorado Court of Appeals*  
Court of Appeals Case No. 19CA1575

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**Petitioner:**

Enrique Ernesto Gorostieta,

v.

**Respondent:**

The People of the State of Colorado.

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**Judgment Affirmed**

*en banc*

September 12, 2022

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**JUSTICE GABRIEL** delivered the Opinion of the Court, in which **JUSTICE MÁRQUEZ, JUSTICE HART, JUSTICE SAMOUR,** and **JUSTICE BERKENKOTTER** joined.

**CHIEF JUSTICE BOATRIGHT,** joined by **JUSTICE HOOD,** concurred in the judgment.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 This case affords this court an opportunity to clarify what prosecutors must prove to establish a defendant's identity as the perpetrator of a prior crime when the defendant's conviction of that prior crime is an element or sentence enhancer of the present offense (e.g., in cases involving a charge of possession of a weapon by a previous offender ("POWPO") or a charge under the habitual criminal statute).<sup>1</sup>

¶2 We now conclude that in order for the prosecution to prove a defendant's identity in such a case, the prosecution must establish an essential link between the prior conviction and the defendant. This, in turn, requires the prosecution to present some documentary evidence combined with specific corroborating evidence of identification connecting the defendant to the prior felony conviction. The question thus becomes whether the prosecution satisfied this standard here and therefore carried its burden of proving that Enrique Gorostieta was convicted of the prior felony alleged in this case. Like the division below, we believe that the

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<sup>1</sup> Specifically, we granted certiorari to review the following issue:

Whether the court of appeals applied an incorrect standard when assessing the sufficiency of the evidence to establish that the defendant had previously been convicted of a felony in a prosecution for possession of a weapon by a previous offender, which is an issue that has not been directly resolved by this court.

prosecution could and should have done more to carry its burden. *See People v. Gorostieta*, No. 19CA1575 (May 13, 2021). Nonetheless, under the relatively lenient standard of review that applies to sufficiency of the evidence challenges, we conclude that the prosecution presented sufficient evidence to allow a reasonable jury to find that Gorostieta had been convicted of the prior felony at issue here.

¶3 Accordingly, we affirm the judgment of the division below.

### **I. Facts and Procedural History**

¶4 One early morning in El Paso County, witnesses heard multiple gunshots being fired from a vehicle parked at a neighbor's house. Police arrived a short time later and ordered the occupants to get out of the vehicle. When the occupants did not do so, a police officer fired a rubber bullet through the back window of the vehicle. The occupants still did not emerge from the vehicle, and the police called in a SWAT unit.

¶5 Upon arriving at the scene, the SWAT unit pinned the vehicle in its position with an armored vehicle so that the occupants could not drive away. Thereafter, the police deployed a smoke canister into the back window of the vehicle, and the driver, but not the passenger, got out. The officers then fired a 40 mm nonlethal round into the back window. At this point, the passenger also got out of the vehicle.

¶6 Police officers identified Gorostieta as the driver, took him and the passenger into custody, and transported Gorostieta to a police operations center where they interviewed him. Officers also searched the vehicle and found two handguns, one of which Gorostieta admitted to purchasing.

¶7 The El Paso County prosecutor subsequently charged Gorostieta with, among other things, POWPO, alleging that Gorostieta had a prior felony conviction for possession of a controlled substance.

¶8 The case proceeded to trial, and at trial, officers testified that Gorostieta's name was Enrique Gorostieta and that he was born on January 19, 1990. In addition, one of the witnesses who had initially seen the vehicle from which the shots were fired testified that its occupants were "Mexican" or "Hispanic." And the court admitted by stipulation certain self-authenticating court records showing that a person named Enrique Ernesto Gorostieta, who had the same birth date as the defendant in the present case, had previously been convicted in El Paso County, case number 15CR5859, for possession of a controlled substance. Those court records further described the defendant in that case as a Hispanic male, 5'4" in height and weighing 192 pounds, with black hair and brown eyes. Gorostieta was present at the trial of the POWPO charge now at issue, and thus the jury was able to observe him and compare his physical appearance to the description in the records from the prior case.

¶9 The jury ultimately convicted Gorostieta of the POWPO charge, and the court sentenced him to 15 months in prison.

¶10 Gorostieta appealed, arguing that the prosecution had produced insufficient evidence to prove that he was the same person convicted of the prior drug felony. In a split, unpublished opinion, a division of the court of appeals affirmed Gorostieta's conviction. *Gorostieta*, ¶¶ 1, 17.

¶11 Applying the substantial evidence test, which we discuss below, the majority concluded that, although the prosecution could and probably should have done more to carry its burden of proof, the evidence was nonetheless sufficient to support the jury's determination that Gorostieta was, in fact, the person convicted of the prior crime. *Id.* at ¶¶ 5, 13, 17. In support of this conclusion, the majority pointed to the prosecution's evidence showing that Gorostieta's name and date of birth matched the same information for the defendant in the prior felony case. *Id.* at ¶ 14. In addition, the majority observed that the jury had had the opportunity to view Gorostieta at trial and could compare him to the physical description set forth in the court packet from the prior case. *Id.* Finally, the majority relied on the fact that the prior felony conviction had occurred in the same county as the present POWPO offense, making it more likely that the same Gorostieta was convicted in the prior case. *Id.* at ¶ 16.

¶12 Judge Tow dissented. Although he agreed with the majority's recitation of the test to be applied in reviewing the sufficiency of the evidence, he concluded that the evidence was not substantial and sufficient to show, and thus the prosecution did not prove beyond a reasonable doubt, that Gorostieta had committed the prior felony. *Id.* at ¶¶ 20, 31 (Tow, J., dissenting). In Judge Tow's view, the prosecution proved only that a conviction entered for someone using the name Enrique Ernesto Gorostieta with a particular birth date and who was a "Hispanic male of average stature and build." *Id.* at ¶ 23. Indeed, other than the foregoing demographic information and physical description, which Judge Tow indicated was "information that is difficult to verify and usually based on self-report," he perceived "no evidence whatsoever that tied that information to the person sitting before the jury accused of the criminal offense in the present case." *Id.*

¶13 In support of this conclusion, Judge Tow noted that no one testified that Gorostieta's fingerprints or signature matched those in the court file from the prior case. *Id.* at ¶ 24. Nor was the jury provided with (1) a photograph of the defendant from the prior case file; (2) Gorostieta's criminal history, which could have tied the prior conviction to a state identification number or some other unique identifier, such as a driver license, social security, or inmate number; or (3) information from the present offense's booking report to allow the jury to see whether Gorostieta's

address here matched the address of the defendant in the prior case. *Id.* Judge Tow further observed that the prosecution did not call either Gorostieta’s probation officer to identify Gorostieta as the person being supervised for the prior offense or any other person with personal knowledge who could have connected Gorostieta to that case. *Id.* at ¶ 25. In Judge Tow’s view, these were all “simple and relatively obvious steps” that the prosecution could have taken. *Id.* at ¶ 26. But the prosecution instead provided only a document that included a name and date of birth, both of which suspects often falsify, and a “relatively nondescript” physical description “that likely matched hundreds, if not thousands, of people in El Paso County.” *Id.* at ¶ 27. Based on the foregoing, Judge Tow concluded that the prosecution had not made the requisite connection between Gorostieta and the defendant in the prior felony conviction to establish beyond a reasonable doubt that Gorostieta had committed that prior felony. *Id.* at ¶ 31.

¶14 Gorostieta petitioned for certiorari, and we granted his petition.

## **II. Analysis**

¶15 We begin by addressing the applicable standard of review. Next, we explain what prosecutors must prove to establish a defendant’s identity as the perpetrator of a prior crime when the defendant’s conviction of that prior crime is an element or sentence enhancer of the present offense. We then proceed to apply this test to the facts before us.

### **A. Standard of Review**

¶16 We review de novo whether the prosecution presented sufficient evidence to sustain a conviction. *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). In doing so, we employ a substantial evidence test. *Id.* Under this test, we ask whether the evidence, “viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt.” *People v. Harrison*, 2020 CO 57, ¶ 32, 465 P.3d 16, 23 (quoting *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973)).

¶17 In applying the substantial evidence test, we must “give the prosecution the benefit of every reasonable inference which might be fairly drawn from the evidence.” *Id.* (quoting *People v. Perez*, 2016 CO 12, ¶ 25, 367 P.3d 695, 701). It does not matter that we might have reached a different conclusion were we the triers of fact. *Clark*, 232 P.3d at 1291.

### **B. Proof of Commission of Prior Crime**

¶18 To convict a criminal defendant, a jury must unanimously agree that the prosecution has proven all elements of the charged offense beyond a reasonable doubt. *People v. Mosely*, 2021 CO 41, ¶ 1, 488 P.3d 1074, 1076.

¶19 To establish that a defendant committed the crime of POWPO, the prosecution must prove, in pertinent part, that the defendant knowingly

possessed a firearm or other weapon subject to the provisions of title 18, article 12 of the Colorado Revised Statutes, “subsequent to the person’s conviction for a felony crime as defined in section 24-4.1-302(1), [C.R.S. (2021)], or subsequent to the person’s conviction for attempt or conspiracy to commit a crime as defined in section 24-4.1-302(1) that is a felony, under Colorado or any other state’s law or under federal law.” § 18-12-108(1), C.R.S. (2021). Accordingly, the existence of a prior felony conviction is an element of a POWPO offense. *People v. Dist. Ct.*, 953 P.2d 184, 189 (Colo. 1998).

¶20 Although we have not previously examined the level of proof of a prior conviction that is required in a POWPO case, a division of the court of appeals considered this issue in *People v. Larson*, 782 P.2d 840, 843 (Colo. App. 1989). There, the prosecution presented evidence that the defendant had the same name and date of birth as the defendant in the prior conviction at issue, and a Department of Corrections records custodian testified that only one person with the same name had ever been subject to the Department’s jurisdiction. *Id.* The records custodian then positively identified the defendant as the same person whose photograph appeared in the court records relating to the prior conviction. *Id.* On these facts, the division concluded that the evidence satisfied the requirements of POWPO. *Id.*

¶21 Although, as noted above, we have not directly considered the question presented in this case, we have examined the level of proof required in cases involving habitual criminal charges, which, like POWPO charges, require proof that the defendant had prior convictions. §§ 18-1.3-801, -802, C.R.S. (2021).

¶22 For example, in *De Gesualdo v. People*, 364 P.2d 374, 378 (Colo. 1961), the prosecution introduced properly authenticated copies of the records of the prior convictions at issue and offered testimony from an identification expert who testified that he had compared the fingerprints and photographs on an identification card that he had seen with fingerprints on file at the local sheriff's office. *Id.* The expert further observed that the date of conviction shown on the authenticated record matched the date on the identification card. *Id.* The prosecution, however, did not seek to admit the identification card into evidence at trial. *Id.* at 379. Nor did the prosecution identify the fingerprints in the local sheriff's office as being those of the defendant, which we described as "an essential connecting link." *Id.* In these circumstances, we concluded that the prosecution's evidence as to whether the defendant had committed the prior offenses was "haphazard and legally inadequate." *Id.* We thus reversed the judgment of conviction. *Id.*

¶23 We again considered the requisite proof of prior convictions in the habitual criminal context in *People v. Mascarenas*, 666 P.2d 101, 110 (Colo. 1983). There,

although we reversed the conviction on which the habitual criminal charge was based, thus requiring us to reverse the habitual criminal conviction as well, we went on to address the sufficiency of the evidence for the habitual criminal charge because, on remand, the prosecution could again bring habitual criminal charges against the defendant. *Id.* In that case, the prosecution's evidence of the defendant's prior convictions consisted of (1) certified copies of two judgments of conviction from the Denver District Court and (2) the defendant's prison record, which included his name, identification number, photographs, fingerprints, and a physical description noting his height, weight, nationality, race, build, complexion, and identifying marks consisting of two tattoos and various scars. *Id.* Based on this evidence, we concluded that the jury could rationally have found beyond a reasonable doubt that the defendant was the person convicted of the prior crimes, and thus the prosecution's evidence was legally sufficient. *Id.*

¶24 Divisions of our court of appeals have likewise examined the sufficiency of the evidence to prove identity in habitual criminal cases, and they have reached varying results, depending on the evidence presented. *Compare People v. Strock*, 252 P.3d 1148, 1156–57 (Colo. App. 2010) (concluding that the evidence offered to prove that the defendant had a prior conviction was sufficient when the defendant had the same name and date of birth as the prior offender, the mittimus in the prior case contained the defendant's prison inmate number, a prison official

testified that photos of the person convicted in the prior case bore a “striking resemblance” to the defendant, and a fingerprint card from the prior case contained the defendant’s inmate number, name, and birth date), *with People v. Cooper*, 104 P.3d 307, 312 (Colo. App. 2004) (concluding that evidence that the defendant had the same name and date of birth as a prior offender was insufficient, particularly because the defendant’s name was not unusual or distinctive).

¶25 Although the foregoing cases have not articulated a clear legal standard that could be applied in all such cases, they have implicitly recognized that to prove that the defendant committed the prior offense, the prosecution must establish an essential link between the prior conviction and the defendant. This, in turn, requires the prosecution to introduce documentary evidence combined with specific corroborating evidence of identification connecting the defendant to the prior conviction. We believe that requiring that a prosecutor do so provides a useful standard.

¶26 Accordingly, we now conclude that in order for the prosecution to prove a defendant’s identity in such a case, the prosecution must establish an essential link between the prior conviction and the defendant, and this requires the prosecution to present some documentary evidence combined with specific corroborating evidence of identification connecting the defendant to the prior felony conviction.

¶27 In so concluding, we note that the types of corroborating evidence that a prosecutor might seek to introduce vary widely, and we could not—and do not—endeavor to provide a comprehensive list of appropriate corroborating evidence. Nor should anything that we say in this opinion be construed to limit the types of corroborating evidence that may suffice in a given case. For purposes of providing guidance to courts and litigants, however, we note that the following types of corroborating evidence might be helpful in establishing that the defendant committed the prior crime: (1) evidence specifically identifying the defendant; (2) unique identifiers such as a driver license, prison identification number, or social security number; (3) photographs or fingerprints from the prior case that link that case to the current defendant; (4) a physical description from the prior case that can be compared to the defendant in the present case; (5) distinguishable features of the defendant such as tattoos; or (6) testimony of probation officers or others with personal knowledge positively identifying the defendant as being the same person who had previously been convicted. *Cf.* § 18-1.3-802 (providing that in habitual criminal cases, (1) “a duly authenticated copy of the record of former convictions and judgments of any court of record for any of said crimes against the party indicted or informed against shall be prima facie evidence of such convictions and may be used in evidence against such party,” and (2) “[i]dentification photographs and fingerprints that are part of the record of

such former convictions and judgments, or are part of the records kept at the place of such party's incarceration or by any custodian authorized by the executive director of the department of corrections after sentencing for any of such former convictions and judgments, shall be prima facie evidence of the identity of such party and may be used in evidence against him or her").

¶28 In contrast, the mere fact that the defendants in the present and prior cases have the same name and date of birth, *without more*, will generally be insufficient. *Cf. Cooper*, 104 P.3d at 312 (concluding that the fact that the defendant had the same name and date of birth as the person previously convicted was insufficient, particularly because the defendant's name was not unusual or distinctive); *cf. also Strock*, 252 P.3d at 1156 (following *Cooper*).

¶29 Having thus articulated the standard that courts are to apply when determining whether prosecutors have established that a defendant was convicted of a prior crime when that prior crime is an element or sentence enhancer of the present offense, we proceed to apply that standard to the case now before us.

### **C. Application**

¶30 As noted above, the prosecution here introduced evidence that Gorostieta had the same name and date of birth as the prior defendant, as well as self-authenticating court records of the prior conviction. These records included a physical description of the defendant in the prior case, including his height,

weight, eye color, hair color, and ethnicity, which the jury would have been able to compare to Gorostieta's appearance at trial. In addition, the court records from the prior case showed that the prior felony occurred in the same county as the instant case, which arguably made it less likely that the defendant in the prior case was a different person from the Gorostieta that was on trial here.

¶31 The court records on which the prosecution relied, however, did not include a photograph of the defendant in that case, fingerprints, a social security or identification number, or any similar evidence that would have clearly tied Gorostieta to the prior case. Nor did the prosecution call a witness connected to the prior case to testify that Gorostieta was the person convicted in that case. As Judge Tow observed, all of these were simple and fairly obvious forms of corroborating evidence on which the prosecution could have relied to satisfy its burden of proof. *Gorostieta*, ¶ 26 (Tow, J., dissenting).

¶32 In our view, the prosecution's decision not to introduce *any* such corroborating evidence makes this case close. As the division below observed, the prosecution could and should have done more to prove the POWPO charge. Nonetheless, taking the facts in the light most favorable to the prosecution, as we are required to do, we conclude that on the evidence presented, although perhaps thin, the prosecution produced sufficient documentary evidence combined with specific corroborating evidence to establish the requisite essential link between the

prior conviction and Gorostieta. Accordingly, we further conclude that the prosecution submitted evidence sufficient to prove that Gorostieta was the person convicted in the prior case.

¶33 In reaching this conclusion, we agree with Gorostieta that evidence that he shared the same name and date of birth as the defendant in the prior case would alone have been insufficient to prove that Gorostieta had a prior felony conviction. But the prosecution did not rely solely on Gorostieta's name and date of birth. To the contrary, as noted above, the prosecution introduced self-authenticating court records from the prior case identifying the defendant as Enrique Ernesto Gorostieta, a Hispanic male with a date of birth of January 19, 1990, who was 5'4" in height and weighing 192 pounds, with black hair and brown eyes, all of which the jury here could have compared to the Gorostieta who was sitting in the courtroom. The prosecution further presented evidence that the prior felony occurred in the same county as the present one, which the jury could reasonably have relied on to decide that it was unlikely that a man named Enrique Gorostieta, whose physical description matched that of Gorostieta here, was a different person from the person on trial for an alleged POWPO violation.

¶34 We likewise are unpersuaded by Gorostieta's reliance on our opinion in *De Gesualdo*, 364 P.2d at 378-79. As discussed above, in *De Gesualdo*, the prosecution relied on an identification card and fingerprints allegedly linking

De Gesualdo to the prior case, but the prosecution did not introduce into evidence either the identification card or evidence establishing that the fingerprints on which the prosecution was relying belonged to De Gesualdo. *Id.* In our view, the evidence here exceeded that which was presented in *De Gesualdo*.

### III. Conclusion

¶35 For the foregoing reasons, we conclude that to prove a defendant's identity when the defendant's conviction of a prior crime is an element or sentence enhancer of the present offense, the prosecution must establish an essential link between the prior conviction and the defendant. This, in turn, requires the prosecution to present some documentary evidence combined with specific corroborating evidence of identification connecting the defendant to the prior felony conviction.

¶36 Applying this standard to the facts before us, we conclude that, although perhaps somewhat thin, the prosecution's evidence was sufficient to establish that Gorostieta was, in fact, the same person who had committed the felony underlying the POWPO charge.

¶37 Accordingly, we affirm the judgment of the division below.

CHIEF JUSTICE BOATRIGHT, joined by JUSTICE HOOD, concurred in the judgment.

CHIEF JUSTICE BOATRIGHT, joined by JUSTICE HOOD, concurring in the judgment.

¶38 I agree with the majority that the prosecution presented sufficient evidence to establish Gorostieta’s prior conviction. But I disagree with the majority’s articulation of a new test that the prosecution must now satisfy to prove the connection between the defendant and a prior conviction. In my view, this special test is unduly restrictive and simply unnecessary. In this case – as with all other cases in which we are asked to review the sufficiency of the evidence, regardless of the charged crime – I believe the only question for the reviewing court is whether the evidence satisfies the deferential test articulated in *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973). Specifically, we need only ask whether “the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt.” *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010) (quoting *Bennett*, 515 P.2d at 469). I believe the evidence here satisfies the *Bennett* test. Accordingly, I respectfully concur in the judgment only.

**I. We Apply *Bennett* When Reviewing Sufficiency-of-the-Evidence Claims Because Our System Places Faith in Juries**

¶39 Juries are an “essential component of the American legal system.” *People v. Harlan*, 109 P.3d 616, 638 (Colo. 2005) (Rice, J., dissenting). Because juries “temper

the rigors of law with community standards,” “legitimize the legal process through their participation in rendering verdicts,” and “check the potential abuses that might result from having one person decide the fate of another,” our system entrusts them with decision-making power in often complex and difficult legal matters. *Id.* And because we place faith in juries as competent and adept fact finders, “it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial.” *Cavazos v. Smith*, 565 U.S. 1, 2 (2011); *see also* *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983) (“[T]he trial court may not serve as a thirteenth juror and determine what specific weight should be accorded to . . . the evidence . . .”). Put simply, we trust juries.

¶40 In line with this foundational principle, we have concluded that when it comes to reviewing sufficiency-of-the-evidence claims, a deferential standard applies. Under *Bennett*, the pertinent question is whether “the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt.” *Clark*, 232 P.3d at 1291 (quoting *Bennett*, 515 P.2d at 469). This test, which we have implemented for nearly half a century, “gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.”

*Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (referring to the federal equivalent of the *Bennett* test); cf. *People v. Dunaway*, 88 P.3d 619, 629 (Colo. 2004) (“[J]urors should be trusted to . . . find the defendant guilty only if the prosecution has proved each of the elements of the charged crime beyond a reasonable doubt . . .”).

## **II. Implementing a Special Test to Prove an Element of a Crime Is Unduly Restrictive and Contrary to *Bennett***

¶41 Today, the majority concludes that the only way to prove the element of prior conviction in the possession of a weapon by a previous offender (“POWPO”) context is for the prosecution to “establish an essential link between the prior conviction and the defendant.” Maj. op. ¶ 2. To do so, the prosecution must present “some documentary evidence combined with specific corroborating evidence of identification connecting the defendant to the prior felony conviction.” *Id.* In so reasoning, despite there being no such requirement in the POWPO statute, the majority essentially mandates the test imposed by the legislature under the habitual offender statute. See § 18-1.3-802, C.R.S. (2021) (stating that documentary evidence, such as a duly authenticated copy of the record of former convictions, shall be prima facie evidence of prior convictions, and corroborating evidence, such as identification photographs and fingerprints, shall be prima facie evidence of the identity of such party); see also *De Gesualdo v. People*, 364 P.2d 374, 379 (Colo. 1961) (requiring an “essential connecting link” to connect a prior

conviction to the present defendant in the context of the habitual offender sentencing scheme). In my view, creating this new test is unnecessary for the following reasons.

¶42 First, the rules that surround proof of prior conviction in the habitual offender context are inapposite in the POWPO context. These rules are simply additional procedural safeguards that were developed by the legislature to ensure that the severe penalty accompanying a habitual offender sentence is, in fact, warranted. *See People v. Cooper*, 104 P.3d 307, 312 (Colo. App. 2004) (stating that the additional requirements for proving prior convictions in the habitual offender context are “born of concern over the serious consequences that follow habitual criminal adjudications”). To be sure, a conviction for a felony is a serious matter. Unlike the habitual offender statute, however, a charge of POWPO does not carry with it a lengthy mandatory sentence. *See* § 18-1.3-801(1)(a), C.R.S. (2021); *see also* § 18-12-108(2), C.R.S. (2021) (specifying that POWPO is a class 5 felony); § 18-1.3-401(1)(a)(V.5)(A), C.R.S. (2021) (specifying that class 5 felonies committed on or after July 1, 2020, shall incur a one- to three-year sentence in the Department of Corrections accompanied by two years of mandatory parole). Therefore, the additional procedural safeguards in the habitual offender context are unnecessary in the POWPO context.

¶43 Second, the restrictive formulation that the majority adopts today limits the prosecution's ability to prove the element of a prior conviction to the jury beyond a reasonable doubt. As this case demonstrates, even common characteristics such as general physical descriptions can, in combination with other corroborating evidence (such as name, birthday, distinctive conduct, etc.), amount to sufficient evidence of identity. See *United States v. Jackson*, 368 F.3d 59, 64 (2d Cir. 2004) (“[T]he more two portraits are amplified to include further similarities . . . , the more probable it becomes that they refer to the same individual.”). But even this fact is beside the point. As with any other sufficiency-of-the-evidence claim, the court's only question on review of the prior conviction element of POWPO should be whether the prosecution presented *enough* evidence to meet its burden of proof, not whether it checked the requisite box of presenting *certain types* of evidence. The prosecution always has the burden of proving each and every element beyond a reasonable doubt to the satisfaction of the jury. We need not prescribe how the prosecution must meet its burden.

¶44 Third and finally, the majority's special test substitutes the judgment of the judiciary for that of the jury and negates the reasoning underlying *Bennett*. See *Clark*, 232 P.3d at 1293 (“We do not sit as a thirteenth juror to determine the weight of the evidence presented to the jury.”); see also *id.* at 1291 (“It does not matter that, were we the trier of fact, we might have reached a different conclusion.”).

Remember that we apply the *Bennett* test when reviewing sufficiency-of-the-evidence claims because our system places faith in juries to “perform the fact-finding function when conflicting evidence—and conflicting reasonable inferences—are presented.” *People v. Perez*, 2016 CO 12, ¶ 31, 367 P.3d 695, 702.

The question of whether the prosecution proved the element of prior conviction is simply one of evidentiary weight, and the jury should decide it, not a reviewing court. *People v. Rivas*, 591 P.2d 83, 86 (Colo. 1979) (“It is the jury’s function to consider and determine what weight shall be given to all parts of the evidence.”).

¶45 For these reasons, instead of reinventing the wheel when it comes to reviewing whether the evidence was sufficient to connect a prior conviction to a present POWPO defendant, I would simply apply the *Bennett* test.

### **III. Under *Bennett*, the Evidence Was Sufficient to Convict Gorostieta of POWPO**

¶46 To prove Gorostieta’s prior conviction, the prosecution offered evidence in the form of self-authenticating documents from a 2015 criminal case involving a class 4 drug felony. According to those documents, the defendant in the 2015 case was named “Enrique Ernesto Gorostieta”; he was a 5’4”, 192-pound Hispanic male with black hair and brown eyes; and he committed the drug offense in El Paso County, Colorado.

¶47 At Gorostieta’s trial, the prosecution established numerous connections between Gorostieta and the 2015 defendant. First, the prosecution provided

additional evidence demonstrating that the defendant in the 2015 case shared Gorostieta's full name, date of birth, gender, ethnicity, and location (the 2015 defendant was convicted in El Paso County, the very same county in which Gorostieta was charged with POWPO). Second, the jury had the opportunity to view Gorostieta during trial and appraise whether he matched the physical description of the 2015 defendant. After considering the evidence and applying its collective common sense, the jury found the evidence of these connections sufficient to prove Gorostieta's prior conviction beyond a reasonable doubt.

¶48 When taken in isolation, it is true that none of these connections would be sufficient to establish that Gorostieta was the same person who was convicted of a drug offense in 2015. But each connection (matching name, matching birthdate, matching physical description, and matching location) creates a layer of corroboration. And each layer builds off of the others, creating context that makes it more and more unlikely that the two Gorostietas are unique from each other.

¶49 Here, in my view, common sense carries the day. It is extremely improbable that two men would share the same first, middle, and last name; the same birthdate; the same location over a relatively short time period; and the same height, weight, hair color, and eye color. Thus, when viewing *all* the evidence in the light most favorable to the prosecution and affording it the benefit of every reasonable inference, a reasonable jury could have very well concluded that the

Gorostieta presently charged with POWPO was the same Gorostieta previously charged with a drug felony. I agree with the division majority that the prosecutor in this case “could have and probably should have done more to prove the prior conviction element” in Gorostieta’s POWPO case. *People v. Gorostieta*, No. 19CA1575, ¶ 13 (May 13, 2021). Nevertheless, under the *Bennett* test, the evidence was sufficient to convict Gorostieta of POWPO.

#### **IV. Conclusion**

¶50 Because I agree with the majority that the evidence was sufficient to convict Gorostieta of POWPO but do not believe that we must import a new test to reach this conclusion, I respectfully concur in the judgment only.