FILED
August 26, 2015
Court of Appeals
Division I
State of Washington

72608-1

No. 72608-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLARENCE WRIGHT, III,

Appellant.

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

The Honorable Elizabeth J. Berns

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. SUMMARY OF ARGUMENT

Clarence Wright was convicted of one count of first degree burglary and two counts of first degree assault for attempting to enter the residence of a family he did not know. Mr. Wright presented a defense of diminished capacity based upon a traumatic brain injury he suffered the year prior and his intoxication at the time of the offenses. At his trial, the court inexplicably admitted evidence of a prior California robbery under ER 404(b) where the prior act was solely propensity evidence. In addition, the prosecutors committed misconduct during the cross-examination of Mr. Wright's expert by stating their opinion of the doctor's credibility and asking the doctor to offer an opinion about Mr. Wright's credibility.

Mr. Wright's sentence must be reversed where the court found by a mere preponderance of the evidence Mr. Wright had suffered two qualifying prior convictions rendering him a persistent offender, and imposing a sentence of life imprisonment without the possibility of parole. In so doing, the court violated Mr. Wright's constitutionally protected right to a jury trial, his right to equal protection, and his right to proof beyond a reasonable doubt, requiring reversal of his sentence and remand for a standard range sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Wright's constitutionally protected right to due process and a fair trial when it admitted evidence of a prior California robbery which prejudiced Mr. Wright.

2. The prosecutor's misconduct during the cross-examination of Dr. Beaver violated Mr. Wright's due process right to a fair trial.

3. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of a qualifying prior conviction violated Mr. Wright's right to equal protection.

4. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of a qualifying prior conviction violated Mr. Wright's rights to a jury trial and due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Prior acts of a defendant are not admissible simply to prove he acted in conformity with a particular character trait. Prior acts may be admissible if relevant and they fall within one of the designated exceptions enumerated in ER 404(b). Here, the trial court admitted a prior California robbery for which Mr. Wright had not been convicted as *res gestae*, common scheme or plan evidence, and as evidence of

Mr. Wright's intent. Must this Court reverse Mr. Wright's convictions where the prior robbery was improper propensity evidence used solely to infer Mr. Wright was a thief, and the trial court's error was not harmless where the overwhelming prejudice of this evidence outweighed any limited probative value?

2. The Sixth and Fourteenth Amendments guarantee an individual a fair trial before an impartial jury. Prosecutorial misconduct infringes on the defendant's right to a fair trial. A prosecutor commits misconduct when he or she states their opinion and asks a witness on cross-examination to render an opinion on the credibility of a party. Here, during the cross-examination of Mr. Wright's expert on diminished capacity, the prosecutor stated an opinion about the doctor's credibility and asked the doctor to render an opinion on whether Mr. Wright had been lying during his examination. Did the prosecutor's actions constitute misconduct and as a result, deny Mr. Wright a fair trial?

3. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With

the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and where the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

4. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Mr. Wright's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had a prior most serious offense,

thus elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

D. STATEMENT OF THE CASE

On February 11, 2013, at about 12:30 in the morning, Clarence Wright knocked on the door of Mary Tillman's apartment in Tukwila. 9/2/2014RP 51; 9/4/2014RP 22. Living with Ms. Tillman was her son, Nathaniel Tillman. 9/2/2014RP 74. Also spending that night in the apartment was Ms. Tillman's estranged husband, Jay Tillman. 9/2/2014RP 74-75, 9/4/2014RP 20. None of the Tillman family claimed to have known Mr. Wright. 9/2/2014RP 87-88, 9/4/2014RP 35-36.

According to the Tillmans, Mr. Wright attempted to enter the apartment while carrying a handgun. 9/4/2014RP 23. A brawl ensued where Jay Tillman and Nathaniel Tillman as well as Mr. Wright received gunshot wounds. Mr. Wright never said anything prior to, during, or after the struggle.[1] 9/2/2014RP 88, 9/4/2014RP 30. Once shot, Mr. Wright ran away and was stopped by the police a short distance from the apartment. 9/2/2014RP 83-85, 9/4/2014RP 31-32.

[1] Nathaniel Tillman was shot in the thigh, while Jay Tillman was shot in the abdomen, penetrating his lung and stomach, and causing the loss of his spleen. 9/2/2014RP 86-87, 9/4/2014RP 34-35.

The police found an early 1900's .38 caliber handgun in the foyer of the Tillman apartment. 9/2/2014RP 111, 122-25, 128.

Mr. Wright was charged with two counts of first degree assault and one count of first degree burglary, and one count of first degree unlawful possession of a firearm. CP 1-3. At trial, over defense objections, the court under ER 404(b) admitted evidence of a 2013 California robbery involving Mr. Wright for which he had yet to be charged or convicted. CP 212-14; 8/21/2014RP 291. The California robbery occurred on January 19, 2013, when Mr. Wright was alleged to have entered a cellular phone store in San Rafael and demanded money. 8/21/2014RP 215. When the two employees in this robbery fled to a backroom, Mr. Wright was alleged to have fired a single shot from a handgun and then fleeing without any money. 8/21/2014RP 215-16.

San Rafael Police Officer Todd Berringer was notified by King County authorities that Mr. Wright had been arrested following the incident at the Tillman's. 8/21/2014RP 227. The detective flew to Washington and interviewed Mr. Wright. 8/21/2014RP 230. Mr. Wright admitted conducting the robbery in San Rafael and admitted firing a shot during the robbery. 8/21/2014RP 232. He also admitted the handgun he used in California was the same handgun he possessed

during the Tillman incident. 8/21/2014RP 235. Mr. Wright said he chose the cellular phone store because he thought it would be an easy target as it was on U.S. 101, a main north-south freeway. 8/21/2014RP 233. The robbery was captured in video. 8/21/2014RP 216.

Over defense objection, the trial court admitted evidence of the California robbery on three bases: common scheme or plan, evidence of intent, and *res gestate*. CP 213; 8/21/2014RP 290-91; 9/17/2014RP 81-82. The court allowed the testimony of Detective Berringer but found the video more prejudicial than probative and only allowed testimony about what the video contained. *Id.*

Mr. Wright proffered a defense of diminished capacity. CP 40-43. Mr. Wright offered the expert opinion of Dr. Craig Beaver, a neuropsychologist, who opined that Mr. Wright lacked the capacity to form the requisite intent because of his intoxication that night and the alcohol's effect on Mr. Wright's prior traumatic brain injury suffered a year prior to the incident. 9/8/2014RP 1177-83, 112. The State countered with the expert opinion of Dr. Ray Hendrickson, a forensic psychologist at Western State Hospital, who disagreed with Dr. Beaver's conclusion and opined that Mr. Wright's actions were not the

result of diminished capacity to form the requisite intent, but deliberate goal-driven behavior. 9/16/2014RP 77, 138.

At the completion of trial, the jury rejected Mr. Wright's diminished capacity defense and found him guilty as charged. CP 209-11. The trial court found that Mr. Wright had suffered two previous qualifying convictions, declared him a persistent offender, and imposed a sentence of life imprisonment without the possibility of parole. CP 260.

E. ARGUMENT

1. The evidence admitted pursuant to ER 404(b) proved nothing more than Mr. Wright acted in conformity with a character trait which violated his right to a fair trial

a. *The admission of other acts evidence violates the due process right to a fair trial.*

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. XIV; *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Generally, the mere failure to comply with state evidentiary rules does not violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). But, mere compliance with state

evidentiary and procedural rules does not *guarantee* compliance with the requirements of due process. *Id.*, *citing Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984). Due process *is* violated where the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986).

b. *Evidence of a person's prior actions cannot be admitted to prove he acted in conformity with that trait.*

ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith.[2] Under ER 404(b), evidence of other misconduct is not allowed to show that the defendant is a "criminal-type person" likely to commit the crime charged. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). ER 404(b) is intended to prevent application by jurors of the common assumption "that 'since he did it once, he did it again.'" *State v. Bacotqarcia*, 59 Wn.App. 815, 822, 801 P.2d 993 (1990), *review denied*, 116 Wn.2d 1020 (1991).

[2] "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." ER 404(a).

"This prohibition encompasses not only prior bad acts and unpopular behavior but *any* evidence offered to 'show the character of a person to prove the person acted in conformity' with that character at the time of a crime." *Foxhoven*, 161 Wn.2d at 175 (emphasis in original). This rule is "not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *Id.* "In no case . . . may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

The same evidence may be admissible for other purposes though, depending on its relevance and the balancing of the probative value and danger of unfair prejudice. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). ER 404(b) includes a nonexclusive list of permissible purposes for admitting evidence of a person's other bad acts.[3]

[3] "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

The law resists criminal convictions based upon the jury's view that the defendant is a bad person or has a history of bad conduct. Therefore, the trial court must begin with the presumption that evidence of prior misconduct is inadmissible. *State v. DeVincentis,* 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, when demonstrated, such evidence may be admissible for purposes "'such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" *State v. Powell,* 126 Wn.2d 244, 258, 893 P.2d 615 (1995), *quoting* ER 404(b). Before the trial court admits evidence of prior misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Fisher,* 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis,* 150 Wn.2d at 17. The latter factor inserts an ER 403 examination into an ER 404(b) analysis. "Unfair prejudice" is caused by evidence that is likely to arouse an emotional response rather than a rational decision. *State v. Rice,* 48 Wn.App. 7, 13, 737 P.2d 726 (1987).

---

intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

The burden of demonstrating a proper purpose for admitting evidence of a person's prior bad acts is on the proponent of the evidence. *DeVincentis,* 150 Wn.2d at 17. The court must conduct this analysis on the record. *State v. Sublett,* 156 Wn.App. 160, 195, 231 P.3d 231 (2010), *aff'd,* 176 Wn.2d 58 (2012). Courts should resolve doubts as to admissibility of prior bad acts character evidence under ER 404(b) in favor of exclusion. *State v. Thang,* 145 Wn.2d 630, 642, 41 P.3d 1159 (2002), *citing State v. Smith,* 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

The question to be answered in applying ER 404(b) is not whether a defendant's prior bad acts are logically relevant; they are. Evidence that a criminal defendant is a "criminal type" is always relevant. But ER 404(b) reflects the long-standing policy to exclude most character evidence because

> it is said to weigh too much with the jury and to so overpersuade them. . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168 (1948).

Thus, the question to be answered in applying ER 404(b) is whether the prior act was relevant for a purpose other than showing Mr. Wright's propensity.

c. *The evidence of the California robbery was not res gestate evidence.*

Among the bases for admitting the evidence of the prior California robbery was the evidence constituted *res gestate* evidence. The trial court erred in admitting the evidence on this ground as it did not constitute *res gestae* evidence.

Under the *res gestae* exception to ER 404(b), admission of evidence of other crimes or bad acts is allowed to complete the story of a crime or to provide the context for events close in time and place. *Powell*, 126 Wn.2d at 254. The purpose of the evidence is not to demonstrate the defendant's character but to show the "sequence of events surrounding the charged offense." *State v. Hughes*, 118 Wn.App. 713, 725, 77 P.3d 681 (2003). "Each act must be 'a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.'" *Powell*, 126 Wn.2d 244, *quoting State v. Tharp*, 27 Wn.App. 198, 204, 616 P.2d 693 (1980). Such evidence is "restricted to proving the *immediate* context within which a charged

crime took place." *State v. Brown,* 132 Wn.2d 529, 576, 940 P.2d 546 (1997) (emphasis in original).

Here, the California robbery was not within the immediate context of the Tukwila incident. The two incidents occurred approximately two months apart and involved separate victims who did not know one another; the evidence did not relate to a single sequence of events, but to two different situations in two different states. In addition, the two incidents are not related in any way; in the California robbery it was clear Mr. Wright was trying to take money; in the Tukwila case it was unclear why Mr. Wright tried to enter the apartment. The State's conclusion was that Mr. Wright was engaged in an attempt to rob the Tillmans, but there was nothing more to support this conclusion. Mr. Wright attempted to enter the house but said nothing and was never able to enter. The evidence of the prior California robbery was not *res gestae* evidence.

d. *The State failed to establish the California robbery was part of a common scheme or plan.*

The court also admitted the California robbery under the common scheme or plan exception to ER 404. Again, the trial court erred as the evidence did not fall under this exception.

Prior conduct evidence is admissible to show a common scheme or plan under ER 404(b) where (1) the evidence of the prior act was part of a larger, overarching plan; or (2) the evidence of prior act followed a single plan to commit separate but very similar crimes. *DeVincentis*, 150 Wn.2d at 19. Such a common scheme or plan "may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances." *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Evidence of such a plan "'must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.'" *DeVincentis*, 150 Wn.2d at 19, *quoting Lough*, 125 Wn.2d at 860.

When evaluating whether the prior and current conduct are part of a common scheme or plan, the trial court examines the whole, not a part, of the planning, preparation, and execution of the misconduct. "[T]he preferred approach is for the trial court to focus on the closeness of the relationship between the other misconduct and the charged crimes in terms of time, place and modus operandi." *Lough*, 125 Wn.2d

at 858. Although a unique modus operandi is one factor to consider, the crux of the inquiry is similarity, not uniqueness. *DeVincentis,* 150 Wn.2d at 20. The degree of similarity for the admission of evidence of a common scheme or plan must be substantial. *DeVincentis,* 150 Wn.2d at 20.

The Supreme Court has stated that "'caution is called for in application of the common scheme or plan exception,'" *DeVincentis,* 150 Wn.2d at 18, *quoting State v. DeVincentis,* 112 Wn.App. 152, 159, 47 P.3d 606 (2002), *aff'd,* 150 Wn.2d 11, 74 P.3d 119 (2003); "[r]andom similarities are not enough," "the degree of similarity ... must be substantial," and "admission of this kind of evidence requires more than merely similar results." *Id.* (internal citations omitted).

The evidence of the California robbery was not admissible as a common scheme or plan for the same reasons as it was not *res gestae* evidence; the California and Washington events were completely different from one another with the two offenses only sharing the fact that Mr. Wright was involved.

The State attempted to argue the similarities were substantial between the two incidents because Mr. Wright was attempting to rob the Tillmans as he had robbed the store in California. But there was no

support for this argument. Mr. Wright's motive in attempting to enter the Tillman's apartment was unclear. Mr. Wright never said anything during the struggle at the entrance to the apartment and he never entered the residence. Thus, the evidence of the California prior incident was not part of a common scheme or plane and should not have been admitted as such.

e. *The California robbery was not properly admitted as evidence of Mr. Wright's intent.*

When evidence of prior acts is offered to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense. *State v. Wade,* 98 Wn.App. 328, 334, 989 P.2d 576 (1999). This additional relevancy turns on the facts of the prior act itself and not upon the fact that the same person committed each of the acts. Otherwise, the only relevance between the prior acts and the current act is the inference that once a criminal always a criminal. It is the facts of the prior acts, and not the propensity of the actor, that establish the permissive inference admissible under ER 404(b). *Id*, at 336.

> When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is essentially asking the fact-finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then

> possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case.
>
> Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves. Wigmore calls this the "abnormal factor" that ties the acts together. Wigmore, § 302. Once this connection is established, then other reasonable inferences, such as intent or motive, can logically flow from introduction of the prior acts.

Id. at 335.

Once again, the dissimilarity between the two acts renders the trial court's ruling patently unreasonable.

f. *The error in admitting the evidence of the California robbery was not a harmless error.*

When a court erroneously admits prior bad acts evidence under ER 404(b), reversal is required where, "within reasonable probability, the error materially affected the outcome of the trial." *Gresham*, 173 Wn.2d at 433.

Here the trial was infected by the admission of the highly prejudicial evidence of the California robbery. By admitting evidence of the prior robbery, the State's burden of proving Mr. Wright's intent

when attempting to enter the Tillman residence was substantially diminished as it was able to rely solely on the prior robbery for proving intent here. In fact, the prosecutor in closing argument used the prior California robbery for propensity, arguing he did it in California, *ergo* her did it here:

> It's through the story, the complete story that we know that was the Defendant's intent, was to rob the Tillman residence. This all started out down in San Rafael, California. The Defendant came over from the neighboring town of Vallejo. He went into the cell phone store, he was wearing a hoodie and a hat, he was wearing a glove on his gunned hand.
>
> He went into a business late at night, where there were no customers. He went in there, pointing that firearm in the same manner he pointed a firearm at Mr. Tillman. He led with the gun. He led with a purpose. His purpose was to intimidate the people he was going to rob so that they would comply to his demands.
>
> The most ironic thing happened to Mr. Wright down in California. Their expert himself even said: I don't know what I would do if somebody pointed a gun at me, but I'm not sure I would grab it, or try to get it away. That's what they did. They tried to get it away from him. Mr. Wright's response is pretty much exactly what he did here in Seattle, in Tukwila. He fired a shot at him. With the same darn gun he used up here, he fired a shot at him. After two shots, it didn't accomplish anything. Did he run away with money? No. He got none. His intent was to get money, and he got none.

9/18/2014RP 137-38.

Thus, given the dissimilarity between the two acts coupled with the prosecutor using the evidence for the improper purpose, there is a reasonable probability the admission of the prior robbery evidence materially affected the outcome of the trial. As a result, the error in admitting the evidence of the unrelated prior robbery was not a harmless error and Mr. Wright is entitled to reversal of his conviction.

2. **Repeated instances of misconduct by the prosecutor rendered Mr. Wright's trial unfair and his convictions must be reversed.**

In Mr. Wright's case-in-chief, Dr. Beaver offered his opinion that Mr. Wright lacked the ability to form the requisite intent for the charged offenses. In cross-examining Dr. Beaver, the prosecutor asked:

> Q: You also have the transcript of the interview that the defendant did with Detective Barringer that was 49 pages long; correct?
>
> A: Yes.
>
> Q: And you didn't do any follow-up questions, in fact, I asked, but that during the interview and you were, like, "Yeah, I could have asked more questions, but I didn't."
>
> A: Well, I think that things had been covered.
>
> Q: Okay. *Even though it's patently obvious from the statement that the defendant gave to these separate statements* [sic], *that he is lying*, he says he doesn't have a gun, he does have a gun, he was hiding, he

wasn't hiding, you had all that information when you were interviewing him?

A: I'm sorry, you said he was patently lying?

Q: Sometimes he remembers what happens, sometimes he doesn't. When he does remember a fact, he has a different interpretation for what occurred, or it didn't occur.

A: Well, certainly, if you look at what he says, right in the – before this event happened, and right after the event, he is giving different versions of events. He has consistently reported no memory in the between.

9/8/2014RP 138-39 (emphasis added).

The following day, the other assigned prosecutor took over the cross-examination of Dr. Beaver:

Q: In 1987, you took a – you made a workshop presentation called implications of neurological deficits, Idaho Conference on Alcohol and Drugs, Boise, Idaho, 1987. Is this one of the workshop presentations that you performed, you presented?

A: Yes.

Q: But you didn't present on alcohol and drugs, you presented on neurophysiological deficits, which is your expertise, correct?

A: Well, it is my expertise, but it was about drugs and alcohol and their impact.

Q: You specifically spoke of that?

A: Yes.

Q: *Yeah, I would like to see your class list on that.*

9/9/2014RP 17 (emphasis added). Mr. Wright immediately objected the remark was a comment on the evidence and an improper opinion by the prosecutor. 9/9/2014RP 17. The trial court overruled the objection. *Id.*

Later during the same day, the same prosecutor asked Dr. Beaver:

> Q: The defendant's actions in both crimes, aren't they exactly the same?
>
> A: No.
>
> Q: In both places, he attempted to rob strangers, didn't he?
>
> . . .
>
> A: Well, again, I don't see things that indicate that he was trying to rob someone.
>
> Q: Okay. *So that's a difference of opinion that the two of us have, we can work with that.*

9/9/2014RP 29-30 (emphasis added).

Lastly, the prosecutor asked Dr. Beaver about Mr. Wright's criminal history: "Excuse me, and also possession of a firearm in the first degree. He pled guilty to those charges; correct?" 9/9/2014RP 40.[4]

[4] Prior to trial, Mr. Wright moved to bar any mention of a 2002 prior conviction he had for possession of a firearm in the first degree. The court granted the motion.

At the conclusion of Dr. Beaver's testimony, Mr. Wright moved for a mistrial based upon the repeated instances of misconduct by the prosecutor:

> The motion is based on several things: During the cross examination of Dr. Beaver yesterday, there was a question that was submitted by counsel where the – where there was a comment that Mr. Wright was obviously lying. In addition, there was further misconduct today when Dr. Beaver was testifying that he had referenced a particular -- or that he had a class on – that he was teaching a class on the effects of alcohol at a seminar that he was conducting, and Mr. Soukup, I believe, said, which wasn't even a question, "I would like to see your class list." The further basis for the motion is when, on the subject of Mr. Wright's motive to rob the Tillmans, when Dr. Beaver testified that he didn't know if Mr. Wright went to the Tillmans' house to rob them, the prosecutor declared, "So that's a difference of opinion that we have, we can work with that." And the final basis of our motion is that Mr. Soukop violated the Court's pre-trial ruling by referring to a felon in possession of a firearm charge that Mr. Wright had when impeaching Dr. Beaver. So based on those -- based on those things, we would ask the Court to declare a mistrial at this point.

9/9/2014RP 106-07.

> The Court heard argument yesterday in the form of a motion by Defense Counsel requesting that the Court declare a mistrial. There were four specific instances of questioning, in particular, that supported the Defense's request for a mistrial, all occurring during the cross-examination of Dr. Beaver.
>
> The Court heard from the State in response and the Court also received the excerpts of the testimony at issue from

> our court reporter through Mr. Hart for the Defense and also received an additional excerpt provided by the State, and that excerpt was referenced in the State's argument in response to the motion as well. The Court's had an opportunity to review all that . . . Based on my review and the arguments presented to the Court, the Court is going to deny the Defense request for a mistrial.

9/10/2014RP 608.

Mr. Wright renewed his objection to the prosecutor's actions in a motion for a new trial. CP 246-47. The court denied that motion, noting:

> A majority, if not all, of the issues presented in Defendant's motion were extensively litigated prior to and during the course of the trial. In the event that this is Defendant's Motion for Reconsideration of those prior rulings, then that motion is also DENIED and the Court incorporates by reference its prior rulings and applicable findings on the issues presented.

CP 256.

a. *Prosecutorial misconduct violates a defendant's constitutionally protected right to a fair trial.*

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3 and article I, section 22 of the Washington Constitution guarantee the right to a fair trial. *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Prosecutors represent the State as quasi-judicial officers and they have a "duty to subdue their courtroom zeal for the sake of

fairness to a criminal defendant." *State v. Fisher,* 165 Wn.2d 727, 746, 202 P.3d 937 (2009). "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.'" *State v. Monday,* 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), *quoting State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton,* 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in

the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

Where the defendant objects to the misconduct, the defendant must show a substantial likelihood the misconduct affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). [5]

b. *The prosecutor's cross-examination of Dr. Beaver regarding Mr. Wright "lying" was misconduct.*

A prosecutor must not ask a witness during cross-examination to comment on the truthfulness of other witnesses. *See, e.g., United States v. Harrison*, 585 F.3d 1155, 1158 (9th Cir.2009); *United States v. Sanchez* 176 F.3d 1214, 1219-20 (9th Cir.1999). This rule is "black

[5] Although Mr. Wright did not object to all of the misconduct by the prosecutors, the issue was nonetheless preserved for appeal when he moved for a mistrial following Dr. Beaver's testimony. *See State v. Lindsay*, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014) ("In this case, however, defense counsel made a motion for a mistrial due to prosecutorial misconduct directly following the prosecutor's rebuttal closing argument, citing many of the same examples that are raised on appeal. Thus, the issue is preserved for appellate review."), *citing United States v. Prantil*, 764 F.2d 548, 555 n. 4 (9th Cir. 1985).

letter law," *Harrison,* 585 F.3d at 1158, and it ensures that determinations of credibility remain within the sole province of the jury. *See Sanchez,* 176 F.3d at 1219-20.

The practice of asking one witness whether another witness is lying "is contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason." *State v. Casteneda-Perez,* 61 Wn.App. 354, 363, 810 P.2d 74 (1991). Thus, cross-examination "designed to compel a witness to express an opinion as to whether other witnesses were lying" constitutes improper conduct. *State v. Padilla,* 69 Wn.App. 295, 299, 846 P.2d 564 (1993).

Here, the prosecutor asked Dr. Beaver during cross-examination to admit Mr. Wright was lying when Dr. Beaver interviewed him. Dr. Beaver appeared to be taken aback by the prosecutor's question and even asked if what the prosecutor was asking was whether Mr. Wright was lying. It became clear that was exactly what the prosecutor was asking. This was misconduct.

c. *The prosecutor's repeatedly expressing his opinion regarding the credibility of witnesses and his belief of what happened was misconduct.*

It is misconduct for a prosecutor to state his or her personal belief as to a witness's credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

> It is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (citing Am. Bar Ass'n, Model Code of Professional Responsibility and Code of Judicial Conduct § DR 7406(C)(4) (1980)). It constitutes misconduct, *id.*, and violates the advocate-witness rule, which "prohibits an attorney from appearing as both a witness and an advocate in the same litigation." *Prantil*, 764 F.2d at 552–53.

Lindsay, 180 Wn.2d at 437.

Here, the prosecutors rendered their opinions about Mr. Wright's and Dr. Beaver's credibility. During their cross-examination of Dr. Beaver, the prosecutor made it plain to the jury that she believed Mr. Wright was lying when he spoke about the facts of the Tillman incident to Dr. Beaver. The following day on two occasions, the other prosecutor rendered his opinion about Dr. Beaver in his snarky comments regarding the doctor's answers to the prosecutor's questions. These incidences were misconduct by the prosecutor.

d. *The prosecutor's misconduct substantially prejudiced Mr. Wright and requires reversal of his convictions.*

The standard used to assess prejudice is not whether Mr. Wright should have asked for a curative instruction but, rather, whether the prosecuting attorney's misconduct had a substantial likelihood of affecting the jury's verdict. *Emery*, 174 Wn.2d at 760-61. A request for a curative instruction is only required if the defendant did not timely object. *Id.*

Further, the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect. *State v. Walker*, 164 Wn.App. 724, 737, 265 P.3d 191 (2011).

The prosecutor's improper comments went directly to Mr. Wright's defense. Dr. Beaver was the primary witness for Mr. Wright and who opined that Mr. Wright did not have the capacity for form the requisite intent for the charged offenses. The prosecutor's comments about the credibility of Dr. Beaver provided the imprimatur of the State stating that Dr. Beaver was not credible, thus, neither is Mr. Wright's diminished capacity defense. During closing argument, the prosecutor used this question of credibility to his advantage:

> And you might all have an opinion about the way that Dr. Beaver was cross-examined, and to be quite honest, I don't really care what your opinion is about that. But what's important is this: Is that if you're going to get up

> here and you're going to tell 12 people, I know what was going on in that man's mind, I know that -- Dr. Beaver -- I know what was going on in his mind, much like the guy at the circus who can tell the future for you, it better be scrutinized, because that's pretty powerful stuff. Dr. Hendrickson said nobody can do that. You can't jump into somebody's head. You can't say what's going on through their mind. And that's obvious.

9/18/2014RP 189-90.

The prosecutor's attack on Dr. Beaver and his comments on Dr. Beaver's credibility were clearly improper and there was a substantial likelihood those comments affected the jury's verdict. Mr. Wright is entitled to reversal of his convictions and remand for a new trial.

3. **The classification of the Persistent Offender finding as an "aggravator" or "sentencing factor," rather than as an "element," deprived Mr. Wright of the equal protection of the law.**

Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, *Smith v. Washington*, 124 S.Ct. 1616 (2004); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, the Washington Supreme Court has held that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of "much confusion," the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony it "actually alters the crime that may be charged," and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. *Id*. While *Roswell* correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which *Roswell* termed "sentencing factors," is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the Supreme Court has said "merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). More recently the Court noted:

> *Apprendi* makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L. Ed.2d 466 *(*2006). Beyond its failure to abide by the logic of *Apprendi*, the distinction *Roswell* draws does not accurately reflect the impact of the recidivist fact in either *Roswell* or the cases the Court attempts to distinguish.

In *Roswell*, the Court considered the crime of communication with a minor for immoral purposes (CMIP). *Id*. at 191. The Court found that in the context of this and related offenses,[6] proof of a prior conviction functions as an "elevating element," i.e., it elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. *Id*. at 191-92. Thus, *Roswell* found it significant that the fact altered the maximum possible penalty from one year to five. *See* RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross

[6] Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. *Roswell*, 165 Wn.2d at 196, *discussing State v. Oster*, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002).

misdemeanor unless the person has a prior conviction, in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to *Blakely*, the "maximum punishment" is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004). In all other circumstances "maximum penalty" is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender score of 3[7] would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. *See* Washington Sentencing Guidelines Commission, *Adult Sentencing Manual 2008*, III-76. The "elevation" in punishment on which *Roswell* pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the "elements" of the substantive crime remain the same, save for the prior conviction "element." A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which

[7] Because the offense is elevated to a felony based upon a conviction of a prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have a score lower than 3.

actually alters the maximum punishment from 171 months to life without the possibility of parole.

In fact, the Legislature has expressly provided that the purpose of the additional conviction "element" is to elevate the *penalty* for the substantive crime. S*ee* RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). But there is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an 'aggravator' in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994), *abrogated by, Apprendi*, 530 U.S. at 476-77. A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. *Thorne*, 129

Wn.2d at 771. The Washington Supreme Court has held that "recidivist criminals are not a semi-suspect class," and therefore where an equal protection challenge is raised, the court will apply a "rational basis" test. *Id*.

> Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be "purely arbitrary" to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the Persistent Offender Accountability Act (POAA) as follows:

> to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist

criminal more harshly. But in the former instance, the prior conviction is called an "element" and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an "aggravator" and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable doubt, even if the prior rape conviction is the person's only felony and thus results in a "maximum sentence" of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. *Roswell* concluded the recidivist fact in that case was an element because it defined the very illegality, reasoning, "if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for

immoral purposes." 165 Wn.2d at 192 (italics in original). But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction, the prior offense merely alters the maximum punishment to which the person is subject. *Id*. So too, first degree assault is a crime whether one has two prior convictions for most serious offenses or not.

Because the recidivist fact here operates in the precise fashion as in *Roswell*, this Court should hold there is no basis for treating the prior conviction as an "element" in one instance – with the attendant due process safeguards afforded "elements" of a crime – and as an aggravator in another. The trial court violated Mr. Wright's right to equal protection.

4. **The judicial finding that Mr. Wright had suffered two prior qualifying convictions which rendered him a Persistent Offender violated his rights to a jury trial and to due process.**

The Due Process Clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. A criminal defendant has the right to a jury trial and may only be

convicted if the government proves every element of the crime beyond a reasonable doubt. *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 2160-62, 186 L.Ed.2d 314 (2013); *Blakely*, 542 U.S. at 300-01; *Apprendi*, 530 U.S. at 476-77.

The Supreme Court has recognized this principle applies equally to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant or the mandatory minimum. *Alleyne*, 133 S.Ct. 2161-62; *Blakely*, 542 U.S. at 304. *Blakely* held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. *Id*. at 304-05; *see Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (invalidating death penalty scheme where jury did not find aggravating factors). In *Apprendi*, the Court found a statute unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by only the preponderance of the evidence. 530 U.S. at 492-93.

In *Alleyne*, the Supreme Court ruled the facts underlying the imposition of a mandatory minimum sentence must be found beyond a

reasonable doubt by a jury, ruling that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." 133 S.Ct. 2160.

Finally, the Supreme Court has recognized that the jury's traditional role in determining the degree of punishment included setting fines, and concluded that under *Apprendi*, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. *Southern Union Co. v. United States*, ___ U.S. ___, 132 S.Ct. 2344, 2356, 183 L.Ed.2d 318 (2012).

In these cases, the Court rejected the notion that arbitrarily labeling facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi*, 530 U.S. at 476. A judge may not impose punishment based on judicial findings. *Alleyne*, 133 S.Ct. at 21562-63; *Blakely*, 542 U.S. at 304-05.

As noted above, the Washington Supreme Court has embraced this principle in *Roswell*: where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." *Roswell*, 165 Wn.2d at 192.

And since the prior convictions are elements of the crime rather than aggravating factors, *Roswell* states that the prior conviction exception in *Apprendi* and *Almendariz-Torres* does not apply. *Id.* at 193 n.5. Thus, under *Alleyne, Blakely*, *Apprendi* and *Roswell*, the judicial finding of Mr. Wright's prior conviction and the fact he qualified as a persistent offender violated his right to due process and right to a jury trial.

F. CONCLUSION

For the reasons stated, Mr. Wright asks this Court to reverse his conviction and remand for a new trial. Alternatively, Mr. Wrights asks this Court to reverse his sentence of life imprisonment without the possibility of parole and remand for resentencing to a standard range sentence without the persistent offender designation.

DATED this 26th day of August 2015.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. CLARENCE WRIGHT III, Appellant.	)))))))))	NO. 72608-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF AUGUST, 2015, 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:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] CLARENCE WRIGHT III ID #215148 MARIN COUNTY JAIL 13 PETER BEHR DR SAN RAFAEL, CA 94903	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF AUGUST, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710