SUPREME COURT NO. 99872-8
COA NO. 80053-1-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LINNELL BLUFORD,

Petitioner.

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

The Honorable Michael Diaz, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

A. IDENTITY OF PETITIONER

Charles Bluford asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Bluford requests review of the decision in State v. Charles Linnell Bluford, Court of Appeals No. 80053-1-I (slip op. filed May 10, 2021), attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in admitting a non-testifying declarant's out-of-court statement because (a) ER 806, which permits impeachment of a non-testifying declarant, is inapplicable in the absence of a hearsay statement to be impeached, and (b) defense counsel did not open the door to the out-of-court statement because the State first raised the subject?

2. Whether counsel was ineffective in failing to move in limine to exclude evidence that Bluford was in debt where the evidence was irrelevant to show motive, unfairly prejudicial and used against Bluford by the prosecutor in closing argument?

3. Whether the combination of errors specified above violated the right to a fair trial under the cumulative error doctrine?

4. Whether the court erred in requiring Bluford to register as a felony firearm offender because the jury's general verdict did not establish that Bluford used a real firearm, as opposed to what only appeared to be a firearm?

D. STATEMENT OF THE CASE

Bluford proceeded to a jury trial on charges of first degree rape and first degree robbery alleged to have been committed against R.U. CP 128-30. Evidence showed R.U. was raped and robbed outside her Shoreline home at about 10 p.m. on March 10, 2012. 2RP[1] 79, 1013, 1016-17, 1028-41. The assailant had a firearm, or what appeared to be a firearm. 2RP 112, 1031, 1034-36, 1059, 1082-84. The encounter ended when the assailant grabbed R.U.'s purse, which contained her cell phone, and took off in a car that pulled up. 2RP 1041-44,1047-50, 1057-58, 1099-1103.

Phone records showed a Subscriber Identity Module (SIM) card belonging to Cheryl Woodard was used in R.U.'s cell phone on March 11 at 4:28 a.m. 2RP 274, 793-95, 1174. The phone was

[1] The verbatim report of proceeding is cited as follows: 1RP - three consecutively paginated volumes consisting of: 9/17/18, 10/1/18, 10/2/18, 10/2/18, 10/24/18, 5/1/19, 6/13/19, 6/13/19; 2RP - nine consecutively paginated volumes consisting of 10/8/18, 10/9/18, 10/10/18, 10/11/18, 10/15/18, 10/16/18, 10/17/18, 10/18/18, 10/23/18.

used to communicate with a phone number registered to Bree Brazille a few minutes later. 2RP 281. On March 15, police searched Woodard's Renton residence and recovered R.U.'s cell phone. 2RP 289-90, 295. Woodard testified that Brazille, a long-time acquaintance, sold her a phone. 2RP 365, 379-80. Woodard knew Bluford through Brazille. 2RP 366-70, 395, 422. She thought the two were married. 2RP 335. Woodard had used the phone to take a photo of Brazille and Bluford at her residence at 4:16 a.m. on March 11. 2RP 299-300, 388-89, 415, 798-806, 1226; Ex. 48.

Police stopped Bluford and Brazille on March 15. 2RP 486-88, 492-93, 525, 533, 631-34, 1155, 1192. R.U.'s wedding ring was in Brazille's purse. 2RP 629-30, 1163. Marriage license paperwork for Bluford and Brazille and Jewelry Exchange paperwork dated March 14, 2012 were in the car. 2RP 1181-85, 1190-91. Police took Brazille's cell phone at the time of the stop. 2RP 638, 1158. According to cell phone tower data, the phone moved north from the Renton area to the Shoreline area and back again on the night of the crime. 2RP 1322-33. Over defense objection, the court admitted Brazille's hearsay statement that she shared the phone with Bluford. 2RP 1133-35, 1159.

Detectives served a search warrant on the address listed on the marriage certificate, where officers recovered R.U.'s purse and its contents. 2RP 688-89, 956-66, 1003, 1097-1104, 1197-98, 1279-81. Bluford and Brazille were present at the residence. 2RP 706, 709. Among the documents showing Bluford's address was a letter from a debt collection agency showing Bluford owed $1,735.75. 2RP 1205-07; Ex. 58, 76.

Police showed R.U. a photo montage immediately after the incident. 2RP 1120, 1154. R.U. did not identify Bluford from the montage; she picked someone else out of the montage with 80 percent certainty. 2RP 1120-21, 1154, 1239. She nonetheless identified Bluford in court as the perpetrator. 2RP 1107-08.

R.U. testified her assailant had a Jamaican accent. 2RP 1081. She recognized the Jamaican accent because she worked on cruise ships for a few years. 2RP 1010-12, 1122. Consistent with her trial testimony, she told police that the man had a distinct Jamaican accent. 2RP 95, 100, 308-09. Bluford does not have a Jamaican accent. 2RP 422, 718, 1203, 1309. The jury convicted Bluford. CP 123-24.

On appeal, Bluford argued (1) the court erred in admitting Brazille's hearsay statement about the phone; (2) defense

counsel's failure to object to evidence of Bluford's debt constituted ineffective assistance; (3) cumulative error violated Bluford's due process right to a fair trial; and (4) the court erred in requiring Bluford to register as felony firearm offender. The Court of Appeals rejected these arguments. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT ERRED IN ADMITTING EVIDENCE TO IMPEACH A NON-TESTIFYING DECLARANT, AS THE STATE CANNOT USE THE OPEN DOOR DOCTRINE AS BOTH A SWORD AND A SHIELD.

Brazille was deceased at the time of trial. 2RP 1310. What she said from beyond the grave became an issue. Over defense objection, the court admitted Brazille's out-of-court statement to a detective that she shared her phone with Bluford. 2RP 1133-35, 1159. The court erred in so doing because Brazille's hearsay statement was not admissible for impeachment purposes under ER 806 and the defense did not open the door to the statement. Bluford seeks review under RAP 13.4(b)(4).

Under ER 806, "impeachment of the declarant is permissible only when a hearsay statement is admitted into evidence." State v. Mohamed, 186 Wn.2d 235, 241, 375 P.3d 1068 (2016). Defense counsel did not elicit a hearsay statement in cross-examining

Detective Knudsen about the phone. 2RP 638. For this reason, ER 806 did not permit admission of Brazille's out-of-court statement for impeachment. The Court of Appeals did not dispute this.

Instead, the Court of Appeals sided with the trial court's belief that defense counsel opened the door to admission of the statement because "defense counsel's questioning of Detective Knudsen could have implied to the jury that the phone belonged to Brazille alone because defense counsel referred to the cell phone as 'her' phone." Slip op. at 5-6.

The open door doctrine is inapplicable because the State was the party that raised the subject. The State cannot be allowed to open its own door. "The open door doctrine recognizes that a party can waive protection from a forbidden topic *by broaching the subject*. Should this happen, the opposing party is entitled to respond." State v. Rushworth, 12 Wn. App. 2d 466, 473, 458 P.3d 1192 (2020) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)) (emphasis added).

In Bluford's case, defense counsel did not broach the subject of the phone being Brazille's. The State did that all on its own. On its direct examination of Detective Priebe-Olsen, which took place before defense counsel cross-examined Detective Knudsen, the

State asked "And who identified that this was their phone?" Detective Priebe-Olsen answered "That was Bree Brazille." RP 279-80. And before that, the State addressed Brazille's possession of that phone in examining Woodard. 2RP 375 (Q: "you said that Bree had a phone that you would communicate with, a cell phone that you would communicate with. A. Yes.").

The open door doctrine "permits a court to admit evidence on a topic that would normally be excluded for reasons of policy or undue prejudice *when raised by the party* who would ordinarily benefit from exclusion." Rushworth, 12 Wn. App. 2d at 473 (emphasis added). The purpose of the open door doctrine is not served when the State first raises the subject at issue and then is permitted to exploit defense counsel's subsequent questioning on that same subject. Defense counsel, in questioning Detective Knudsen, simply followed the State's lead in referring to the phone as "her phone" based on a factual predicate built by the State.

The Court of Appeals believed any error was not prejudicial because defense counsel said in opening statement that although the phone belonged to Brazille, "Bluford would use it sometimes." Slip op. at 6. "Opening statements of counsel are not evidence." State v. Evans, 96 Wn.2d 119, 124, 634 P.2d 845, 649 P.2d 633

(1982). The jury was so instructed, so what counsel had to say in opening statement makes no difference.

The prosecutor argued to the jury that the phone records showed "it was the Defendant who committed this offense." 2RP 1413. That is why admission of Brazille's hearsay statement tying Bluford to the phone is prejudicial.

The Court of Appeals said "There was significant evidence, besides the phone, that implicated Bluford in R.U.'s robbery and assault." Slip op. at 6. But there was also significant evidence that Bluford was not the perpetrator. For example, R.U. was adamant her attacker had a distinct Jamaican accent, which Bluford does not have. 2RP 95, 100, 308-09, 422, 718, 1010-12, 1081, 1122, 1203, 1309. Further, although R.U. identified Bluford in court — eight years after the incident — she identified someone else as her attacker in a police montage administered shortly after the crime occurred with 80 percent certainty. 2RP 1107-08, 1120-21, 1154, 1239. This is the stuff of reasonable doubt. Under the circumstances, there is a reasonable probability that the error in admitting Brazille's hearsay statement affected the outcome.

2. COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO EVIDENCE OF BLUFORD'S DEBT THAT THE PROSECUTOR ARGUED GAVE BLUFORD MOTIVE TO COMMIT THE CRIME.

The State presented evidence in the form of a collection letter from Alliance 1 Receivables Management that Bluford was in debt and then argued his debt gave him motive to commit the crime. 2RP 1205-07, 1420-22; Ex. 58, 76. The evidence was inadmissible because evidence of a defendant's financial status alone cannot be used to show motive to commit a crime. Defense counsel was ineffective in failing to move in limine to exclude the improper evidence on grounds of unfair prejudice under ER 403. Bluford seeks review under RAP 13.4(b)(3).

The accused is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); U.S. Const. amend. VI. Counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. "Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have

been sustained." State v. Fortun-Cebada, 158 Wn. App. 158, 172, 241 P.3d 800 (2010).

The State may not introduce evidence of poverty on the assumption that poor people are more likely to steal than wealthy people. State v. Matthews, 75 Wn. App. 278, 286, 877 P.2d 252 (1994), review denied, 125 Wn.2d 1022, 890 P.2d 463 (1995). "Evidence of poverty is generally not admissible to show motive" or to "create an inference that a defendant's financial status alone would suggest that he or she is more likely to commit a financially-motivated offense." State v. Kennard, 101 Wn. App. 533, 541, 6 P.3d 38 (2000), (citing United States v. Mitchell, 172 F.3d 1104, 1108 (9th Cir. 1999), review denied, 142 Wn.2d 1011, 16 P.3d 1267 (2000). Proof of poverty or desire for money, without more, "is likely to amount to a great deal of unfair prejudice with little probative value." Mitchell, 172 F.3d at 1109.

The Court of Appeals acknowledged "[e]vidence of poverty is generally not acceptable to show motive." Slip op. at 7 (quoting Kennard, 101 Wn. App. at 541). The Court of Appeals, however, opined the document was admissible because it was relevant to show dominion and control of the premises. Slip op. at 7. It concluded "the evidence was not offered merely as evidence of

poverty leading to motive, it likely would have been admissible as relevant," and therefore Bluford could not show counsel was deficient in not objecting to its admission. Slip op. at 7-8.

The Court of Appeals did not address the point that information related to the debt could have been redacted from the letter through a motion in limine under ER 403. In that case, the unredacted part showing Bluford's name and address would have still served a relevant purpose of showing dominion and control while the unfairly prejudicial aspect would not have reached the jury.

Further, there was plenty of other documentary evidence showing dominion and control of the premises. 2RP 951-56, 966-70, 1204-05; Ex. 76. In this regard, the debt document was cumulative. Evidence of debt in that document did not contribute anything significant, except unfair prejudice. See State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998) ("The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence."); State v. Rivera, 95 Wn. App. 132, 139, 974 P.2d 882 (1999) ("unfair prejudice occurs whenever the probative value is negligible, but the risk that a decision will be made on an improper basis is great."), portion of opinion withdrawn and modified, 95 Wn. App. 132, 992 P.2d 1033 (2000).

The debt evidence was of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (quoting United States v. Roark, 753 F.2d 991, 994 (11th Cir. 1985)). Defense counsel was deficient in failing to seek exclusion of the debt evidence. The Court of Appeals did not reach the prejudice prong of the ineffective assistance standard.

3. CUMULATIVE ERROR VIOLATED BLUFORD'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007); U.S. Const. Amend. XIV. An accumulation of errors affected the outcome and produced an unfair trial in Bluford's case, including (1) improper admission of Brazille's hearsay statement; (section E.1., supra); and (2) ineffective assistance of counsel in not moving to exclude evidence of Bluford's debt (section E.2., supra). Bluford seeks review under RAP 13.4(b)(3).

4. THE JURY'S GENERAL VERDICT DID NOT AUTHORIZE THE COURT TO REQUIRE BLUFORD TO REGISTER AS A FELONY FIREARM OFFENDER.

The trial court erred in ordering Bluford to register as a felony firearm offender because the jury's general verdict is unclear as to whether Bluford committed a "felony firearm offense" as defined and required by statute. CP 123-24, 205, 216. The Court of Appeals decision, in holding otherwise, conflicts with State v. Rios, 6 Wn. App. 2d 855, 858, 431 P.3d 1016 (2018). The Court of Appeals, instead of confronting Rios, simply ignored it. Slip op. at 10-11. Rios controls in Bluford's favor. The Court of Appeals decision has created a conflict in the law warranting review under RAP 13.4(b)(2).

"A defendant may be ordered to register as a felony firearm offender under RCW 9.41.333 only if he or she was convicted of a felony firearm offense." Rios, 6 Wn. App. 2d at 858. RCW 9.41.330(1) thus provides: "whenever a defendant in this state is convicted of a felony firearm offense . . . the court must consider whether to impose a requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement." (emphasis added).

The problem here is that it cannot be determined that the jury did in fact convict Bluford of a "felony firearm offense." A "felony firearm offense" is defined as "[a]ny felony offense if the offender was armed with a firearm in the commission of the offense." RCW 9.41.010(10)(e). "Firearm" is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(11).

The jury was instructed that a firearm is a deadly weapon. CP 113. The jury's general verdict for the rape count, however, does not specify which of two alternatives the jury relied on to convict — a deadly weapon or only what appears to be a deadly weapon. CP 118, 123. The jury did not convict of a firearm offense on the robbery because the to-convict instruction does not include a deadly weapon/firearm element. CP 119. Under these circumstances, no court can find Bluford was convicted of a "felony firearm offense." Rios controls.

In Rios, the charge was second degree assault, alleging the defendant committed the assault with "a handgun and/or a knife. Rios, 6 Wn. App. 2d at 856. The evidence at trial showed either a knife or a firearm was used in the commission of the crime. Id. at 858. The prosecutor argued in closing that it did not matter

whether Rios was armed with a knife or a firearm because either made him guilty. Id. at 859. The jury was instructed that to find Rios guilty of second degree assault, it must find that the State proved beyond a reasonable doubt that Rios assaulted another with a deadly weapon. Id. at 857. The jury returned a general verdict of guilty as charged, but the verdict form did not specify whether the deadly weapon Rios was armed with was a firearm or a knife. Id. at 857. Rios held the sentencing court erred by applying the discretionary factors and ordering Rios to register as a felony firearm offender because the jury's general verdict was unclear as to the threshold question of whether Rios committed a "felony firearm offense." Id. at 856, 859.

Bluford finds himself in a comparable situation. The to-convict instruction for the rape count gave the jury the option of finding Bluford guilty if it found he either used a deadly weapon or only what appeared to be a deadly weapon. CP 118. Because the jury returned a general verdict on the rape count, it is possible the jury found Bluford guilty of committing that offense by using what appeared to be a firearm. This would be consistent with the prosecutor's closing argument in which the jury was told it was

sufficient to find Bluford guilty based on the "appeared to be a deadly weapon" alternative. 2RP 1401, 1481-19, 1458.

A conviction involving what appears to be a firearm does not qualify as a "felony firearm offense" because the statute requires the defendant be "armed with a firearm in the commission of the offense." RCW 9.41.010(10)(e). And "firearm" means "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(11). Something that appears to be a firearm, but is not in fact a real firearm, does not meet the definition of a firearm in the registration statute.

The threshold question of whether Bluford was convicted of a "felony firearm offense" remains unanswered because the jury's general verdict on the rape count does not establish that Bluford was armed with a firearm, as opposed to what appeared to be a firearm, in the commission of the offense. When the jury's verdict does not establish that it found the defendant guilty of being armed with a firearm in the commission of the offense, the defendant cannot be made to register as a felony firearm offender. Rios, 6 Wn. App. 2d at 856.

The Court of Appeals said "[w]hen the trial court's finding results in a regulatory, rather than punitive result, a jury

determination is not required." Slip op. at 10. The asserted distinction between punishment and regulation is misplaced here. The plain language of the firearm registration statute grounds the authority of the court to impose the registration requirement on the crime of conviction. RCW 9.41.330(1), (3). In a jury trial, the jury is the entity that convicts, not the judge. We thus look to the jury verdict to determine whether firearm registration is authorized, just as the Rios court did. "A defendant may be ordered to register as a felony firearm offender under RCW 9.41.333 only if he or she was convicted of a felony firearm offense." Rios, 6 Wn. App. 2d at 858.

Even if the matter were not resolved by the plain language of the statute, "[t]he constitutional right to jury trial requires that a sentence must be authorized by a jury's verdict." State v. Clark-El, 196 Wn. App. 614, 624, 384 P.3d 627 (2016) (quoting State v. Morales, 196 Wn. App. 106, 112, 383 P.3d 539 (2016) (citing State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010)). The felony firearm finding is part of Bluford's judgment and sentence. CP 205, 216. As resolved in Rios, we must look to the jury's verdict to determine what Bluford was convicted of.

The Court of Appeals cited State v. Reynolds, 80 Wn. App. 851, 860, 912 P.2d 494 (1996) for the proposition that "[a]n

appellant may not challenge for the first time on appeal the trial court's findings of fact where those findings are a result of assertions made at the sentencing hearing without objection." Slip op. at 10-11. That proposition is inapplicable.

Sentencing errors can be raised for the first time on appeal where the trial court lacks statutory authority to enter a particular sentence. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993). Such is the case here. The court lacked authority to order Bluford to register as a felony firearm offender because the jury's verdict did not authorize it. "[A] defendant cannot empower a sentencing court to exceed its statutory authorization." State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980).

Hedging its bets on the preservation issue, the Court of Appeals offered "[r]egardless, the record supports the trial court's ruling that Bluford was armed with a firearm." Slip op. at 11. The whole point is that the trial court lacked authority to make that finding because the jury did not make that finding. Rios, 6 Wn. App. 2d at 856-59. Bluford's case is no different. Whether the record could have supported a finding is therefore irrelevant.

Bluford also notes the Court of Appeals' treatment of the firearm registration requirement has implications for the sex offense registration requirement. It has been held that where defendant is not convicted of a sex offense, "[t]he trial court lacked statutory authority to require sex offender registration, and that part of the sentence is stricken." State v. Johnson, 104 Wn. App. 489, 507, 17 P.3d 3 (2001); see RCW 9A.44.130(1)(a) (registration requirement triggered when the defendant is "convicted of any sex offense"). If the Court of Appeals' reasoning in Bluford's case were correct, a person could be required to register as a sex offender even where the jury did not find the defendant guilty of committing a sex offense, so long as the judge thought it was a sex offense.

F. CONCLUSION

For the reasons stated, Bluford requests that this Court grant review.

DATED this 9th day of June 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC

CASEY GRANNIS, WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES LINNELL BLUFORD, Appellant.	)	No. 80053-1-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Charles Bluford appeals his convictions for rape in the first degree and robbery in the first degree. He argues that the court erred by admitting a hearsay statement, that his counsel was ineffective, and that cumulative error violated his right to a fair trial. He also argues that one of the community custody conditions imposed on him is not crime-related, that the court erred by requiring him to register as a firearm offender, and that the court erred by imposing a discretionary legal financial obligation (LFO). We affirm Bluford's convictions, but remand to strike the LFO.

FACTS

Bluford was charged and convicted of seven counts of robbery in the first degree, one count of indecent liberties, and one count of first degree rape, for a series of

offenses involving multiple victims in Seattle, Renton, Bellevue, and Shoreline. Bluford's convictions were overturned on appeal after the Supreme Court held that the trial court abused its discretion by joining all of the offenses in a single trial. State v. Bluford, 188 Wn.2d 298, 303, 393 P.3d 1219 (2017).

On remand, the State amended the information to five counts, including rape in the first degree (count 1), and robbery in the first degree (count 2) for a March 10, 2012, incident involving victim R.U. Counts 1 and 2 were tried by jury in October 2018.

Testimony at trial established as follows. On March 10, 2012, R.U. drove home from work alone at about 10:30 p.m. and activated the electronic garage door as she pulled up to her house on the end of a dead end street. She parked outside the garage and went to get something from the trunk of her car. As she bent over the trunk, a man emerged from behind a large tree. At trial, R.U. identified the man as Bluford.

Bluford approached R.U., called out to her, and pressed a gun against her side. Bluford directed R.U. into her open garage and pushed her against a wall. Bluford pulled out a condom, and pulled down R.U.'s leggings. R.U. kept pulling her leggings back up, but Bluford forcefully inserted his finger inside her vagina repeatedly. Bluford then forced R.U. to her knees, and forced his penis into her mouth.

A car pulled up in front of the house, blocking the driveway, and R.U. heard a woman say, "That's enough, that's enough." R.U. broke free and activated the electronic garage. Bluford had already taken R.U.'s ring set, and he grabbed R.U.'s purse as the door was closing. R.U.'s phone was in her purse.

Police tracked R.U.'s phone, and discovered that an individual had replaced R.U.'s Subscriber Identity Module (SIM) card with their own SIM card with a different

phone number. Police determined that a SIM card belonging to Cheryl Woodward was used in R.U.'s cellphone on March 11, 2012. Woodward communicated with Bree Brazille on the phone. When police served a search warrant on Woodward's home on March 15, 2012, officers recovered R.U.'s phone containing Woodward's SIM card. Woodward, a long-time acquaintance of Brazille, testified that Brazille sold her the phone. Woodward believed that Brazille was married to Bluford. Woodward showed officers a picture of Bluford and Brazille that she had taken on the phone.

Also on March 15, 2012, King County Sheriff's detectives stopped Bluford and Brazille. Police took Brazille's phone at the stop. R.U.'s engagement wedding ring set was in Brazille's purse. Officers recovered a marriage license between Bluford and Brazille. Detectives served a search warrant on the address listed on the marriage certificate, where officers recovered R.U.'s purse. Police also found a document showing that Bluford owed money to a debt collector at the residence. Because Brazille was deceased at the time of trial, the State moved to admit Brazille's statements to officers that she shared the phone with Bluford, which the court allowed.

The jury convicted Bluford as charged. After conviction on these counts, Bluford entered a guilty plea to felony harassment and two counts of theft in the first degree for the conduct stemming from the other cases. At sentencing, the court imposed an indeterminate sentence of 229 months to life for the rape count, running the other counts concurrently. The court imposed a lifetime term of community custody. Bluford appeals.

ANALYSIS

A. Testimony Impeaching Non-testifying Declarant

Bluford first argues that the trial court erred by admitting Brazille's hearsay statement to the detective that she shared her phone with Bluford. He contends the court erred because Brazille's statement was not admissible for impeachment purposes under ER 806 and that the defense did not open the door. We disagree.

We review a trial court's evidentiary ruling for an abuse of discretion. State v. Mohamed, 186 Wn.2d 235, 241, 375 P.3d 1068 (2016). Hearsay is an out-of-court statement made by someone other than the testifying declarant that is offered for the truth of the matter asserted. ER 801(c). While hearsay is generally inadmissible, when hearsay statements are admitted into evidence, ER 806 permits impeachment of the hearsay declarant.

> When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

ER 806.

During the State's case, Detective Marylisa Priebe-Olson testified about the investigation. She said that Brazille identified the phone as hers. Detective Kris Knudsen testified that Brazille was searched incident to arrest and that he interviewed Brazille after her arrest. On cross-examination, defense counsel asked Detective Knudsen about Brazille's phone and referred to the phone as "her" phone repeatedly. On redirect, the State confirmed that Detective Knudsen obtained this information from

his conversation with Brazille, and that she said the phone was hers. When asked whether Brazille shared the phone with someone, Knudsen said "She said that was her cell phone number."

After Knudsen concluded his testimony, the State alerted the court that it intended to call Detective Priebe-Olson again to illicit testimony that Brazille shared the phone with Bluford. The defense did not object.

Under ER 806, the State moved to admit evidence that Brazille told Detective Priebe-Olson that Brazille and Bluford shared the phone. The trial court determined that when defense counsel questioned Detective Knudsen and referred to the phone as "her phone," it implied to the jury that the phone belonged to Brazille only. In accordance with this ruling, the State asked Detective Priebe-Olson "when you spoke with Ms. Brazille on that particular day, did she tell you that she and Charles Bluford shared the same cell phone," to which Detective Priebe-Olson replied "yes, she did."

Despite Bluford's contentions that the court erred in admitting the testimony because defense counsel did not open the door to such testimony, Bluford cannot demonstrate that the trial court abused its discretion. A party may open the door during the questioning of a witness to otherwise inadmissible evidence. State v. Korum, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). "Where the defendant 'opened the door' to a particular subject, the State may pursue the subject to clarify a false impression." State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). Here, defense counsel's questioning of Detective Knudsen could have implied to the jury that the phone belonged to Brazille alone because defense counsel referred to the cell phone as "her"

phone. The court did not abuse its discretion by allowing the clarifying testimony of Detective Priebe-Olson.

Even if the court erred in admitting the single hearsay statement, the error was harmless. An evidentiary error is not prejudicial unless the error materially affected the outcome of the trial. In opening argument, defense counsel said that although the phone belonged to Brazille, "Bluford would use it sometimes." There was significant evidence, besides the phone, that implicated Bluford in R.U.'s robbery and assault.[1] For these reasons, even if there was an error, it was harmless.

B. Ineffective Assistance of Counsel

Bluford next contends that his counsel was ineffective by not objecting to evidence of Bluford's debt. We disagree.

To demonstrate ineffective assistance of counsel, the defendant must show that: (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness based on consideration of all the circumstances and (2) defense counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 125 (1995). The defendant establishes the second prong when there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 335.

Counsel's performance is presumed to be reasonable. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). The defendant must show the absence of a legitimate

[1] R.U. identified Bluford in court, the picture of Bluford on R.U.'s phone matched her description of her assailant, R.U. accurately described Bluford's vehicle, and R.U.'s stolen possessions were recovered from Bluford's residence.

strategic or tactical reason supporting the challenged conduct by counsel. State v. Mannering, 150 Wn.2d 277, 286, 75 P.3d 961 (2003).

At trial, the State presented evidence of a document sent to Bluford by a debt collection agency, Alliance One, showing that Bluford owed $1,735.75. Defense counsel did not object. Then, during closing, the prosecutor used the debt as evidence of a possible financial motive, arguing:

> What is the motive? Was it a financial motive? We know from the Defendant's mail that he was in arrears. According to his Alliance One, he owed $1737.75. Did it start off as a financial motive? Was the motive because he needed a wedding ring for his fiancée [Brazille]? We know that they were going to be getting married.

The prosecutor continued by telling the jury that only the person who committed the crime knows the motive and motive is not an element of the crime that needs to be proven.

Bluford contends that defense counsel was ineffective for failing to object because evidence of poverty or debt is generally inadmissible to show motive, and an objection would have been sustained because the evidence was irrelevant. We agree with Bluford that "[e]vidence of poverty is generally not acceptable to show motive." State v. Kennard, 101 Wn. App. 533, 541, 6 P.3d 38 (2000). But the letter from Alliance One was offered by the State for two reasons. First, because the letter was addressed to Bluford at the same address as Brazille, it provided evidence that Bluford lived with Brazille at the house where the victim's stolen property was recovered. And second, the letter was offered to show a possible motive, i.e., that Bluford may not have had sufficient funds to buy Brazille a wedding ring. Thus, because the evidence was not offered merely as evidence of poverty leading to motive, it likely would have been

admissible as relevant. Bluford cannot show that defense counsel was deficient for failing to object.[2]

C. Cumulative Error

Bluford also argues cumulative error. Under the cumulative error doctrine, the defendant must show that while multiple errors, when standing alone, are insufficient grounds for reversal, the combined effect of these errors requires a new trial. State v. Clark, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). Bluford has not demonstrated that the trial court erred by admitting hearsay or that counsel was ineffective. While Bluford attempts to characterize these alleged deficiencies as major errors, these are minor instances that had little to no effect on the jury's verdict. Therefore, he cannot demonstrate cumulative error.

D. Community Custody Condition

Bluford argues that the community custody condition regarding sexual relationships is not crime related and infringes on Bluford's constitutional rights. We disagree.

We review community custody conditions for an abuse of discretion and will reverse them if they are manifestly unreasonable. State v. Nguyen, 191 Wn.2d 671, 678, 425 P.3d 847 (2018). The court may impose and enforce crime-related prohibitions and affirmative conditions as part of the sentence. RCW 9.94A.505(9). A

[2] As the State correctly points out, defense counsel addressed the potential financial motive head on, arguing "The defendant was in arrears for a debt he owned. Big deal." He then pointed at pictures of the house and continued:

> Look at that house. Its middle to upper middle class. They have nice TVs, electronic toys, the furniture is nice. [Brazille] was obviously making enough money, whatever she was doing, in order to maintain this lifestyle.
>
> So, in arrears $1000, you're going to go out and commit a First Degree Rape and First Degree Robbery? I don't think so.

"crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). To be crime-related, there must be a reasonable relationship between the condition and the defendant's behavior, but "the prohibited conduct need not be identical to the crime of conviction." Nguyen, 191 Wn.2d at 684. Any community custody conditions that interfere with the convict's fundamental rights must be reasonably necessary to accomplish the essential needs of the State and must be sensitively imposed. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

The court imposed the following condition on Bluford: "Inform the supervising CCO[3] and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such."

We recently held that an identical condition was constitutional as long as the condition was crime-related. See State v. Lee, 12 Wn. App. 2d 378, 386, 403, 460 P.3d 701 (2020) (defendant was required to "'[i]nform the supervising [community corrections officer] and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such'" (alterations in original)).

The requirement imposed on Bluford is plainly crime-related and sensitively imposed. Bluford was convicted of raping a woman a gunpoint. Even though R.U. was not his romantic partner, this condition involves sexual intimacy which directly relates to Bluford's offense. Bluford's requirement to disclose his history of sexual violence to

[3] Community Corrections Officer.

future partners, so that they can make an informed decision regarding any sexual relationship with him, is crime related.

E. Felony Firearm Offender

Bluford argues that the court erred by requiring him to register as a felony firearm offender. We disagree.

A person convicted of a felony firearm offense may be required to comply with registration requirements. RCW 9.41.330(1). A "felony firearm offense" includes "any felony offense if the offender was armed with a firearm in the commission of the offense." RCW 9.41.010(10)(e).

The firearm registration statute is regulatory, not punitive. State v. Gregg, 196 Wn.2d 473, 485, 474 P.3d 539 (2020). When the trial court's finding results in a regulatory, rather than punitive result, a jury determination is not required. State v. Felix, 125 Wn. App. 575, 578, 105 P.3d 427 (2005).

Bluford was charged with rape in the first degree, one element of which was "that the defendant used or threatened to use a deadly weapon or what appeared to be a deadly weapon." The jury was instructed that a firearm is a deadly weapon.

During sentencing, the court made a finding that counts 1 and 2 were felony firearm offenses after the State's request.[4] Bluford did not object. Bluford was required to comply with the felony firearm registration requirements.

Bluford's failure to object to the trial court's findings results in Bluford failing to preserve this issue on appeal. "An appellant may not challenge for the first time on

[4] The State did not distinguish which offense formed the basis for the firearm registration requirement. Because the rape charge formed the proper basis for Bluford to comply with firearm registration requirements, we do not need to consider whether the robbery charge requires firearm registration.

appeal the trial court's findings of fact where those findings are a result of assertions made at the sentencing hearing without objection." State v. Reynolds, 80 Wn. App. 851, 860, 912 P.2d 494 (1996). Regardless, the record supports the trial court's ruling that Bluford was armed with a firearm.[5] Therefore, the court's requirement of Bluford to register as a felony firearm offender was proper.

F. Legal Financial Obligations

Bluford argues that the court erred by imposing discretionary LFOs. The State concedes. We accept the State's concession.

The trial court found Bluford indigent, and waived all waivable fees, fines, and interest. The court imposed community custody supervision fees from boilerplate language on the judgment and sentence. Courts shall not impose discretionary costs on defendants who have been found indigent. RCW 10.01.160(3); State v. Ramirez, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). Supervision fees are discretionary legal financial obligations. State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020). We remand to the trial court to strike the community custody supervision fees.

Affirmed.[6]

[5] R.U. was taught about firearms, she felt the gun press against her hip, she thought it looked and felt like a real gun, she thought it looked like a smaller version of a .45 caliber pistol, a single round from a .380 semi-automatic handgun was found in Bluford's residence, a .380 is similar to but smaller than a .45, and Bluford had been convicted of prior robberies using a firearm.

[6] In his statement of additional grounds, Bluford contends that the court violated his due process rights and right to a fair trial. He bases this on an interaction where Woodward held up her hands to demonstrate how long the gun was. Bluford contends that the court should have given a curative instruction. Bluford fails to demonstrate prejudice from this interaction.

Mann, C.J.

WE CONCUR:

Brennan, J.

Chun, J.

NIELSEN KOCH P.L.L.C.

June 09, 2021 - 3:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80053-1
Appellate Court Case Title:	State of Washington, Respondent v. Charles Linnell Bluford, Appellant

The following documents have been uploaded:

- 800531_Petition_for_Review_20210609153226D1128976_7119.pdf
  This File Contains:
  Petition for Review
  The Original File Name was State v. Charles Bluford 80053-1-I.Petition.pdf

A copy of the uploaded files will be sent to:

- Jim.Whisman@kingcounty.gov
- Sloanej@nwattorney.net
- paoappellateunitmail@kingcounty.gov

Comments:

Copy mailed to petitioner: DOC: 335200 - Coyote Ridge Corrections Center

---

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
Filing on Behalf of: Casey Grannis - Email: grannisc@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20210609153226D1128976