NO. 72608-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CLARENCE WRIGHT III,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ELIZABETH BERNS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID SEAVER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Rules and Regulations

Washington State:

A. ISSUES PRESENTED

1) Whether the trial court properly admitted evidence of Wright's weeks-earlier attempted armed robbery of another victim in order to prove intent, to show a common scheme, and to provide a more complete picture of Wright's actions on the night of the charged crimes.

2) Whether the trial court properly denied motions for mistrial and new trial due to purported instances of prosecutorial misconduct during the State's cross-examination of Wright's psychological expert witness.

3) Whether the trial court properly sentenced Wright to life imprisonment without possibility of parole after determining that he was a persistent offender.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Clarence Wright III, was charged by information with one count of first-degree burglary and two counts of first-degree assault arising out of a home invasion he committed in Tukwila on February 11, 2013. CP 1-2. Wright was charged in the same information with one count of first-degree unlawful

possession of a firearm, but that charge was severed by the trial court on Wright's pretrial motion. CP 2-3; CP 28.

By jury verdicts rendered on September 18, 2014, Wright was found guilty as charged on the burglary and assault charges. CP 209-11. The trial court sentenced Wright to a term of life imprisonment without possibility of parole after determining that he was a persistent offender. CP 260.

2. SUBSTANTIVE FACTS

On the very early morning of February 11, 2013, Jay Tillman was asleep with other members of his family in their apartment in Tukwila when he was awakened by a knock at the front door. 14RP 20-22.[1] Looking through the door's peephole, Jay[2] mistakenly believed that he recognized the person on the other side as a neighbor, and opened the door. 14RP 22-23. In doing so, Jay came face to face with Wright, a complete stranger, who walked into the now-open doorway and immediately thrust a revolver at

---

[1] The verbatim report of proceedings consists of 23 volumes, referred to in this brief as follows: 1RP (9/11/2013); 2RP (12/4/2013); 3RP (2/14/2014); 4RP (4/18/2014); 5RP (8/14/2014); 6RP (8/19/2014); 7RP (8/21/2014); 8RP (8/25/2014); 9RP (8/27/2014); 10RP (8/28/2014); 11RP (also 8/28/2014); 12RP (9/2/2014); 13RP (9/3/2014); 14RP (9/4/2014); 15RP (also 9/4/2014); 16RP (9/8/2014); 17RP (9/9/2014); 18RP (9/10/2014); 19RP (9/16/2014); 20RP (9/17/2014); 21RP (9/18/2014); 22RP (10/23/2014); 23RP (4/9/2015).

[2] A number of members of the Tillman family testified at Wright's trial, and will be referred to in this brief by their first names to avoid confusion. No disrespect to the Tillman family is intended.

Jay. 14RP 23, 36. In fear, Jay reached for Wright's gun as Wright pushed him backward, causing Jay to fall onto a couch. 14RP 23. As Jay was falling, Wright fired his gun, striking Jay in the abdomen. 14RP 24. Jay continued to try to pry the gun from Wright's hand, but was rapidly losing strength due to his injury. 14RP 25.

Jay's 20-year-old son, Nathanial Tillman, was awakened by his father's struggle with Wright and ran to help him. 12RP 76. He attempted to put Wright in a headlock; Wright shot Nathanial in the leg. 12RP 76, 81. Jay managed to wrest the gun from Wright and shot at Wright, hitting him once in the shoulder. 14RP 28. Wright then stumbled out of the apartment. 14RP 31.

Jay's wife, Mary, called 911, and officers with the Tukwila Police Department (TPD) quickly responded to the scene. 12RP 53, 61. When TPD Sergeant Rory Mettlin arrived, he located Wright running from the area in the direction described by onlookers; Mettlin ordered Wright to stop and Wright briefly complied, before continuing to run away. 12RP 111. With the assistance of a K-9, Mettlin and other officers engaged in a foot pursuit, finally locating Wright hiding under an apartment balcony. 12RP 64-67. When Wright failed to obey the officers' orders to

surrender, the police dog was released and bit Wright, causing him to fall down a hillside, where he was ultimately placed under arrest. 13RP 16-17, 19-21. Wright's gun was recovered from the Tillmans' apartment and placed into evidence, along with a pair of gloves belonging to Wright, which he had abandoned during the pursuit. 12RP 127-28, 176-77; 14RP 121.

TPD investigators quickly discovered that a warrant had been issued in California for Wright's arrest, and contacted the relevant agency in that state, the City of San Rafael Police Department (SRPD). 14RP 45, 60. On February 12, 2013, SRPD Detective Todd Berringer arrived from California and interviewed Wright regarding an attempted armed robbery of a cell phone store that had occurred in his jurisdiction on January 18, 2013. 14RP 48-51, 61-62. Wright admitted to committing the crime, explaining that he wanted to obtain money so he could visit his daughter in Seattle and bring her gifts. 14RP 67-68, 73. Wright acknowledged that he had shot at the store's employees when they began to run to the back of the store as soon as he'd entered, revolver in hand. 14RP 48-49, 67-68. Wright told Det. Berringer that he had used the same gun at the Tukwila apartment. 14RP 70.

In an interview with TPD Det. Ron Corrigan a day earlier, Wright said that he had been drinking gin all day and could not explain why he had ended up at the Tillmans' apartment. 14RP 106. He claimed that he did not have a gun or gloves with him, and knew only that he had been put in a headlock and been beaten before he was shot. 14RP 106-07.

Wright did not testify in his own defense, but called psychologist Dr. Craig Beaver to testify as an expert witness. 16RP 8-9. Dr. Beaver testified that he had conducted a forensic neurological examination of Wright, and concluded that brain damage caused by a head injury that Wright had suffered in September 2012, coupled with Wright's intoxication,[3] rendered Wright incapable of forming criminal intent when he invaded the Tillmans' home on February 11, 2013. 16RP 112. On cross-examination, Dr. Beaver recognized that Wright committed both the Tukwila and California crimes after the brain injury that Dr. Beaver believed caused Wright to be unable to form criminal intent, though Dr. Beaver acknowledged that he saw no reason to doubt that

[3] Toxicology testing at the hospital at which Wright was treated (for his gunshot and dog bite wounds) immediately after his arrest showed that he had a blood alcohol content level of .181. 16RP 59. Wright told Dr. Beaver that he had been drinking alcohol on a daily basis for several months. 17RP 33.

Wright's California robbery was anything other than intentional. 17RP 28.

In its rebuttal case, the State presented the testimony of Western State Hospital forensic psychologist Dr. Ray Hendrickson, who agreed with Dr. Beaver that Wright suffered from substance abuse and depression, but found no indications of dementia that would affect Wright's capacity to form intent. 18RP 633; 19RP 25-27. Dr. Hendrickson explained to the jury that Wright's level of alcohol intoxication was not so great as to cause delirium or to otherwise interfere with general functioning, and noted that neither the treating hospital or police officers who interacted with Wright observed him to be highly inebriated. Dr. Hendrickson further observed that Wright's flight from the scene and his attempt to hide from police indicated that he was engaging in goal-directed behavior. 19RP 141-42.

The State concluded its rebuttal case by publishing to the jury a recording of phone calls that Wright made while in jail, awaiting trial on the instant matter. State's Exs. 115, 116. In one call, Wright indicates to the man with whom he was speaking that he was "playing crazy" to assist in his defense. State's Exs. 115, 116.

C. ARGUMENT

1. THE TRIAL APPROPRIATELY ALLOWED THE STATE TO ADMIT EVIDENCE OF WRIGHT'S RECENT ATTEMPTED ROBBERY IN CALIFORNIA.

Wright first contends that the trial court erred by permitting the State to present evidence of his attempted robbery of a store in San Rafael, California, roughly three weeks prior to his invasion of the Tillman family's home. Wright argues that the trial court misapplied ER 404(b) when it found that his prior crime was probative of his ability to form the intent to commit the charged offenses, was indicative of a common scheme, and was helpful to the jury insofar as it provided a more complete understanding of how he came to be at the Tillmans' Tukwila apartment. Wright's claim should be rejected. The trial court's conclusions were justified by well-established law and amounted to a reasonable exercise of its discretion.

Evidence of a defendant's prior acts is admissible under ER 404(b) if it satisfies two distinct criteria. First, the evidence must be logically relevant to a material issue before the jury. Evidence is relevant if (1) the identified fact for which the evidence is admitted is of consequence to the trial, and (2) the evidence tends to make

the existence of that fact more or less probable. ER 402; see also State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

Second, if the evidence is relevant, its probative value must outweigh its potential for unfair prejudice. Saltarelli, 98 Wn.2d at 362.

Evidence of other bad acts is inadmissible if used only to prove criminal propensity. See ER 404(b). By contrast, when such evidence is logically relevant to a material issue distinct from propensity, such as proof of intent or motive, the evidence is admissible, subject to the balancing test described in ER 403. Saltarelli, 98 Wn.2d at 362.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion only when its exercise of judgment is manifestly unreasonable, or based upon untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Furthermore, a trial court's decision to admit evidence of prior misconduct under ER 404(b) will be upheld if any one of its cited bases is justified. Powell, 126 Wn.2d at 264.

Here, the trial court admitted evidence showing that Wright had, on January 19, 2013, attempted to rob, at gunpoint, a small

store in San Rafael, CA. In an interview with San Rafael investigators shortly after his arrest in Tukwila, Wright admitted his culpability for that offense, explaining that he committed the act in order to obtain money so he could visit his daughter in Seattle and bring gifts purchased with the proceeds of his crime. 7RP 233. Wright acknowledged that he used the same gun in California and at the Tillmans' home, that he had fired the gun shortly after he entered the San Rafael store in order to obtain the compliance of the store's employees, and that he had worn gloves on both occasions. 7RP 232-36.

Following a pretrial hearing, the trial court ruled that it would allow the State to present proof, in the form of testimony by San Rafael investigators,[4] of Wright's January 2013 attempted robbery, because it was probative of intent and amounted to both common scheme and *res gestae* evidence. 7RP 290-91. The court found that the legitimate value of this evidence outweighed any risk of unfair prejudice, and directed defense counsel to submit a limiting instruction if they so elected. 7RP 290-91. Such an instruction was included in the trial court's closing instructions to the jury. CP 195.

[4] The trial court refused to allow the State to show video of the California crime, captured by the victim store's surveillance camera, to the jury, on the ground that it would unfairly prejudice Wright. 7RP 291.

In order to understand the trial court's reasoning, it is crucial to bear in mind several facts. First, Wright's selection of the Tillman home was, by all accounts, completely random, insofar as he had no prior relationship with the Tillmans, such that his decision to invade their home could be attributable to some earlier interaction with one or more members of that family. Second, Wright's attempt to enter the Tillmans' apartment was interrupted by Jay's active resistance; as a result, Wright was deprived of the fullest opportunity to manifest his entire intent by completing his preplanned crime. Third, Wright posited his defense on a claim of diminished capacity due to organic brain damage as a result of a head injury predating both the California and Tukwila crimes, coupled with acute intoxication.

With these facts in mind, the trial court's conclusions were wholly justified. Under the *res gestae* exception to ER 404's general prohibition, evidence of prior bad acts is admissible to "complete the story of the crime on trial by proving its immediate context of happenings near in time or place." Powell, 126 Wn.2d at 263 (citation omitted). As the Powell court explained, each act must be a "piece of the mosaic necessarily admitted in order that a complete picture be depicted for the jury." Id. (citation omitted).

As Wright explained to the San Rafael, CA, detective following his arrest in Tukwila, he attempted the armed robbery of the store in California approximately three weeks earlier so he could finance a visit to his daughter in the Seattle area and be able to buy gifts for her. The attempted robbery in San Rafael thereby evidenced his intent to come to Washington, both to see his daughter *and* to avoid capture for his California crime, and, more importantly, it suggested that he was financially incapable of making the trip using his own resources, and had decided to steal money in order to do so. The *res gestae* evidence of the San Rafael incident thus allowed the jury to see his invasion of the Tillmans' home in a more complete light, as a calculated act by a fleeing felon in desperate need of money, rather than as a mysterious, inexplicable happenstance.

As this Court explained in State v. Lough, 70 Wn. App. 302, 853 P.2d 920, aff'd, 125 Wn.2d 847, 889 P.2d 487 (1995), there are two categories of evidence that may be sufficient to demonstrate a common scheme or plan: (1) evidence of a single plan used to commit separate but similar crimes, and (2) evidence of multiple acts or events that constitute parts of a larger, overarching plan in which the prior acts are causally related to the charged offense.

Lough, 70 Wn. App. at 302. In this case, the trial court explained that it was admitting evidence of the San Rafael attempted armed robbery because it bore significant similarities to the Tukwila event. 7RP 290-91. In other words, Wright used the same approach to commit separate but similar offenses.

In Lough, this Court identified a number of "commonsense questions" to keep in mind when determining whether prior events show a common scheme as opposed to a mere proclivity to commit crime. Id. at 319. Those questions include: whether the crimes involved forethought, so that prior experience with preplanned crimes would benefit the defendant later, when he committed the charged offense; whether evidence exists of a repetitive, conscious effort to orchestrate events in order to avoid exposure; whether an unusual technique was involved; and whether there were sufficient features in common from which the fact finder could determine that the prior and current incidents were the work of a single mastermind. Id. at 319-20. Or, as the supreme court noted when affirming this Court's opinion:

> To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct 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.

State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

The commonalities between the charged incident and Wright's earlier attempted robbery in California are plain, and the trial court's decision here comports with established case law issued by this and other appellate courts in this state. Wright wore the same clothes in both instances, using his hood and outerwear in such a way as to conceal his identity, along with wearing a glove on the hand with which he held the same gun. 7RP 264-65. In both instances, Wright selected a target with which he had no earlier relationship, so that he would lessen the risk of being recognized. 7RP 277. Each time, he manifested his willingness to not merely brandish a gun to exact obedience, but to actually shoot in order to obtain compliance. 7RP 232; 14RP 23-24.

The commonalities of the two events provided necessary context to what would otherwise appear, as discussed above, to be a bizarre act of extreme violence inside the Tillmans' apartment lacking in any motivation. The similarities between the two events provided the jury with the information it needed in order to see

Wright's appearance at the Tillmans' home for what it was: his attempt to force his way into their apartment so he could obtain money and easily-liquidated possessions, rather than to simply commit violence against the occupants.

Finally, Wright's decision to put into question his ability to form criminal intent, due to pre-existing brain damage, on the night of February 11, 2013, made the evidence of his January 19, 2013, attempted robbery especially important. As Division Three of the Court of Appeals has observed, as a matter of logical probability, a defendant's prior convictions to other crimes requiring intent make it less likely that the defendant could not form the requisite intent for the charged offense. See State v. Medrano, 80 Wn. App. 108, 113, 906 P.2d 982 (1995). Here, although Wright was not yet convicted of the San Rafael attempted robbery before he committed his crimes in Tukwila, he readily admitted his responsibility for the California crime to the police. Moreover, he explained his motivation for attempting to rob the store and the reasoning behind his actions while his crime was underway. 7RP 232-36. Awareness of Wright's goal-directed behavior in San Rafael, less than a month before his February 2013 invasion of the Tillmans' home, was critical to the jury's ability to evaluate Wright's claim at

trial that a head injury he had suffered in September 2012 rendered him organically incapable for forming criminal intent.

The trial court understandably found, given Wright's admissions to investigators and video capturing the event, that the State proved his commission of the San Rafael attempted armed robbery by a preponderance of the evidence. It reasonably recognized that evidence of this prior bad act was probative as *res gestae* information, indicative of a common scheme or plan, and relevant to the question of Wright's intent in Tukwila. The trial court took care to attenuate the risk of any unfair prejudice by restricting the manner in which the State could prove the details of Wright's California crime, and by instructing the jury as to the limited purposes for which it could consider the prior bad act. The trial court did not abuse its discretion.

2. THE TRIAL COURT PROPERLY DENIED WRIGHT'S MOTIONS FOR MISTRIAL AND NEW TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

Wright next contends that his convictions must be reversed due to questions and comments made by the State's counsel during cross-examination of psychologist Craig Beaver, Wright's expert witness. In the course of questioning Dr. Beaver about his satisfaction with the answers he received from Wright during his

interview of the defendant, the prosecutor asked whether Dr. Beaver had asked every question he needed to, "[e]ven though it's patently obvious from the statement that the defendant gave to these separate statements [i.e., the ones provided by Wright to various police investigators] 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 this information when you were interviewing him?" 16RP 139. When Dr. Beaver responded by asking the prosecutor if she had said that Wright was "patently lying," the prosecutor replied that "[s]ometimes [Wright] remembers what happens, sometime he doesn't. When he does remember a fact, he has a different interpretation for what occurred, or it didn't occur." 16RP 139. At that point, defense counsel objected that the prosecutor was badgering Dr. Beaver, and the trial court directed the State's counsel to be more specific in her questions. 16RP 139-40. The prosecutor obeyed the court's instruction, and asked Dr. Beaver whether he had the reports prepared by Tukwila Police Department officers, which included Wright's claim to them that he had disposed of a gun. 16RP 140. Dr. Beaver acknowledged that Wright had given differing accounts to various individuals about his possession of a gun. 16RP 140.

During the following day's cross-examination, the State's attorney was questioning Dr. Beaver about his claim of expertise in toxicology, and, in response to the witness's claim that he had delivered a presentation in 1987 on the subject of alcohol and drugs, stated, "Yeah, I would like to see your class list on that." 17RP 17. Shortly after, the prosecutor examined Dr. Beaver about his conclusion that Wright was incapable of forming criminal intent on the night of the charged crimes due to his prior brain injury, and asked Dr. Beaver why he could reach that conclusion even though the witness had stated he had no reason to doubt that Wright's attempted robbery of the store in California weeks earlier was an intentional act. 17RP 28-29. The following exchange took place:

Q: In both cases, he attempted to rob strangers, correct?
A: Well, he committed a robbery in San Rafael. I don't know – don't see that he was committing a robbery in Tukwila.
Q: But Dr. Beaver, he didn't commit a robbery in San Rafael, did he? He tried to?
A: Yes.
Q: He was unsuccessful?
A: That's my understanding.
Q: Okay. Much like in Tukwila, he tried to and he was unsuccessful?
A: Well, again, I don't see things that indicate 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. In both

> case, he had gloves on that hid his hands, correct?

17RP 30. The prosecutor followed with additional questions about apparent similarities between the two events in California and Tukwila. 17RP 30-32.

After Dr. Beaver's testimony concluded, defense counsel moved for mistrial on the basis that the State had committed prosecutorial misconduct in each of the above-described instances. 17RP 106-07.[5] Wright's attorney did not state any specific legal basis for dismissal, nor attempt to make any showing of prejudice, seemingly believing that it was unnecessary to do so. The prosecutors defended their performance, claiming that they had not intended to express their personal opinions, but simply meant to question Dr. Beaver about the inconsistencies in Wright's various statements and to determine that Beaver's opinion was simply that, i.e., one person's assessment of Wright's capabilities. 17RP 108-09.

The trial court denied Wright's motion for mistrial without elaboration. 18RP 608. Wright renewed his contentions in the

[5] Wright's motion for mistrial also concerned a question posed by the prosecutor during Dr. Beaver's cross-examination regarding a prior conviction of Wright's. 17RP 40. This allegation is not a subject of Wright's appeal, and was also rejected by the trial court. 18RP 608.

form of a written motion for new trial following the jury's verdicts. CP 246-47. By written order, the trial court held that Wright had presented no new reason to cause the court to question its earlier resolution of these claims of misconduct, and denied the motion for new trial. CP 256.

In his brief to this Court, Wright again asserts that reversible misconduct occurred during Dr. Beaver's cross-examination. However, he does not frame the matter in the appropriate context of appellate review. He fails to explain that when a defendant moves for mistrial or new trial on the basis of prosecutorial misconduct, the trial court's denial of such a motion is examined for abuse of discretion. See State v. Brown, 132 Wn.2d 529, 563, 940 P.2d 546 (1997) (concerning motion for mistrial); State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991) (concerning motion for new trial). A mistrial should be granted only "when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). Similarly, misconduct warrants the granting of a motion for new trial only when there is a substantial likelihood that it affected the jury's verdict. State. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993). In both of these circumstances,

the appellate courts have recognized the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced the defendant's right to a fair trial. State v. Perez-Valdez, 172 Wn.2d 808, 819, 265 P.3d 853 (2011); Lord, 117 Wn.2d at 887. In determining whether the trial court abused its broad discretion, an appellate court will find abuse only when no reasonable judge would have reached the same conclusion. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

In this matter, the State acknowledges that the challenged remarks of the prosecutors were poorly chosen and could have been worded more carefully or left unsaid. However, it must be noted that it is not true that the prosecutor asked Dr. Beaver, as Wright contends in his brief to this Court, to express his opinion as to whether another *witness* was telling the truth when she stated that Wright was "obviously lying." Brief of Appellant, at 26-27. Wright did not testify. Rather, Dr. Beaver was offering an opinion of the defendant's capabilities that was necessarily based on the proposition that Wright had been fully candid during Dr. Beaver's forensic interview, and was being questioned about that. The State recognizes that the deputy prosecutor's choice of words could

certainly have been less loaded, but the potential harm was not due to an invasion into the province of the jury.

Rather, this question by the prosecutor, along with the two other challenged remarks, are problematic insofar as they convey, explicitly or implicitly, the personal opinions of the State's counsel as to Wright's guilt. See State v. Dhaliwal, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). However, the trial court properly concluded that neither mistrial nor new trial was warranted because the prosecutor's remarks were not so inflammatory as to deprive Wright of a fair trial or cast doubt on the basis for the jury's verdict.

A prosecutor's allegedly improper statements should be viewed within the context of the issues in the case, the evidence presented, and the jury instructions. See Brown, 132 Wn.2d at 561. Prejudice is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

Here, the State's case in no way depended on the ability of the trial prosecutors to communicate their personal belief in Wright's guilt. Rather, the State's case relied on the testimony of numerous police and civilian eyewitnesses, physical evidence, and Wright's own admissions, including his statement, made in a

recorded phone call to a friend while he was incarcerated, that he was "playing crazy" to assist in his defense. The evidence of Wright's guilt was prodigious and required several days to present, and, other than in the form of isolated remarks during a few moments of heated cross-examination, the State's attorneys never risked injecting their personal opinions into their presentation. Furthermore, the jury was instructed that the statements of the attorneys were not themselves evidence, and that the jurors, and no one else, were the sole judges of credibility. CP 174.

Under these circumstances, it cannot fairly be said that the trial court reached a conclusion that no reasonable judge would have made. Due to Wright's inability, here and before the trial judge, to demonstrate prejudice, his claim of reversible misconduct should be rejected.

3. WRIGHT WAS LAWFULLY SENTENCED AS A PERSISTENT OFFENDER.

Finally, Wright contends that his sentence to life imprisonment without parole is unlawful because his status as a persistent offender is an element of one or more of his instant "strike" offenses, and that the fact that he had two prior "strike" convictions was a question that should have been pleaded to and

found proven by the jury, rather than determined by the trial court. Brief of Appellant, at 30-31, 37-38. Wright claims that his constitutional rights to due process, equal protection, and a jury trial were violated as a result.

Consideration by this Court of Wright's challenges to his sentence on the grounds of due process and right to jury are foreclosed by precedent established by the Supreme Court of Washington. See State v. Witherspoon, 180 Wn.2d 875, 891-92, 329 P.3d 888 (2014) (holding that established precedent, which held that Washington's recidivist sentencing scheme was constitutionally valid, was not disturbed by the U.S. Supreme Court's decision in Alleyne v. United States, __ U.S. __, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)). This Court is bound to adhere to the state's highest court, and reject Wright's claims here. See State v. Burkins, 94 Wn. App. 677, 701-02, 973 P.2d 15 (1999).

As to Wright's equal protection claim, identical arguments have been rejected by each division of the Washington Court of Appeals, and petitions for review on this subject have been denied by the state supreme court. See State v. Langstead, 155 Wn. App. 448, 454-57, 228 P.3d 799, rev. denied, 170 Wn.2d 1009 (2010); State v. Witherspoon, 171 Wn. App. 271, 303-05, 286 P.3d 996,

rev. granted on other gds. and aff'd, 180 Wn.2d 875, 329 P.3d 888 (2014); State v. Williams, 156 Wn. App. 482, 496-99, 234 P.3d 1174, rev. denied, 170 Wn.2d 1011 (2010). As this Court observed in Langstead, the legislature may rationally conclude that recidivists whose conduct is inherently culpable enough to incur a felony sanction are reasonably distinguishable from those whose conduct is felonious only if preceded by a prior conviction for the same or similar offense, and that this legislative determination withstands equal protection scrutiny under the rational basis test. See Langstead, 155 Wn. App. at 456-57 (rejecting contention that State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008), requires that fact of prior qualifying convictions is an "element" that must be proved to a jury before a defendant is subject to sentencing as a persistent offender).

Wright has provided no new argument or citation to subsequent authority that would justify reconsideration by this Court of its decision in Langstead, the reasoning of which has been adhered to by its sister courts in this state.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Wright's convictions for first-degree burglary and

first-degree assault, as well as his sentence as a persistent offender.

DATED this 4th day of December, 2015.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: _____
DAVID SEAVER, WSBA# 30390
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Thomas Kummerow, containing a copy of the Brief of Respondent, in STATE V. CLARENCE WRIGHT, Cause No. 72608-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

C Brame
Name

12/7/15
Date

Done in Seattle, Washington