No. 93053-8
COA No. 72608-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLARENCE WRIGHT III,

Petitioner.

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

The Honorable Elizabeth J. Berns

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Clarence Wright III asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Clarence Wright III*, No. 72608-1-I (April 18, 2016). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. 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. Is a significant question of law under the United States or Washington Constitutions involved 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 offered an opinion on the doctor's credibility and asked the doctor to render an opinion on whether Mr. Wright had been lying during his examination. Is a significant question of law under the United States or Washington Constitutions involved where the prosecutor's actions constituted misconduct and as a result, denied Mr. Wright a fair trial?

3. 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. Is a significant question of law under the United

States or Washington Constitutions involved when a judge, not a jury, found by a preponderance of the evidence that Mr. Wright had two prior most serious offenses, thus elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

4. 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?

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. 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. 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. 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.[1]

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.

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[1] 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.

> 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.

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.

The Court of Appeals rejected Mr. Wright's arguments on appeal, finding evidence of the California prior robbery admissible under ER 404(b) and *res gestae*. Decision at 6-8. The Court also concluded the misconduct by the prosecutor involved "a single, isolated reference[,]" and "involved an extremely minor portion of the cross-examination" of Dr. Beaver. Decision at 11-12. Finally, the Court rejected Mr. Wright's challenges to his persistent offender sentence of life imprisonment without the possibility of parole. Decision at 12-13.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

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.**

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).

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).

The Washington and California incidents could not be more dissimilar. The California robbery was of a retail store where Mr. Wright entered the store with a firearm and demanded money. 9/4/2014RP 49. The Washington offenses involved a private residence that Mr. Wright apparently chose at random. Mr. Wright said nothing to the Tillmans and demanded nothing from them.

Contrary to the Court of Appeals conclusion, the California incident was not *res gestae* as it did not occur in the "immediate context within which [the] charged crime took place." *State v. Brown,* 132 Wn.2d 529, 576, 940 P.2d 546 (1997). In addition, the California robbery was not part of a common scheme or plan as, again despite the

[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).

Court of Appeals' conclusion to the contrary, the two events were completely different from one another with the two offenses only sharing the fact that Mr. Wright was involved. The Court of Appeals noted "some differences" which was an understatement - the offenses were completely different.

Finally, the California was not admissible as evidence of 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. Once again, the dissimilarity between the two acts renders the trial court's ruling patently unreasonable.

This Court should accept review and rule that the evidence of the California robbery was not admissible under ER404(b) as it constituted pure propensity evidence.

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

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). 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).

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.

Also, 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.

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 to form the requisite intent for the charged offenses. The prosecutor's comments about the credibility of Dr. Beaver provided the imprimatur of the State claiming that Dr. Beaver was not credible, thus, neither was Mr. Wright's diminished capacity defense. During closing argument, the prosecutor used this question of credibility to the State's advantage. 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.

This Court should accept review, find the prosecutor's misconduct rendered Mr. Wright's trial unfair and reverse and remand for a new trial.

3. 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 v. Washington*, 542 U.S. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

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.

Since the prior convictions were elements of the crime rather than aggravating factors, under *Alleyne, Blakely,* and *Apprendi,* the judicial finding of Mr. Wright's prior convictions and the fact he qualified as a persistent offender violated his right to due process and right to a jury trial.

This Court should accept review, find the trial court erred in making a finding regarding the two prior convictions, and reverse Mr. Wright's sentence.

4. **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.**

Under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt. The 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).

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).

Because the recidivist fact here operated in the precise fashion as in *Roswell*, this Court should hold there is no basis for treating the prior convictions as an "elements" in one instance – with the attendant due process safeguards afforded "elements" of a crime – and as an aggravator in another.

This Court should accept review, find Mr. Wright's right to equal protection was violated at sentencing, and reverse his sentence.

F. CONCLUSION

For the reasons stated, Mr. Wright asks this Court to grant review and reverse his convictions and/or reverse his sentence of life without the possibility of parole.

DATED this 20th day of April 2016.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CLARENCE HERMAN WRIGHT, III, Appellant.	)	No. 72608-1-I (Consolidated with No. 73300-1-I) DIVISION ONE UNPUBLISHED FILED: April 18, 2016

Cox, J. – Following an attempted armed home invasion, a jury found Clarence Wright guilty of burglary in the first degree and two counts of assault in the first degree. The trial court determined that Wright was a persistent offender and sentenced him to life imprisonment without the possibility of parole.

On appeal, we conclude that the trial court did not abuse its discretion in admitting evidence of Wright's recent participation in an uncharged attempted robbery. We also reject Wright's claims that the State committed prejudicial misconduct and that the trial court erred in sentencing him as a persistent offender. Wright's statement of additional grounds raises no meritorious issues. Accordingly, we affirm.

During the early morning hours of February 11, 2013, Jay Tillman was sleeping on a couch in a Tukwila apartment when he was awakened by a knock

at the door. Jay[1] got up to investigate and looked through the peep hole. Believing the person he saw might be an upstairs neighbor, he opened the door slightly. The man outside, later identified as Clarence Wright, immediately thrust a revolver through the opening.

Terrified, Jay grabbed the gun and attempted to block the entrance. During the ensuing struggle, both men held on to the gun. Wright eventually pushed Jay back over a couch. As Jay fell, Wright fired the gun, striking him in the abdomen. Jay continued to hold on to the gun.

Nathanial Tillman, Jay's 20-year-old son, was awakened by his mother's screams and the sounds of gunfire. He came out of his bedroom and saw Jay and Wright struggling with the gun. As Nathanial attempted to help his father by placing Wright in a headlock, Wright shot him in the thigh.

At some point, Jay managed to seize the gun from Wright and fired it, striking Wright in the shoulder. At this point, Wright stumbled back out of the apartment and disappeared into an apartment complex across the street. Wright did not say anything during the incident except "Why did you bite me" when Nathanial bit him in the forehead. None of the apartment's occupants had ever met Wright.

Mary Tillman, Jay's wife, called 911. With the assistance of a K-9 unit, Tukwila police officers arrested Wright a short time later. Officers recovered

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[1] Where necessary for clarity, we use the witnesses' first names.

Wright's gun from the Tillmans' apartment and the gloves that he abandoned during the pursuit.

The State charged Wright with one count of burglary in the first degree, two counts of assault in the first degree, and one count of unlawful possession of a firearm in the first degree. The trial court severed the firearm count for trial.

Shortly after Wright's arrest, Tukwila investigators learned that he was the subject of a California arrest warrant for the attempted robbery of a cell phone store in San Rafael on January 19, 2013. During the incident, an armed man entered the store, pointed a handgun at the employees, and demanded money. The suspect fired the gun once in the general direction of the employees before running off without obtaining any money.

On February 12, 2013, City of San Rafael Police Department Detective Todd Berringer interviewed Wright at the King County Jail. After being advised of his Miranda[2] rights, Wright admitted that he had committed the attempted robbery in San Rafael. He explained that he was trying to get money to visit his daughter in Seattle and to buy her some shoes. Wright said he fired the gun to stop the store employees from fleeing and acknowledged that the gun he used was the same gun he used during the Tukwila incident.

During an interview with Tukwila police officers, Wright said he had been drinking gin all afternoon before going to the Tillmans' apartment. Wright claimed that he did not know why he was at the apartment and could recall only that "he

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

was put in a headlock, and that somebody was punching him and somebody shot him." Notwithstanding his contrary statement to Detective Todd Berringer, he denied having a gun during the Tukwila incident. He also denied having gloves.

At trial, Wright raised a defense of diminished capacity. Dr. Craig Beaver, a clinical psychologist, conducted a forensic neurological evaluation of Wright. Dr. Beaver diagnosed Wright with dementia secondary to a traumatic brain injury that he suffered in September 2012. Dr. Beaver concluded that as a result of brain damage and intoxication, Wright lacked the capacity to form criminal intent during the Tillman incident.

In rebuttal, the State presented the testimony of Dr. Ray Hendrickson, a forensic psychologist. Dr. Hendrickson disputed Dr. Beaver's testimony that Wright's dementia affected his capacity to form intent and that Wright's intoxication was sufficiently severe as to interfere with his ability to function. In Dr. Hendrickson's opinion, Wright's actions during the home invasion, including his flight after being shot and his attempts to hide from the police, reflected deliberate, goal-driven behavior rather than a lack of capacity to form the requisite intent.

The State also introduced two recordings of telephone calls that Wright made in jail while awaiting trial. In one of the recordings, Wright told a woman that future calls might be monitored so that "if I sound a little off just go along with the flow." In another recording, Wright indicated he was planning to assist in his defense by "playing I am crazy."

The jury found Wright guilty as charged. The trial court found Wright was a persistent offender and sentenced him to life imprisonment without the possibility of parole.

ER 404(b)

Over defense objections, the trial court ruled that the State could present evidence of the attempted robbery in California. The court concluded that the evidence was admissible as res gestae, common scheme or plan, and intent under ER 404(b) and that the probative value outweighed the potential for unfair prejudice. Wright argues that the evidence failed to satisfy the requirements of ER 404(b) and merely constituted inadmissible evidence of a propensity to commit crimes.

Under ER 404(b), evidence of prior misconduct is not admissible "to show that it is likely the defendant committed the alleged crime, acted in conformity with the prior bad acts when committing the crime, or had a propensity to commit the crime."[3] Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[4] Before admitting evidence of prior misconduct under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for admitting the evidence; (3) determine the relevance of the evidence to prove an element of

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[3] State v. Wilson, 144 Wn. App. 166, 175, 181 P.3d 887 (2008).
[4] ER 404(b).

the charged crime; and (4) weigh the probative value against its prejudicial effect.[5] We review the trial court's decision to admit or exclude evidence under ER 404(b) for an abuse of discretion.[6]

Prior misconduct may be admissible as res gestae evidence "[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place."[7] If another offense constitutes a "'link in the chain' of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible 'in order that a complete picture be depicted for the jury.'"[8]

Wright asserts that the California attempted robbery was not res gestae evidence because it did not occur within the "immediate context" of the Tukwila offense. But contrary to Wright's assertion, the California incident did not occur two months before the current charge, but rather about three weeks. Wright told Det. Berringer that he tried to rob the cell phone store on January 18, 2013, to obtain money to visit his daughter in Seattle and buy her presents. Under the circumstances, the unsuccessful attempted robbery in San Rafael provided specific contextual information about Wright's presence in the Seattle area and his otherwise unexplained armed invasion of the Tillmans' apartment shortly after arriving in the area. The trial court did not abuse its discretion in admitting the California robbery as res gestae evidence.

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[5] State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012).
[6] State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).
[7] State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995) (citations omitted).
[8] State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (quoting State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)).

We also agree that the trial court did not abuse its discretion in admitting the San Rafael incident as evidence of a common scheme or plan. In order to constitute a common scheme or plan, the evidence of the prior misconduct and the charged crime "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."[9]

Wright barged into both the cell phone store and the Tukwila apartment brandishing a revolver. In both incidents, he was wearing similar clothing, including a hoodie and cap intended to conceal his identity. He also wore a glove on the hand that held the firearm. Wright expressly demanded money in the San Rafael incident, but said nothing about his intentions during the Tukwila incident. But the occupants of the apartment physically confronted Wright almost immediately, requiring him to struggle over possession of the gun. In both incidents, Wright fired the revolver shortly after entry.

Despite some differences, the similarities were sufficient to support a reasonable determination that the incidents were "individual manifestations" of the same plan.[10] Evidence admitted to show a common scheme or plan need not be "distinct from common means of committing the charged crime."[11]

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[9] State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003) (quoting State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)).
[10] Gresham, 173 Wn.2d at 423.
[11] Id.

Finally, even if admission of the attempted robbery was erroneous for purposes of res gestae or common scheme or plan, the trial court did not abuse its discretion in admitting the evidence to prove intent and to rebut Wright's diminished capacity defense. "When the State offers evidence of prior acts 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."[12]

Wright admitted that he had attempted to rob the cell phone store and that he intentionally fired the gun to stop the employees from fleeing. Wright also explained the specific purpose for obtaining money. Evidence of Wright's actions less than one month before the current offense tended to rebut his claim that a September 2012 head injury rendered him incapable of forming criminal intent.[13]

PROSECUTORIAL MISCONDUCT

Wright contends that prosecutorial misconduct during the cross examination of Dr. Beaver, the defense's expert witness on diminished capacity, violated his right to a fair trial. He argues that the deputy prosecutors improperly asked Dr. Beaver whether Wright was "lying" and expressed personal opinions about Wright's credibility and his guilt.

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[12] State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999) (emphasis in original).

[13] See State v. Medrano, 80 Wn. App. 108, 113, 906 P.2d 982 (1995) (as "a matter of logical probability," evidence of a prior criminal offense requiring intent makes it "less likely that [the defendant] could not form the requisite intent for the current burglary").

During cross examination about the thoroughness of his review of Wright's inconsistent statements about the Tillman incident, Dr. Beaver acknowledged that he "could have asked [Wright] more questions," but thought that "things had been covered." The deputy prosecutor then continued:

> 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 just 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.[14]

Defense counsel did not object to the reference to "lying," but later objected on the basis that the deputy prosecutor was "badgering" the witness. The trial court overruled the objection.

On the following day, a different deputy prosecutor questioned Dr. Beaver's expertise to conduct a 1987 workshop on neurological deficits. When Dr. Beaver acknowledged that his presentation also encompassed the effects of drugs and alcohol, the deputy prosecutor commented, "Yeah, I would like to see your class list on that."[15] The trial court overruled defense counsel's objection that the remark was an improper comment on the evidence.

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[14] Report of Proceedings (Sept. 8, 2014) at 139 (emphasis added).
[15] Report of Proceedings (Sept. 9, 2014) at 17.

When the deputy prosecutor asked about similarities between the charged crime and the San Rafael incident, Dr. Beaver stated, "I don't see things that indicate that he was trying to rob someone."[16] The deputy prosecutor replied, "Okay. So that's a difference of opinion that the two of us have, we can work with that."[17] Defense counsel did not object.

Finally, Wright contends that the deputy prosecutor violated a pre-trial ruling by referring to Wright's 2002 conviction for unlawful possession of a firearm.

At the conclusion of Dr. Beaver's testimony, Wright moved for a mistrial. After reviewing the transcripts of the alleged misconduct, the trial court denied the motion. Wright renewed his challenge to the alleged misconduct in a motion for a new trial, which the trial court also denied.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial.[18] When the defendant objects to alleged misconduct or moves for a mistrial, an appellate court accords the trial court deference because it is in the best position to assess potential prejudice.[19] Consequently, we review the trial court's rulings on alleged misconduct for an abuse of discretion and will overturn the court's decisions only if the defendant demonstrates a substantial likelihood that the

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[16] Id. at 30.
[17] Id.
[18] State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).
[19] State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

alleged misconduct affected the verdict.[20] We assess alleged misconduct in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.[21]

On appeal, Wright devotes almost no discussion to the context of the challenged comments. After Dr. Beaver asked whether the deputy prosecutor was saying that Wright was "patently lying," the deputy prosecutor immediately clarified the context:

> 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.[22]

The deputy prosecutor then continued to question Dr. Beaver about the inconsistent interviews Wright gave after his arrest.

The deputy prosecutor's references to a "class list" and a difference of opinion were irrelevant and snide. But contrary to Wright's assertions, the comments did not clearly communicate a comment on the evidence or a personal opinion on credibility. Moreover, in each instance, the deputy prosecutor did not pursue or repeat the comments and immediately moved on to proper questions. Similarly, after briefly mentioning the firearm conviction, the deputy prosecutor questioned Dr. Beaver about the specific facts underlying Wright's 2002 robbery convictions.

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[20] See State v. Lindsay, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014); see also State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002).
[21] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).
[22] Report of Proceedings (Sept. 8, 2014) at 139.

In summary, each of the alleged instances of misconduct involved a single, isolated reference. Several of the comments were too attenuated to clearly convey an improper personal opinion. The deputy prosecutor did not repeat the alleged improper remarks and immediately moved on to proper cross examination. The trial court also instructed the jury that "the lawyers' statements are not evidence."

Viewed in context, the challenged comments involved an extremely minor portion of an extensive cross examination that thoroughly challenged Dr. Beaver's opinion about Wright's capacity to form criminal intent. Under the circumstances, there is no reasonable likelihood that any improper comments affected the jury's assessment of Wright's diminished capacity defense or the outcome of the trial.

PERSISTENT OFFENDER ACCOUNTABILITY ACT (POAA)

Wright contends that the POAA's classification of prior convictions as sentencing factors rather than additional elements of the crime violates his right to equal protection. He argues that there is no rational basis for requiring the State to prove prior convictions to a jury when they are an element of the crime, but allow judges to find some prior convictions by a preponderance of the evidence as "sentencing factors."

This court rejected an essentially identical argument in State v. Langstead:

> We conclude recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is

> felonious only if preceded by a prior conviction for the same or a similar offense. We reject Langstead's equal protection challenge.[23]

Wright has not addressed Langstead or presented any argument warranting reconsideration of our analysis. We therefore reject Wright's equal protection challenge.

Wright also contends that the State had to prove beyond a reasonable doubt his prior strike offenses to a jury before the court could sentence him as a persistent offender. Our supreme court rejected this contention in State v. Witherspoon:

> Accordingly, it is settled law in this state that the procedures of the POAA do not violate federal or state due process. Neither the federal nor state constitution requires that previous strike offenses be proved to a jury. Furthermore, the proper standard of proof for prior convictions is by a preponderance of the evidence.[24]

Witherspoon is binding on this court.[25]

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In his statement of additional grounds for review, Wright asserts (1) the State delayed providing certain unidentified evidence to the defense; (2) the court reporter observed jurors speaking to a State witness; (3) he was called a liar numerous times, and (4) he was not allowed to take his "legal paper work" when he was transported to California.

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[23] 155 Wn. App. 448, 456-57, 228 P.3d 799 (2010).
[24] 180 Wn.2d 875, 893, 329 P.3d 888 (2014).
[25] See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Because several of Wright's allegations involve matters that are outside the record, this court cannot address them on direct appeal.[26] The remaining allegations are too conclusory to permit judicial review.[27]

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Ellington

Becker, J.

[26] State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

[27] See RAP 10.10(c) (appellate court "will not consider a [defendant/appellant's] statement of additional grounds for review if it does not inform the court of the nature and occurrence of [the] alleged errors").

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72608-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: April 20, 2016