SUPREME COURT NO. 93668-4
COA NO. 73047-9-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES BLUFORD,

Petitioner.

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

The Honorable Julia Garratt, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Charles Bluford asks this 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 published decision in State v. Charles Bluford, Court of Appeals No. 73047-9-I (slip op. filed Aug. 29, 2016), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether the court violated Bluford's due process right to a fair trial in joining nine counts for trial because the evidence was not cross-admissible to show identity via modus operandi and the jury could not be expected to compartmentalize the evidence?

D. STATEMENT OF THE CASE

The State charged Bluford with nine counts, which included seven counts of first-degree robbery plus a charge of first-degree rape of one victim and indecent liberties of another victim. CP 11-14. The State initially charged Bluford under three different cause numbers, but moved to join all the counts for trial. CP 379-406. Bluford filed a motion to sever five of the counts from the others. CP 369-77. Argument from both parties covered all counts. 1RP 3-43. The court considered these cross motions at the same hearing and joined all counts for trial. CP 15-18; 1RP

43-52. In joining the offenses, the trial court ruled the crimes were cross admissible for the following reasons:

> Each incident occurred within an approximately two month period. Each incident occurred during hours of darkness. Each incident occurred in the Seattle metro area. Each incident occurred in a residential area. The defendant was a stranger to each victim. In each incident, the victims were alone when an African American male approached with a handgun and gave verbal demands to the victims. The descriptions of the handgun by the victims are similar. Four of the victims gave a description of the vehicle, which matches the vehicle the defendant was later found inside. Two of the three female victims were sexually assaulted during the course of the robberies. Although one of the female victims was not sexually assaulted during the robbery, she ran away at the time of the robbery, thereby limiting the opportunity [for the defendant] to sexually assault her.... Therefore, although none of the incidents are a carbon copy of the others, the incidents are strikingly similar. CP 17.

Additionally, (1) the perpetrator approached the victim as he or she exited a car; and (2) when the victim did not cooperate, the perpetrator forcefully took his or her property. Slip op. at 9.

After hearing evidence of all nine charged crimes, a jury convicted on all but one count. CP 136-44. The court sentenced Bluford to life without the possibility of release as a persistent offender. CP 196, 199. On appeal, Bluford argued the trial court abused its discretion in joining the counts for trial, erred in not giving a lesser offense instruction for the indecent liberties count, and erred in imposing a persistent offender

sentence. The Court of Appeals agreed with the latter two arguments, but affirmed the trial court's joinder decision. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. JOINING NINE COUNTS INVOLVING SEVEN SEPARATE INCIDENTS FOR A SINGLE TRIAL PREJUDICED BLUFORD'S RIGHT TO A FAIR TRIAL.

Review is warranted because this case presents a significant question of constitutional law. RAP 14.3(b)(3). Joinder and severance are covered by court rule and statute. CrR 4.3(a)[1]; CrR 4.4(b)[2] (severance); RCW 10.37.060 (joinder). But the constitutional dimension of the decision should not be overlooked. Joinder that results in a fundamentally unfair trial violates due process. Bean v. Calderon, 163 F.3d 1073, 1084 (9th Cir. 1998) (citing United States v. Lane, 474 U.S. 438, 446 n.8, 106 S. Ct. 725, 730, 88 L. Ed. 2d 814 (1986)); U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. Consideration of the requisite factors shows joinder violated Bluford's right to a fair trial. The evidence was not cross-

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[1] CrR 4.3(a) provides: two or more offenses may be joined when they "(1) Are of the same or similar character, even if not part of a single scheme or plan; or (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan."

[2] CrR 4.4(b) provides, in relevant part: "The court . . . on application of the defendant . . . shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense."

admissible to show identity because the test for showing a signature was unmet. And because the offenses were joined for the purpose of showing identity and the State urged the jury to consider the offenses collectively for this purpose, the jury could not be expected to do the opposite by compartmentalizing the offenses.

This case also presents an issue of substantial public importance. Whether evidence of other crimes is admissible to show identity is a recurring issue. The standard for showing a signature crime is meant to be stringent. State v. Coe, 101 Wn.2d 772, 778, 684 P.2d 668 (1984). But courts have tended to dilute the standard over the years, and the decision on review perpetuates the error. This case gives the Court the opportunity to clarify and reinvigorate the test for showing a unique modus operandi. For this reason, review is warranted under RAP 13.4(b)(4).

a. Four factors are considered in determining whether joinder is unduly prejudicial.

Because joinder and severance are based on the same underlying principle that the defendant must receive a fair trial untainted by undue prejudice, the "pure" legal issue of joinder cannot be decided in a vacuum without considering prejudice. State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017, 978 P.2d 1100 (1999). Thus, "even if joinder is legally permissible, the trial court should

not join offenses if prosecution of all charges in a single trial would prejudice the defendant." Bryant, 89 Wn. App. at 865.

Beginning with this Court's decision in State v. Smith, courts have assessed whether prejudice results from joinder by looking at four factors: (1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) admissibility of the evidence of the other crimes. State v. Smith, 74 Wn.2d 744, 755, 446 P.2d 571 (1968), vacated in part on other grounds, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972); Bryant, 89 Wn. App. at 867-68. The central dispute on appeal involves two of these factors: whether the evidence was cross-admissible and whether the jury could be expected to compartmentalize the evidence based on the instruction to consider each count separately.

b. The evidence of different crimes did not establish a unique signature sufficient to show identity and so would not have been cross-admissible had the charges been separately tried.

The Court of Appeals upheld the trial court's ruling that the offenses were cross-admissible on the basis of showing identity through modus operandi. Slip op. at 9-11. On the contrary, the trial court abused

its discretion because it applied an improper legal standard and the evidence does not meet the signature test for showing identity.

Modus operandi is used to prove identity under ER 404(b). State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). When evidence of other acts is admitted to show identity, the method employed in the commission of crimes must be so unique that proof an accused committed one of the crimes creates a high probability that he also committed the other crimes. Thang, 145 Wn.2d at 643. The modus operandi used to prove identity "must be so unusual and distinctive as to be like a signature." Coe, 101 Wn.2d at 777.

The commonalities identified by the trial court do not meet the stringent test for showing the presence of a signature. These are ordinary incidents of robbery: the robbery occurred during hours of darkness in a residential area, the perpetrator was a stranger to the victim, and the victims were alone when a black male approached with a handgun and made verbal demands.[3] Substantial similarity between crimes is not

[3] See State v. Hernandez, 58 Wn. App. 793, 794 P.2d 1327 (1990) (in prosecution for three robberies, evidence on one charge was inadmissible on other charges under signature theory: "In each case, the robber entered a store, pulled a gun, asked for the money and fled upon receiving it. There is nothing about this method of robbery that suggests it is highly probable that the same robber committed all three crimes"), disapproved on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991); State v. Bythrow, 114 Wn.2d 713, 715-16, 720, 790 P.2d 154 (1990) (no

enough to satisfy the unique modus operandi requirement. State v. DeVincentis, 150 Wn.2d 11, 18-21, 74 P.3d 119 (2003).

The court determined victim descriptions of the handgun were similar. CP 17. But a description of a black or dark gun is so general as to be useless in pegging it to a signature, and descriptions of the gun were not otherwise uniform.[4] The court noted four victims gave a vehicle description that matched the vehicle Bluford was later found in. CP 17. But the make of the car was variously described, and was a common make at that.[5] Only three victims, not four, described a vehicle.[6] Four of the seven victims did not describe any vehicle being involved.

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signature for two robberies; in each robbery two men entered business establishments, a weapon was pulled, money from cash register was demanded, and store workers were told to stay for 10 minutes).

[4] See 11RP 63-64 (Sakounthang describes black or gray handgun as "medium sized"); Ex. 23 at 20 (R.J. describes black gun as "not very big"); 15RP 119 (Ramirez describes black/dark gun as large, and as a 9 mm in 911 call); 13RP 115, 125-26 (Rivera describes black gun as "little" and "small"); 17RP 171; 29RP 22 (R.U. describes black gun as a small .45); 15RP 46 (Cooksey merely says it was handgun).

[5] See 11RP 16, 43, 66 (Sakounthong described a gray or black, late 80's or early 90's four-door Japanese car); 15RP 99-100 (Ramirez described a dark, 1993 to 1995 Honda Civic); 28RP 110, 29RP 27-29 (R.U. described a blue/green or olive/green car, 96' or 97' four door with tinted windows).

[6] At the pre-trial hearing, the State claimed Rivera as the fourth person, and that he saw a black or gray "Civic like car." CP 406; 1RP 20. No testimony was actually admitted to back up that claim. Rivera testified he did not remember seeing any cars before he was approached or after the assailant left. 13RP 138.

While otherwise common features may add up to a signature when combined, dissimilar features of the crimes must be taken into account in determining whether the crimes establish a signature. Thang, 145 Wn.2d at 643, 645. Defense counsel pointed out (1) two victims were struck (R.U. and Ramirez), the others were not; (2) the manner of initiating contact was not the same in all cases, and a ruse was used at the onset of only one robbery (Sakounthong), (3) different words were spoken in demanding money; (4) and the victims were of different age, gender and ethnicity. CP 374-75.

There are other dissimilarities between offenses. Unlike other encounters where the assailant accosted victims in an open street upon arriving at their residential destination, the robbery of R.J. occurred inside a parking garage that could not generally be seen from the road (13RP 76) and the attack on R.U. happened after the man emerged from behind some bushes and pushed her into the garage. 28RP 86-90. The physical and clothing descriptions of the perpetrator were not identical. The offenses occurred in the same region, but in different cities (Seattle, Shoreline, Bellevue, Renton).

The robberies were perpetrated against both men and women. No single gender was targeted. The trial court found two of the three female victims were sexually assaulted during the robberies, while the third ran

away "thereby limiting the opportunity to sexually assault her." CP 17. The implication is that the robber would have sexually assaulted the third woman (Cooksey) if he had more time, but this is speculation. Guessing would have happened had the circumstances been different does not properly make up for the lack of evidence to support a signature. The sexual assaults on the two other women (R.J. and R.U.) are markedly different. R.U. was violently raped. R.J. was at worst groped.

It is always possible to find common features between offenses by making generalizations about different details, ignoring or discounting differences in the details, and then conclude there is something unique about the combination of generalized behaviors. But that does not mean the identified signature meets the stringent legal requirements necessary to show identity through ER 404(b). Dissimilar features of the compared crimes, if any, must be taken into account in determining whether the crimes establish a signature. Thang, 145 Wn.2d at 643, 645. Thang illustrates a defect in the trial court's ruling. The trial court incorrectly applied the rule by not addressing the impact of dissimilarities between the offenses. CP 15-18. The trial court necessarily abused its discretion because it applied the wrong legal standard and based its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Bluford's case compares favorably to other cases where a signature was non-existent even though there were similarities between offenses.[7] Any doubt about admissibility must be resolved in favor of the defendant. Thang, 145 Wn.2d at 643. But neither the trial court nor the Court of Appeals gave Bluford the benefit of any doubt.

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[7] See, e.g., State v. Eastabrook, 58 Wn. App. 805, 814, 795 P.2d 151 (1990) (test of uniqueness not met in rape case where (1) the apartments that were entered were occupied by lone females who had been gone during the late evening or early morning hours; (2) some clothing was disrupted in each apartment; (3) the suspect had similar physical characteristics; (4) the rapist wore a ring and a similar ring was found in the defendant's apartment when searched after the second burglary; (5) the rapist wore a ski mask and the defendant had a ski mask with him when detained as a prowler suspect; (6) the rapist used a knife and a knife was found in the bushes where the prowler had been seen; and (7) the rapist took a distinctive Wonder Woman towel and such a towel was seen in the defendant's apartment); State v. Smith, 106 Wn.2d 772, 778-79, 725 P.2d 951 (1986) (rapist and defendant both wore a leather jacket and gloves when committing the crimes but: (1) of the three burglaries and three rapes, only one rape and one burglary occurred on the same day or in close proximity to one another; (2) in the case of all six crimes, the mode of entry, through a door or window, was not unusual, (3) the items stolen in the burglaries differed somewhat from those taken at the scene of the rapes; (4) the clothing worn by defendant at the time of his arrest for burglary differed from that worn by the rapist; (5) the rapist wore gloves during each of the rapes, whereas defendant did not wear gloves during at least one of the burglaries); Thang, 145 Wn.2d at 645 (shared features of the offenses included (1) both cases involved theft of a purse and jewelry; (2) both victims were elderly; (3) in both cases, the perpetrator remarked "the bitch is dead" and (4) both victims were repeatedly kicked. However, there were also several dissimilarities between the two crimes that prevented the finding of a unique signature: (1) they occurred 18 months apart; (2) they took place in different parts of the state; (3) one victim was kicked three times and the other until she died; (4) entry occurred through a door in one case, through a window in the other; (5) the perpetrators fled in the victim's car in one case, by foot in the other).

The Court of Appeals cited State v. Jenkins, 53 Wn. App. 228, 766 P.2d 499 (1989)[8] and State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984)[9] as support for its holding that the evidence was cross-admissible to show modus operandi. But even the Court of Appeals acknowledged Bluford's case "does have more dissimilarities than Jenkins or Laureano." The test of uniqueness to establish identity is "stringent." Coe, 101 Wn.2d at 778. The decision in Bluford's case represents a watering down of this standard. The Court of Appeals rejected Bluford's argument that the similarities that the trial court identified are common in robberies on the ground that "the individual features do not have to be unique as long as

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[8] In Jenkins: (1) two men broke into several apartment complexes in the same area; (2) in each instance, one acted as a lookout while the other entered a ground floor apartment; (3) each break-in occurred during the morning; (4) a pipe wrench was used to break into each apartment; and (5) a brown Camero vehicle was used to leave each apartment. Jenkins, 53 Wn. App. at 237-30.

[9] In Laureano: "Each incident occurred within an approximately two month period. Each incident occurred during hours of darkness. Each incident occurred in the Seattle metro area. Each incident occurred in a residential area. The defendant was a stranger to each victim. In each incident, the victims were alone when an African American male approached with a handgun and gave verbal demands to the victims. The descriptions of the handgun by the victims are similar. Four of the victims gave a description of the vehicle, which matches the vehicle the defendant was later found inside. Two of the three female victims were sexually assaulted during the course of the robberies. Although one of the female victims was not sexually assaulted during the robbery, she ran away at the time of the robbery, thereby limiting the opportunity [for the defendant] to sexually assault her. . . . Therefore, although none of the incidents are a carbon copy of the others, the incidents are strikingly similar." Laureano, 101 Wn.2d at 765.

they are sufficiently unique in combination." Slip op. 11. Bluford's argument, however, is that the features are not sufficiently unique in combination, and the Court of Appeals does not explain how adding up common features somehow transmogrifies the facts of this case into a signature.

The Court of Appeals and the trial court recited the rule for admitting *modus operandi* evidence, but in practice applied the less onerous test for admission under *common scheme or plan.* A common scheme may be established by evidence that the defendant "committed markedly similar acts of misconduct against similar victims under similar circumstances." State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Admission of common scheme evidence, which is relevant only when the existence of the crime as opposed to identity is at issue, requires "substantial similarity" between the prior acts and the charged crime. DeVincentis, 150 Wn.2d at 21. The common scheme test, however, does not require evidence of "a unique method of committing the crime." Id. at 20-21. Resort to the notion that a bunch of common features add up to a unique signature tends to blur the line between modus operandi evidence and common scheme evidence, and risks eviscerating the test for showing identity when not applied in a rigorous manner. The risk is realized here.

Even if the evidence of different offenses established modus operandi, that still does not mean the evidence of all these crimes is cross-admissible. The Court of Appeals affirmed the trial court's ruling that the evidence was cross-admissible under ER 404(b) for the purpose of showing identity. But merely identifying a proper purpose for admission is not enough to render ER 404(b) evidence admissible: "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). The ER 403 analysis is particularly significant for the two charged sex offenses at issue, as they carried the highest risk of prejudice. Saltarelli, 98 Wn.2d at 364; State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009). The trial court did not consider the unfair prejudice analysis mandated by ER 403 in ruling the evidence was cross-admissible under ER 404(b). CP 15-18. Again, the court necessarily abused its discretion because it applied the wrong legal standard. Quismundo, 164 Wn.2d at 504.

c. The jury could not be expected to compartmentalize the evidence based on the court's instructions and the way in which the case was presented and argued to the jury.

The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by

joinder. State v. Bythrow, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). The trial court instructed the jury that it must "decide each count separately." CP 155. As explained below, that instruction did nothing to guard against prejudice from joining the counts.

First, this instruction did not specifically admonish jurors that they could not consider evidence of one offense as evidence establishing others. Bean, 163 F.3d at 1084. The boilerplate instruction does not actually require the jury to compartmentalize the evidence. CP 155. The jury was also instructed that in deciding whether any proposition has been proved, "you must consider all of the evidence" admitted "that relates to the proposition." CP 147 (Instruction 1). This instruction gives jurors limitless discretion in deciding whether evidence on one count bears on another count.

Second, there is generally "a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." Bean, 163 F.3d at 1084 (quoting United States v. Lewis, 787 F.2d 1318, 1322 (9th Cir. 1986)). Two factors explain the risk: (1) "[i]t is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, than it is to compartmentalize evidence against

separate defendants joined for trial," and (2) studies establish "that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case." Bean, 163 F.3d at 1084 (quoting Lewis, 787 F.2d at 1322).

These concerns resonate with particular force here because the State encouraged the jury to consider the different charges in concert, as reflecting the modus operandi characteristic of Bluford's criminal activities. "[T]he jury could not 'reasonably [have been] expected to compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime . . . when the State's closing argument and the import of several of the instructions it heard urged it to do just the opposite." Bean, 163 F.3d at 1084 (internal quotation marks omitted) (quoting United States v. Johnson, 820 F.2d 1065, 1071 (9th Cir. 1987)). The instruction directing jurors to consider each count separately could not have had any meaningful effect in guarding against prejudice from joinder because the evidence of other crimes was admitted for the purpose of showing identity through the presence of a modus operandi. In closing argument, the State urged the jury to consider the evidence of the different crimes in relation to one another as evidence that the same man committed all of them. 31RP 19-22 ("The commonalities, everything that's the same between each of these crimes, shows the pattern and it

shows that they were all committed by the same person, the Defendant."). In other words, the State, consistent with the trial court's joinder ruling, in effect exhorted the jury *not* to compartmentalize the evidence because doing so would preclude considering the crimes in relation to one another on the issue of identity.

On appeal, Bluford pointed out no limiting instruction prevented the jury from considering evidence of other crimes as propensity evidence. The Court of Appeals said Bluford did not request such an instruction and so the trial court was not required to give one. Slip op. at 6 (citing State v. Russell, 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011)). The Court of Appeals misconstrued the thrust of Bluford's point. Bluford does not argue the trial court erred in failing to give a limiting instruction. Rather, the fact that no limiting instruction was given impacts whether the jury could be expected to properly compartmentalize the evidence of disparate charges such that no prejudice resulted from joining them.

This Court has recognized "[w]hen evidence concerning the other crime is limited or not admissible, our primary concern is whether the jury can reasonably be expected to 'compartmentalize the evidence' so that evidence of one crime does not taint the jury's consideration of another crime. . . . We must insure that the trial court properly instructed the jury on the limited admissibility of evidence." Bythrow, 114 Wn.2d at 721

(quoting Johnson, 820 F.2d at 1071). In Bluford's case, the Court of Appeals determined the evidence was cross-admissible for the limited purpose of showing identity. Yet no instruction was given limiting the jury's consideration of the evidence for that limited purpose in relating the counts to one another. The jury's natural inclination to view the evidence associated with multiple counts as evidence of propensity was given free reign in the absence of such instruction. That speaks to the question of whether the jury could be expected to compartmentalize the evidence so that consideration of one charged crime did not taint its consideration of others.

In Bythrow, the court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence, different witnesses testified as to the different counts, and the issues and defenses were distinct. Id. at 723. On that basis, this Court concluded the jury was likely not influenced by evidence of multiple crimes and refusal to sever was not error. Id.

Unlike in Bythrow, the jury in this case was unlikely to compartmentalize the evidence of the different counts. First, Bluford's trial spanned nearly six weeks, with 19 days of testimony. 11RP-33RP. Moreover, testimony on the different counts was not presented in sequence, with testimony of various witnesses jumping from incident to

incident.[10] Given the length of trial, non-sequential testimony, and no less than nine counts involving seven different victims, the jury was likely to infer Bluford had a criminal disposition.

"Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." Sutherby, 165 Wn.2d at 883. For these reasons, where charges are joined, the jury may find guilt when it otherwise would not. State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

The joined sex offenses deserve special attention. "The joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature." Sutherby, 165 Wn.2d at 884. "In this context there is a

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[10] The following is the sequence of evidence presented during the State's case-in-chief: Sakounthong → car investigation → R.J. → Rivera → Cooksey → R.J. → car stop → Cooksey → R.J. → Ramirez-Aguilar → Rivera → Nguyen → Cooksey → car stop, arrest, purse search → Ramirez-Aguilar → R.J. → R.U. → Rivera → R.U. → Woodard residence search → Sakounthong → Bluford/Brazille residence search → R.U. → Woodard residence search → car search → R.U. → car fingerprint examination → R.U. → R.J. → R.U. → Woodard residence search → Brazille purse search, wallet search → car search → Bluford/Brazille residence search → Woodard testimony → Bluford/Brazille residence search → R.U. → Cooksey → R.U. → Brazille phone contents → Nguyen → Bluford/Brazille residence search → Ramirez-Aguilar → Cooksey → Nguyen → Bluford/Brazille residence search → Ramirez-Aguilar → Nguyen → Cooksey → Ramirez-Aguilar → Nguyen → Cooksey → Bluford/Brazille residence search → R.U. → Bluford/Brazille residence search → GPS, Brazille phone records →R.U. → Brazille phone records → R.U. → Brazille phone.

recognized danger of prejudice to the defendant even if the jury is properly instructed to consider the crimes separately." Id. The unique nature of sex offenses can often lead jurors to disregard the trial court's instructions. Id. at 884, 886-87; Harris, 36 Wn. App. at 750. The Court of Appeals, in rejecting Bluford's challenge, did not acknowledge the particular problems associated with joined sex offenses.

d. This case presents an opportunity to reconsider whether it is appropriate to balance the right to a fair trial against the desire for judicial economy.

Long ago, this Court embraced the proposition that "the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration." Smith, 74 Wn.2d at 755 (quoting Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85, 88 (1964)); accord Bythrow, 114 Wn.2d at 718 ("Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy"). The trial court emphasized the strong concern for judicial economy in making its ruling. 1RP 43-45.

Bluford questions why prejudice is balanced against the concern for judicial economy. Consider this competing proposition: "Courts must not sacrifice constitutional rights on the altar of efficiency." State v.

Madsen, 168 Wn.2d 496, 509, 229 P.3d 714 (2010). Defendants in criminal cases have the due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Improper joinder implicates that due process right. Bean, 163 F.3d at 1084; Lane, 474 U.S. at 446 n.8. If joinder prejudices a defendant's right to a fair trial, that should end the inquiry and reversal should follow. There is no sound reason rooted in constitutional law to require a defendant to show even more prejudice, such that it outweighs the desire for judicial economy, before a new trial is warranted. Review should be granted to clarify this point.

F. CONCLUSION

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

DATED this 29th day of September 2016.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 73047-9-I
Respondent,	)	DIVISION ONE
v.	)	
CHARLES LINNELL BLUFORD,	)	PUBLISHED
Appellant.	)	FILED: August 29, 2016

Cox, J. — Charles Bluford appeals his judgment and sentence, based on eight felony convictions for robbery and other charges. We hold that the trial court did not abuse its discretion when it joined multiple counts against him and refused to sever those counts for trial. But the court erred when it denied his request to instruct the jury on the lesser included offense of fourth-degree assault. Additionally, the State failed to prove that Bluford is a persistent offender under the Persistent Offender Accountability Act (POAA). Thus, the sentence of life without the possibility of release cannot stand. We affirm, in part, reverse, in part, and remand for resentencing.

The State charged Charles Bluford with nine felony counts. These included seven counts of first-degree robbery plus a charge of first-degree rape of one victim and indecent liberties of a separate victim.

The State initially charged Bluford under three different cause numbers, but moved to join all the counts for trial. Bluford moved to sever five of the counts from the others. The court considered these cross motions at the same hearing and joined all counts for trial.

At trial, Bluford requested a lesser included instruction of fourth-degree assault for the charge of indecent liberties. The court denied his request.

The jury found Bluford guilty of eight counts and acquitted him of one count of robbery. The trial court determined that Bluford's prior felony convictions in New Jersey and South Carolina qualified him under the POAA as a persistent offender. It sentenced him to life without the possibility of release.

Bluford appeals.

JOINDER

Bluford argues that the trial court abused its discretion by joining for trial the nine counts against him. Specifically, he argues that the joinder prejudiced him. We hold that the court did not abuse its discretion in joining all counts for trial.

Under RCW 10.37.060,

> When there are several charges against any person, or persons, for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments or informations the whole may be joined in one indictment, or information, in separate counts; and, if two or more indictments are found, or two or more informations filed, in such cases, the court may order such indictments or informations to be consolidated.

Similarly, under CrR 4.3(a),

> Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
>
> > (1) Are of the same or similar character, even if not part of a single scheme or plan; or
> >
> > (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Courts may not join offenses if it would prejudice the defendant.[1] It is the defendant's burden to establish prejudice.[2]

As a threshold matter, the State argues that we should abandon and disavow the reasoning of this court's decision in State v. Bryant.[3] We decline to do so.

There, this court considered whether joinder of bail jumping and second-degree robbery counts was proper.[4] The trial court denied Bryant's motion to sever the two counts that the State had alleged in an amended information.[5] Because Bryant failed to renew his motion to sever during trial, this court held that he failed to preserve the issue for review.[6]

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[1] State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998).

[2] State v. Bythrow, 114 Wn.2d 713, 720, 790 P.2d 154 (1990).

[3] 89 Wn. App. 857, 950 P.2d 1004 (1998).

[4] Id. at 862.

[5] Id. at 864.

[6] Id.

Nevertheless, this court considered both joinder and severance. This court did so because both rules "are based on the same underlying principle, that the defendant receive a fair trial untainted by undue prejudice."[7] In reaching this conclusion, this court acknowledged that the federal courts maintain a distinction between the two.[8]

We see no compelling reason in this case to depart from the approach we took in Bryant. Here, Bluford also failed to renew his severance motion following the pretrial denial of that motion. Thus, he technically failed to preserve for review the issue of severance.

Nevertheless, we note that the trial court considered and decided the cross motions for joinder and severance at the same hearing. The State offers no practical assistance on how or why we should separate the two issues for purposes of our review of the trial court's decision at that hearing to grant joinder and deny severance.

We also note that the state supreme court has repeatedly stated that joinder should not prejudice a defendant.[9] A Division Two opinion on which the State relies here states that the supreme court "has blurred the distinction between joinder and severance so carefully drawn in federal law by referring to it

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[7] Id. at 865.

[8] Id.

[9] State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747 (1994); State v. Long, 65 Wn.2d 303, 319, 396 P.2d 990 (1964).

as a broad rule."[10] We will leave to the supreme court to decide whether it wishes to follow the federal approach or continue a more flexible approach to this question, as indicated in the jurisprudence.

Accordingly, under Bryant, we first determine whether joinder in this case meets the criteria of the rule and statute. We then consider whether actual prejudice precludes joinder.

Joinder of the counts was proper under CrR 4.3 and RCW 10.37.060. The charges against Bluford were based on a series of acts connected together. And Bluford does not dispute that joinder was proper under the rule and statute.

Accordingly, the next question is whether Bluford can establish that the joinder prejudiced him.

We expansively construe the joinder rule to promote the public policy goal of conserving judicial resources.[11] Joinder is appropriate unless it is so "manifestly prejudicial" that it outweighs the need for judicial economy.[12]

Four factors guide the determination whether prejudice results from joinder: "(1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court's

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[10] State v. Wilson, 71 Wn. App. 880, 886, 863 P.2d 116 (1993), rev'd in part, 125 Wn.2d 212, 883 P.2d 320 (1994).

[11] Bryant, 89 Wn. App. at 864.

[12] Bythrow, 114 Wn.2d at 718.

instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime[s]."[13]

Strength of the Evidence

Here, the trial court determined that the strength of the State's evidence for each count was equivalently strong. Bluford disagrees, pointing out that two of the victims identified Bluford while the others did not. But while these two were the only victims to identify Bluford, they were also the only victims whose property was not found in the possession of Bluford's associate. Thus, while the evidence for each count was different, the court did not abuse its discretion by determining that the evidence was equivalently strong.

Clarity of Defenses to Each Count

Bluford asserted a general denial for each count—he argued that someone else committed the crimes. Thus, he could not have been prejudiced by inconsistent defenses—his defenses were all the same.

Instruction to Consider Evidence of Each Count Separately

The court determined that the jury could be instructed to consider the evidence for each count separately. Bluford argues that the court's instructions to the jury at the end of the case did not instruct the jury that it could not consider the evidence of other crimes as propensity evidence. But Bluford failed to request such an instruction. And the trial court is not required to give such an instruction if the defendant fails to request one.[14]

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[13] State v. Cotten, 75 Wn. App. 669, 687, 879 P.2d 971 (1994).

[14] State v. Russell, 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011); ER 105.

At the time of the court's pretrial ruling, the court properly identified that such a limiting instruction could be given. Additionally, assuming that the lack of such an instruction weighs towards severance, this is only one factor to consider.

Cross Admissibility of Evidence

The court determined that the evidence of each count would be cross admissible for the other counts. We hold that the court properly did so for the purpose of showing modus operandi.

ER 404(b) prohibits introducing evidence of other bad acts as propensity evidence. But such evidence is admissible for other purposes, such as proof of motive, plan, or identity.[15]

We review for abuse of discretion decisions to admit evidence under ER 404(b).[16]

Under the modus operandi exception, evidence of other bad acts is admissible to show identity "if the method employed in the commission of [the] crimes is so unique that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged."[17] "The modus operandi 'must be so unusual and distinctive as to be like a signature.'"[18]

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[15] State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

[16] State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

[17] Foxhoven, 161 Wn.2d at 176 (internal quotation marks omitted) (quoting Thang, 145 Wn.2d at 643).

[18] Id. (internal quotation marks omitted) (quoting State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984)).

Modus operandi requires unique features.[19] But features that are not individually unique can be sufficiently unique in combination.[20] "The question for the court to answer is whether all of these shared features, when combined, are so unusual and distinctive as to be signature-like."[21]

For example, in State v. Jenkins, two men broke into several apartment complexes in the same area.[22] In each instance, one acted as a lookout while the other entered a ground floor apartment.[23] Additionally, each break-in occurred during the morning, a pipe wrench was used to break into each apartment, and a brown Camero vehicle was used to leave.[24] This combination was unique enough to affirm the trial court's ruling that the evidence of the other break-ins was admissible as modus operandi evidence.[25]

Similarly, in State v. Laureano, the supreme court upheld admission of evidence as a modus operandi after the trial court determined that there were several similarities between two robberies, including:

> (1) that they occurred only approximately three weeks apart; (2) that they both involved the forcible entry of family residences; (3) that both crimes occurred after dark; (4) that both crimes involved three perpetrators, although not the same three in each instance;

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[19] Id.

[20] Thang, 145 Wn.2d at 644.

[21] Id. at 645.

[22] 53 Wn. App. 228, 237, 766 P.2d 499 (1989).

[23] Id.

[24] Id. at 229-30, 237.

[25] Id. at 237.

> (5) that both crimes involved the presence of firearms by each of the persons entering the residence; (6) that in both cases one of the perpetrators was armed with a [20 gauge, 6 shot] shotgun, and said shotgun was used in a similar manner in each crime; (7) that both crimes involved perpetrators dressed in Army fatigues; and that the above list of similarities is illustrative in nature but is not exhaustive[.][26]

In Bluford's case, the trial court determined that the crimes were cross admissible for the following reasons:

> Each incident occurred within an approximately two month period. Each incident occurred during hours of darkness. Each incident occurred in the Seattle metro area. Each incident occurred in a residential area. The defendant was a stranger to each victim. In each incident, the victims were alone when an African American male approached with a handgun and gave verbal demands to the victims. The descriptions of the handgun by the victims are similar. Four of the victims gave a description of the vehicle, which matches the vehicle the defendant was later found inside. Two of the three female victims were sexually assaulted during the course of the robberies. Although one of the female victims was not sexually assaulted during the robbery, she ran away at the time of the robbery, thereby limiting the opportunity [for the defendant] to sexually assault her . . . . Therefore, although none of the incidents are a carbon copy of the others, the incidents are strikingly similar.[27]

Additionally, in each case the perpetrator approached the victim as he or she exited a car. And when the victim did not cooperate, the perpetrator forcefully took his or her property or assaulted the victim.

The trial court did not abuse its discretion when it determined that these similarities were sufficient to admit the evidence of other crimes as modus

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[26] 101 Wn.2d 745, 765, 682 P.2d 889 (1984) (second alteration in original).

[27] Clerk's Papers at 17.

operandi evidence. The trial court based its decision on appropriate considerations. "[G]eographical proximity and commission of the crimes within a short time frame" are appropriate factors to consider.[28]

This case resembles Jenkins and Laureano. As in Laureano, all crimes occurred after dark and involved multiple perpetrators and firearms.[29] Additionally, evidence suggested that one perpetrator was armed with the same gun in all crimes, and that gun was used in a similar manner in each crime. And as in Jenkins, there was evidence that the perpetrators used the same car in multiple crimes.[30]

This case does have more dissimilarities than Jenkins or Laureano. Many features were present in some, but not all, crimes. But "the existence of some dissimilarities in the crimes is not dispositive."[31] One or two characteristics may be missing from a given crime if the remaining similarities still suggest a signature.[32] And a higher number of crimes compensates for some dissimilarities.[33]

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[28] Thang, 145 Wn.2d at 643.

[29] 101 Wn.2d at 765.

[30] 53 Wn. App. at 237.

[31] In re Det. of Coe, 175 Wn.2d 482, 498-99, 286 P.3d 29 (2012).

[32] Id.

[33] Id. at 500.

The trial court did not abuse its discretion when it determined that the evidence of other crimes was cross admissible as modus operandi evidence.

Bluford relies on State v. Thang[34] to argue that his crimes are not similar enough to qualify as modus operandi evidence. But in that case the trial court determined that the crimes were not distinctive enough.[35] Thus, that case is not helpful here, where the trial court used its discretion to determine that the other crimes were admissible as modus operandi evidence.

Bluford also argues that the similarities that the trial court identified are common in robberies. But the individual features do not have to be unique as long as they are sufficiently unique in combination.[36]

Bluford also identifies several dissimilarities among the crimes. But as stated earlier, this is not dispositive, and not every feature needs to be present in every crime.

Accordingly, the court did not abuse its discretion when it determined that the evidence was cross admissible to establish a modus operandi. And, weighing the four relevant factors, the court did not abuse its discretion when it determined that joinder would not prejudice Bluford.

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[34] 145 Wn.2d 630, 41 P.3d 1159 (2002).

[35] Id. at 645.

[36] Id. at 644.

LESSER INCLUDED OFFENSE

Bluford argues that the court erred by denying his request for a lesser included offense instruction. We agree.

Instructing juries on lesser included offenses "is crucial to the integrity of our criminal justice system."[37] Consequently, courts "err on the side of instructing juries on lesser included offenses."[38] Courts should instruct the jury about a lesser included offense if the jury could find that the defendant committed only the lesser included offense.[39]

We analyze whether a defendant is entitled to a lesser included offense instruction under the test announced in State v. Workman.[40] Under this test, the defendant is entitled to an instruction when "(1) each of the elements of the lesser offense is a necessary element of the charged offense and (2) the evidence in the case supports an inference that the lesser crime was committed."[41]

Here, there is no dispute that the factual prong is satisfied. The question is whether the legal prong of the Workman test is met. We review de novo whether the legal prong is met.[42]

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[37] State v. Henderson, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015).

[38] Id.

[39] Id.

[40] 90 Wn.2d 443, 584 P.2d 382 (1978).

[41] Henderson, 182 Wn.2d at 742.

[42] State v. Condon, 182 Wn.2d 307, 316, 343 P.3d 357 (2015).

The State charged Bluford with one count of indecent liberties. This was in connection with the robbery of R.J.

Indecent liberties requires that a person "***knowingly*** cause[] another person [who is not his or her spouse] to have sexual contact with him or her or another . . . [b]y forcible compulsion."[43] Accordingly, this crime requires knowledge as the mental state.

Bluford argued that he was entitled to a lesser included offense instruction on fourth-degree assault. Fourth-degree assault is an assault not amounting to first, second, or third-degree assault.[44] Because the statute does not define the term "assault," Washington uses the common law definition.[45] "For purposes of this case, the definition of assault that applies is an unlawful touching with criminal intent."[46] Thus, fourth-degree assault requires intent as the mental state.

Here, the trial court ruled that assault is not a lesser included offense because it requires a higher mental state than indecent liberties. The court relied on State v. Thomas,[47] an opinion from Division Three. Although Thomas so holds, a subsequent supreme court case shows that Thomas was wrongly decided.[48]

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[43] RCW 9A.44.100(1)(a) (emphasis added).

[44] RCW 9A.36.041(1).

[45] State v. Stevens, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006).

[46] Id. at 311.

[47] 98 Wn. App. 422, 989 P.2d 612 (1999).

[48] Stevens, 158 Wn.2d at 310-12.

In State v. Stevens, the supreme court decided whether fourth-degree assault was a lesser included offense of child molestation.[49] Child molestation does not explicitly include an intent requirement.[50] But "sexual contact" between the defendant and the victim is one element.[51]

The legislature has defined "[s]exual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire."[52] Thus, the State must prove that the defendant acted with a sexual purpose.[53] The Stevens court held that this purpose requirement meant that fourth-degree assault did not require a higher mental state and was a lesser included offense of child molestation.[54]

The same reasoning applies here. Indecent liberties also requires "sexual contact."[55] And the same definition of "sexual contact" applies to both indecent liberties and child molestation.[56] Thus, the State must prove that the defendant

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[49] 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006).

[50] RCW 9A.44.086.

[51] Id.

[52] RCW 9A.44.010(2).

[53] Stevens, 158 Wn.2d at 312.

[54] Id. at 311.

[55] RCW 9A.44.100(1).

[56] RCW 9A.44.010.

acted with a sexual purpose. Accordingly, fourth-degree assault does not require a higher mental state than indecent liberties.

Thus, the Workman test's legal prong is met here. Consequently, Bluford was entitled to a lesser included offense instruction on fourth-degree assault.

Failure to instruct the jury on a lesser included offense when warranted requires reversal.[57] Thus, we must reverse Bluford's conviction for indecent liberties.

The State does not address the merits of this argument. Instead, it argues that Bluford may not raise this issue under either the invited error doctrine or RAP 2.5(a). Neither reason applies, and we reject the State's procedural arguments.

Bluford submitted lesser included offense instructions to the trial court. In a colloquy with the court, Bluford acknowledged Thomas's holding on the claimed difference in mental state. But Bluford maintained that a lesser included offense instruction was still appropriate. This was sufficient to preserve the issue for our review.

Despite the State's argument to the contrary, Bluford did not invite the trial court's error. For the invited error doctrine to apply, "[t]he defendant must materially contribute to the error challenged on appeal by engaging in some type

[57] Condon, 182 Wn.2d at 326.

of affirmative action through which he knowingly and voluntarily sets up the error."[58] The State has the burden to prove invited error.[59]

Here, Bluford maintained that a lesser included offense instruction was appropriate. Thus, he did not "knowingly and voluntarily" set up any error.

RAP 2.5(a) also does not prevent Bluford from arguing this issue on appeal. Under this rule, this court generally does not review issues first raised on appeal. Because Bluford preserved the issue for review, RAP 2.5(a) does not apply.

POAA

Bluford argues that the State failed to prove that he is a persistent offender. Because we agree, we reverse the sentence of life without the possibility of release and remand for resentencing.

At sentencing, the trial court determined that Bluford's prior convictions in South Carolina and New Jersey were comparable to robbery in Washington, a "most serious offense" under the POAA. The court sentenced him to "confinement for life without the possibility of release" as a "persistent offender."

We review de novo whether an out-of-state conviction is comparable to a Washington crime.[60] To determine comparability, "we first consider if the elements of the foreign offense are substantially similar to the Washington

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[58] State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014).

[59] Id.

[60] State v. Sublett, 176 Wn.2d 58, 87, 292 P.3d 715 (2012).

counterpart. If so, the inquiry ends."[61] In this analysis, we look at the statutes in effect at the time the out-of-state crime was committed.[62]

If the elements are not substantially similar,

> the sentencing court can, in some cases, look at portions of the record of the prior proceeding to see if the conduct of which the defendant was convicted was identical to what is required for a comparable Washington conviction; ***but the portion of the foreign record that the Washington court can consider is very limited.*** The sentencing court can look at the charging instrument from the foreign proceeding, but it cannot consider "facts and allegations contained in [the] record of prior proceedings, if not directly related to the elements." This limitation is compelled by not just statutory interpretation but also constitutional concerns. . . . Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic.[63]

Under RCW 9.94A.030(38), a persistent offender:

> is an offender who: (a)(i) Has been ***convicted in this state*** of any felony considered ***a most serious offense***; and (ii) ***Has***, before the commission of the offense under (a) of this subsection, ***been convicted as an offender on at least two separate occasions,*** whether in this state or ***elsewhere, of felonies that under the laws of this state would be considered most serious offenses*** . . . provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.[64]

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[61] Id.

[62] In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

[63] State v. Jones, 183 Wn.2d 327, 345-46, 352 P.3d 776 (2015) (emphasis added) (alteration in original) (citations omitted) (quoting State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999)).

[64] (Emphasis added.)

Here, Bluford was convicted in this state of robbery, a most serious offense for purposes of this statute.[65] The question is whether the State proved that his South Carolina and New Jersey felony convictions fulfill the statutory requirements for at least two prior most serious offenses.

New Jersey

Bluford pleaded guilty to second-degree robbery in New Jersey. He argues that the State failed to prove that this offense is comparable to Washington's robbery statute. We agree.

New Jersey's robbery statute is not legally comparable to Washington's robbery statute. In Washington:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.[66]

In contrast, in New Jersey:

> A person is guilty of robbery if, in the course of committing a theft, he: (1) Inflicts bodily injury or uses force upon another; or (2) Threatens another with or purposely puts him in fear of immediate bodily injury; ***or (3) Commits or threatens immediately to commit any crime of the first or second degree.***[67]

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[65] RCW 9.94A.030(33).

[66] Former RCW 9A.56.190 (1975).

[67] N.J. Stat. § 2C:15-1 (emphasis added).

This statute's third prong does not require the use of force or threatened force. Thus, New Jersey's robbery statute is broader than Washington's.

The New Jersey judgment and sentence for Bluford does not specify under which prong he pleaded guilty. It merely lists the entire statute, N.J. Stat. § 2C:15-1, as the basis for the conviction. So, there is the possibility that he pleaded guilty to the third prong of the statute.

Likewise, the State did not produce the information for the charge to which Bluford pleaded guilty. So, there is no basis to exclude the possibility that he could have pleaded guilty to the third prong of the statute.

The next question is whether the crimes are factually comparable. There is insufficient proof of this requirement.

There is no evidence in this record of any facts that Bluford either admitted or stipulated to, or that were proven beyond a reasonable doubt. Accordingly, there is no basis in this record to make a factual comparison.

The State argues that it proved Bluford's conviction was legally comparable to a Washington robbery conviction. It relies on two matters in the record for this argument.

First, it argues that Bluford was initially charged with first-degree robbery under the second prong of the statute. New Jersey initially indicted Bluford for first-degree robbery for "threaten[ing] immediate bodily injury . . . [or] use of a deadly weapon." Threatening bodily injury corresponds with the second prong of

the statute, while threatening use of a deadly weapon corresponds with the elevation of the crime to the first degree.[68]

The State argues that the lack of an amended information for second-degree robbery permits this court to infer that Bluford was charged with and pleaded guilty to second-degree robbery under the same prong he was charged with for first-degree robbery. It argues, "If Bluford had pled guilty under a different prong than the one set out in the original charging document, presumably an amended charging document would have been necessary. . . ."

We are not persuaded by this untenable presumption. The State cites no authority for this argument. For that reason alone, we could reject it.

In any event, we decline to speculate on whether an amended information was required in New Jersey. The fact is that none is in the record before us. That is a failure of proof of a vital piece of information to determine whether Bluford is a persistent offender for sentencing purposes.

The State also argues that the judgment's description of facts establishes that Bluford pleaded guilty to the second prong. This argument falls short of the required proof.

The State concedes that this description of facts cannot be used for a factual comparability analysis. They are neither admitted to nor proven beyond a reasonable doubt. Why they should be used in this circumstance is not convincingly explained.

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[68] Id.

The State argues that it "is aware of no authority holding that [this description of facts] may not be considered as circumstantial evidence of the prong under which the New Jersey court accepted Bluford's guilty plea." We are unaware of any authority that would permit this court or any court to use such facts when making a comparability determination.

South Carolina

We next consider the South Carolina convictions to determine whether the State has met its burden of proof in this case.

On August 12, 1998, Bluford pleaded guilty to two counts of armed robbery in South Carolina. To the extent these two felonies should be considered most serious offenses in Washington, either of them may be considered, but not both. That is because the plain words of RCW 9.94A.030(38)(ii) require prior qualifying convictions to occur "on at least two separate occasions." These South Carolina convictions were both on the same day, August 12, 1998, the date he pleaded guilty to the two counts of armed robbery. Thus, they were not convictions on two separate occasions. Accordingly, only one of Bluford's two South Carolina convictions may be considered as a most serious offense in this analysis.

Because only one of the two South Carolina convictions may be considered, and the State has failed in its burden to show that the New Jersey conviction is comparable, we need not address further the comparability of either South Carolina conviction. That is because doing so would be insufficient to

show that Bluford had two prior qualifying convictions. Accordingly, we do not further address the comparability of either South Carolina conviction.

In sum, on this record, there is a failure of proof to show that Bluford is a persistent offender. The sentence of life without the possibility of release is not warranted. We must reverse the sentence and remand for resentencing.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Bluford's Statement of Additional Grounds for Review does not raise any meritorious claims.

In his first argument, he appears to argue that one of the victims for two of the charged crimes was allegedly unable to identify him in a photo montage. But, given the evidence at trial, this apparent challenge to the sufficiency of the evidence is untenable.

Bluford's second argument is that police officers violated the Fourth Amendment and article I, section 7 of the state constitution when they searched his home. But he concedes that the police had a valid warrant. Accordingly, this argument is also untenable.

For these reasons, we reject his request for relief based on these additional arguments.

We affirm Bluford's convictions for rape and six counts of first-degree robbery. We reverse Bluford's conviction for indecent liberties. We vacate Bluford's sentence of life without the possibility of release and remand for resentencing.

COX, J.

WE CONCUR:

Dwyer, J.

Becker, J.

NIELSEN, BROMAN & KOCH, PLLC

September 28, 2016 - 1:24 PM

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