

FILED
Nov 06, 2015
Court of Appeals
Division I
State of Washington

COA NO. 73047-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES BLUFORD,

Appellant.

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

The Honorable Julia Garratt, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in granting the State's motion to join nine counts for trial. CP 15-18.

2. The court erred in failing to instruct the jury on fourth degree assault as a lesser included offense to indecent liberties.

3. The court erred in concluding appellant's out-of-state convictions for robbery were comparable to the Washington offense of robbery and qualified as a "most serious offense" under the three strikes law.

Issues Pertaining to Assignments of Error

1. Whether the court abused its discretion in joining nine counts (seven robberies and two sex offenses) for trial because consideration of the requisite factors showed prejudice outweighed the desire for judicial economy?

2. Whether the court erred in refusing to give instruction on fourth degree assault as a lesser offense of indecent liberties where the legal and factual prongs of the test for giving such instruction were met?

3. Whether the court erred in concluding appellant's prior South Carolina and Jersey robbery convictions were comparable to the Washington offense of robbery because the foreign offenses are broader and the record is insufficient to show factual comparability?

B. STATEMENT OF THE CASE

1. Charges

The State charged Charles Bluford as follows: first degree robbery against Justin Sakounthong (count 1); first degree robbery against R.J. (count 2); indecent liberties against R.J. (count 3); (4) first degree robbery against Victor Ramirez Aguilar (count 4); first degree robbery against Elvis Rivera (count 5); first degree robbery against R.U. (count 6); first degree rape against R.U. (count 7); first degree robbery against Jennifer Cooksey (count 8); and first degree robbery against Tri Nguyen (count 9). CP 11-14.

2. Description of Events

• Count 1:

After 11 p.m. on January 22, 2012, Justin Sakounthong parked his truck near his girlfriend's house in North Seattle. 11RP¹ 39-40, 45-46. As he got out, a man approached, falsely claiming Sakounthong sideswiped

¹ The verbatim report of proceedings is referenced as follows: 1RP - 6/23/14; 2RP - 8/14/14; 3RP - 8/21/14; 4RP - 8/25/14; 5RP - 8/26/14; 6RP - 8/27/14; 7RP - five consecutively paginated volumes consisting of jury selection for 8/28/14, 9/2/14, 9/3/14, 9/4/14, 9/8/14; 8RP - 9/2/14; 9RP - 9/4/14; 10RP - 9/9/14; 11RP - 9/10/14; 12RP - 9/11/14; 13RP - 9/16/14; 14RP - 9/17/14; 15RP - 9/18/14; 16RP - 9/22/14; 17RP - 9/23/14; 18RP - 9/24/14; 19RP - 9/29/14; 20RP - 10/1/14; 21RP - 10/2/14; 22RP - 10/6/14; 23RP - 10/7/14; 24RP - 10/8/14; 25RP - 10/9/14; 26RP - 10/13/14; 27RP - 10/14/14; 28RP - 10/15/14; 29RP - 10/16/14; 30RP - 10/21/14; 31RP - 10/22/14; 32RP - 10/23/14; 33RP - 10/24/14; 34RP - 1/21/15.

his car. 11RP 40. The man pulled out a gun and demanded money. 11RP 40, 63-64. Sakounthong turned over his wallet, which contained money in a red envelope that he received for Chinese New Year. 11RP 27, 41, 57, 70-71. The man demanded more money and patted him down. 11RP 41, 52-53, 77-78. He grabbed Sakounthong's keys from his pocket and said "turn around and run, get out of here." 11RP 41-42. The man ran off, throwing the keys down. 11RP 41-42. A gray or black, late 80's or early 90's four-door Japanese car sped off. 11RP 16, 43, 66. Assailant description: black male, 28-40, 5' 6", 135-150 pounds, mustache, bald, wearing a black and gray letterman style jacket, tan construction boots, and a black zip-up hooded sweatshirt. 11RP 16, 60, 79.

- Counts 2 and 3:

At about 2 a.m. on January 26, 2012, R.J. (R.A.) drove her car into her Bellevue apartment building's underground parking garage. Ex. 23 at 8-13.² As she opened the car door, a man pulled on the door and then her purse. Id. at 13. The man pressed a gun to her head and said "Give me your purse or I'll shoot you." Id. at 13, 19. He took her purse and then asked if she had any more money or anything else on her. Id. at 14, 20. R.J. told him she didn't. Id. at 14. He patted down about her body over

² Ex. 23 is the redacted transcript of the video deposition admitted into evidence as testimony. 12RP 144-45; 30RP 97.

her clothes and located her cell phone, which he took. Id. at 14, 21-22. He asked if she had any more money. Id. at 14. She said no. Id. He then patted her down some more, including under her bra and down to her crotch area under her panties. Id. at 14, 22-24. He left when he found nothing more. Id. at 14. He did not take her car keys. Id. at 28. At the time he left, a car was driving into the garage. Id. at 14.

The man wore a hooded jacket; the hood had fur trim and was a different color.³ Id. at 31-33. She provided this description to a responding officer: black male, 6' tall, 30's, 180 pounds, average build, no facial hair, wearing a black down jacket, a fur-trimmed hat, black pants and black gloves. 12RP 90, 104-05. In her deposition testimony, R.J. said the man had a "slender" build. Ex. 23 at 44-45. He also had a "bit of an accent," but not a foreign accent. Id. at 32, 45.

- Count 4:

Around midnight on February 21, 2012, Victor Ramirez-Aguilar arrived home at his apartment complex in Renton. 15RP 95, 100. He noticed a dark, 1993 to 1995 Honda Civic following him before he arrived. 15RP 99-100. After Ramirez parked and started walking away, a man from the Honda ran towards him and asked for the time. 15RP 102-03.

³ Video of a man walking through the parking area shows him wearing a jacket with fur-lined hood. 13RP 62-64; Ex. 14 (2:26:53-58).

Then he pulled a gun and asked where Ramirez's wallet was. 15RP 103-04, 119, 129. Ramirez asked if he was serious. 15RP 105. The man hit him on the head with the gun. 15RP 105-06, 109. He then took his wallet and went through his pockets. 15RP 109-12. He directed Ramirez to lie down and kicked him in the stomach. 15RP 111. He took Ramirez's keys and threw them as he ran off. 15RP 111. He got into the Honda, which drove away. 15RP 113. The driver was female. 15RP 121. Ramirez described the man as a black male, approximately 5'8", 160 pounds, wearing a small-billed cap and black vest with large pockets. 16RP 89, 104. Ramirez testified he did not notice any facial hair, while the responding officer testified that Ramirez's description at the scene included a goatee. 15RP 117; 16RP 89.

- Count 5:

Around 8 p.m. on March 2, 2012, Elvis Rivera returned to his Renton apartment and parked his car. 13RP 112-13. As he opened the car door to get out, a man put a gun to his neck and demanded his wallet. 13RP 112, 114-16, 125. Rivera complied. 13RP 117. The man searched Rivera's pockets, took his phone and walked away. 13RP 116-17, 119. Assailant description: black male, 40-50 years old, wearing a black jacket and black jeans, with no facial hair. 13RP 107-08.

- Counts 6 and 7:

Around 10 p.m. on March 10, 2012, R.U. parked in front of her garage at her house in Shoreline. 28RP 80-83; 29RP 30. After she got out, she heard someone say "I'm sorry, ma'am." 28RP 83, 85. A man approached from behind a tree. 28RP 86-87. Holding a gun, he poked her in the ribs, pushing her towards the garage. 17RP 171, 173; 28RP 88-90; 29RP 22.

Once inside, the man took her rings and purse. 28RP 90-91; 29RP 34-35. He pulled down her pants while she struggled to keep them up. 28RP 91-94. He hit her on the thigh with the gun, hit her face with the gun, pulled her hair, and pushed her head forward into the wall. 28RP 94-95, 97-98; 29RP 32-34. In an attempt to dissuade the man from raping her, she said she had AIDS. 28RP 98. The man took out a condom but did not put it on. 28RP 99-101; 29RP 14. He digitally penetrated her vagina. 28RP 101-02. The man then grabbed R.U. by her hair and forced her to engage in fellatio. 28RP 102-05.

R.U. noticed a car arrive and park nearby. 28RP 106, 109. She heard a male and female talking inside. 28RP 106-08. The female shouted something like "hey, that's enough, let's go." 28RP 102, 108. The man pushed R.U. to the ground and ran off with her purse. 28RP 110-12.

R.U. described the car as a blue/green or olive/green car, 96' or 97' four door with tinted windows. 28RP 110, 29RP 27-29.⁴ Assailant description: dark skinned male, 35-45 years old, 5'8", stockier, heavy build, 200 pounds, stubble but no beard, wearing a beanie style cap and a leather, letterman-style jacket (sleeves of different color than rest of jacket and emblem on left breast).⁵ 17RP 168-69, 181. R.U., described seeing a red badge on the jacket, similar to a Harley Davidson emblem. 29RP 11, 15-20, 44. R.U. told responding officers that the man had a distinct Jamaican accent. 17RP 147, 173, 182. She knew it was a Jamaican accent because she worked on cruise ships for five years. 25RP 109; 29RP 6-7.

- Count 8:

On March 14, 2012 shortly before 1 a.m., Jennifer Cooksey parked in her designated space at her apartment building in Renton. 15RP 38-41. Seeing a man standing nearby, she waited until he walked away. 15RP 39, 43. As she got out of her car, the same man approached, revealed a gun and said "give me your purse." 15RP 39, 44-46, 64-65. Cooksey started screaming. 15RP 47. The man took the keys out of her hand, grabbed her

⁴ Police dispatch relayed a two door, olive green sports car. 17RP 121, 183.

⁵ R.U.'s description of the man at trial: black male, 35-37 years old, a little chubby, a little bit of facial hair on the sides of his head, little bit of a moustache, short hair, wearing a black knit cap, and black/gray denim pants. 28RP 103; 29RP 5-9, 11, 21, 54, 61-62.

purse and coat from the car seat, and fled. 15RP 47. Cooksey gave this description to the responding officer: black male, in his 30's, medium build, around 5'6", wearing dark clothing. 16RP 26, 33. She described him at trial as thin, shorter than 6', no facial hair, wearing a knit cap. 15RP 52, 57, 68-69.

- Count 9:

On March 14, 2012 around 9 p.m., Tri Nguyen returned to his Renton home, parked his van in the driveway, and got out. 25RP 132, 134-36. A man shoved him from behind, put something hard to the back of his head and said "give me the wallet." 25RP 136, 138-39, 149. Nguyen did. 25RP 139. The man searched his pockets and took his cell phone and his keys. 25RP 136, 140. He also took a bag of art supplies. 25RP 136. The man asked Nguyen to get on the ground and count to 100. 25RP 136. Nguyen complied. 25RP 136. The man came back and handed the bag of art supplies to Nguyen. 25RP 136. He said "here is your key" and threw it in the grass. 25RP 142. The man tried to take off Nguyen's wedding ring but it was too tight to be removed. 25RP 136-37. The man asked him to count to 100 again and left. 25RP 137. Assailant description: black male, 6' tall, wearing a black stocking cap and dark clothing. 14RP 38. Nguyen recovered his wallet from the driveway area the next morning; nothing was missing from it. 25RP 150.

3. Investigation

Phone records showed a Subscriber Identity Module (SIM) card belonging to Cheryl Woodard was used in R.U.'s phone on March 11 at 4:28 a.m. 22RP 48-50, 66-67. On March 15, detectives executed a search warrant on Woodard's Renton residence and recovered R.U.'s cell phone. 23RP 80-81. Woodard said she received the phone from Bree Brazille, a long time acquaintance. 25RP 7, 15-17, 23. Woodard used the phone to take a photo of Brazille and Bluford at her residence. 25RP 18-19; Ex. 88. The photo was taken at 4:16 a.m., about six hours after R.U. was robbed and raped. 22RP 20, 55, 58. The photo shows Bluford wearing a jacket with a crest on it, but the jacket was not leather and the sleeves were the same color as the rest of the jacket. Ex. 88; 22RP 60-61. At trial, R.U. did not recognize the jacket. 23RP 163-64; 29RP 20.

Woodard knew Bluford lived with Brazille. 25RP 10-13. According to Woodard, Brazille asked Woodward to store a pistol at the latter's apartment after the search.⁶ 25RP 34. Brazille put the gun, a Smith and Wesson about 8 inches or more long, in Woodward's make-up bag. 25RP 34-37. Brazille removed the gun a couple days later, and then subsequently stored the gun there again. 25RP 38.

⁶ Woodard had been previously convicted for crimes of dishonesty. 25RP 6.

On March 15, officers stopped a green 1994 Honda Civic four-door driven by Bluford. 14RP 57-62; 23RP 124. The car was registered to Brazille, the passenger. 12RP 54; 14RP 60. These items were recovered from Brazille's purse: R.U.'s wedding ring, a ticket stub with Cooksey's name on it, an airline ticket with R.J.'s name on it, a red, Chinese-style gift envelope with cash inside, and documents with Bluford's name. 16RP 67; 23RP 95-100, 103-04, 116-17; 25RP 110-11, 128-30. A business card taken from Sakounthong was in a wallet that had Bluford's identification in it. 23RP 102, 112-13.

Nguyen's cell phone was found in the car. 21RP 47; 26RP 169; 27RP 46. Law enforcement also found marriage license paperwork for Bluford and Brazille, as well as Jewelry Exchange paperwork dated March 14, 2012. 21RP 46, 71, 23RP 128-29. Condoms were in the car. 21RP 48. Trip data extracted from the GPS found in the car did not match up with the location of the crimes. 28RP 22, 25-26.

Police took Brazille's cell phone at the time of the stop. 16RP 69. She said she shared the phone with Bluford. 30RP 89-90. Phone records showed calls associated with this phone being made around the time of some of the charged crimes and within 76 miles of those crimes. 30RP 23-38, 41-42, 60, 78-79, 85.

On March 19, detectives served a search warrant on the Renton residence listed on the marriage license found in the car. 23RP 133. Bluford and Brazille were there. 23RP 139. Personal property found in the residence included R.U.'s purse and property; Sakounthang's wallet and property; and R.J.'s purse and property. 23RP 169, 173-75, 178-79; 24RP 33-35, 41-43, 84-87; 27RP 19-20, 30-31, 34. Recovered clothing included various hats and a black coat with fur-trimmed hood. 24RP 44-52, 57-58. Also found in the residence: (1) various documents listing Bluford's and Brazille's address; (2) a concealed weapons permit in Brazille's name; (3) a .380 round consistent with use in small handgun; and (4) condoms in numerous locations.⁷ 23RP 165-66; 24RP 31-33, 47-48, 51-52, 68-77; 26RP 24.

On March 27, 2012, the complaining witnesses (except R.U.) attended a line-up that included Bluford, at which the men were ordered to speak. 12RP 12-13, 17. Sakounthong (count 1) did not identify Bluford; he picked someone else out of the line-up with 98 percent certainty. 11RP 75; 80-81, 86; 12RP 54. R.J. (counts 2 and 3) did not identify Bluford; she picked someone else out of the line-up. 13RP 53-54; Ex. 23 at 38-39, 50-51. Ramirez-Aguilar (count 4) picked Bluford from the line-up, although he was unable to pick anyone out of an earlier photomontage.

⁷ Woodard knew Brazille worked as a prostitute. 25RP 51.

15RP 122-23, 126-27, 141-42; 26RP 98-99, 110. Rivera (count 5) identified Bluford in the line-up as the person that robbed him with 70-75 percent certainty. 13RP 131-32; 14RP 15-16; 26RP 110-11. Cooksey (count 8) did not identify Bluford in the line-up; she picked out two other individuals as most closely resembling the robber. 15RP 56-58. Nguyen (count 9) did not identify Bluford in the line-up. 25RP 154.

R.U. (counts 6 and 7) did not identify Bluford from a montage; she picked someone else out of the montage with 80 percent certainty. 25RP 63-64, 107. R.U. testified that she recognized Bluford in court as the man who robbed and attacked her. 29RP 44-45. But she insisted she picked Bluford out of the montage and was confident she picked the person that assaulted her from the montage.⁸ 29RP 50-51, 69.

Sakounthong, Rivera and Nguyen could not make an in-court identification. 11RP 76; 13RP 133; 25RP 154. R.J. did not identify Bluford in court at the deposition. Ex. 23 at 15. In court, Cooksey said Bluford looked similar to the man that robbed her, but she was not 100 percent certain. 15RP 63. Ramirez identified Bluford in court. 15RP 127-28. Bluford was born in 1973. 23RP 110. His 2010 driver's license lists him as 5'6" and 200 pounds. Ex. 78.

⁸ In closing argument, the prosecutor acknowledged R.U. did not pick Bluford out of the montage. 31RP 23.

4. Outcome and sentencing

The jury convicted on all counts except count 5 involving Rivera. CP 119-27. The State sought a sentence of life without the possibility of release, alleging Bluford's 1994 New Jersey conviction for robbery and two 1997 South Carolina convictions for armed robbery each qualified as a "most serious offense" under the three strikes law. CP 266-84; 34RP 25-28. The defense did not concede comparability. 34RP 31-32, 338.

The trial court determined the New Jersey robbery was comparable to the Washington offense of second degree robbery. 34RP 35. The court further concluded the South Carolina robberies were comparable to the Washington offenses of first and second degree robbery. 34RP 35-38. The court sentenced Bluford to life without the possibility of release as a persistent offender. CP 196, 199. This appeal follows. CP 227.

C. ARGUMENT

1. **THE TRIAL COURT ERRED IN JOINING THE COUNTS FOR TRIAL BECAUSE JOINDER PREJUDICED BLUFORD'S RIGHT TO A FAIR TRIAL.**

The trial court erred in joining nine counts from three different cause numbers for one trial. A proper balancing of the requisite factors shows joinder presented an undue risk of prejudice to Bluford's right to a fair trial. The convictions should be reversed for this reason.

a. Standard of review and issue preservation

Before trial, the State moved to join the counts from three cause numbers. CP 379-406. Defense counsel moved to sever. CP 369-77. The written motion to sever covers counts 1 through 5, but argument from both parties and the court's ruling cover all counts. 1RP 3-43. The court granted joinder and denied the motion to sever, ruling the relevant factors supported a single trial on all charged crimes. CP 15-18; 1RP 43-52.

Bluford's counsel did not renew the severance motion during trial. Failing to renew an unsuccessful severance motion constitutes a waiver for appeal. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). The joinder issue, however, remains preserved for review. Bryant, 89 Wn. App. at 865. The court's decision is reviewed for abuse of discretion. State v. Weddel, 29 Wn. App. 461, 464, 629 P.2d 912, 914 (1981).

b. Consideration of the relevant factors shows joinder prejudiced the fairness of the trial

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." Conversely, 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."

The joinder rule under CrR 4.3(a) is construed expansively to promote the public policy of conserving judicial and prosecution resources. Bryant, 89 Wn. App. at 864. But 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. Id. at 865. 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." Id. Joinder that results in a fundamentally unfair trial violates due process. Bean v. Calderon, 163 F.3d 1073, 1084 (9th Cir. 1998); U.S. Const. amend. XIV.

Four factors help determine whether prejudice results from joinder. State v. Williams, 156 Wn. App. 482, 500-01, 234 P.3d 1174 (2010). These factors are: "(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 instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the

evidence of the other crime." State v. Cotten, 75 Wn. App. 669, 687, 879 P.2d 971 (1994).

i. Strength of evidence and clarity of defenses

The trial court determined the relative strength of the evidence for each count was equal. CP 16. There are dissimilarities. Ramirez-Aguilar (count 4) and Rivera (count 5) identified Bluford pre-trial as the person that robbed them. 13RP 131-32; 14RP 15-16; 26RP 110-11; 15RP 122-23, 126-27, 141-42; 26RP 98-99, 110. None of the other victims identified Bluford as the perpetrator before trial. Unlike the other victims, the property of Ramirez-Aguilar and Rivera was not found in the residence, the car or Brazille's purse. Even if the strength of the evidence between counts is relatively equal, this factor is not dispositive. No single factor is preeminent; they are assessed together in order to determine if severance is required. State v. Warren, 55 Wn. App. 645, 655, 779 P.2d 1159 (1989).

The defenses were not distinct. General denial was a defense to all the counts. Courts have found the same defense to weigh against severance. See, e.g., State v. McDaniel, 155 Wn. App. 829, 861, 230 P.3d 245, review denied, 169 Wn.2d 1027, 241 P.3d 413 (2010). The Supreme Court, however, has found distinct defenses to weight against severance. State v. Bythrow, 114 Wn.2d 713, 721, 790 P.2d 154 (1990) (defense of alibi for one robbery, defense of ignorance that companion was going to

commit robbery for the other). So either this factor is a no-win scenario for the defense or there is a conflict in the case law. In any event, no one factor is dispositive. McDaniel, 155 Wn. App. at 860. The meat of Bluford's argument lies in the remaining two factors.

ii. Effect of instruction to decide each count separately

The third factor supports separate trials despite instruction informing the jury it must "decide each count separately." The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. Bythrow, 114 Wn.2d at 721. 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, the reviewing 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.⁹ 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.

The sex offenses involving R.U. and R.J. deserve special attention in this regard. "The joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature." State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009). "In this context there is a recognized danger of prejudice to the defendant even if the jury is properly instructed to consider the crimes separately." Sutherby, 165 Wn.2d at 884. The unique nature of sex offenses can often lead jurors to disregard the trial court's instructions. Id. at 884, 886-87; State v. Harris, 36 Wn. App.

⁹ 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.

746, 752, 677 P.2d 202 (1984) (quoting State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982)).

Further, even where the jury is instructed to consider each count separately, the jury is still free to consider evidence from one count in deciding another count. State v. Bradford, 60 Wn. App. 857, 860-62, 808 P.2d 174 (1991) (instruction that "The jury is free to determine the use to which it will put evidence presented during trial" was consistent with instruction that jury was to consider each count separately), review denied, 117 Wn.2d 1003, 815 P.2d 266 (1991). The boilerplate instruction does not actually require the jury to compartmentalize the evidence. CP 155. The jury, meanwhile, 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). Such instruction gives jurors nearly limitless discretion in deciding whether evidence on one count bears on another count.

The jury was not instructed that the jury must not consider the evidence on any given count as evidence of a propensity to commit the other charged crimes involving different victims. See State v. Gresham, 173 Wn.2d 405, 423-24, 269 P.3d 207 (2012) ("An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for

the purpose of concluding that the defendant has a particular character and has acted in conformity with that character."). By joining the charges, the trial court gave the benefit of ER 404(b) evidence to the State without any protection against jurors using the different crimes for an improper propensity purpose.¹⁰ See Bean, 163 F.3d at 1084 (9th Cir. 1998) (in holding joinder resulted in unfair trial, pointing out jury instructions, including instruction to consider each count separately, "did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other"). The instruction to weigh each count separately does not weigh in favor of joinder due to the length and complexity of the trial, the presence of sex offenses, and the lack of a limiting instruction preventing the jury from using the multiple counts for propensity purposes.

iii. Cross-admissibility of evidence

The fourth factor — cross-admissibility of evidence — favored separate trials. When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged;

¹⁰ During argument on joinder/severance, the State noted the court could limit the potential that jurors would use the evidence improperly by giving an ER 404(b) limiting instruction. 1RP 25-26.

and (4) weigh the probative value against its prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The trial court found the evidence of different crimes was cross-admissible under ER 404(b) to show common scheme or plan, modus operandi, and identity. CP 17. The court relied on the following in support of its ruling: (1) each incident occurred within an approximately two month period in the Seattle metro area; (2) each incident occurred during hours of darkness in a residential area; (3) the perpetrator was a stranger to the victim in each incident; (4) the victims were alone when a black male approached with a handgun and made verbal demands; (5) victim descriptions of the handgun are similar; (6) four victims gave a description of the vehicle, which matches the vehicle Bluford was later found in; (7) 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; (8) the police department crime analyst opined the offenses were unique. CP 17.

The court wrongly concluded the evidence was cross-admissible under the common scheme or plan rationale. Evidence that a "[d]efendant committed markedly similar acts of misconduct against similar victims under similar circumstances" is admissible to show a common scheme or plan. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). But

evidence of a common scheme or plan is only relevant "when the existence of the crime is at issue." State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). In Bluford's case, whether the crimes happened was not at issue in deciding whether joinder was appropriate. The issue was identity, i.e., whether Bluford was the person who committed the crimes. The State acknowledged "in this case the identity element is what defense is contesting." IRP 25. Even if the crimes could be described as showing a common scheme or plan, the existence of such a scheme or plan was irrelevant to the identity issue. The evidence would not be cross-admissible under a common scheme or plan theory.

The trial court's determination that the offenses were cross-admissible on the basis of modus operandi and identity is also erroneous. Modus operandi is used to prove identity. State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). When evidence of other bad acts is introduced to show identity, the evidence is relevant only if the method employed in the commission of crimes is 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." State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984).

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.¹¹ Substantial similarity between crimes is not enough to satisfy the unique modus operandi requirement. DeVincentis, 150 Wn.2d at 18-21:

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. 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

¹¹ 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); Bythrow, 114 Wn.2d at 715-16, 720 (no 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).

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).

The court noted four victims gave a vehicle description that matched the vehicle Bluford was later found in. CP 17. But that means three victims did not describe any vehicle being involved. The State proffered the opinion of a crime analyst who "felt" that a unique pattern was involved. 1RP 20. That opinion adds nothing of substance to the analysis. The court decides admissibility, not a police officer.

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-Aguilar), 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.

Bluford's case compares favorably to Thang and other cases where a signature was non-existent even though there were similarities between offenses.¹² Any doubt about admissibility must be resolved in favor of the defendant. Thang, 145 Wn.2d at 643.

¹² See, e.g., 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); 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

Even if the evidence of different offenses established *modus operandi*, that still does not mean the evidence of all these crimes should be cross-admissible. 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." Saltarelli, 98 Wn.2d at 361. The ER 403 analysis is particularly significant for the two charged sex offenses at issue, as they carried the highest risk of prejudice. Id. at 364; Sutherby, 165 Wn.2d at 884. Bad enough that the jury was allowed to consider seven different victims of crimes in deciding whether Bluford committed any one of those crimes; worse that Bluford was transformed into a sexual attacker by the two sex offenses — offenses that many in the community view as especially fearsome and heinous.

Misapplication of ER 404(b) in severance cases compels a new trial where there is a reasonable probability that the error affected the outcome. State v. Watkins, 53 Wn. App. 264, 273, 766 P.2d 484 (1989).

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).

The State's case lacked strong identification evidence. Only two of the seven victims identified Bluford before trial (Ramirez-Aguilar and Rivera). Only two victims made an in-court identification (Nguyen and Cooksey), but Cooksey could only say Bluford looked similar and the jury acquitted on the count involving Nguyen. Circumstantial evidence tied Bluford to the crimes. But as argued by defense counsel, a competing inference was that Brazille was involved in the burglaries with another man. 32RP 7; 12, 29-36. The State's case against Bluford on all counts was not ironclad.

The R.U. counts deserve special attention. Circumstantial evidence tied Bluford to the R.U. robbery/rape. Yet R.U. was adamant that her attacker had a Jamaican accent. 17RP 147, 173, 182; 25RP 109; 29RP 6-7. Bluford does not have a Jamaican accent. 22RP 25. The size of the print left at the scene did not match Bluford's shoe size. 17RP 184; 20RP 73, 79. R.U. identified Bluford in court, but insisted he was the same man she picked out of the montage, when in fact this was untrue. 25RP 63-64, 107; 29RP 44-45, 50-51, 69. This is the stuff of reasonable doubt. If the R.U. counts fall, the others fall as well, given the State's theory that the same person committed all the crimes.

But when all the counts are tried together, the strength of the evidence against Bluford on the R.U. counts possesses a greater persuasive

force. Indeed, all of the counts feed off one another to Bluford's detriment. "When 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." Bythrow, 114 Wn.2d at 721 (quoting United States v. Johnson, 820 F.2d 1065, 1071 (9th Cir. 1987)). Again, where the trial was short, the evidence presented sequentially, and the issues and defenses are distinct, the jury may be reasonably expected to compartmentalize the evidence, and "there may be no prejudicial effect from joinder even when the evidence would not have been admissible in separate trials." Bythrow, 114 Wn.2d at 721.

That is not Bluford's case. The trial court's joinder of nine counts for a single trial encouraged the jury to infer that 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. Experienced trial prosecutors know full well that jurors are more likely to convict if presented with multiple offenses of the same or similar character. See United States v. Muniz, 1 F.3d 1018, 1023 (10th Cir. 1993) (when offenses of similar character are joined for trial, proof of one crime may tend to corroborate the commission of the other crime due

to considerations of general criminal disposition or propensity to commit crime). Where charges are joined, the jury may use evidence of one or more of the charged crimes to infer a criminal disposition, or the jury may cumulate evidence of the charges and find guilt when, if considered separately, it would not. Harris, 36 Wn. App. at 750. A more subtle prejudicial effect may be present in a "latent feeling of hostility engendered by the charging of several crimes as distinct from only one." Id. (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)).

Evidence of other misconduct is prejudicial because jurors may convict on the basis that the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Bowen, 48 Wn. App. at 195. A juror's natural inclination is to reason that having previously committed an offense, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), review denied, 116 Wn.2d 1020 (1991). No jury instruction prevented the jury from following their natural inclination.

The jury acquitted Bluford on count 5 involving Rivera. But it convicted on the remaining eight counts. One acquittal versus eight convictions does not defeat Bluford's claim of prejudice. Compare State v. Ramirez, 46 Wn. App. 223, 228, 730 P.2d 98 (1986) (severance error required reversal despite the fact that the jury had acquitted on one of the two counts) with State v. Standifer, 48 Wn. App. 121, 124-27, 737 P.2d 1308 (1987) (no prejudice shown where jury in rape case returned verdicts of not guilty, guilty, and guilty of lesser on three counts of second degree rape), review denied, 108 Wn.2d 1035 (1987).

Under the circumstances, Bluford has met his burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. Bythrow, 114 Wn.2d at 718. The charges should not have been joined to give Bluford a fair trial. The convictions should be reversed.

2. BLUFORD WAS ENTITLED TO INSTRUCTION ON FOURTH DEGREE ASSAULT AS A LESSER OFFENSE TO INDECENT LIBERTIES AND THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE IT.

The trial court erred in failing to give defense counsel's proposed instruction on fourth degree assault as a lesser-included offense of indecent liberties. Supreme Court authority has eclipsed the Court of Appeals decision that the trial court relied on to conclude the legal prong

of the test was unmet. The failure to instruct the jury on the lesser offense requires reversal of the indecent liberties conviction.

a. The court ruled the legal prong of the lesser offense test was not satisfied.

The defense proposed instruction on fourth degree assault as a lesser offense of indecent liberties. CP 60-66. One of the proposed instructions defines assault as "an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive." CP 61 (citing WPIC 35.50). The State objected to the instruction, citing State v. Thomas, 98 Wn. App. 422, 989 P.2d 612 (1999). 29RP 73-74. The State conceded the factual prong of the lesser offense test was met, but contended the legal prong was unmet under Thomas. 29RP 75. The trial court agreed with the State and did not give the lesser offense instruction. 29RP 76-77.

b. Overview of the law on lesser offense instruction.

Defendants in Washington are entitled to have juries instructed not only on the charged offense, but also on all lesser included offenses. RCW 10.61.006. It is a violation of due process not to give a requested lesser offense instruction whenever the evidence would support a

conviction on the lesser offense. Ferrazza v. Mintzes, 735 F.2d 967, 968 (6th Cir. 1984); U.S. Const. amend XIV.

A defendant is entitled to a lesser offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged offense; and (2) the evidence supports an inference that the defendant committed the lesser offense. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first requirement is the "legal prong;" the second requirement is the "factual prong." State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

To satisfy the legal prong of the Workman test, the elements of the lesser crime must be "necessarily" and "invariably" included among the elements of the greater charged offense. State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004). "Stated differently, if it is possible to commit the greater offense without committing the lesser offense, the latter is not an included crime." State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993). To satisfy the factual prong of the Workman test, the evidence must raise a rational inference that only the lesser offense was committed. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

Here, the parties did not dispute the factual prong is met. The trial court ruled the legal prong is unmet. The trial court's refusal to give a

lesser instruction based upon the legal prong is a ruling of law reviewed de novo. State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366, 367 (2010).

- c. **The crime of indecent liberties incorporates the intent element of assault via the "sexual contact" requirement, and therefore fourth degree assault is a lesser offense of indecent liberties.**

A person is guilty of indecent liberties when he "knowingly causes another person to have sexual contact with him . . . [b]y forcible compulsion." RCW 9A.44.100(1)(a); see CP 173 (Instruction 23). "Sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2); CP 167 (Instruction 18).

"A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." RCW 9A.36.041(1). Of the different forms of assault, the one at issue here is an unlawful touching with criminal intent. See State v. Stevens, 158 Wn.2d 304, 311, 143 P.3d 817 (2006) (setting forth the different kinds of assault); CP 61 (defense proposed instruction on fourth degree assault).

In Thomas, Division Three held fourth degree assault is not a lesser offense of indecent liberties because the legal prong is unmet. Thomas, 98 Wn. App. at 425. The court observed the required mental

state for indecent liberties is knowledge whereas intent is an implied element of assault. Id. at 424. "Since the two crimes require different mental states, each element of the lesser offense of fourth degree assault is not a necessary element of the offense of indecent liberties. Mr. Thomas could thus commit one crime without committing the other." Id. at 425. Division Three rejected the argument that "sexual contact" as defined in RCW 9A.44.010(2) injects the requirement of intent. Id. at 425-26. The court reasoned "sexual contact" is not an element of indecent liberties: "the statutory elements of the crime of indecent liberties expressly include the necessary culpable mental state, i.e., knowledge, not intent." Id. at 426.

Thomas is wrongly decided and this Court should decline to follow it. See Grisby v. Herzog, __ Wn. App. __, __P.3d __, 2015 WL 6447743, at *11-13 (slip op. filed Oct. 26, 2015) (a division of the Court of Appeals is free to disagree with another division's decision, or even a prior decision within the same division). The Supreme Court's later decision in Stevens shows why. In that case, the Court held fourth degree assault is a lesser included offense of second degree child molestation. Stevens, 158 Wn.2d at 312. Its reasoning: child molestation necessarily includes the elements of fourth degree assault because the "sexual contact" requires the person to touch with the purpose of gratifying sexual desire, thereby incorporating the "intent" element of assault. Id. at 311-12.

The definition of assault at issue in Stevens was an unlawful touching with criminal intent. Id. at 311. Second degree child molestation requires a person to have, or to "knowingly" cause another person under the age of 18 to have "sexual contact" with a person who is between the ages of 12 and 14. RCW 9A.44.086(1). "[B]y defining 'sexual contact' as 'any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party,' the State must prove a defendant acted with the purpose of sexual gratification." Stevens, 158 Wn.2d at 312. The legal prong of the lesser offense test was satisfied because second degree child molestation is a touching of the sexual parts of a child for the purpose of sexual gratification, and so child molestation necessarily includes the elements of fourth degree assault, including the intent element. Id. at 311.

The definition of assault at issue in Stevens was an unlawful touching with criminal intent — the same kind of assault at issue in Bluford's case. The definition of "sexual contact" applicable to child molestation is the same definition applicable to indecent liberties: touching of the sexual parts of a person for the purpose of sexual gratification. RCW 9A.44.010(2). The intent aspect of "sexual contact" incorporates the intent requirement found in fourth degree assault (unlawful touching with criminal intent). As a result, it is impossible to

commit indecent liberties without also committing fourth degree assault. The legal prong is satisfied.

Division Three's decision in Thomas cannot be squared with the Supreme Court's reasoning in Stevens regarding the effect of the "sexual contact" requirement on the legal prong of the Workman test. Under the reasoning of Thomas, fourth degree assault should not be a lesser offense of child molestation either. But the Supreme Court saw it differently.

Thomas purported to draw a rigid distinction between formal "elements" of an offense and requirements contained in the definition of an element. According to Thomas, the intent aspect of "sexual contact" was not an element of indecent liberties and therefore the legal prong of the lesser offense test was unmet for fourth degree assault. Thomas, 98 Wn. App. at 426. What Thomas failed to grasp is that while sexual gratification is not an explicit element of indecent liberties, the State must still prove a defendant acted for the purpose of sexual gratification. Cf. Stevens, 158 Wn.2d at 309-10 ("while sexual gratification is not an explicit element of second degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification.").

The legal prong test is whether it is possible to commit the greater offense without committing the lesser offense. Harris, 121 Wn.2d at 320. That test encompasses not only the formal elements of the crime but also

the definitional requirements of those elements. Under the reasoning of Stevens, Bluford was entitled to an instruction on the lesser offense of fourth degree assault because the charged crime of indecent liberties could not be committed without also committing fourth degree assault.

The State did not dispute the factual prong was met. 29RP 75. That concession is appropriate. The touching occurred during the course of a robbery. He patted down R.J. after asking her if she had any more money on her. Ex. 23 at 14, 20-24. R.J. herself testified "it felt like he was searching for money." Id. at 47. He did not squeeze, fondle or grab her. Id. at 48. The jury could have rationally found that Bluford intentionally touched R.J. without finding that he touched her with the purpose of sexual gratification. The jury could have found Bluford intentionally touched her for the purpose of finding property to take. By touching private areas of R.J.'s body without consent or privilege, the evidence supported a finding that his touch harmed or offended, and that fourth degree assault was therefore committed.

Reversal is required when a defendant is entitled to instruction on a lesser charge and the trial court fails to give it. State v. Condon, 182 Wn.2d 307, 326, 343 P.3d 357 (2015) (citing State v. Parker, 102 Wn.2d 161, 163-64, 166, 683 P.2d 189 (1984)). Bluford's conviction for indecent liberties must be reversed.

3. THE STATE DID NOT PROVE PRIOR OUT-OF-STATE OFFENSES ARE COMPARABLE TO THE WASHINGTON OFFENSE OF ROBBERY, AND SO THE COURT ERRED IN IMPOSING A PERSISTENT OFFENDER SENTENCE.

Bluford was improperly sentenced as a persistent offender pursuant to the Persistent Offender Accountability Act, RCW 9.94A.570. The court treated a New Jersey robbery conviction and two prior South Carolina robbery convictions as comparable to the Washington offense of robbery. This was error. The offenses are not legally comparable because the out-of-state robbery offenses are broader than the Washington counterpart. The State did not otherwise prove the offenses are factually comparable. The out-of-state offenses therefore cannot be counted as strike offenses and Bluford cannot be sentenced as a persistent offender.

a. Overview of the law on comparability.

Persistent offenders are subject to a mandatory sentence of life without the possibility of release. RCW 9.94A.570. A "persistent offender" is one 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 and would be included in the offender score under RCW 9.94A.525[.] RCW 9.94A.030(38).

The definition of "most serious offense" includes "any . . . out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection." RCW 9.94A.030(33)(u). Under Washington law, first degree robbery and second degree robbery qualify as a "most serious offense." RCW 9.94A.030(33)(a) (any class A felony), (o) (second degree robbery).

It must first be determined whether the foreign offense is legally comparable. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The court must compare the elements of the out-of-state crime with the elements of potentially comparable Washington crimes as defined on the date the out-of-state crime was committed. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Offenses are not legally comparable if the elements are different or if the Washington statute defines the offense more narrowly than does the foreign statute. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999); Lavery, 154 Wn.2d at 255-56. If the foreign offense's elements are broader or different than Washington's elements, precluding legal comparability, it must then be determined whether the offense is factually comparable. Thiefault, 160 Wn.2d at 415. Comparability is a question of law reviewed de novo.

State v. Beals, 100 Wn. App. 189, 196, 97 P.2d 941 (2000). The State bears the burden of proving comparability. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 880, 123 P.3d 456 (2005).

b. The South Carolina robberies are not comparable to Washington robbery.

Two South Carolina convictions are at issue here. The "sentence" sheet for the Richland County offense indicates Bluford pled guilty to armed robbery in violation of "§ 16-11-330(A)" on August 12, 1998. CP 331.¹³ The Richland indictment states "That Charles L. Bluford did in Richland County on or about June 14, 1997, while armed with a deadly weapon, to wit: handgun, attempt to feloniously take from the person or presence of Barbarella Gordon, by means of force or intimidation, goods or monies of the Burger King 1840 Diamond Lane, such goods or monies being described as follows: U.S. Currency and/or coins all in violation of § 16-11-330 Code of Laws of South Carolina (1976, as amended)." CP 335. The "true bill" for the indictment lists the crime as "armed robbery" under "S.C. Code 16-11-330(A)." CP 334.

The "sentence" sheet for the Lexington County offense indicates Bluford pled guilty to armed robbery in violation of "§ 16-11-330(A)" on August 12, 1998. CP 332. The Lexington indictment states: "that Charles

¹³ Sentencing Exhibits 3, 4 and 5 contain the same documents as the clerk's papers for the South Carolina and New Jersey offenses.

Bluford did in Lexington County on or about June 9, 1997, commit robbery by feloniously taking from the person or presence of Kevin Steagall by means of force or intimidation goods or monies of Garrett's Grill and Grog, 612 St. Andrews Road, such goods or monies being described as U.S. Currency with intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonable [sic] believed to be a deadly weapon." CP 340.

The South Carolina statute defines the crime of armed robbery as follows: "A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony[.]" S.C. Code Ann. § 16-11-330(A).

Robbery, defined by common law, is "the felonious or unlawful taking of money, goods or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611 (S.C. 1995).

"The common-law offense of robbery is essentially the commission of larceny with force." State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719 (S.C. 1979). The intent to steal is a requirement of robbery. Brown, 274 S.C. at 49-50; Broom v. State, 351 S.C. 219, 221, 569 S.E.2d 336 (S.C. 2002).

Washington law, meanwhile, provides that a person commits robbery "when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her 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." RCW 9A.56.190. The specific intent to steal is an essential, non-statutory element of the crime of robbery. State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012).

"A person is guilty of robbery in the second degree if he or she commits robbery." RCW 9A.56.210. A person commits first degree robbery if "[i]n the commission of a robbery or of immediate flight therefrom, he or she: (i) Is armed with a deadly weapon; or (ii) Displays what appears to be a firearm or other deadly weapon[.]" RCW 9A.56.200(1)(a).

The State failed to prove the South Carolina offenses are legally comparable to a Washington robbery. The dispositive comparison is to the Washington crime of second degree robbery. If the South Carolina armed robbery convictions are not comparable to the Washington offense of second degree robbery, then by definition they are not comparable to first degree robbery because first degree robbery requires the commission of an ordinary robbery, i.e., second degree robbery.¹⁴

In Washington, "robbery requires (1) *taking* (2) personal property (3) from another person or from another's immediate presence (4) against his or her will (5) by force or threatened force (6) *with the specific intent to steal*." Sublett, 176 Wn.2d at 88 (emphasis added). "Robbery includes the elements of the crime of larceny, one of which is an intent to deprive the owner or other persons of the things taken." State v. Byers, 136 Wn. 620, 622, 241 P. 9 (1925). A theft by taking requires the intent at the time of the taking to convert the property to the taker's use. 13B Wash. Prac., Criminal Law § 2607 (2014-2015 ed.) (citing State v. Garman, 76 Wn.2d 637, 647, 458 P.2d 292 (1969)).

¹⁴ Conversely, if the South Carolina offenses are comparable to Washington's second degree robbery, then it is irrelevant whether they are also comparable to first degree robbery because second degree robbery is a "most serious offense." RCW 9.94A.030(33)(o).

But to constitute a South Carolina robbery, the intent to steal need not have existed at the time of obtaining possession of the stolen goods. State v. Hyman, 276 S.C. 559, 566, 281 S.E.2d 209 (S.C. 1981) (citing State v. Craig, 116 S.C. 440, 107 S.E. 926 (S.C. 1921)), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)). The South Carolina robbery offense is therefore broader than the Washington robbery offense. In Washington, the taking must occur with intent to steal. In South Carolina, the intent to steal may be formed after the taking and still constitute a robbery in South Carolina. The South Carolina offenses are not legally comparable to Washington robbery. A person could be convicted of a South Carolina robbery even though the intent to steal is not formed until after the taking, whereas the Washington robbery offense requires that the intent to steal must exist at the time of the taking.

Further, the State did not prove the South Carolina convictions are factually comparable to the Washington offense of robbery. If the elements are different or if the Washington statute defines the offense more narrowly than does the foreign statute, the court then determines whether the offenses are factually comparable. Ford, 137 Wn.2d at 479; Lavery, 154 Wn.2d at 255-56. In assessing factual comparability, the court may look at the facts underlying the prior conviction to determine if

the defendant's conduct would have resulted in a conviction in Washington. Lavery, 154 Wn.2d at 255.

"[B]ut the portion of the foreign record that the Washington court can consider is very limited." State v. Jones, 183 Wn. 2d 327, 345, 352 P.3d 776 (2015). "In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." Thiefault, 160 Wn.2d at 415. The court can go no further due to limitations imposed by the Sixth Amendment. State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007). Blakely¹⁵ protections apply to limit judicial inquiry into the underlying circumstances of the prior conviction where the exact facts of a prior offense are used to increase the statutory maximum sentence. State v. Jordan, 180 Wn. 2d 456, 462-63, 325 P.3d 181 (2014) (citing Descamps v. United States, __ U.S. __, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 1262, 161 L. Ed. 2d 205 (2005)); see also State v. Olsen, 180 Wn. 2d 468, 475-77, 325 P.3d 187, 191 (2014) (Sixth Amendment implications of Descamps consistent

¹⁵ Blakely v. Washington, 542 U.S. 296, 301-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (Sixth Amendment right to a jury trial provides a constitutional limit on the facts that a sentencing court can use to support a sentence above a statutorily mandated range).

with Washington's comparability analysis), cert. denied, 135 S. Ct. 287, 190 L. Ed. 2d 210 (2014).

In South Carolina, the plea admits all the elements of the offense. State v. Munsch, 287 S.C. 313, 314, 338 S.E.2d 329 (S.C. 1985); State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708 (S.C. Ct. App. 2000). In pleading guilty, Bluford admitted the elements of the robbery offense. But he did not admit anything more than that. The South Carolina paperwork related to the robbery convictions sets forth no underlying facts of the crime that were admitted, stipulated to, or proven beyond a reasonable doubt. There is no way to determine whether Bluford, as a factual matter, had the specific intent to steal at the time he took the property, as opposed to forming such intent after he took the property.

The South Carolina offenses are therefore not factually comparable to Washington's robbery offense. When determining whether an out-of-state conviction is comparable to a Washington crime, a sentencing court may not assume "facts alleged in the charging document [that] are not directly related to the elements" of the offense have been proved or admitted. Thomas, 135 Wn. App. at 486. For the reasons set forth, the trial court wrongly determined the South Carolina robberies are comparable to the Washington offenses of first and second degree robbery. 34RP 35-38.

Assuming arguendo that both of the South Carolina convictions are comparable to Washington robbery, they would not each count as a strike offense because "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[.]" RCW 9.94A.030(38). Bluford pled guilty and was sentenced on the same day for both South Carolina offenses. CP 331-32. Thus, the South Carolina convictions in the aggregate could at most only count as one "most serious offense." That being said, for the reasons discussed above, neither South Carolina conviction is comparable to the Washington offense of robbery.

c. The New Jersey robbery is not comparable to Washington robbery.

The original charge for the New Jersey offense was first degree robbery. CP 309, 315-16. The indictment for that charge states: "The Grand Jurors of the State of New Jersey for the County of Cape Kay, upon their oaths present that Charles Linnelle Bluford, on or about September 21, 1993, in the City of Cape May, County of Cape May aforesaid, and within the jurisdiction of this Court, in the course of committing a theft, did threaten immediate bodily injury to Joseph Salladino and/or did purposely put Joseph Salladino in fear of immediate bodily injury while armed with and/or threatening the immediate use of a deadly weapon;

contrary to the provisions of N.J.S.A. 2C:15-1, and against the peace of this State, the Government and dignity of the same." CP 316.

The judgment of conviction reflects a conviction for the crime of second degree robbery under N.J.S.A. 2C:15-1. CP 309. Bluford entered a guilty plea to that amended charge on May 9, 1994. CP 309.

N.J.S.A. 2C:15-1(a) defines robbery as follows:

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.

An act shall be deemed to be included in the phrase "in the course of committing a theft" if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.

N.J.S.A. 2C:15-1(b) provides "Robbery is a crime of the second degree, except that it is a crime of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon."

The first problem is that the amended indictment is not part of the record provided by the State. Bluford did not plead guilty to the first degree robbery charged in the original indictment. He pled guilty to the

amended charge of second degree robbery. The absence of the amended indictment precludes a finding of the alternative means to which Bluford actually pled guilty, which in turn has consequences in conducting a legal comparison with the Washington robbery offense.

The New Jersey judgment does not specify the subsection of the robbery statute that Bluford pled guilty to. It merely lists N.J.S.A. 2C:15-1. CP 309. On this record, Bluford could have pled guilty to second degree robbery based on the alternative means that "in the course of committing a theft," he "[c]ommits or threatens immediately to commit any crime of the first or second degree." N.J.S.A. 2C:15-1(a)(3). If so, then the New Jersey robbery offense he pled guilty to is broader than the Washington offense of robbery. New Jersey's statute is broader because injury or threat of injury is not required — a person can commit robbery by committing "any" first or second degree crime in the course of committing theft. There is no such counterpart in the Washington offense.

The second barrier to legal comparability lies in the breadth of "in the course of committing a theft" under New Jersey law. Under the New Jersey statute, one can commit robbery in the attempt to commit a theft. N.J.S.A. 2C:15-1(a). Washington's robbery statute requires the offender to actually take the property of another. RCW 9A.56.190 ("unlawfully takes personal property from the person of another or in his or her

presence"). New Jersey's robbery statute is therefore broader than Washington's robbery statute.

There is a third reason why the New Jersey robbery is not legally comparable. In Washington, "force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking." RCW 9A.56.190. The New Jersey statute, in two of the alternative means of committing the crime, requires that a person "(1) Inflicts bodily injury or uses force upon another; or (2) Threatens another with or purposely puts him in fear of immediate bodily injury[.]" N.J.S.A. 2C:15-1(a). The New Jersey statute does not specify that the force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.

Further, the State did not prove the New Jersey conviction is factually comparable to the Washington offense of robbery. The judgment of conviction, under the heading of "reasons" for the sentence, states: "This offense occurred when defendant and a juvenile accomplice committed an armed robbery during the course of which they stole \$85.00 and a ring having great sentimental value to the victim. The weapon, which the victim believed to be a 9 mm handgun was in fact a B.B. gun." CP 310. These facts are neither admitted, stipulated to, or proved beyond a reasonable doubt, and therefore cannot be used to establish factual

comparability. Thiefault, 160 Wn.2d at 415. The State therefore failed to meet its burden of establishing factual comparability.

The trial court determined the New Jersey robbery was comparable to the Washington offense of second degree robbery and qualified as a "most serious offense." 34RP 35. For the reasons set forth above, that is an incorrect conclusion of law. The persistent offender sentence must be reversed and the case remanded for resentencing.

D. CONCLUSION

For the reasons set forth, Bluford requests that this Court reverse the convictions. In the event this Court declines to reverse the convictions, then the case should be remanded for resentencing.

DATED this 14 day of November 2015

Respectfully Submitted,

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

STATE OF WASHINGTON)

Respondent,)

v.)

CHARLES BLUFORD,)

Appellant.)

COA NO. 73047-9-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF NOVEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHARLES BLUFORD
DOC NO. 335200
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF NOVEMBER 2015.

x Patrick Mayovsky