73398-2

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February 29, 2016
Court of Appeals
Division I
State of Washington

NO. 73398-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ROBERT MORTENSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TANYA L. THORP

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The invited error doctrine strictly precludes a criminal defendant from seeking appellate review of an error he helped create. In Mortenson's retrial on remand from this Court for felony driving under the influence (DUI), Mortenson repeatedly argued that the trial court was bound by law to adopt all previous rulings of the prior trial court. Mortenson now claims the trial court erred by adopting all previous rulings of the prior trial court. Does the invited error doctrine strictly preclude Mortenson from seeking appellate review on this basis?

2. If prior criminal history is an element of the charged crime, the trial court has broad discretion to bifurcate the trial or jury instructions, but a defendant has no right to either measure because in such cases it is not error to allow the jury to hear evidence on the issue. In Mortenson's retrial for felony DUI, the trial court reviewed the complete records of the prior trials, afforded Mortenson an opportunity to argue for bifurcation, then denied bifurcation but followed a procedural alternative our supreme court has endorsed. Did the trial court properly exercise its discretion?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

In May 2011, Christopher Robert Mortenson[1] was charged by Amended Information in King County Superior Court with four counts: (1) Attempting to Elude a Pursuing Police Vehicle; (2) Felony Driving Under the Influence (DUI); (3) Driving While License Suspended/Revoked in the Second Degree (DWLS); and (4) Tampering With a Witness. CP 9-11. All counts were alleged to have occurred in King County, Washington, on or about August 21, 2010. Id.

Prior to trial, on January 10, 2012, the State moved to dismiss Count 4 (witness tampering). 1/10/12 RP 22.[2] The next day, Mortenson pleaded guilty to Count Three (DWLS). 1/11/12 RP 13; Supp. CP __ (Sub #111, Statement of Defendant on Plea of Guilty).

Mortenson's first trial on Counts One and Two, before the Honorable Judge Brian Gain, ended in a mistrial on January 25, 2012. 1/25/12 RP 6; Supp. CP __ (Sub #118, Order on Criminal

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[1] In Superior Court, Mortenson was tried under the name Chris Robert Mortenson.

[2] The extensive verbatim reports of proceedings in this case encompass all three trials from January 2012 through March 2015. The State is referring to the dates of the proceedings.

Motion). In Mortenson's second trial in March 2012, before the Honorable Judge Lori Smith, a jury convicted Mortenson of Counts One and Two as charged. 3/23/12 RP 3-7; CP 12. The court imposed 29 months in prison on Count One (Eluding) and 60 months on Count Two (felony DUI) to run concurrently. CP 15.

On March 31, 2014, the court of appeals issued an unpublished opinion affirming the conviction for attempting to elude but reversing the DUI conviction. CP 46-65.[3] Mortenson's sentence for eluding was remanded for resentencing following the disposition of the felony DUI charge on remand. CP 65.

After a third trial on the DUI charge, in February 2015, a jury convicted Mortenson as charged. 2/11/15 RP 114; CP 100. The trial court imposed the same sentence as originally imposed in 2012, which Mortenson had already served in the meantime. CP 122. Mortenson timely appealed. CP 127.

2. SUBSTANTIVE FACTS

a. Felony Driving Under The Influence.

Around two o'clock in the morning on August 21, 2010, King County Sheriff's Deputy Jeffrey Petrenchak was on patrol on

[3] See also Court of Appeals No. 68812-0-I; State v. Mortenson, 180 Wn. App. 1013 (2014), cited here for procedural history, not precedential value.

Military Road South in unincorporated King County when he saw a car coming the other way at about 65 miles an hour in a 45-mph zone. 2/10/15 RP 81-83. He turned on all his emergency lights, but the car sped past the deputy and continued north. 2/10/15 RP 84. The deputy pursued the unyielding vehicle for about a mile, making several turns, until it finally stopped in the middle of the street. 2/10/15 RP 86-93.

The deputy opened his car door, drew his pistol, and ordered the driver to show his hands. 2/10/15 RP 94. Instead, the driver, Christopher Mortenson, got out of the car and "started stumbling back" toward the deputy. 2/10/15 RP 96. "As he walked he just kind of was staggering almost in a zigzag or serpentine motion," the deputy later testified. 2/10/15 RP 97. "It was just kind of slow and deliberate and just basically was slowly, you know, closing the distance." Id.

After Mortenson continued staggering toward the deputy without heeding any commands, Deputy Petrenchak used a Tazer three times to immobilize Mortenson and handcuff him. 2/10/15 RP 98-107. Mortenson was still extremely off balance, reeked of alcohol, had bloodshot eyes and a flushed face, and was belligerent. 2/10/15 RP 108-13. Mortenson was cursing and

mumbling in a "low growl," and was very difficult to understand. 2/10/15 RP 111, 113. He refused a breath test. 2/10/15 RP 126.

At the time, Mortenson had been previously convicted of four or more prior offenses within ten years pursuant to RCW 46.61.5055(14)(a).[4] CP 99, 125.

b. Relevant Facts Of Proceedings.

i. Previous trials and appeal.

Prior to Mortenson's first trial in January 2012, Judge Gain declined to bifurcate the trial as to Mortenson's prior offenses, but ruled that the jury instructions would be bifurcated. 1/10/12 RP 114-16. However, the jury was not instructed at all, because a mistrial was declared during the presentation of the evidence. 1/25/12 RP 6.

In Mortenson's second trial, in March 2012, Judge Smith reviewed the transcripts of the first trial and ruled that the court would adopt all of Judge Gain's previous pretrial rulings. 3/14/12 RP 29. Mortenson took exception, and argued for a bifurcated trial. 3/14/12 RP 30-32. Judge Smith declined to change her mind, and

[4] These prior Driving Under the Influence convictions were in 2001, 2002, and twice in 2005. CP 125. Mortenson also had five additional prior DUI convictions: 1988, 1991, 1994, and twice in 1997. Id. This was his tenth DUI conviction. He also was convicted of Reckless Driving in 1998. Id.

ruled that the trial would not be bifurcated, but the instructions would be bifurcated. 3/14/12 RP 38.

However, Mortenson failed to present a proposed bifurcated jury instruction. 3/22/12 RP 38-39. Mortenson said he had decided to forgo a bifurcated jury instruction. 3/22/12 RP 63. When the court presented the final jury instructions without bifurcation, Mortenson said he was satisfied with them. 3/22/12 RP 69.

Mortenson did not raise the bifurcation issue on appeal. CP 48-65. Instead, he assigned error to the trial court's failure to strike the venire after the prospective jurors learned prior to voir dire that Mortenson was alleged to have four prior convictions under RCW 46.61.5055, and that RCW 46.61.5055 was the DUI statute. CP 49. The court of appeals agreed this was prejudicial error as to the felony DUI charge and reversed that conviction. CP 61.

ii. The trial at issue here.

As his third trial began, Mortenson filed a Defendant's Trial Brief in which his first pretrial motion was for the trial court "to adopt all prior pretrial rulings made in this case." CP 83. In his brief, Mortenson cited to case law in arguing that "[t]hose pre-trial motions that were not objected to and raised on appeal, become the law of the case." Id. He noted that "the only issue raised and

decided on appeal was the error by the trial judge in reading the statute to the jury at the beginning of the trial." Id.

He further argued in his brief, citing to more case law, that the "law of the case doctrine" existed to protect "against the agitation of settled issues," and thus:

> Clearly here, these issues have now been litigated three times, the first mistrial, the second re-trial, those issues raised and not raised on appeal. There has been no change in any of the evidence produced in any of these trials. Re-litigating would only encourage a party who obtained unfavorable results to potentially encourage a mistrial in the hopes of different pre-trial rulings upon remand or retrial. The issues before this Court have been litigated three times and to revisit these issues would only deprive Mr. Mortenson his right to due process and a fair trial that is based upon evidence and not the randomness of what judge happens to be available to preside over his trial. 'The law of the case doctrine' dictates that this Court adopt the previous rulings made in this case and not open the floodgates to re-litigating issues that have been settled in this case for years.

CP 83-84.

The trial court acknowledged reviewing Mortenson's brief and said it also had reviewed "the entire court file," including the findings of fact from the previous CrR 3.5 and 3.6 hearings and the unpublished opinion from the court of appeals. 2/4/15 RP 5. The trial court invited Mortenson to re-argue the bifurcation issue. 2/4/15 RP 10. Mortenson replied:

> Your Honor, my first motion in my trial brief is requesting the Court to adopt all the prior rulings made in the prior court.

> And so, if the Court is not inclined to grant that motion, I guess I will certainly proceed to argument on the motion to bifurcate.

2/4/15 RP 11.

Mortenson mentioned that he had previously made a motion to bifurcate the entire trial, "[b]ut if the court is inclined to grant the defendant's motion to adopt the prior rulings I guess I would simply forego [sic] making arguments if that's in fact what the court's going to do." Id. He added, "My [bifurcation] motion that I filed was, in essence, supplemental in the event that the court doesn't grant that motion." Id.

The trial court said it was confused by Mortenson's "inconsistent" motions. 2/4/15 RP 11-12. On one hand, the court said, Mortenson sought adoption of all the prior court rulings, but, on the other hand, he asked for bifurcation even though there had been no bifurcation in the previous trial. Id. Mortenson replied:

> *Well, Your Honor, I believe the case law directs the court to adopt all prior rulings.* If the court is going to adopt some in part and others, and not adopt others, certainly defense is asking the court to bifurcate not only the proceeding but certainly the jury instructions.

2/4/15 RP 12 (emphasis added).

The court then denied the motion to bifurcate. 2/4/15 RP 14. The judge said that she felt legally bound by Judge Gain's prior

CrR 3.5 and 3.6 rulings. 2/4/15 RP 15. But as for bifurcation, the judge said she rendered a decision after she considered the record and the fact that Mortenson had not raised bifurcation as an issue on appeal. Id.

Later, prior to the State resting its case, the parties discussed Mortenson's stipulation to the prior offenses and how it would be presented. 2/11/15 RP 65-67. Mortenson asked for a bifurcated jury instruction, but noted that the trial court was "inclined" not to bifurcate the instructions. 2/11/15 RP 65. The court replied that "it's not that I'm not inclined to do it; it's that I denied the request." 2/11/5 RP 66. The court said it had considered the instructions from the previous trial and had reviewed the latest proposed instructions from both parties in making its decision. Id.

The court then read the stipulation that Mortenson had been previously convicted four or more times pursuant to RCW 46.61.5055(14)(a). 2/11/15 RP 74; CP 99. The court instructed the jury that the stipulation was for the limited purpose of establishing the specific element of previous convictions, and that the jury was not to speculate as to the nature of the prior convictions or consider them for any other purpose, including whether Mortenson was

driving under the influence on the date of the charged offense. 2/11/15 RP 81; CP 116.

C. ARGUMENT

1. THE INVITED ERROR DOCTRINE STRICTLY PRECLUDES MORTENSON FROM ARGUING THAT THE TRIAL COURT ERRED BY ADHERING TO THE LAW OF THE CASE DOCTRINE.

This appeal epitomizes invited error. Mortenson repeatedly argued to the trial court that it should "adopt all prior pretrial rulings made in this case," and "adopt all the prior rulings made in the prior court," and that "the case law directs the court to adopt all prior rulings." Now he says that adopting all prior rulings was reversible error. This Court should decline to review this argument.

"The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights." State v. Carson, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), aff'd, 184 Wn.2d 207, 357 P.3d 1064 (2015). The doctrine applies to jury instructions. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). "'That doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal.'" Id. (quoting State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). If error is committed, "of whatever kind," at the defendant's

invitation, "he is ... precluded from claiming on appeal that it is reversible error." Henderson, 114 Wn.2d at 870. "To hold otherwise would put a premium on defendants misleading trial courts; this we decline to encourage." Id. at 868.

There can be no question here that the error that Mortenson now alleges — that the trial court adopted the prior rulings of the previous trial courts — was directly promoted by Mortenson himself. "The defendant's challenge ... must therefore fail." State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979).

In this case, Mortenson did not argue merely that the trial court *should* adopt the previous rulings. He argued that the trial court was *bound by law* to do so. In fact, Mortenson went so far as to admonish the trial court that failing to follow the previous court's rulings would "deprive Mr. Mortenson his right to due process and a fair trial." CP 85. This epitomizes invited error.

Mortenson might claim now that he did not really invite the error because he told the trial court that he preferred bifurcation, or perhaps that his motion was aimed only at the rulings that went his way. But such an argument would not fit the facts, and he cannot have it both ways. The record is clear that Mortenson told the trial court that his first choice was for the court to follow *all* previous

rulings, and that "case law directs" it to do so. 2/4/15 RP 12. He said he would argue for bifurcation only if the trial court declined to follow *all* the previous rulings. Mortenson may not argue now that the trial court erred by doing what he wanted.

This case is the archetypal situation that the invited-error doctrine was designed to eliminate. This Court should refuse to consider this argument.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO BIFURCATE.

Mortenson now argues that the trial court was *not* bound by prior rulings and abused its discretion by not bifurcating his trial or his jury instructions. His lengthy discussion of the "law of the case" is beside the point. The trial court was not obliged to adopt the prior rulings on bifurcation and jury instructions — but it never said that it was. Mortenson enjoyed no right to bifurcation of his trial or of the jury instructions in this case, where the existence of his prior convictions was an essential element of the charge the State was required to prove. The trial court had complete discretion to bifurcate or not. It followed an alternative procedure to instructional bifurcation that our supreme court has approved for such cases. It did not abuse its discretion.

A trial court's decision on bifurcation is reviewed for an abuse of discretion. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). An abuse of discretion exists "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A decision is "manifestly unreasonable" if the court adopts a view that no reasonable person would take. State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990). A decision is an abuse of discretion if it is "outside the range of acceptable choices." State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

In a felony DUI charge, the existence of four or more predicate offenses is an essential element that must be proved to a jury beyond a reasonable doubt. State v. Chambers, 157 Wn. App. 465, 481-82, 237 P.3d 352 (2010). When the existence of a prior conviction is an essential element of the charge, a defendant is not entitled to a bifurcated trial and the trial court does not abuse its discretion by declining to grant one. Roswell, 165 Wn.2d at 198-99. The jury has a right to regard the "to convict" instruction as a complete statement of the law. Id. at 196. See also State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002).

It may be "better practice" in such cases to bifurcate the jury instructions to guard against potential prejudicial effect of the prior convictions. Id. at 147-48. Still, instructional bifurcation "is constitutionally permissible but not required." Roswell, 165 Wn.2d at 197. Our supreme court has never held that "the defendant had a *right* to bifurcated jury instructions." Id. (emphasis in original).

That is because "[c]ourts have long held that when a prior conviction is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue." Id. (citing Pettus v. Cranor, 41 Wn.2d 567, 568, 250 P.2d 542 (1952); State v. Tully, 198 Wash. 605, 89 P.2d 517 (1939); Spencer v. Texas, 385 U.S. 554, 565-66, 87 S. Ct. 648 17 L. Ed. 2d 606 (1967)). Any prejudice created by evidence of the prior conviction may be countered with a limiting instruction from the trial court. Roswell, 165 Wn.2d at 198. "If a prior conviction is an element of the crime charged, evidence of its existence will never be irrelevant." Id. "One can always argue that evidence that tends to prove any element of a crime will have some prejudicial impact on the defendant." Id.

First, the State has no dispute with Mortenson's latest position that the trial court was *not* bound by the earlier pretrial rulings that were not the subject of his first appeal. See State v. Stein, 140 Wn. App. 43, 55, 165 P.3d 16 (2007), as amended (Aug. 21, 2007) (under law of the case doctrine, an *appellate court's decision* is binding on further proceedings in the trial court on remand); State v. Trask, 98 Wn. App. 690, 695, 990 P.2d 976 (2000) (law of the case does not apply to matters not explicitly or implicitly considered on appeal). But his lengthy discussion of the law of the case doctrine, while interesting, is beside the point here.

Contrary to Mortenson's argument, the trial court never said it was bound on the issue of bifurcation. In fact, the trial court explicitly demonstrated otherwise. It indicated that while it felt bound by Judge Gain's rulings on CrR 3.5 and 3.6, it was independently considering the issue of bifurcation. The trial court reviewed the entire case file, and then invited Mortenson to re-litigate his bifurcation motion. 2/4/15 RP 10. This is not the behavior of a court that feels its hands are tied.

Ultimately, the trial court declined bifurcation and elected to follow the rulings of the prior trial court for two reasons: (1) Mortenson argued strenuously that it should (and even must); and (2) it read the entire record of the prior proceedings, considered Mortenson's previous stipulations, and considered that Mortenson had not raised the issue of bifurcation on appeal. Mortenson's current argument —that the trial court refused to exercise discretion (after he told it that it had none)— is not supported by the facts.

In declining to bifurcate, the trial court was well within its discretion under Roswell and Oster. Our supreme court has emphasized that it is never error to decline bifurcation of either the trial or the jury instructions in cases such as this. Mortenson cannot show that the court acted unreasonably. And moreover, he cannot show he was prejudiced by the court's exercise of this discretion.

That is especially so because Mortenson's trial essentially mirrored a procedural alternative to instructional bifurcation that our supreme court in Roswell directly endorsed for felony DUI cases. 165 Wn.2d at 198 n.6 ("a different procedure that could be used by

trial courts to limit prejudice in these situations").[5] In that procedure, a defendant stipulates "to the prior conviction element but the trial court could inform the jury of the element by utilizing statutory citations rather than the name of the crime." Id. Then the jury would be instructed that the defendant had stipulated "to the existence of at least the requisite number of prior offenses within the requisite time period"; that the jury was not to speculate on the nature of the prior convictions; and that it must not consider the stipulation for any other purpose. Id.

That is what happened here: The stipulation to prior offenses supplied the jury with the statutory citation but not the names of the offenses (though even if it had, "it is not error to allow the jury to hear evidence on that issue"). Roswell, 165 Wn.2d at 197. The jury learned no facts of the prior offenses. The trial court instructed the jury to consider the existence of Mortenson's prior convictions only for the predicate-offense element, and not to consider it for any other purpose, including whether he drove drunk. "Any prejudice created by evidence of the prior conviction may be countered with a limiting instruction from the trial court." Id. at 198.

[5] While Roswell was a sex-crime case, the example of the approved procedure used a hypothetical felony DUI case.

Thus, Mortenson can show no harm from the trial court's discretionary denial of bifurcation.

Mortenson argues that the failure to bifurcate in this trial was no different than the prejudicial situation in the earlier trial that resulted in reversal. That is plainly not so. The trial court's adherence to the supreme court's suggested procedure from Roswell here meant the jury did not learn the specific name or nature of the underlying convictions, which was the only prejudicial error in his earlier trial. Moreover, the jury venire Mortenson's earlier trial was not given a contemporaneous limiting instruction, while in this trial the jury was carefully instructed matching our supreme court's direction in Roswell. Mortenson cannot explain how following our supreme court's specific advice for avoiding prejudice results in prejudice.

Mortenson cannot show that the trial court abused its discretion by accepting his invitation to adopt the previous trial court's rulings on bifurcation. His arguments, even if reviewable, are meritless.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Mortenson's judgment and sentence.

DATED this 29TH day of February, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Maureen Cyr, the attorney for the appellant, at Maureen@washapp.org, containing a copy of the BRIEF OF RESPONDENT in State v. Chris Robert Mortenson, Cause No. 73398-2, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 29th day of February, 2016.

Name:
Done in Seattle, Washington