

FILED
SEP 12 2016
WASHINGTON STATE
SUPREME COURT

Supreme Court No. 93576.9
COA No. 73398-2-I

FILED
Aug 22, 2016
Court of Appeals
Division I
State of Washington

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ROBERT MORTENSON,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER/DECISION BELOW..... 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE..... 2

1. First trial 3

2. Second trial 4

3. Third trial 5

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED 6

This Court should grant review because the trial court misapplied the law of the case doctrine. RAP 13.4(b)(1), (4)..... 6

 1. *The trial court misapplied the law of the case doctrine*..... 6

 2. *The error was not invited* 10

 3. *The trial court should have bifurcated the proceeding in order to mitigate the potential for unfair prejudice* 15

 4. *In the alternative, the trial court should have included the prior conviction element in a separate jury instruction and provided a separate verdict form* 18

E. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Cases

Burbo v. Harvey C. Douglass, Inc., 125 Wn. App. 684, 106 P.3d 258 (2005)..... 15

In re Welfare of Harbert, 85 Wn.2d 719, 538 P.2d 1212 (1975)..... 15

Roberson v. Perez, 119 Wn. App. 928, 83 P.3d 1026 (2004) 8

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005) 7, 8

State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999)..... 12

State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993)..... 9

State v. Garcia-Martinez, 88 Wn. App. 322, 944 P.2d 1104 (1997) 9, 13

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005).....9, 10, 13

State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990) 11

State v. Johnson, 77 Wn.2d 423, 462 P.2d 933 (1969) 16

State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005)..... 18

State v. Monschke, 133 Wn. App. 313, 135 P.3d 966 (2006)..... 16, 17

State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002)..... 19

State v. Patu, 147 Wn.2d 717, 58 P.3d 273 (2002) 11

State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008)..... 9

State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008) 16, 19

State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997)..... 18

State v. Smith, 122 Wn. App. 294, 93 P.3d 206 (2004)..... 12

<u>State v. Stein</u> , 140 Wn. App. 43, 165 P.3d 16 (2007)	8
<u>State v. Strauss</u> , 119 Wn.2d 401, 832 P.2d 78 (1992).....	8
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999)	12
<u>State v. Young</u> , 129 Wn. App. 468, 119 P.3d 870 (2005).....	17

United States Supreme Court Cases

<u>Old Chief v. United States</u> , 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).....	16, 17
---	--------

Rules

ER 403	16
ER 404	16
RAP 13.4.....	1

A. IDENTITY OF PETITIONER/DECISION BELOW

Christopher Robert Mortenson requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Mortenson, No. 73398-2-I, filed July 25, 2016. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. When a person's conviction is reversed on appeal and remanded for a new trial, the "law of the case" doctrine does not preclude the second judge from reconsidering issues that were not addressed by the Court of Appeals. Here, Mr. Mortenson's conviction was reversed on appeal and remanded for a new trial. Did the trial court err in concluding the law of the case doctrine prevented it from revisiting the prior court's rulings?

2. Did the Court of Appeals err in concluding any error was invited, where counsel proposed bifurcated jury instructions and argued in favor of presenting the prior conviction evidence in a separate proceeding?

3. Prior conviction evidence carries a substantial danger of unfair prejudice. When a prior conviction is an element but otherwise unrelated to the current charge, the trial court may order the prior

conviction evidence presented to the jury in a separate proceeding. A bifurcated proceeding is particularly warranted when the prior conviction is for the same crime as the current charge, and the evidence consists of multiple prior convictions. Here, Mr. Mortenson was charged with felony DUI, which contains as an element that the defendant has four prior convictions for DUI. Did the court abuse its discretion in refusing to order a bifurcated proceeding?

4. When a prior conviction is an element, the defendant receives greater constitutional protection if the court uses a bifurcated instruction and verdict form as to the existence of the prior convictions. Did the court abuse its discretion in refusing to instruct the jury on the prior conviction evidence in a separate instruction and verdict form?

C. STATEMENT OF THE CASE

In the early morning of August 21, 2010, a King County Sheriff deputy stopped Mr. Mortenson as he was driving on Military Road South in Auburn. 2/10/15RP 80-90, 127-30. Mr. Mortenson was speeding but not driving erratically. 2/10/15RP 82-83. The deputy said Mr. Mortenson's breath smelled of alcohol and his speech was slurred. 2/10/15RP 113-15. He did not agree to take a breath test and

no blood-alcohol test, or field sobriety test, was performed. 2/10/15RP 116-18, 126, 144, 147.

Mr. Mortenson was charged with one count of attempting to elude a pursuing police vehicle and one count of felony DUI.¹ CP 9-11. The felony DUI charge was based on the allegation he had at least four prior offenses. CP 10.

1. First trial.

A trial began in King County Superior Court before Judge Brian Gain. Defense counsel moved to present the evidence of the prior convictions to the jury in a separate proceeding. 1/10/12RP 30-31. Judge Gain denied the motion 1/10/12RP 116-17. But in an effort to mitigate the potential for unfair prejudice, he ruled he would bifurcate the jury instructions, asking the jury to find the existence of the prior convictions in a separate instruction. 1/10/12RP 115; 1/24/12RP 9.

The jury never decided the case. During trial, two witnesses testified to evidence that the court had previously excluded. CP 52. Consequently, Judge Gain declared a mistrial. CP 52.

¹ Mr. Mortenson was also charged with one count of driving while license suspended or revoked in the second degree, and one count of tampering with a witness. CP 9-11. He pled guilty to the driving while license suspended charge, which is not at issue in this appeal. CP 23. The State dismissed the charge of tampering with a witness. CP 52.

2. Second trial.

Mr. Mortenson's case was reassigned to Judge Lori Smith. CP 52. Defense counsel urged the court to reconsider Judge Gain's ruling and order the evidence of the prior convictions be presented to the jury in a separate proceeding. 3/14/12RP 15-22. The court denied the motion and decided to adopt Judge Gain's rulings. 3/14/12RP 29, 37-38. Judge Smith ordered the jury would be instructed separately on the prior convictions and use a separate verdict form. 3/14/12RP 38.

At jury selection, Judge Smith read the information verbatim to the prospective jurors. CP 48-49, 52-53. By doing so, Judge Smith informed the jurors that Mr. Mortenson was charged with committing felony DUI "[c]ontrary to RCW 46.61.502 and 46.61.5055," and that he allegedly had "at least four prior offenses, as defined under RCW 46.61.5055(14)(a), within ten years of the arrest for the current offense." CP 10, 48-49, 52-53. In this way, Judge Smith explicitly informed the jurors that Mr. Mortenson was previously convicted at least four times under the same statute as the current charge. CP 48-49.

The jury convicted Mr. Mortenson of felony DUI. CP 54. Mr. Mortenson appealed. The Court of Appeals reversed the conviction.² CP 48-65. The court concluded Mr. Mortenson was unfairly prejudiced by Judge Smith's inadvertent disclosure of his prior DUI conviction history to the venire. CP 49.

3. Third trial.

A third trial was held before Judge Tanya Thorp, on the felony DUI charge only. Prior to trial, defense counsel once again moved to present the evidence of the prior convictions in a separate proceeding. CP 66-71; 2/04/15RP 11, 13; 2/11/15RP 64-65. In the alternative, counsel moved to provide the jury with a separate instruction regarding the prior conviction element and a separate verdict form, in accordance with Judge Gain's original ruling. 2/04/15RP 13; 2/11/15RP 64-65.

Judge Thorp denied both motions. 2/04/15RP 14-15. Judge Thorp reasoned she was bound by Judge Smith's rulings and the instructions given to the previous jury under the "law of the case" doctrine. 2/04/15RP 15; 2/11/15RP 66. Judge Thorp stated that because the to-convict instruction in the previous trial contained the

² The Court affirmed the conviction for attempting to elude a pursuing police vehicle, which is not at issue in this appeal. CP 49.

prior conviction element, and Mr. Mortenson did not challenge that instruction in his appeal, she did not have discretion to instruct the jury in a different manner. 2/04/15RP 15; 2/11/15RP 66. Thus, the to-convict instruction contained the prior conviction element. CP 115.

Under these circumstances, Mr. Mortenson stipulated he was previously convicted of four or more prior offenses within ten years pursuant to RCW 46.61.5055(14)(a). CP 99; 2/11/15RP 64-65. The jury found Mr. Mortenson guilty of felony DUI. CP 100.

Mr. Mortenson appealed again. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review because the trial court misapplied the law of the case doctrine. RAP 13.4(b)(1), (4).

1. The trial court misapplied the law of the case doctrine.

Before trial, defense counsel urged the court to adopt additional procedures that might reasonably lessen the prejudicial impact that would inevitably occur when the jury heard that Mr. Mortenson had four prior convictions for violating RCW 46.61.5055. First, counsel argued the court should present the evidence of the prior convictions in a separate proceeding from the evidence regarding the present incident. CP 66-71; 2/04/15RP 11-13; 2/11/15RP 64-65. If the court had done

so, there would have been *no* risk that the jury would unfairly conclude Mr. Mortenson must have driven under the influence on the current occasion simply because he had done so at least four times in the past. Second, counsel argued the court should instruct the jury on the prior conviction element in a separate instruction. 2/04/15RP 13; 2/11/15RP 64-65. Doing so would have at least encouraged the jury to consider the allegations regarding the current incident separately from the allegations regarding the prior convictions.

The trial court denied both requests without meaningfully considering them. The court concluded it did not have discretion to bifurcate the proceedings, or to provide different jury instructions, simply because those issues were not raised or decided in Mr. Mortenson's first appeal. 2/04/15RP 15; 2/11/15RP 66. The court erred in concluding it was required by the "law of the case" doctrine to deny Mr. Mortenson's motions.

The "law of the case" doctrine derives from both RAP 2.5(c) and the common law. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). It stands for the proposition that once an appellate court enunciates a principle of law, that holding will be followed in

subsequent stages in the same litigation. Id. The purpose of the doctrine is to promote finality and efficiency in the judicial process. Id.

The law of the case doctrine does *not* preclude a trial court on remand from reconsidering an issue that was not raised or decided by the appellate court in the appeal. Roberson v. Perez, 119 Wn. App. 928, 932, 83 P.3d 1026 (2004), aff'd, 156 Wn.2d 33, 123 P.3d 844 (2005). An appellate court's decision supersedes the trial court's decision only on those issues that the appellate court actually decided. State v. Strauss, 119 Wn.2d 401, 412, 832 P.2d 78 (1992); State v. Stein, 140 Wn. App. 43, 55, 165 P.3d 16 (2007); RAP 2.5(c)(1).

According to these principles, Judge Thorp had authority and discretion to reconsider Judge Gain's and Judge Smith's earlier rulings that were not challenged or ruled upon in the appeal. Mr. Mortenson did not argue in his first appeal that the prior conviction evidence should have been presented to the jury in a separate proceeding, or that the court should have provided a separate jury instruction and verdict form. This Court did not reach those issues. Therefore, the law of the case doctrine did not constrain the trial court's discretion in regard to those issues on remand. Roberson, 156 Wn.2d at 41; RAP 2.5(c)(1).

Judge Thorp did not meaningfully consider Mr. Mortenson's motions to bifurcate the proceedings, or to provide a separate jury instruction and verdict form, because she erroneously believed she *had* no discretion. Generally, RAP 2.5(c)(1) applies only if the trial court on remand "exercises its independent judgment," and "reviews and rules again on such issue." State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). But a trial court's erroneous belief that it lacks discretion to render a decision is itself an abuse of discretion. State v. Garcia-Martinez, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997). A court's categorical refusal to exercise its discretion is effectively a failure to exercise discretion and is subject to reversal. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Moreover, a court necessarily abuses its discretion if its decision is based on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Judge Thorp's refusal to exercise her independent judgment was based on an erroneous belief that she *had* no authority to exercise such judgment. Her failure to exercise discretion was itself an abuse of discretion and should not preclude appellate review. Garcia-Martinez,

88 Wn. App. at 329-30; Grayson, 154 Wn.2d at 342; Quismundo, 164 Wn.2d at 504.

Mr. Mortenson properly raised the issues before Judge Thorp (as well as before Judge Gain and Judge Smith) and even proposed appropriate jury instructions. CP 66-71, 93, 94, 97; 2/04/15RP 11-13; 2/11/15RP 64-65. The trial court had authority to exercise her independent judgment on remand and her refusal to do so is “properly before” this Court. RAP 2.5(c)(1). Because the court’s failure to exercise discretion was itself an abuse of discretion, this Court should grant review, reverse and remand to the trial court so that it may exercise its discretion and render a proper decision.

2. *The error was not invited.*

Contrary to the Court of Appeals’ conclusion, defense counsel did not invite the court’s error in failing to exercise its discretion to bifurcate the proceedings. Counsel proposed bifurcated jury instructions and argued in favor of presenting the prior conviction evidence in a separate proceeding. Although counsel misstated the law of the case doctrine, counsel’s erroneous understanding of the doctrine was the same as the court’s. It is *the court’s* duty to know the law and apply it correctly. When a party asserts an erroneous view of the law

that is the same as the court's, this is not invited error. Moreover, counsel argued that the court *could* bifurcate the proceedings, but the court denied the request based on its erroneous view that it was bound by the law of the case doctrine. Under these circumstances, Mr. Mortenson did not invite the error and may challenge the court's decision on appeal.

Generally, the invited error doctrine precludes a party from setting up an error at trial and then complaining about it on appeal. State v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The policy behind the doctrine is:

The law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant's request. To hold otherwise would put a premium on defendants misleading trial courts; this we decline to encourage.

State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

The invited error doctrine applies only where counsel sets up the error through some *affirmative action* rather than by simply asserting a mistaken view of the law. Washington courts apply the invited error doctrine to erroneous jury instructions only where the appellant *affirmatively requested* or *proposed* the erroneous instruction at issue.

See, e.g., State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (defendants invited error in jury instructions where they *proposed* erroneous instructions); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) (applying invited error doctrine where defense counsel *proposed* instructions identical to instructions given to jury that defendant later challenged on appeal); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defense counsel *participated in drafting* instructions later challenged on appeal).

Here, defense counsel proposed bifurcated jury instructions and affirmatively argued the court should allow the prior conviction evidence to be presented to the jury in a separate proceeding. CP 66-80, 93-94; 2/04/15RP 11-15; 2/05/15RP 44-45; 2/11/15RP 64-66. Counsel repeated the argument on two separate days prior to trial, and again after the testimony had concluded. Counsel reiterated his position after the testimony had concluded because he wanted to make sure his position was “clear.” 2/11/15RP 64. He stated his position:

defense’s request [i]s to bifurcate the instructions. In essence to take section 3 out of the to-convict instruction for felony DUI, hold that back from the instruction packet as well as the stipulation. If the jury returns a verdict as to driving under the influence, then have a second verdict form then provide the stipulation—sorry—permit the stipulation, provide the additional instruction of felony DUI regarding the four prior

offenses, and then allow them to enter a second verdict as to felony DUI.

2/11/15RP 64-65.

The judge summarily denied counsel's request to bifurcate the proceedings based on her erroneous view she was bound by the law of the case doctrine. She did not consider the merits of counsel's proposal or issue a ruling based on the merits. She stated, "Judge Smith's trial jury was instructed as to sub-3 under WPIC 92.26. Parties had an opportunity to raise that to the court of appeals, they did not. The jury will be so instructed." 2/04/15RP 15.

After the close of evidence, the judge again stated her erroneous view that she was required by the law of the case doctrine to deny the request to bifurcate. She said she would provide the same instructions that Judge Smith provided in the previous trial because "any jury instructions were submitted and reviewed by the court of appeals and had that opportunity were the ones I have considered." 2/11/15RP 66.

Because the judge did not consider the merits of counsel's proposal to bifurcate the evidence, she failed to exercise her discretion. Thus, her decision was an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); State v. Garcia-Martinez, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997).

It is true defense counsel initially stated, “I believe the case law directs the Court to adopt all prior rulings.” 2/04/15RP 12. But at the same time, counsel argued the court *could* issue a different ruling. Counsel stated, “my first request would be to completely bifurcate the proceedings and, if not, certainly in the event to follow the previous court’s ruling and at least bifurcate the instructions.” 2/04/15RP 11.

Counsel’s statements show counsel did not *affirmatively request* the court allow the prior conviction evidence to be presented in a single proceeding with the other evidence, and did not *affirmatively request* a to-convict jury instruction that included the prior conviction element. Thus, under the authorities cited above, the invited error doctrine does not apply. Counsel was simply operating under an erroneous view of the law. Counsel mistakenly believed the court was bound by the law of the case doctrine “to adopt all prior rulings.” 2/04/15RP 12.

Defense counsel’s mistaken belief that the court was bound by the law of the case doctrine was shared by both the judge and the deputy prosecutor. As stated, the judge summarily denied the request for bifurcation because she believed she was bound by the law of the case doctrine to apply the same procedure as was used in the previous trial. 2/04/15RP 15; 2/11/15RP 66. The deputy prosecutor also

believed the court was bound by the law of the case doctrine. The prosecutor stated, the previous jury was “instructed on sub-part 1. The jury did consider it. I’m unaware of Mr. Mortenson raising that as a challenge and so I would ask, Your Honor, to adopt the instructions and to instruct this jury—this jury panel as the jury was instructed in the second trial.” 2/04/15RP 14.

There is no authority for the position that the invited error applies when counsel merely states an erroneous view of the law that is shared by both the judge and the prosecutor. Ultimately, it is *the judge's* responsibility to know the law and apply it correctly. See In re Welfare of Harbert, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975); Burbo v. Harvey C. Douglass, Inc., 125 Wn. App. 684, 692, 106 P.3d 258 (2005).

Counsel did not set up the error in this case because counsel was merely echoing a mistaken view of the law that was shared by both the court and the prosecutor. The invited error doctrine does not apply.

3. *The trial court should have bifurcated the proceeding in order to mitigate the potential for unfair prejudice.*

A trial court has broad discretion to control the order and manner of trial proceedings, including the decision whether to bifurcate

the presentation of evidence. State v. Monschke, 133 Wn. App. 313, 334-35, 135 P.3d 966 (2006); ER 611. Moreover, the court has a fundamental duty to adopt a procedure that is reasonably designed to ensure that the trial is conducted fairly, expeditiously and impartially. State v. Johnson, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). Although bifurcated trials are generally not favored, they are sometimes necessary to ensure a fair trial. Monschke, 133 Wn. App. at 335. In particular, bifurcation may be appropriate if a unitary trial would significantly prejudice the defendant, and there is no overlap between evidence relevant to the proposed separate proceedings. See id.

“Courts should strive to afford defendants the fairest trial possible.” State v. Roswell, 165 Wn.2d 186, 197, 196 P.3d 705 (2008). Part of that duty is to adopt a procedure that will minimize the risk that the jury will reach a verdict on an improper basis such as propensity. Old Chief v. United States, 519 U.S. 172, 182, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); ER 404. Under ER 403, the court must weigh the relative probative value of proffered evidence against the risk that the jury will misuse the evidence as propensity evidence. Old Chief, 519 U.S. at 182. If the risk that the jury will misuse the evidence as propensity evidence is high, and there is no significant need to conduct

a unified trial, the court should exercise its discretion and order a bifurcated proceeding. See Monschke, 133 Wn. App. at 335.

It is well-recognized that prior conviction evidence carries a great potential to unfairly influence the jury to enter a verdict based on propensity. The danger of prior crime evidence is that the jury will generalize the defendant's earlier bad act into bad character and conclude he must have committed the later bad act now charged, or worse, he should be convicted as a preventative measure even if he should happen to be innocent momentarily. Old Chief, 519 U.S. at 180-81. When the sole purpose of prior conviction evidence is to prove an element, but the evidence is otherwise unrelated to the current charge, "revealing a defendant's prior offense is prejudicial in that it raises the risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged." State v. Young, 129 Wn. App. 468, 475, 119 P.3d 870 (2005).

Under the circumstances, although Mr. Mortenson entered an "Old Chief" stipulation, the stipulation was not sufficient to cure the unfair prejudice inherent in the prior conviction evidence. Mr. Mortenson stipulated "at the time of the arrest, the defendant had been

previously convicted of four or more prior offenses within ten years pursuant to RCW 46.61.5055(14)(a).” CP 99. Any jury hearing this stipulation, given that the charged offense was felony DUI, would naturally assume that the prior convictions must also be for DUI or other alcohol-related driving offenses. What other possible crimes would be relevant to the current charge? Moreover, the stipulation informed the jury that Mr. Mortenson had *four* prior convictions for DUI, which substantially magnified the risk of unfair prejudice.

Given the highly prejudicial effect of the evidence of multiple prior convictions for the same crime, and given there was no significant reason not to present that evidence in a separate proceeding, the court should have granted Mr. Mortenson’s motion to bifurcate the evidence.

4. *In the alternative, the trial court should have included the prior conviction element in a separate jury instruction and provided a separate verdict form.*

As a general rule, the “to-convict” jury instruction must contain all essential elements of the crime. See State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). But when the statutory framework establishes a base crime with elevated penalties if certain facts are present, the trial court may bifurcate the elevating fact into a special verdict form. State v. Mills, 154 Wn.2d 1, 10, 109 P.3d 415 (2005);

State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002). The jury must find the elevating factor beyond a reasonable doubt before answering the special verdict form. Mills, 154 Wn.2d at 10.

A criminal defendant receives “greater constitutional protection” when a court uses a bifurcated instruction as to the existence of prior convictions. Oster, 147 Wn.2d at 147-48. Instructional bifurcation with respect to criminal history constrains the prejudicial effect of prior convictions upon the jury while clearly maintaining the State’s burden to prove each element beyond a reasonable doubt. Id.

In Roswell, this Court reaffirmed its approval of this bifurcated instruction procedure. Roswell, 165 Wn.2d at 198. The procedure is especially important where the prior conviction is for the same type of crime as the crime charged. Id. There is a particular danger the jury will believe the defendant has a propensity to commit that type of crime. Id. Using the bifurcated jury instruction procedure helps to mitigate that danger. Id.; Oster, 147 Wn.2d at 147-48.

Under these authorities, and in order to mitigate the substantial danger of unfair prejudice inherent in the prior conviction evidence, the

trial court should have granted Mr. Mortenson's motion to provide the jury with a separate jury instruction and verdict form.

E. CONCLUSION

The trial court misapplied the law of the case doctrine by concluding it did not have discretion to consider Mr. Mortenson's motions to hold a bifurcated proceeding or to provide the jury with a separate instruction regarding the prior conviction element. This Court should grant review and reverse the conviction.

Respectfully submitted this 19th day of August, 2016.

s/ Maureen M. Cyr

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX A

2016 JUL 25 AM 9:26

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 73398-2-1
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
CHRIS ROBERT MORTENSON,)	
)	
Appellant.)	FILED: July 25, 2016
)	

APPELWICK, J. — Mortenson was convicted of felony DUI and attempting to elude a pursuing police vehicle. We reversed the felony DUI conviction because the trial court improperly informed the jury that Mortenson had four prior DUI convictions within the last 10 years. On remand, Mortenson asked the court both to adopt its previous rulings and to bifurcate the trial or the jury instructions. The court adopted the rulings of the previous judge. Mortenson was convicted of felony DUI. He argues that the trial court improperly applied the law of the case doctrine and abused its discretion in denying his motion to bifurcate the proceeding or give bifurcated jury instructions. We affirm.

FACTS

On August 21, 2010, Deputy Jeffrey Petrenchak observed Chris Mortenson driving 65 miles per hour on a road with a posted speed limit of 45 miles per hour. State v. Mortenson, noted at 180 Wn. App. 1013, 2014 WL 1286551, at *1. Deputy Petrenchak pursued the vehicle, but Mortenson did not stop or slow down. Id. After over a mile, Mortenson stopped the car and exited it, stumbling toward the patrol car. Id. at *2. Mortenson did not comply with Deputy Petrenchak's orders to get on the ground, and Deputy Petrenchak fired his stun gun multiple times until Mortenson complied. Id. at *2.

Mortenson was charged with felony driving under the influence of intoxicating liquor or any drug (DUI), attempting to elude a pursuing police vehicle, driving while license suspended/revoked in the second degree, and tampering with a witness. Id. at *2. The State alleged that Mortenson had at least four prior DUI offenses within 10 years of the current offense.¹ The State dismissed the charge of tampering with a witness, and Mortenson pleaded guilty to driving while license suspended. Id.

Mortenson's first trial on the felony DUI and attempting to elude charges was before Judge Brian Gain. Id. Before trial, Mortenson moved to bifurcate the proceedings so facts relevant to his prior DUI convictions would be presented in a different proceeding than facts relevant to the charged DUI offense. Judge Gain denied the motion. But, he ruled that he would bifurcate the jury instructions by

¹ An element of a felony DUI charge is that the person has four or more prior convictions under RCW 46.61.5055 within 10 years. RCW 46.61.502(6)(a).

requiring the jury to first determine whether Mortenson drove under the influence and then decide whether the State also proved that Mortenson had four prior convictions. At trial, witnesses testified to evidence that had previously been excluded, and Judge Gain declared a mistrial. Id.

Mortenson's second trial was before Judge Lori Smith. Id. Mortenson asked Judge Smith to reconsider Judge Gain's decision not to bifurcate the trial. Judge Smith adopted Judge Gain's rulings. With this in mind, Mortenson stipulated that he had four prior convictions under RCW 46.61.5055. Mortenson, 2014 WL 1286551 at *2. At the beginning of jury selection, the court read the information to the jury. Id. This informed the jury that Mortenson was charged with committing felony DUI in violation of RCW 46.61.502 and RCW 46.61.5055, and that he had at least four prior offenses under RCW 46.61.5055(14)(a) within 10 years of the current offense. Mortenson, 2014 WL 1286551 at *2. Ultimately, Mortenson did not offer bifurcated jury instructions. Mortenson was convicted of felony DUI and attempting to elude a pursuing police vehicle. Mortenson, 2014 WL 1286551 at *3.

On appeal, this court reversed Mortenson's conviction for felony DUI. Id. at *6. We held that by mentioning RCW 46.61.5055 in respect to both Mortenson's prior convictions and the current offense, the trial court informed the jury that Mortenson had four prior DUI convictions within the last 10 years. Id. at *4. This was inherently prejudicial, because it made it more likely that the jury would convict

Mortenson based on improper considerations of his propensity to commit the crime. Id.

The case was remanded for a third trial on the felony DUI charge, this time before Judge Tanya Thorp. Id. at *9. Before trial, Mortenson made several motions. In his trial brief, he argued that the court should adopt all prior pretrial rulings made in the case. He asserted that the pretrial rulings that had not been objected to or raised on appeal had become the law of the case. In a separate motion filed on the same day, Mortenson argued that the court should bifurcate the trial into two proceedings: one involving the facts relating to the current charge of felony DUI and one involving the facts relating to Mortenson's prior convictions.

At oral argument on these motions, Mortenson argued that the court was bound by the prior judges' rulings regarding the prior conviction evidence. But, he asserted that if the court was willing to reconsider those issues, it should completely bifurcate the proceedings or at least bifurcate the instructions. The trial court denied Mortenson's motion to bifurcate. The court noted that Judge Smith's trial jury was instructed as to the third element of felony DUI—that the defendant has four or more prior offenses within 10 years. 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 92.26 (3d ed. 2008). The court recognized that the parties could have challenged this instruction on appeal, but they did not. As a result, the court ruled that the jury would receive the same instructions.

The parties again stipulated that Mortenson had four prior convictions under RCW 46.61.5055(14)(a). The jury received a single “to convict” instruction, which included as an element “[t]hat at the time of arrest, the defendant had been previously convicted of four or more prior offenses within ten years pursuant to RCW 46.61.5055(14)(a).” The jury was also instructed that the stipulation was admitted solely to establish this element, and it was not permitted to speculate about the nature of the convictions.

Mortenson was convicted of felony DUI. He appeals.

DISCUSSION

Mortenson asserts that the trial court erred in denying his motion to bifurcate the proceedings or the jury instructions. And, Mortenson argues that the court erred by failing to exercise its discretion to reconsider the previous judges’ rulings.

An essential element of felony DUI is that the person has four or more prior convictions under RCW 46.61.5055 within 10 years. RCW 46.61.502(6)(a). Before trial, Mortenson moved the court to bifurcate the trial issues into (1) the facts relating to the current charge and (2) the facts relating to any prior DUI convictions. He argued that if the State were permitted to submit evidence that he has committed prior crimes identical to the charged offense, the jury would be unable to set aside that knowledge when weighing the evidence relating to the current offense. To mitigate this potential prejudice, Mortenson asserted that the court should first submit to the jury the question of whether the State has proved that he drove while under the influence of intoxicating liquor. Under this theory

only if the jury found that the State had met its burden would the jury consider if the State had also proved that Mortenson had the requisite prior convictions.

The Washington Supreme Court has explicitly rejected the argument that a defendant has a right to a bifurcated trial when prior convictions are an essential element of the charged offense. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). The defendant in Roswell relied on the United States Supreme Court's decision in Old Chief v. United States, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) to contend that proof of past convictions is necessarily prejudicial. Roswell, 165 Wn.2d at 194-95. But, our Supreme Court disagreed, noting that while Old Chief recognized that a defendant may stipulate to a prior conviction to prevent the State from introducing details about the offense, it did not hold that a jury must be completely shielded from any reference to the prior conviction. Id. at 195.

Under Roswell, Mortenson did not have a right to a bifurcated trial. His prior convictions were an essential element of the crime charged, and it was not error for the jury to hear evidence of that element. Roswell, 165 Wn.2d at 197. The trial court did not abuse its discretion in denying his motion for a bifurcated trial.

Alternatively, Mortenson asserts that the trial court should have bifurcated the jury instructions and verdict form so that the jury was required to first find the other elements of felony DUI were satisfied before finding that the prior conviction element was met.

In State v. Oster, our Supreme Court approved the use of bifurcated jury instructions when prior convictions are an essential element of the crime charged. 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002). The court noted that bifurcated instructions guard against unfair prejudice while clearly maintaining the State's burden to prove each element beyond a reasonable doubt. Id. However, the Roswell court clarified that Oster does not stand for the proposition that a defendant has a right to bifurcated jury instructions. Roswell, 165 Wn.2d at 197. The trial court simply did not err in giving bifurcated jury instructions in Oster, but such a decision is reviewed for an abuse of discretion. Id. at 197-98.

In a footnote, the Roswell court offered an alternative procedure that could be used rather than bifurcation to mitigate prejudice in these situations. Id. at 198 n.6. Under this procedure, the defendant could stipulate to the prior conviction element, but the offense would be identified by statutory citations rather than the name of the offense. Id. The jury would be instructed that the charge requires a certain number of prior offenses, and the defendant has stipulated to the existence of the requisite number of prior offenses. Id. And, the jury would be instructed that it is not to speculate as to the nature of the prior convictions or use the stipulation for any other purpose. Id.

The trial court followed this procedure here. No evidence was presented of the facts surrounding Mortenson's prior convictions. Mortenson was permitted to stipulate to the existence of those prior convictions. This stipulation did not identify Mortenson's prior convictions as prior DUI convictions. Instead, it merely stated

"[t]hat at the time of the arrest, the defendant had been previously convicted of four or more prior offenses within ten years pursuant to RCW 46.61.5055." The jury was instructed that it was to consider this stipulation solely to establish the prior conviction element, and it was not to speculate as to the nature of the convictions or use this evidence for any other purpose. This procedure was sufficient to mitigate the potential unfair prejudice of prior criminal history while still permitting the State to meet its burden. The trial court did not abuse its discretion in denying Mortenson's motion to bifurcate the jury instructions.

Mortenson also suggests that the court abused its discretion in failing to exercise its discretion to reconsider the question of the prior conviction evidence. He argues that the court erroneously believed that under the law of the case doctrine, it was bound by the decision of the prior judges on whether to bifurcate the proceedings or the instructions.

Generally, the law of the case doctrine prevents a court from considering an issue that was already decided in a previous appeal in that case. State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). But, the trial court on remand may exercise its independent judgment as to an issue not raised in the first appeal. RAP 2.5(c)(1); 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.5 task force cmt. at 263 (7th ed. 2014). On remand, the trial court has discretion to decide to revisit an issue that was not the subject of an earlier appeal. State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993).

Mortenson's assertion that the trial court believed it was bound by the prior judges' decisions is not supported by the record. After oral argument on Mortenson's motion to bifurcate, the trial court recognized that there was an issue with Judge Gain's trial ending in a mistrial. And, it noted, "Judge Smith's trial jury was instructed as to [the prior conviction element of felony DUI]. Parties had an opportunity to raise that to the court of appeals, they did not. The jury will be so instructed." The court did not mention that it had no discretion to revisit the issue—it merely decided that it would not do so. The court did not abuse its discretion in giving the jury the same instructions that were provided in the second trial.

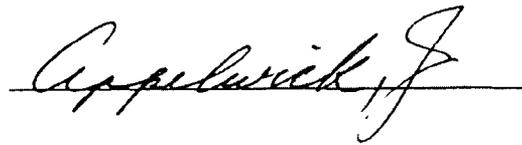
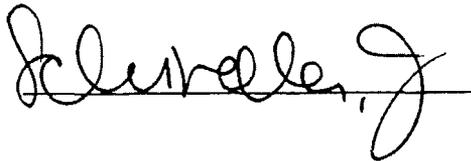
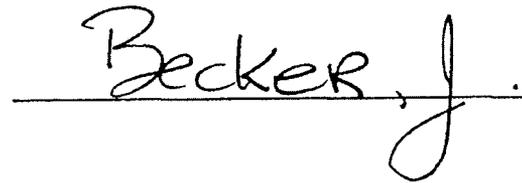
Moreover, even if the trial court did conclude that it lacked discretion to reconsider the prior judges' rulings on bifurcation, Mortenson affirmatively asked the court to reach that conclusion. In his trial brief, Mortenson moved the court to adopt all prior pretrial rulings, because all pretrial motions that were not objected to or raised on appeal had become the law of the case. Mortenson vigorously advocated for the court to adopt this position, asserting, "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 the evidence and not the randomness of what judges happens to be available to preside over his trial." He reiterated this request at oral argument on the motions, stating that "the case law directs the court to adopt all prior rulings."

A criminal defendant cannot seek review of an error he helped create. State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979) (applying the invited error

doctrine where the defendant requested a particular jury instruction); State v. Carson, 179 Wn. App. 961, 973-74, 320 P.3d 185 (2014) (applying the invited error doctrine where the defendant strenuously opposed the trial court's proposed jury instructions), aff'd, 184 Wn.2d 207, 357 P.2d 1064 (2015). We conclude that if the trial court did reach this decision because it believed it was bound by the prior judges' rulings, it did so at Mortenson's request. Therefore, any error was invited.

We affirm.

WE CONCUR:

Handwritten signature of Appelwick, J. in cursive script, written over a horizontal line.Handwritten signature of Schwallen, J. in cursive script, written over a horizontal line.Handwritten signature of Becker, J. in cursive script, written over a horizontal line.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

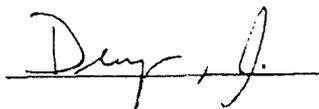
STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 68812-0-1
v.)	
)	ORDER DENYING
CHRIS ROBERT MORTENSON,)	APPELLANT'S MOTION
)	FOR RECONSIDERATION
Appellant.)	
_____)	

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 23rd day of April, 2014.

FOR THE COURT:



FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR 23 AM 11:37

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73398-2-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Ian Ith, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[ian.ith@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 22, 2016