NO. 93668-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LINNELL BLUFORD,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Bluford, No. 73047-9-I, __Wn. App. __, 379 P.3d 163 (filed August 29, 2016).

C. ISSUES PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issues, which the Court of Appeals decided adversely to the State:

1. Whether the doctrine of invited error prevents the defendant from challenging on appeal the trial court's determination that a lesser-included instruction was not appropriate because the legal prong of the Workman test was not met, after the defendant explicitly conceded in the trial court that the legal prong of Workman was not met.

2. Whether a court may consider circumstantial evidence, such as a judge's comments at sentencing, in determining the statutory prong under which a defendant pled guilty in a prior case for purposes of engaging in a legal comparability analysis, and whether the circumstantial evidence in this case was

sufficient to prove by a preponderance of the evidence that the defendant was previously convicted under a comparable prong of the New Jersey robbery statute.

D. STATEMENT OF THE CASE

The defendant, Charles Linnell Bluford, was convicted of six counts of robbery in the first degree against six different victims, as well as rape in the first degree against one of the robbery victims and indecent liberties by forcible compulsion against another. CP 11-14, 136-44. The facts of the crimes, which are relevant to the joinder issue of which Bluford seeks review, are set forth in the State's briefing before the Court of Appeals. Br. of Respondent at 3-17. Facts relevant to the additional issues raised in this Answer and Cross-Petition are set out below in the sections to which they pertain.

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the joinder issue raised by Bluford in his petition for review. The State believes that review by this Court of the joinder issue is unnecessary. However, if this Court grants review of that issue, then in the interests of justice the Court should also grant

review of the following issues raised in the Court of Appeals, which that court decided adversely to the State. RAP 13.4(d).

1. BLUFORD INVITED THE ERROR THAT CAUSED THE TRIAL COURT TO REFUSE TO INSTRUCT THE JURY ON FOURTH DEGREE ASSAULT AS A LESSER INCLUDED OFFENSE OF INDECENT LIBERTIES.

This Court may review a decision of the court of appeals that conflicts with another decision of the court of appeals or raises an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(2), (4). In holding that Bluford did not invite the trial court's denial of an instruction on fourth degree assault lesser-included offense of indecent liberties, the court of appeals' decision mischaracterizes the record and conflicts with other decisions of the court of appeals. Bluford, 379 P.3d at 171.

a. Relevant Facts.

Bluford asked the trial court to instruct the jury on fourth degree assault as a lesser included offense of indecent liberties. CP 60-66. The State conceded that the factual prong of the Workman test was met, but argued that under State v. Thomas[1] the legal prong was not met, because assault requires a mens rea of

[1] 98 Wn. App. 422, 989 P.2d 612 (1999).

intent, while indecent liberties requires only knowledge. 29RP 73-75. Bluford did not contest the continued validity of Thomas, and explicitly conceded that the legal prong of Workman was not met because assault requires a higher mens rea than indecent liberties. 29RP 74-75 ("[W]e are basically conceding the fact that we are asking for a higher mental standard of intent with the assault than indecent liberties."). However, Bluford argued that because *the facts* were sufficient in this case for the jury to find that he acted with the higher mens rea required for fourth degree assault, an instruction on assault was nevertheless appropriate. 29RP 75. He did not explain how his position could be reconciled with Workman's requirement that both the legal and factual prongs be met. The trial court agreed that assault requires a higher mens rea than indecent liberties, and therefore declined to give the requested instruction because the legal prong of the Workman test was not met. 29RP 76.

The court of appeals summarized Bluford's argument to the trial court by saying, "Bluford acknowledged Thomas's holding on the claimed difference in mental state. But Bluford maintained that

a lesser included offense instruction was still appropriate." Bluford, 379 P.3d at 171. The court of appeals held that Thomas is no longer good law and that fourth degree assault does not require a higher level of intent than indecent liberties, and that the trial court therefore erred in ruling that the legal prong of Workman was not met. Id. at 170-71. It concluded that because "Bluford maintained that a lesser included offense instruction was appropriate," he did not invite the error. Id. at 171.

b. The Court Of Appeals Erred In Holding That Bluford Did Not Invite The Error.

Upon request, a defendant is entitled to have the jury instructed on a lesser included offense when two conditions are met: (1) each of the elements of the lesser offense must be a necessary element of the crime charged (known as the "legal prong"), and (2) the evidence in the case must support an inference that only the lesser crime was committed (known as the "factual prong"). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under the invited error doctrine, the appellate courts will not review a party's assertion of an error to which the party "materially contributed" at trial. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). Where a party concedes a

legal issue in the trial court, invited error prevents him from later challenging the trial court's ruling on that issue. In re Det. of Rushton, 190 Wn. App. 358, 371-72, 359 P.3d 935 (2015).

The court of appeals' opinion mischaracterizes the record in this case. Its description of Bluford's arguments in the trial court ignores the fact that Bluford did not merely acknowledge Thomas's holding, but explicitly conceded that fourth degree assault requires a higher level of intent than indecent liberties. The trial court accepted that concession, and its agreement on that point of law was the sole basis for its conclusion that the legal prong of Workman was not met and that the requested lesser-included instruction should not be given.

The court of appeals therefore erred in concluding that Bluford did not "materially contribute to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error." Bluford, 379 P.3d at 171 (quoting State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014)); see Rushton, 190 Wn. App. at 371-72 (any error in trial court's finding that annual review of sexually violent predator

status was not timely done was invited by the State's concession in the trial court that the statutory time restrictions were violated).

A defendant who asks a trial court to do something, but informs the trial court that it has no lawful authority to grant his request, should not then be allowed to challenge the denial of his request on appeal. Unfortunately, this is exactly the result that the court of appeals' opinion allows. If this Court grants Bluford's petition for review on the joinder issue, it should also accept review of this issue to correct the court of appeals' error.

2. A JUDGE'S COMMENTS AT SENTENCING MAY BE CONSIDERED AS CIRCUMSTANTIAL EVIDENCE OF THE STATUTORY PRONG UNDER WHICH THE DEFENDANT PLED GUILTY; THE STATE THEREFORE OFFERED SUFFICIENT EVIDENCE TO PROVE THAT BLUFORD'S NEW JERSEY GUILTY PLEA WAS MADE UNDER A COMPARABLE PRONG OF NEW JERSEY'S ROBBERY STATUTE.

The court of appeals held that the trial judge's comments in the judgment and sentence pertaining to Bluford's prior New Jersey robbery conviction may not be considered in evaluating whether the State has proven the legal comparability of that conviction. Bluford, 379 P.3d at 173. The court of appeals concluded that the State

failed to prove the legal comparability of Bluford's New Jersey conviction. Id. The former holding is inconsistent with opinions of this Court allowing the use of transcripts of prior proceedings to establish criminal history, and the latter holding fails to faithfully apply the preponderance of the evidence standard.

a. Relevant Facts.

At sentencing, the State presented documents related to Bluford's two 1998 South Carolina convictions for armed robbery and his 1994 New Jersey conviction for robbery. Sentencing Ex. 3, 4;[2] CP 306-47. The New Jersey documents established that Bluford was originally indicted for a first degree violation of N.J. Stat. 2C:15-1, with the specific allegations that Bluford "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." CP 316. This charging language corresponds to the second of three possible ways in

[2] Copies of the exhibits appear in the Clerk's Papers as attachments to the State's sentencing brief. CP 305-47. The exhibits contain much clearer photocopies of the documents; however, because the exhibits do not have page numbers, this brief will primarily cite to the Clerk's Papers.

which robbery can be committed in New Jersey. N.J. Stat. 2C:15-1(a)(2).[3]

Pursuant to his New Jersey plea agreement, Bluford pled guilty to second degree robbery rather than first degree. CP 313-14. However, it appears that no amended charging document was ever filed. Sent. Ex. 4; CP 321 (certification that records provided are true and correct copy of original record in the case). The Judgement of Conviction, in describing the original and final charges, does not specify the subsection of N.J. Stat. 2C:15-1 under which Bluford was originally charged or pled guilty. CP 313. It simply lists the description for both the original and final charges as "robbery," the statute for both as "2C:15-1," and the degree for the original charge as "1" and for the final charge as "2." CP 313.

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[3] N.J. Stat. 2C:15-1 states:

> a. Robbery defined. 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.
>
> b. Grading. 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.

In setting out the trial court's reasons for the sentence imposed, the New Jersey judgment indicates that the offense was an armed robbery in which the defendant and a juvenile accomplice stole cash and a ring from the victim, using a weapon that appeared to the victim to be a 9mm handgun but was in fact a BB gun. CP 314. However, the specific facts to which Bluford admitted as a basis for his plea are not clear from the record.[4]

At sentencing in the current case, the State argued that Bluford's South Carolina and New Jersey convictions were each legally and factually comparable to a Washington "most serious offense," specifically first degree robbery and/or second degree robbery. CP 272-75, 278-84; 34RP 25-28. Bluford stated that he did not concede that the offenses were comparable, but he offered no specific arguments challenging the State's analysis. CP 415-16; 34RP 31-32. The trial court agreed with the State, and found that all three of the out-of-state convictions were legally and factually comparable to a Washington conviction for first degree or second degree robbery or attempted robbery. 34RP 34-38; CP 196.

[4] The written plea form states that Bluford would need to make an oral statement of what he did that made him guilty of the crime before the court accepted his plea. CP 318. However, there is no surviving record of what Bluford said at the plea hearing.

The court of appeals concluded that the State had failed to prove the legal comparability of Bluford's New Jersey conviction. Bluford, 379 P.3d at 173. It declined to draw any inferences from the lack of an amended charging document, and held that the trial court's comments in the judgment and sentence could not be considered when evaluating legal comparability. Id.

b. The Details Of A Defendant's Conviction May Be Proved By Circumstantial Evidence, Such As A Trial Court's Comments At Sentencing.

The Sentencing Reform Act (SRA) provides that, when a defendant has prior convictions in another state, the out-of-state convictions are considered part of the defendant's criminal history and "shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3); RCW 9.94A.030(12). The State bears the burden to prove comparability by a preponderance of the evidence. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004).

If the elements of an out-of-state offense are "substantially similar" to the elements of a Washington criminal statute in effect when the out-of-state offense was committed, or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction is legally comparable and counts toward the

defendant's offender score. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

Although a certified copy of a judgment is usually the best method of proving the existence and nature of a prior conviction, this Court has held that "other comparable documents of record or transcripts of prior proceedings" may also be used. In re Pers. Restraint of Adolph, 170 Wn.2d 556, 568, 243 P.3d 540 (2010). When the transcript of a prior proceeding is used to establish the details of a prior conviction, the court conducting a comparability analysis relies on the statements of the court and the parties in the prior proceedings as circumstantial evidence of the crime of which the defendant was convicted. If the prior trial court made statements on the record in the prior proceeding suggesting that the defendant had pled guilty pursuant to a particular statutory prong, the current court would be permitted to rely upon that statement as evidence that the defendant's conviction was in fact entered under that prong. Cf. id.

There is no principled reason to distinguish between a trial court's oral statements recorded in the transcript of a prior proceeding and written statements recorded in the judgment and

sentence. Whether those statements are sufficient to prove the prong under which the defendant pled by a preponderance of the evidence is a separate question, but it is illogical to say that written statements in a judgment and sentence may not be considered when this Court has established that oral statements documented in a transcript may be considered. The court of appeals therefore erred in holding that the New Jersey court's comments in the judgment and sentence could not be considered as circumstantial evidence of the prong under which Bluford pled guilty.

c. The State Proved The Comparability Of Bluford's New Jersey Conviction By A Preponderance Of The Evidence.

Although the State must establish a prior conviction's existence and comparability by a preponderance of the evidence, "that burden is not overly difficult to meet and may be satisfied by evidence that bears some minimum indicia of reliability." Adolph, 170 Wn.2d at 569 (internal quotations marks omitted). Proving a fact "by a preponderance of the evidence" merely requires proving that the fact is more likely than not true. In re Pers. Restraint of Woods, 154 Wn.2d 400, 414, 114 P.3d 607 (2005).

The court of appeals Bluford's indictment charged first degree robbery under language corresponding to N.J. Stat.

2C:15-1(a)(2), which makes a person guilty of robbery if, in the course of committing a theft, he or she "threatens another with or purposely puts him in fear of immediate bodily injury." CP 316; N.J. Stat. 2C:15-1(a)(2). The New Jersey records indicate that Bluford was allowed to plead guilty to second degree robbery instead of first degree—a change that involves only removing the allegation that a deadly weapon was used or threatened to be used. See N.J. Stat. 2C:15-1(b). However, it appears that no amended charging document was ever filed.[5] See CP 321.

If Bluford had pled guilty under a different prong than the one set out in the original charging document, an amended charging document would have been necessary to establish that Bluford was aware of the change before he could make a voluntary and intelligent guilty plea to the new charge. Given that no such document appears in the record, it is more likely than not that Bluford pled guilty under the same prong under which he was originally charged.

The conclusion that the amendment did not alter the prong under which Bluford was charged is further supported by the trial

[5] This has occurred in Washington cases as well, and has been held to not affect the validity of the amendment. E.g., State v. Eaton, 164 Wn.2d 461, 466, 191 P.3d 1270 (2008).

court's comments in the Judgment of Conviction stating that the offense involved the display of what appeared to be a handgun during a theft. CP 314.

The court of appeals found no fault with the State's argument that the prong under which Bluford was originally charged is legally comparable to a Washington robbery or attempted robbery conviction. Bluford, 379 P.3d at 172. However, it overturned the trial court's finding of comparability because the evidence presented by the State did not "exclude the possibility that [Bluford] could have pleaded guilty to the third prong of the statute." Id. In so doing, the court of appeals failed to faithfully adhere to the preponderance of the evidence standard established by this Court, and instead applied a standard closer to proof beyond a reasonable doubt. While the evidence submitted by the State admittedly did not prove beyond a reasonable doubt that Bluford pled guilty under the same prong under which he was originally indicted, it was sufficient to conclude that Bluford more likely than not pled guilty under that prong, thus proving the legal comparability of the New Jersey conviction by a preponderance of the evidence.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the additional issues identified in this Answer.

DATED this 28th day of October, 2016.

Respectfully submitted,

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Today I directed electronic mail addressed to Casey Grannis, the attorney for the appellant, at Grannisc@nwattorney.net, containing a copy of the ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION, in State v. Charles Bluford, Cause No. 93668-4, in the Supreme Court, 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 28 day of October, 2016.

Name:
Done in Seattle, Washington

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

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