NO. 73047-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHARLES BLUFORD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIA L. GARRATT

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES PRESENTED

1. Where the appellant challenges only the initial joinder of charges, and not the denial of severance, should this Court follow supreme court precedent in analyzing only whether the requirements of the joinder rule are met, and abandon a prior holding of this Court that contradicts that precedent?

2. Even if this Court continues to analyze prejudice in evaluating the propriety of an initial joinder, did the trial court properly exercise its discretion in finding that the defendant failed to establish that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy, where the State's evidence was equally strong on each count, the defendant's defenses were clear and consistent, and the evidence would have been cross-admissible even if the charges were tried separately in seven 25-witness trials rather than one 58-witness trial?

3. Where the defendant conceded in the trial court that fourth degree assault requires a higher mens rea than indecent liberties, is he now precluded from challenging the trial court's refusal to give the requested lesser included offense instruction on the grounds that the trial court erred in ruling that the elements of fourth degree assault are not necessarily included within the elements of indecent liberties?

4. Where the evidence established that the defendant was more likely that not previously convicted in both South Carolina and New Jersey of offenses whose elements are the same as or narrower than the elements of a Washington second degree robbery or attempted robbery, did the trial court properly find that the foreign offenses are comparable to Washington most serious offenses?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Charles Linnell Bluford, by amended information with seven counts of robbery in the first degree against seven 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. A jury acquitted Bluford on one robbery charge, and found him guilty as charged on all other counts. CP 136-44. At sentencing, the trial court found that Bluford had at least two prior convictions comparable to most serious offenses, and sentenced him as a persistent offender to life in prison without the possibility of early release. CP 196, 199. Bluford timely appealed. CP 227.

2. SUBSTANTIVE FACTS.

Count One:

After 11:00 p.m. on January 22, 2012, Justin Sakounthong had just parked and exited his vehicle in a dark residential area when a man approached him and falsely accused him of having side-swiped the man's car. 11RP[1] 39-40, 47. When the man got within 10 to 15 feet of Sakounthong, he pointed a dark handgun at him and demanded his money. 11RP 40, 63. After Sakounthong handed over his wallet, the robber repeatedly demanded "the rest of it," and then searched Sakounthong's pockets and patted over his clothes at his waist and ankles to check for additional property, taking his keys.[2] 11RP 41, 54. The robber then instructed Sakounthong to turn around and run away. 11RP 41-42. As Sakounthong did so, he heard the robber throw Sakounthong's keys to the ground and saw a dark-colored late-80s-or-early-90s Japanese-made car speed away with its headlights off. 11RP 42, 66-67.

Sakounthong described the robber as a black male between 28 and 40 years old, approximately five-foot-six, bald, with a moustache; he was wearing tan construction-style boots, a black sweatshirt with the hood up,

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[1] The State will refer to the verbatim report of proceedings in accordance with footnote one in the Amended Brief of Appellant.

[2] The robber did not find Sakounthong's phone, because he neglected to search the particular pocket in which it was stored. 11RP 54.

and a black and gray letterman-style jacket. 11RP 16. Sakounthong's property was later found in Bluford's wallet and in Bluford's residence. 23RP 102, 173-75. Bluford was later booked into jail wearing boots matching the description given by Sakounthong. 19RP 73.

Counts Two and Three:

Around 2:00 a.m. on January 26, 2012, R.J. had just parked in a dimly lit area of her Bellevue apartment building's unsecured parking garage and had started to open her door when a man pulled it the rest of the way open, held a gun to her head, and threatened to kill her if she didn't give him her purse. Ex. 23 at 12-13[3]; 12RP 84. R.J. allowed the robber to take her purse; he then asked if she had anything else on her person, which R.J. denied. Ex. 23 at 13-14. Keeping the gun at her head, the robber found R.J.'s cell phone under her leg and took it, and then began to pat down her body. Ex. 23 at 21-22. During the pat-down, the robber reached inside her bra and underwear to grope her breasts and pubic area skin-to-skin. Ex 23 at 23-24. The robber did not search any other part of R.J.'s body with skin-to-skin contact, nor did he search the pockets of her jacket. Ex. 23 at 24. Eventually, the man left, taking R.J.'s purse and cell phone with him. Ex. 23 at 28.

[3] Because R.J. was medically unable to travel to Seattle for trial, her testimony was taken in a preservation deposition, and the video recording and transcript of the deposition were presented to the jury by agreement of the parties.

R.J. described the robber as a black male in his 30s, approximately six feet tall, wearing black gloves and a black down jacket with a fur-trimmed hood. 12RP 90. A surveillance camera at the entrance of the parking garage confirmed that a male wearing a puffy jacket with the fur-lined hood up, whose face could not be seen, had followed R.J.'s car into the garage on foot, and then had run out of the garage shortly thereafter. 13RP 37-38. A comparison of the suspect's image to the height of a sign past which the suspect had walked revealed that the top of the suspect's raised hood was no higher than about five-foot-nine. 13RP 61. R.J.'s property was later found in the purse of Bluford's girlfriend and in Bluford's residence. 23RP 104, 167; 24RP 33-35, 86.

Count Four:

Around 11:45 p.m. on February 21, 2012, Victor Ramirez-Aguilar was nearing his apartment in Renton when he realized that a dark-colored, 1993-to-1995 Honda Civic was following his vehicle. 15RP 93-101. As Ramirez-Aguilar pulled into his dimly lit parking spot and got out, the Civic stopped nearby and turned out its lights, and a man got out and ran up to Ramirez-Aguilar, asking what time it was. 15RP 101-03. When the man got close, he pointed a black handgun at Ramirez-Aguilar and demanded his wallet. 15RP 103-04, 120. When Ramirez-Aguilar asked if he was serious, the robber struck him in the head with the gun several

times and then went through Ramirez-Aguilar's pockets, taking his wallet and some coins, but did not search anywhere else on his body. 15RP 105, 109-12, 119. The robber then instructed Ramirez-Aguilar to lie down, and kicked him in the stomach once he had done so. 15RP 111. The robber then took Ramirez-Aguilar's keys and threw them away before running back to the Civic, which was driven away by a woman. 15RP 112-13, 121. Ramirez-Aguilar described the robber as a black male who was approximately five-foot-eight and wore a small-billed cap and black vest. 16RP 89.

Although he was not able to pick anyone out of a photo montage a month later, soon thereafter Ramirez-Aguilar identified Charles Bluford in a line-up as the man who had robbed and beaten him. 15RP 123-28, 142. With the exception of the keys the robber threw near a dumpster, Ramirez-Aguilar's property was never recovered. 15RP 131.

Count Five[4]*:*

Around 8:00 p.m. on March 2, 2012, Elvis Rivera parked outside his apartment in his normal unsecured parking spot, which was in a dark area. 13RP 112-14. After sitting in his vehicle for a few seconds listening to music, Rivera exited his vehicle, but immediately felt something touch

[4] Bluford was found not guilty on this count. CP 140. However, the facts are relevant to the joinder issue Bluford raises in his appeal.

the back of his head. 13RP 112. A man told him not to move and to hand over his wallet. 13RP 112. As Rivera handed over his wallet, he saw that the man had a black handgun. 13RP 116-17. The robber then searched Rivera's pockets and found his phone. 13RP 117. Afterwards, the robber calmly walked away. 13RP 119. A later canine scent track ended in a parking lot, consistent with the suspect getting into a vehicle. 17RP 108.

Rivera described the robber as a black male in his 40s, wearing black pants and a black jacket with the hood up, and carrying a black handgun. 13RP 107, 123-25, 132. Less than a month after the robbery, Rivera identified Bluford as the perpetrator in a lineup. 26RP 110-11. Officers later showed Rivera a phone that had been recovered during their investigation, but he was unable to definitively say whether it was his. 13RP 139-40.

Counts Six and Seven:

Shortly after 10:00 p.m. on March 10, 2012, R.U. parked in front of her garage on her dark dead-end street in Shoreline and opened her garage door in preparation for entering her house through the garage. 28RP 81-83; 29RP 5, 26. As she exited her vehicle, a man approached her, saying "ma'am" repeatedly. 28RP 83-85. The man then pulled out a black handgun and held it to R.U.'s ribs, forcing her to enter the garage and face the wall. 28RP 89-90; 29RP 22. The man took her purse and

removed her wedding and engagement rings from her finger. 28RP 90-91; 29RP 34. He then pulled R.U.'s pants down, and when she tried to pull them back up, the man struck her leg with the gun, slapped her face twice, and pushed her forehead into the wall. 28RP 94-95.

In an attempt to dissuade the man from raping her, R.U. claimed to have AIDS, but the man only removed a condom from his pocket and told her to look at the wall. 28RP 98-99. The man digitally penetrated her vagina more than five times, and then forced R.U. to kneel in front of him and perform fellatio on him without a condom. 28RP 102-05; 29RP 14. As this was happening, R.U. heard a man and woman talking in a green 1990s four-door vehicle that was now parked at the end of her driveway, which had not been there when the rapist first approached R.U. 28RP 106-08; 29RP 28-29. The woman in the car yelled, "Hey, that's enough, let's go," to the man who was raping R.U., but he did not stop. 28RP 108, 110. R.U. distracted the man by claiming that someone was approaching the garage, and then ran inside and called 911 when he went to look outside. 28RP 111.

R.U. described her rapist as a black male who was five-foot-six or five-foot-seven, had a heavy build, was 35 to 37 years old, was circumcised, had a small amount of facial hair, smelled of alcohol, and wore a beanie-style knit cap and a letterman-style jacket with an emblem

on the left breast. 17RP 168-71; 29RP 5-8, 13. Genetic testing of her rape kit revealed the presence of a small amount of DNA from a man other than R.U.'s husband, but the quantity was too small to allow identification. 17RP 78-82.

R.U.'s property was later found in the possession of a friend of Bluford's girlfriend, in the purse of Bluford's girlfriend, and in Bluford's residence. 23RP 95; 24RP 38, 86-87; 28RP 37. She identified Bluford in the courtroom as the man who raped and robbed her. 29RP 45.

Count Eight:

Around 9:00 p.m. on March 14, 2012, Tri Nguyen had just parked his vehicle and gotten out in a dark area in front of his Renton home when he felt a gun at the back of his head and heard a man say, "give me the wallet." 25RP 132-37, 139. Nguyen gave the robber his wallet, and the robber then searched Nguyen's pockets, removing his cell phone and keys. 25RP 136, 140. The robber did not search under Nguyen's clothes at any point. 25RP 140. The robber tried to remove Nguyen's wedding ring from his finger, but neither he, nor Nguyen at the robber's direction, could get it off. 25RP 136-37. The robber then instructed Nguyen to lie down

and count to 100, which Nguyen did as the robber ran away after discarding Nguyen's keys.[5] 25RP 136-37.

Although Nguyen never saw the robber's face, he identified him as a black male by his voice, and guessed that he was around five-foot-seven. 25RP 147-48. The robber wore black clothing and black gloves. 25RP 147-48. Nguyen's phone was later found in a vehicle driven by Bluford and owned by Bluford's girlfriend. 23RP 126; 26RP 100, 117.

Count Nine:

Around 1:00 a.m. on March 14, 2012, Jennifer Cooksey had just parked in front of her Renton apartment building when she noticed a man standing in front of the building near her unlit parking space. 15RP 38-40, 71. Cooksey exited her vehicle a few minutes later, believing that the man had walked away, but once she got out the man suddenly appeared behind her, opened his coat to display a handgun in an interior breast pocket, and demanded her purse. 15RP 39, 44-46. Cooksey attempted to push the panic button on her keys, and began screaming. 15RP 46-47. The robber took the keys out of her hand, at which point Cooksey ran away. 15RP 47. As she did so, she saw the robber reach into her vehicle and remove the purse and coat she had left on the front passenger seat, after which the man ran out of the lot. 15RP 47.

[5] A later canine scent track ended abruptly on a residential street, consistent with the suspect entering a home or getting into a vehicle. 17RP 110.

Cooksey described the robber as a black male in his 30s, approximately five-foot-six, wearing dark clothing and a black knit hat. 16RP 26. Cooksey's property was later found in the purse of Bluford's girlfriend. 23RP 99.

The Investigation:

Similarities among the above robberies eventually led detectives to believe that all of them had been committed by the same suspect. 23RP 64; 26RP 77-79. Records pertaining to R.U.'s stolen cell phone indicated that just hours after the crime, someone inserted a SIM card associated with a woman named Cheryl Woodard into R.U.'s phone and began using it. 23RP 52, 66. Detectives executed a search warrant at Woodard's residence and recovered R.U.'s phone. 23RP 73, 77-80.

Woodard was present during the search, and told detectives that the phone had been given to her by her friend Bree Brazille. 23RP 80-81; 25RP 15, 23. Woodard showed detectives a photo of Brazille and her boyfriend, Charles Bluford, that Woodard had taken on the phone at the time Brazille gave it to her. 23RP 82; 25RP 18-19. Forensic analysis of the phone showed that the photo had been taken just five or six hours after it was stolen from R.U. 25RP 119. Bluford is a five-foot-six black male who was 37 years old at the time of the robberies. Ex. 78. His 2010 driver's license lists him as 200 pounds. Ex. 78.

Additional investigation revealed that Brazille was the registered owner of a green 1994 four-door Honda Civic, and that Bluford was also known to be associated with that vehicle. 12RP 54, 59-62; 14RP 59, 71; 21RP 78. On March 15, 2012, Bluford was stopped while driving the Civic with Brazille in the passenger seat; the Civic was then impounded. 14RP 59-62. In Brazille's purse, officers located Bluford's birth certificate, R.U.'s stolen rings, and items later identified as having been in the purses or wallets of Cooksey, Sakounthong, and R.J. at the time they were stolen. 23RP 95-99, 104. In Bluford's wallet, officers found property later identified as belonging to Sakounthong. 23RP 102. However, because R.U.'s rings were the only items that the searching officers knew at the time had been stolen, the remaining property was released back to Bluford and Brazille. 23RP 100, 119.

The Civic was searched pursuant to a search warrant. 23RP 123. Inside, officers found condoms, gloves, Nguyen's stolen cell phone, notes dated March 14, 2012—four days after R.U.'s wedding and engagement rings were stolen—about the cost of resizing rings, and marriage license paperwork for Bluford and Brazille dated the following day. 23RP 125-26, 128-32; 26RP 100. Officers then obtained a search warrant for the address listed as Bluford and Brazille's residence on the marriage paperwork. 23RP 133.

When the search warrant was executed, officers observed that only the master bedroom of the residence appeared to be in use as a bedroom, and documents of Bluford's and Brazille's dominion and control were found in it. 23RP 149-50, 155-57, 165-66; 24RP 27. In the closet of the master bedroom, officers found a men's black jacket with an emblem on the chest,[6] which was the same jacket Bluford was wearing in the photo of him and Brazille that was taken on R.U.'s stolen cell phone shortly after she was raped and robbed. 23RP 161, 164. R.J.'s driver's license and social security card were also found on a shelf in the closet. 23RP 167-68. Officers located an attic-like crawl space above the master bedroom closet, inside which they found a garbage bag full of miscellaneous documents, business cards, and wallets, containing various people's names. 23RP 169-70. Among them were items belonging to Sakounthong and R.J. 23RP 173-78.

Elsewhere in the residence, officers found R.J.'s and R.U.'s purses. 24RP 33-35, 38, 43. They found a puffy black coat with fur trim on a chair in the living room, which appeared to be the same coat seen in the surveillance video of the man who robbed and fondled R.J. 24RP 43-45. Officers also found condoms throughout the apartment, and multiple black knit hats like the one Bluford was wearing in the photo taken on R.U.'s

[6] R.U. described her attacker as wearing a black jacket with a cloth badge sewn on the breast. 19RP 15, 58.

stolen cell phone shortly after she was raped and robbed. 24RP 32-33, 48, 50, 56. A single round of ammunition, of the proper size to use in a handgun, was found in a linen closet. 24RP 51-52. Utility bills and other mail addressed to both Bluford and Brazille at that address were found in the kitchen. 24RP 68-77. Credit cards stolen from Sakounthong, R.J., and R.U. were found in a briefcase in the laundry room. 24RP 81-87.

When Brazille was interviewed following the search, she told officers that she and Bluford owned a single cell phone, which they shared. 30RP 89-90. That phone was seized and lawfully searched. 25RP 76-77. The contents of the phone supported Brazille's contention that she shared it with Bluford, and a photo on the phone established that Bluford is circumcised. 25RP 76-103; 28RP 38-40. Analysis of cell tower records allowed officers to identify the general area in which that phone had been located around the time of five of the seven incidents.[7] 30RP 19-36. For each of the five incidents for which phone location data was available, the phone had been used shortly before or after the robbery and had connected to a cellular tower whose five-mile-wide transmission area included the location of the robbery. 30RP 19-36.

[7] The records obtained by police did not cover the date of the robbery charged in count one, and no calls were made on the phone around the time of the robbery charged in count nine. 30RP 37.

At trial, the State's witnesses—numerous officers, the seven victims, Cheryl Woodard, and others—testified to the facts above. Woodard also testified that at some point after police searched her apartment, Brazille had asked to store a handgun there, and had then left the gun at Woodard's apartment off and on over the course of a month. 25RP 25, 34-38, 48. Woodard believed she recalled that Bluford had been with Brazille on at least one of those occasions. 25RP 47.

Bluford did not testify or call any witnesses. 30RP 126. In closing, he did not dispute that the robberies had occurred, but argued only that he was not involved. 32RP 5-39. Additional facts are presented below in the sections to which they pertain.

C. ARGUMENT

1. THE INITIAL JOINDER OF THE COUNTS INVOLVING R.U. AND R.J. WITH THE OTHER CHARGES WAS PROPER.

Bluford contends that the trial court abused its discretion when it permitted the counts involving R.J. and R.U. to be joined with the other five robbery charges for trial. This claim should be rejected. The Washington Supreme Court has repeatedly indicated that an initial joinder is proper so long as the charges are sufficiently similar or related, which they were here. Even if this Court continues to incorporate a prejudice

analysis, as it erroneously did in State v. Bryant,[8] the trial court properly exercised its discretion in finding that Bluford failed to establish that a joint trial would be so manifestly prejudicial as to outweigh the strong concern for judicial economy.

a. Relevant Facts.

The charges against Bluford were originally filed under three cause numbers: one for the charges of robbery and indecent liberties involving R.J., one for the charges of robbery and rape involving R.U., and one for the five robbery charges involving the other victims. CP 379-88. Prior to trial, the State brought a motion to join all the charges in a single information. CP 379-406. Bluford moved to sever the charges to allow a separate trial for each of the seven victims.[9] CP 369-78; 1RP 29-38.

The trial court noted that joinder was proper if the offenses were of the same or similar character, but that severance would nevertheless be proper if Bluford met his burden to show that a joint trial on all offenses would be so manifestly prejudicial as to outweigh the concerns for judicial economy. 1RP 43. The trial court then analyzed each of the four factors for evaluating prejudice, finding that the offenses were "quite startlingly

[8] 89 Wn. App. 857, 950 P.2d 1004 (1998).

[9] As Bluford notes in his brief, although his written motion to sever (which was filed before the State filed its motion to join the three cause numbers) addressed only the five robbery charges that were originally filed together, he argued at trial for the severance of all seven incidents, and the court treated his motion as a motion to sever all seven incidents. CP 369-78; 1RP 29-38, 43-52.

similar," the State's evidence was strong on each count, and each incident was distinct and could be compartmentalized by the jurors to the extent necessary. 1RP 44, 51; CP 16-17. The court also ruled that even if separate trials were granted, the evidence of the other offences would be cross-admissible under ER 404(b) to show a common scheme or plan or modus operandi in order to prove identity. 1RP 51-52; CP 17. Finding that joinder was proper and did not unduly prejudice Bluford, the trial court denied the motion to sever. 1RP 52; CP 18.

b. Issue Preservation.

As Bluford properly concedes, he abandoned any objection to the trial court's denial of his pre-trial motion to sever the charges when he did not renew the motion during trial. Brief of Appellant ("BOA") at 14; CrR 4.4(a)(2). Thus, the only issue before this Court is the propriety of the initial joinder of the charges. However, before evaluating the propriety of joinder in this particular case, this Court must resolve a conflict within our caselaw regarding the proper bounds of the initial joinder inquiry.

c. The Proper Analysis When Evaluating An Initial Joinder Of Charges Asks Only Whether The Requirements Of CrR 4.3(a) Were Met.

CrR 4.3 allows two or more offenses to be joined in a single charging document when the offenses "(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." CrR 4.3(a). The propriety of an initial joinder of charges is a question of law resolved solely under CrR 4.3. State v. Wilson, 71 Wn. App. 880, 884-86, 863 P.2d 116 (1993) (noting propriety of joinder is a question of law, and concluding initial joinder proper because CrR 4.3 satisfied), rev'd in part on other grounds, 125 Wn.2d 212, 883 P.2d 320 (1994); see also, e.g., State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992) (finding offenses properly joined because CrR 4.3 and RCW 10.37.060[10] were satisfied).

CrR 4.3 is construed expansively to promote the public policy of conserving judicial resources. State v. Hentz, 32 Wn. App. 186, 189, 647 P.2d 39 (1982), rev'd in part on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983). In contrast, CrR 4.4 protects defendants by allowing properly joined offenses to be severed whenever a defendant "demonstrat[es] that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Bythrow, 114 Wn.2d 713, 717-18, 790 P.2d 154 (1990). A trial court's ruling on a motion to sever is reviewed for manifest abuse of discretion. Id. at 717.

[10] RCW 10.37.060 is the joinder statute, which predates, but is consistent with, CrR 4.3(a). State v. Thompson, 88 Wn.2d 518, 525, 564 P.2d 315 (1977), overruled in part on other grounds by State v. Thornton, 119 Wn.2d 578, 835 P.2d 216 (1992).

The fact that offenses can be "properly joined" and yet cause sufficient prejudice to warrant severance confirms that the absence of prejudice is not a requirement for proper initial joinder. See id. Instead, CrR 4.3 and 4.4 work together to satisfy the dual goals of conserving judicial resources and ensuring that defendants' due process rights are not violated—CrR 4.3 promotes judicial economy by allowing initial joinder whenever offenses are sufficiently related, and CrR 4.4 protects defendants' rights by requiring severance whenever joinder, though proper, is nevertheless unduly prejudicial. CrR 4.3, 4.4. With prejudice a factor only at the severance stage, the different standards of review for joinder and severance make sense—the propriety of initial joinder is reviewed de novo because the analysis asks only whether CrR 4.3(a) is satisfied, while the propriety of severance is reviewed for abuse of discretion because the analysis requires a balancing of individualized prejudice against the public's interest in judicial economy.

Although Bluford concedes that his pre-trial request to sever the charges against him under CrR 4.4 has not been preserved for appellate review, he contends that this Court should nevertheless grant him a new trial on the grounds that the joinder of the charges unduly prejudiced him, on the theory that undue prejudice renders the initial joinder itself improper. BOA at 13-15. Bluford relies on two cases for this proposition:

State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998), and Bean v. Calderon, 163 F.3d 1073, 1083 (9th Cir. 1998). However, the latter does not support the proposition for which it is cited, and the former was an incorrect deviation from controlling caselaw that should now be abandoned.

Bean does not stand, as Bluford contends, for the proposition that an initial joinder is improper if it would result in a fundamentally unfair trial. BOA at 15. Although the Ninth Circuit, in reviewing Bean's habeas petition, used imprecise language when it stated that "the joinder [of charges] was constitutionally impermissible" because it deprived Bean of a fundamentally fair trial, the opinion in Bean's direct appeal reveals that the issue of which Bean complained was not the propriety of the initial joinder of charges, but rather the propriety of denying his motion for severance. Bean, 163 F.3d at 1083; People v. Bean, 46 Cal. 3d 919, 934-35, 760 P.2d 996 (1988). In that context, it becomes clear that what the Ninth Circuit meant in Bean is that *the denial of severance* was constitutionally impermissible because the joinder of the charges resulted in a fundamentally fair trial. 163 F.3d at 1083.

State v. Bryant, in contrast, does in fact say that prejudice must be considered when evaluating the propriety of an initial joinder of charges.

89 Wn. App. at 865. However, as explained below, Bryant is incorrect, conflicts with controlling caselaw, and should be abandoned on that point.

Because the rules regarding joinder and severance interrelate so closely, and because courts rarely address the propriety of joinder without also addressing the propriety of severance, courts have on occasion failed to properly distinguish between the analyses applicable to initial joinder and severance. E.g., State v. Thompson, 88 Wn.2d 518, 524-25, 564 P.2d 315 (1977) (finding no abuse of discretion in trial court's denial of motion to sever, but discussing CrR 4.3 rather than CrR 4.4), overruled in part on other grounds by State v. Thornton, 119 Wn.2d 578, 835 P.2d 216 (1992); see also Wilson, 71 Wn. App. at 885 (noting failure of some opinions to properly distinguish between joinder and severance); United States v. Werner, 620 F.2d 922, 926 (2d Cir.1980) ("The question of the propriety of joinder under [the federal joinder rule] and of refusal to grant relief from prejudicial joinder under [the federal severance rule] are quite different in nature, although some decisions tend to obscure this."[11]).

The clearest instance of a Washington court conflating the joinder and severance analyses occurred when the Bryant court held that prejudice must be considered in evaluating the propriety of an initial joinder of charges, even when the propriety of severance is not at issue. BOA at 15.

[11] The federal joinder and severance rule, Federal Rules of Criminal Procedure 8 and 14, operate equivalently to CrR 4.3 and CrR 4.4.

The court correctly noted that the propriety of initial joinder is a question of law subject to de novo review while the propriety of severance is reviewed only for abuse of discretion, and that "[w]here joinder is proper, the offenses **shall** be consolidated for trial; but the trial court may sever the offenses if doing so will promote a fair determination of the defendant's guilt or innocence of each offense, considering any resulting prejudice to the defendant." Bryant, 89 Wn. App. at 864 (emphasis added). However, the Bryant court perplexingly went on to conclude, unsupported by any well-reasoned authority, that the initial joinder of charges is improper if it prejudices the defendant, regardless of whether a motion to sever is ever brought or preserved. Id. at 865.

The concern underlying Bryant's holding seems to have been the court's belief that the joinder and severance rules "are based on the same underlying principle, that the defendant receive a fair trial untainted by undue prejudice." Id. at 865. However, it provided no authority for this statement, nor did it grapple with the fact that the severance rule becomes redundant if the joinder rule already protects defendants against unduly prejudicial joinder.[12] Id. Instead, the Bryant court simply noted the Wilson court's observation that the joinder and severance analysis have

[12] Indeed, requiring a lack of prejudice in the joinder analysis eviscerates CrR 4.4's requirement that a defendant renew a motion to sever at the close of all the evidence in order to preserve the issue for appeal. CrR 4.4(a)(2).

sometimes been conflated, and cited to a series of state and federal cases that the Bryant court interpreted as supporting its conclusion that prejudice must be considered in evaluating the propriety of an initial joinder.[13] Id.

However, none of the cases cited in Bryant actually stand for that proposition. Wilson specifically disapproved of the conflation of joinder and severance principles, and found the initial joinder of Wilson's charges proper because CrR 4.3(a) was satisfied, reaching the question of prejudice only when it reviewed the trial court's refusal to sever the charges. Wilson, 71 Wn. App. 884-86. The court in United States v. Peoples did state that "[e]ven if [the federal joinder rule] permits joinder, the court should not grant a motion to join if unfair prejudice results to the defendant," but the opinion is unclear as to whether severance or only initial joinder was at issue in that case, and the sole authority cited for the proposition is United States v. Jamar, a severance case that makes clear that the propriety of initial joinder turns only on whether the offenses are sufficiently related. Peoples, 748 F.2d 934, 936 (4th Cir. 1984); Jamar,

[13] The confusion and conflation that underlies Bryant is evident in the imprecise phrasing of the opinion, which states the test for initial joinder as: "[E]ven if joinder is legally permissible, the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant." Bryant, 89 Wn. App. at 865. The Bryant court thus recognized that initial joinder is lawful so long as CrR 4.3 is satisfied, and yet simultaneously held that initial joinder is not lawful if it would prejudice the defendant. This standard, if read literally, favors separate trials far more than the severance rule's requirement that separate trials be ordered only if joinder is "so manifestly prejudicial as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718.

561 F.2d 1103, 1105-06 (4th Cir. 1977). The other sources cited in Bryant offer even less support for its holding. Bryant, 89 Wn. App. at 865 (citing State v. Culver,[14] Bayless v. United States,[15] and 12 Royce A. Ferguson, Wash. Prac., Criminal Practice and Procedure § 1717 (2d ed.)[16]).

Bryant's unsupported holding is in conflict with the many cases, both before and since, that make clear that the propriety of initial joinder turns only on the requirements of CrR 4.3, while the prevention of undue prejudice is entrusted to CrR 4.4's severance analysis. E.g., Zafiro v. United States, 506 U.S. 534, 538, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993) (federal severance rule accounts for fact that even proper joinder can be prejudicial); Markle, 118 Wn.2d at 439 (initial joinder proper because CrR 4.3 satisfied); Bythrow, 114 Wn.2d at 717 (laying out framework that where initial joinder was proper yet unduly prejudicial, severance is warranted). This Court should therefore disavow that aspect

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[14] In Culver, the defendant did not challenge the propriety of the initial joinder, but rather argued that he was prejudiced by evidence admitted solely on a charge that was dismissed at the close of the State's case, essentially challenging the denial of severance. State v. Culver, 36 Wn. App. 524, 528-30, 675 P.2d 622 (1984).

[15] The Bayless court found that the charges were properly initially joined because the federal equivalent to CrR 4.3 was satisfied, and analyzed prejudice only in reviewing the denial of Bayless's motion to sever. 381 F.2d 67, 71-72 (9th Cir. 1967).

[16] It is not entirely clear what sources were cited in Washington Practice's second edition article on the rules regarding joinder of offenses. The current edition conflates joinder and severance analyses when it states, "Even though the court rule or statutory grounds for joinder are met, offenses still may not be joined if prosecution of all charges in a single trial would prejudice the defendant," and cites for support to a case that pre-dates the criminal rules and relies on Bayless (see note 15 above), another that addresses the propriety of severance under CrR 4.4, and another that addresses severance and relies on Bryant.

of Bryant and conform to controlling precedent by holding that the initial joinder of charges is proper so long as CrR 4.3(a) is satisfied, and that an analysis of prejudice comes into play only in the context of a motion to sever.

d. When Analyzed Under The Proper Standard, The Initial Joinder Of Bluford's Charges Was Indisputably Proper.

As Bluford implicitly concedes by failing to argue otherwise, the requirements of CrR 4.3(a) were satisfied in this case, as the offenses joined were of a same or similar character and were also based on a series of acts constituting parts of a common scheme or plan. The initial joinder of the offenses into a single charging document was therefore proper as a matter of law, and Bluford's claim on appeal fails.

e. Even If This Court Applies The Bryant Analysis, Bluford's Claim Fails Because The Trial Court Properly Exercised Its Discretion In Finding That Bluford Failed To Establish That A Joint Trial Would Be So Manifestly Prejudicial As To Outweigh The Concern For Judicial Economy.

Under Bryant, a court evaluating the propriety of an initial joinder must first assess whether the requirements of CrR 4.3 have been met, and then assess whether the defendant demonstrated that he was unduly prejudiced by the joinder (the traditional severance analysis). Bryant, 89 Wn. App. at 865-68. Although Bryant purported to apply to this question the de novo standard of review that precedent prescribes for review of

initial joinder, Bluford appears to correctly recognize that the application of the severance analysis logically requires application of the severance standard of review—manifest abuse of discretion. Id. at 868-69; BOA at 14; see Bythrow, 114 Wn.2d at 717-18 (trial court's decision regarding whether a defendant has demonstrated undue prejudice is reviewed for manifest abuse of discretion).

A defendant seeking to avoid a joint trial on grounds of undue prejudice has the 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. In evaluating the potential for prejudice, the courts consider four factors that may offset or neutralize any prejudicial effect of joinder: (1) the strength of the State's evidence on each count, (2) the clarity of defenses to each count, (3) whether the court properly instructed the jury to consider the evidence of each crime separately, and (4) the admissibility of the evidence of the other crimes even if they had not been joined for trial. Bryant, 89 Wn. App. at 867-68 (citing State v. York,[17] 50 Wn. App. 446, 451, 749 P.2d 683 (1987)). "[A]ny residual prejudice must be weighed against the need

[17] Tellingly, York was analyzing the propriety of severance, not initial joinder, and began its analysis by stating, "Even where two or more offenses properly are joined for trial under CrR 4.3(a), a motion to sever under CrR 4.4(b) raises the issue of prejudice to the defendant from the joinder." 50 Wn. App. at 450.

for judicial economy." State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Here, the concern for judicial economy is incredibly strong, because separate trials would have expended seven times the judicial resources, and even if none of the incidents were found to be cross-admissible, approximately half of the 58 witnesses who testified during the 11-week joint trial would have had to repeat their testimony in most or all of the seven separate trials.[18] Furthermore, all four factors listed above exist to neutralize any prejudicial effect of joinder.

i. Strength of evidence, clarity of defenses, and instruction to consider each count separately.

As the trial court recognized, the State's evidence was equally strong on each count. CP 16. The evidence strongly suggested that the same person was responsible for all seven incidents, and in each incident, Bluford was either identified by the victim as the robber or was found in possession of the victim's property, or both. 15RP 123-28, 142; 23RP 95, 99, 102-04, 126, 167, 173-75; 24RP 33-35, 86-87; 26RP 100, 110-11, 117; 29RP 45.

Bluford's defenses were clear and consistent across all charges—his defense was that someone connected to Bree Brazille may have

[18] Many of the witnesses were officers whose involvement in contacting Bluford and Brazille and searching their vehicle and residence would have been relevant in each case.

committed the charged offenses, but that person was not he. 32RP 5-39. The question is not whether the defenses are the same or different; it is the *clarity* of defenses and the extent to which joinder prevents the defendant from presenting his defenses. Wilson, 71 Wn. App. at 886-87; see Bythrow, 114 Wn.2d at 718. Even mutually antagonistic defenses do not necessarily require severance. Bythrow, 114 Wn.2d at 720. Thus, the trial court properly found that this factor did not weigh in favor of finding undue prejudice.

A trial court's instruction to consider the evidence of each crime separately, and the ease of following such an instruction by mentally compartmentalizing the evidence, is a factor that mitigates the prejudice of joinder where the evidence is not cross-admissible. Id. at 721. Because the trial court properly exercised its discretion in ruling that the evidence in this case was cross-admissible on each count to prove the identity of the perpetrator, as discussed below, it was neither necessary nor appropriate to instruct the jury to limit its consideration of the evidence on a particular charge to that charge, and the lack of such an instruction does not weigh in favor of finding undue prejudice.[19]

[19] Although Bluford complains of the lack of a limiting instruction directing the jury not to consider the cross-admissible evidence for the purpose of finding a criminal propensity, a trial court is not required to give such a limiting instruction unless the defendant requests one, which Bluford did not do. ER 105; State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604 (2011).

ii. Cross-admissibility of evidence if charges were tried separately.

The fact that separate counts would not be cross-admissible if tried separately does not require a finding that a joint trial would be unduly prejudicial, due to the countervailing interest in judicial economy. State v. Kalakosky, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993); see Bythrow, 114 Wn.2d at 722 ("[A] defendant seeking severance must make an even stronger showing of prejudicial effect than would be required in determining whether to admit other-crimes evidence in a severed trial."). However, where the evidence is cross-admissible, joinder is not prejudicial. State v. Weddel, 29 Wn. App. 461, 465, 629 P.2d 912 (1981).

Evidence of other bad acts may be admitted to prove identity if the trial court (1) finds by a preponderance of the evidence that the acts occurred, (2) identifies the purpose for which the evidence is admitted, (3) finds that the evidence is related to that purpose, and (4) determines that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. ER 403, 404(b); State v. Kilgore, 147 Wn.2d 288, 292, 5 P.3d 974 (2002). The admission of other bad acts to prove identity usually involves the use of a prior crime to which the defendant is definitively connected (often by conviction), which the State believes is sufficiently similar to the charged crime to suggest that the

defendant is responsible for both. E.g. State v. Thang, 145 Wn.2d 630, 640-41, 41 P.3d 1159 (2002). The distinct methods of the known and unknown perpetrators are used to show that they are the same person. State v. Laureano, 101 Wn.2d 745, 763-65, 682 P.2d 889 (1984), overruled in part on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

However, in order for the probative value of the defendant's prior crime to be sufficiently high in relation to the risk of unfair prejudice, there must be "sufficient distinctive characteristics between the crimes to justify the conclusion that there [i]s a high probability the same person committed both crimes." State v. Smith, 106 Wn.2d 772, 778, 725 P.2d 951 (1986). The common characteristics need not be individually unique, as long as in the aggregate they create the requisite "high probability" of a common perpetrator. Id.

Here, the evidence established a high probability that all the charged offenses were committed by the same person. They were all committed in the Seattle metro area within a seven-week period, with all but one occurring in the suburbs. CP 405. In each incident, the robber approached the victim while or immediately after he or she exited his or her vehicle at a residence in a poorly-lit area. Where the perpetrator could do so, he appeared next to the victim silently and without warning (R.J.,

Rivera, Nguyen, and Cooksey); where he could not approach without being seen, he engaged the victim verbally as he ran up in order to buy time to get close to him or her (Sakounthong, Ramirez-Aguilar, and R.U.).

Once the robber got close to each victim, he displayed a dark handgun. If he had approached unseen, the robber touched the gun to the victim's body;[20] if he had been seen approaching, he pointed the gun at the victim from a short distance away. The robber then verbally demanded male victims' wallets and female victims' purses.[21] Except in the one case where the victim ran away screaming, the robber then searched each victim for additional property. In each case where the robber encountered a cell phone during his search, he took it. In each case where the robber found a male victim's keys during his search, he took them but threw them away nearby before leaving the scene. The two victims who resisted the robber's demands, Ramirez-Aguilar and R.U., were both physically assaulted, while none of those who cooperated were beaten. Both of the female victims who did not run away were sexually assaulted.[22]

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[20] The only exception to this pattern was the robbery of Cooksey, where the robber had approached unseen, but then merely opened his jacket to display the gun in an interior pocket. 15RP 44-46.

[21] The one possible exception to this pattern was the robbery of R.U. At trial, she did not mention whether the robber had said anything at the time he took her purse. 28RP 90-91.

[22] Bluford is correct that there are differences between the lesser violation of R.J. and the full rape of R.U. BOA at 25. However, that a criminal might be more restrained early in a crime spree, and bolder in later incidents, is natural. Cf. In re Det. of Coe, 175 Wn.2d 482, 499, 286 P.3d 29 (2012) (noting patterns of behavior can evolve over time).

The three victims who saw the vehicle in which the robber left the area gave consistent descriptions ranging in specificity from a green 1990s four-door car to a dark-colored 1993-1995 Honda Civic; all the descriptions matched the dark green 1994 Honda Civic in which Bluford was later stopped. All victims described the robber as a black male. Sakounthong, R.U., Nguyen, and Cooksey all estimated his height at five-foot-six or five-foot-seven, Ramirez-Aguilar estimated it at approximately five-foot-eight, and the record is not clear on what height estimate Rivera gave at trial. R.J., the only victim who was sitting during her entire encounter with the robber, estimated his height at six feet tall, but a surveillance video of the robber entering the garage indicated that his height plus the thickness of his raised puffy hood was no more than about five-foot-nine. Although the robberies occurred on different nights, on each occasion the robber wore black clothing with a raised hood or knit cap.

This multitude of similarities in the way the crimes were perpetrated supported, by themselves, a finding of a "high probability" that the string of robberies was the work of a single perpetrator. A robbery detective even testified that in his experience, this particular combination of circumstances was unique. 26RP 78; see In re Det. of Coe, 175 Wn.2d 482, 498, 286 P.3d 29 (2012) (giving significant weight

to expert testimony that commonalities among rapes constituted a unique signature). However, the evidence that the same person committed all seven robberies did not stop with the circumstances of the crimes themselves. In addition, property stolen during five of the seven robberies, as well as boots, jackets, and hats described by various victims, were found in the possession of the same couple: Bluford and Brazille. Combined with the similarities among the crimes, this evidence established a nearly-irrefutable connection between the crimes, creating an extremely high probability that the same person (whether it be Bluford or someone else associated with Brazille) was responsible for all of them.

There is a direct correlation between the probability that the same person committed the multiple offenses at issue and the probative value of evidence tying the defendant to one of the offenses. State v. Coe, 101 Wn.2d 772, 776-78, 684 P.2d 668 (1984). Thus, the extremely high probability that the same person was involved in all seven robberies means that evidence inculpating Bluford in any one robbery had an extremely high probative value as to all the others.

Moreover, the risk of prejudice from cross-admitting the various incidents in Bluford's case was considerably lower than in cases where the prior bad act offered is a prior conviction for a similar crime. Here, whether Bluford was responsible for the other incidents was in question

just as much as whether he was responsible for any one incident; the jury could have agreed that the same person was responsible for all the robberies, and yet still acquitted Bluford. The risk of unfair prejudice therefore did not outweigh the probative value of the evidence regarding the other incidents, and it cannot reasonably be said that the trial court manifestly abused its discretion in ruling that the evidence of all seven incidents would be cross-admissible even if they were tried separately. See Laureano, 101 Wn.2d at 765 (where reasonable minds could differ as to whether the evidence should have been admitted, trial court's decision was not manifestly unreasonable).

Because none of the four factors applicable to an analysis of prejudice weighs in favor of granting seven separate trials, and because the interest in judicial economy weighed heavily in favor of a single joint trial, the trial court properly exercised its discretion in finding that Bluford failed to establish that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy. Therefore, even if this court follows the expanded joinder analysis adopted in Bryant, the joinder of the charges against Bluford was proper.

f. Any Error In Joining The Offenses Was Harmless.

Even if this Court were to determine that the trial court erred in allowing the initial joinder of the three cause numbers, the error is

harmless, because there is no reasonable probability that the jury's verdict would have been different had the causes been tried separately and the evidence not cross-admitted. Sakounthong's description exactly matched Bluford's age, height, facial hair, as well as the boots and vehicle Bluford was wearing and driving when arrested, plus cards from Sakounthong's wallet were found in a wallet containing Bluford's identification card. Ramirez-Aguilar's description of the suspect's height was off by about two inches, but he pinpointed the year, make, and model of the vehicle, and also identified Bluford in a lineup. Nguyen's description matched Bluford, and his phone was found in the car Bluford was driving. Cooksey's description also matched Bluford, and her property was found in Brazille's purse and in Bluford's residence. And because the charges involving Sakounthong, Ramirez-Aguilar, Nguyen, and Cooksey were filed under the same cause number from the very beginning, those charges would have been tried together regardless of the trial court's ruling on the initial joinder of the three cause numbers.

Even had R.U.'s case been tried separately, R.U.'s description matched Bluford's height, build, and quantity of facial hair, was within a few years of his age, and correctly identified him as circumcised. She also correctly described the vehicle and the fact that a woman was associated with it. A photo of Bluford and Brazille was taken on R.U.'s stolen phone

just hours after the robbery, and in it Bluford was wearing a jacket that matched R.U.'s description of the jacket worn by the perpetrator.[23]

R.J.'s case would also have resulted in a conviction for Bluford had it been tried separately. R.J.'s description matched Bluford except as to height, and the surveillance video established that the robber's true height was consistent with Bluford's very uncommon male height of five-foot-six. Furthermore, R.J.'s property was found in multiple places in Bluford's home, with her purse and identification on a shelf in his bedroom closet, and the jacket worn by the robber in the surveillance video was found in the living room, with Bluford the only male present.

Given all these facts, there is no reasonable probability that the jury would have reached different verdicts had the three cause numbers been tried separately and not cross-admitted.

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[23] Bluford attaches particular significance to the fact that R.U. believed her attacker had a Jamaican accent, which Bluford does not have. BOA at 28. However, she testified that it was simply the rapidity of his speech that made her think he was Jamaican. 29RP 7. Bluford's contention that a shoe print left in her garage did not match his shoe size is similarly unavailing. Although responding officers observed what they believed to be a fresh boot print in R.U.'s garage, and assumed the perpetrator had tracked rain into the garage, the fact that the footprint had not dried out by the time a detective took photos the next day suggested it may have been an older print left by a substance other than water. 17RP 133-34; 32RP 48-49.

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

Bluford contends that the trial court committed reversible error when it found that fourth degree assault is not a lesser included offense of indecent liberties because the legal prong of the Workman[24] test is not satisfied. This Court should not review his claim. Bluford invited the alleged error by conceding in the trial court that the legal prong of the Workman test was not met. Even if he had not affirmatively conceded the issue, his failure to present to the trial court the theory on which he now relies waived the issue, which is not one that can be reviewed for the first time on appeal.

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[25] the legal prong was not met, because assault requires a mens rea of intent, while indecent liberties requires only knowledge. 29RP 73-75. Bluford conceded that assault requires a higher

[24] State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978).

[25] 98 Wn. App. 422, 989 P.2d 612 (1999).

mens rea than indecent liberties, but argued that because the facts were sufficient in this case for the jury to find that he acted with intent, an instruction on assault was appropriate. 29RP 74-75. 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.

b. The Doctrine Of Invited Error Bars Review Of This Claim.

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). This doctrine applies even to constitutional errors that, if manifest, would otherwise be reviewable for the first time on appeal under RAP 2.5. State v. Elmore, 139 Wn.2d 250, 280, 985 P.2d 289 (1999). Courts apply the invited error doctrine strictly, sometimes with harsh results. E.g., State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999). 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).

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, and (2) the evidence in the case must support an inference that only the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Because Bluford conceded in the trial court that assault requires a higher mens rea than indecent liberties, he conceded that the legal prong of the Workman test was not met, and invited the alleged error of which he now complains. 29RP 74-75. His claim is therefore barred.

c. This Claim May Not Be Reviewed For The First Time On Appeal.

Even had the alleged error not been invited, it would still not be properly before this Court. Because Bluford argued that the lesser included instruction was appropriate on an entirely different theory in the trial court than the one he advances on appeal, he did not preserve his current claim. Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994). Furthermore, the failure to give a lesser included instruction is not an error that may be raised for the first time on appeal under RAP 2.5. State v. O'Hara, 167 Wn.2d 91, 101, 217 P.3d 756

(2009). Therefore, even if this Court were to conclude that the error was not invited, it should still decline to review this claim.

3. THE TRIAL COURT PROPERLY RULED THAT BLUFORD'S OUT-OF-STATE ROBBERY CONVICTIONS ARE COMPARABLE TO WASHINGTON MOST SERIOUS OFFENSES.

Bluford contends that the trial court erred in ruling that his prior South Carolina and New Jersey robbery convictions are comparable to Washington robbery or attempted robbery convictions. This claim should be rejected. Because the State proved by a preponderance of the evidence that the elements of the foreign convictions are substantially similar to the elements of a Washington robbery or attempted robbery, the offenses were legally comparable, and the trial court's ruling was proper.

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;[26] CP 306-47. The South Carolina documents established that on the same day in 1998, Bluford pled guilty to and was sentenced for "armed robbery," in violation

[26] 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.

of S.C. Code § 16-11-330(A),[27] in two separate cases: one out of Lexington County, and the other out of Richland County. CP 331-32.

The indictment in the Lexington County case charged:

> that CHARLES BLUFORD did . . . commit robbery by feloniously taking from the person or presence of Kevin Steagall[,] by means of force or intimidation[,] such goods or monies of Garrett's Grill and Grog, 612 St. Andrews Road, such goods or monies being described as U.S. Currency[,] with the 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 indictment in the Richland County case charged:

> that CHARLES BLUFORD did . . . , while armed with a deadly weapon, to wit: handgun, attempt to[28]

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[27] S.C. Code § 16-11-330(A) states, in relevant part:

> 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 and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted.

[28] Because the conviction documents indicated that Bluford was convicted of "armed robbery" rather than attempted armed robbery, and was convicted under S.C. Code § 16-11-330(A), which pertains to completed armed robbery, instead of S.C. Code § 16-11-330(B), which pertains to attempted armed robbery, the trial court found that the Richland County conviction was in fact for completed armed robbery, and that the inclusion of "attempt to" in the charging document was merely a scrivener's error. 34RP 38. The court also found that even if Bluford had only been convicted of attempted armed robbery, it would still be comparable to Washington's attempted robbery in the

> feloniously take from the person or presence of Barbaretta 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 . . . .

CP 335.

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 which robbery can be committed in New Jersey. N.J. Stat. 2C:15-1(a)(2).[29]

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second degree, which is still a "most serious offense." 34RP 37; RCW 9.94A.030(32)(a), (o).

[29] 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

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.

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.[30]

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serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.

[30] 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 record of what Bluford said at the plea hearing.

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. Supp. CP __ (sub 169); 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.

b. Comparability Analysis.

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 defendant does not agree that his out-of-state conviction is comparable to a Washington felony, the court applies a

two-part test. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

First, the sentencing court compares the elements of the out-of-state offense with the elements of a Washington criminal statute in effect when the out-of-state offense was committed. Id. at 255. If the elements of the two crimes are "substantially similar," or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction counts toward the defendant's offender score. Id. at 255; State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

If the foreign statute defines the offense more broadly than the Washington statute, the court proceeds to conduct a factual comparability analysis. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). Factual comparability requires the sentencing court to determine whether the defendant's conduct, as evidenced by the indictment or information, or the records of the foreign conviction, would have violated the comparable Washington statute. Lavery, 154 Wn.2d at 255. However, the court may rely only on facts that were admitted, stipulated to, or proven beyond a reasonable doubt. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

The comparability of offenses is a question of law that appellate courts review de novo. State v. Jordan, 180 Wn.2d 456, 460-61, 325 P.3d

181 (2014). This Court may affirm the trial court's ruling on any basis supported by the record. State v. Poston, 138 Wn. App. 898, 904-05, 158 P.3d 1286 (2007).

i. Bluford's South Carolina robberies are legally comparable to a Washington robbery.

Both of Bluford's South Carolina convictions were for robbery under S.C. Code § 16-11-330(A), which addresses the commission of robbery while armed with a deadly weapon or what appears to be a deadly weapon. South Carolina's statutory scheme uses the common law definition of robbery, which 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. Al-Amin, 353 S.C. 405, 424, 578 S.E.2d 32 (S.C. Ct. App. 2003), overruled in part on other grounds by State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015); S.C. Code § 16-11-325.

Thus, "[t]he 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 (1979). Larceny is the felonious taking and carrying away of the goods of another against the owner's will or without his consent, which requires proof that the defendant carried the property away with the intent to steal it. Al-Amin, 353 S.C. at 424. Thus, in South Carolina a

charge of robbery requires the State to prove that the defendant (1) took (2) personal property (3) from the person of another or in his or her presence (4) against his or her will (5) by violence or by putting such person in fear (6) with the intent to steal the property. See Al-Amin, 353 S.C. at 424.

Washington defines robbery as the "unlawful[] tak[ing] [of] 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," with the intent to steal the property. RCW 9A.56.190; State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012). The elements of a South Carolina robbery are thus substantially similar to a Washington robbery in the second degree. See Sublett, 176 Wn.2d at 88 (finding California's robbery statute legally comparable to Washington's because both "require (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.").

Bluford contends that the two robbery statutes are not substantially similar because South Carolina does not require that the intent to steal exist at the time possession of the property is first obtained, which Bluford contends is broader than Washington's requirement that the intent to steal

exist at the time of the taking. BOA at 44-45. However, in a Washington robbery the "taking" is ongoing until the defendant escapes with the property. State v. Truong, 168 Wn. App. 529, 535-36, 277 P.3d 74 (2012). Correspondingly, Washington's definition of theft encompasses not just wrongfully obtaining property, but also exerting unauthorized control over property lawfully in one's possession.[31] RCW 9A.56.020(1)(a); RCW 9A.56.010(22).

Thus, a Washington defendant who forms the intent to steal after initially obtaining the property can still be guilty of robbery, such as when a shopper puts an item in his cart intending to pay for it, but later decides to steal it and uses force to do so. E.g., State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992) (defendant who claimed to have permission to borrow bicycle guilty of robbery for using force to resist owner's attempt to reclaim bicycle). This is consistent with South Carolina's recognition that robbery can occur even where a defendant forms the intent to steal

[31] The Washington Practice article Bluford cites for his implicit contention that Washington law requires intent to steal at the time of initially obtaining the property relies on language in State v. Garman, 76 Wn.2d 637, 647, 458 P.2d 292 (1969), that was addressing only the former statutory subsection equivalent to the current "unlawfully obtains" language; Garman specifically contrasted that with a separate subsection equivalent to the current "exerts unauthorized control" language, under which it was theft to misappropriate property that was initially obtained lawfully. 76 Wn.2d at 647.

after initially obtaining the property lawfully. State v. Hyman,[32] 276 S.C. 559, 566, 281 S.E.2d 209 (1981), overruled in part on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Bluford's South Carolina convictions are therefore legally comparable to Washington convictions for robbery in the second degree.[33]

ii. Bluford's New Jersey robbery is legally comparable to a Washington robbery.

Bluford's first contention regarding the comparability of his New Jersey conviction is that the State failed to prove under which prong of the New Jersey robbery statute Bluford pled guilty. BOA at 50. Bluford contends that it is possible that he pled guilty under N.J. Stat. 2C:15-1(a)(3), which is not comparable to a Washington robbery.[34] However, the State's evidence was sufficient to establish by a preponderance of the evidence that Bluford pled under the same prong under which he was originally indicted.

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[32] Hyman traces back to a case in which a defendant was guilty of larceny for misappropriating a gun that had been loaned to him. See State v. Davenport, 38 S.C. 348, 17 S.E. 37, 38 (1893).

[33] As the trial court properly noted, the South Carolina convictions are also legally comparable to Washington's robbery in the first degree, as Bluford was convicted of robbery while armed with a deadly weapon, and South Carolina's definition of "deadly weapon" is narrower than Washington's. Compare State v. Scurry, 322 S.C. 514, 517, 473 S.E.2d 61 (S.C. Ct. App. 1996) ("A deadly weapon is generally defined as "any article, instrument or substance which is likely to produce death or great bodily harm."), with RCW 9A.04.110(6).

[34] N.J. Stat. 2C:15-1(a)(3) makes it a robbery to commit or threaten to commit any first or second degree crime in the course of committing theft.

Proving a fact "by a preponderance of the evidence" merely requires proving that the fact is more likely than not true. In re Woods, 154 Wn.2d 400, 414, 114 P.3d 607 (2005). 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.[35] See CP 321.

If Bluford had pled guilty under a different prong than the one set out in the original charging document, presumably an amended charging document would have been necessary 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.

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[35] 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).

The conclusion that the amendment did not alter the prong under which Bluford was charged is further supported by the trial 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. While such comments may not be a proper basis for a factual comparability analysis, the State is aware of no authority holding that they may not be considered as circumstantial evidence of the prong under which the New Jersey court accepted Bluford's guilty plea. Thus, considering all the evidence, the State properly proved that Bluford more likely than not pled guilty to robbery under N.J. Stat. 2C:15-1(a)(2) rather than N.J. Stat. 2C:15-1(a)(3).

Bluford's second challenge to the comparability of his New Jersey conviction is that New Jersey's robbery statute is broader than Washington's because in New Jersey one can be convicted of robbery for using or threatening to use force in an attempt to commit theft, rather than only in a completed theft. BOA at 50-51. However, even if Bluford had been convicted of robbery under an attempted theft theory, the New Jersey conviction would be comparable to a Washington conviction for attempted robbery in the second degree, which remains a "most serious offense." RCW 9.94A.030(32)(a), (o). The trial court was therefore correct when it ruled that the State had proven by a preponderance of the evidence that

Bluford's New Jersey robbery conviction is comparable to a Washington "most serious offense." CP 196.

Because the State proved by a preponderance of the evidence that Bluford had, on two prior and separate occasions, been convicted of felonies comparable to Washington most serious offenses, the trial court properly sentenced Bluford as a persistent offender. RCW 9.94A.030(38).

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Bluford's convictions and sentences.

DATED this 9th day of March, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Casey Grannis, the attorney for the appellant, at Grannisc@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Charles Bluford, Cause No. 73047-9, 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 9th day of March, 2016.

Name:
Done in Seattle, Washington