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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 34049-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Lissa Lathrop,

Appellant.

Lewis County Superior Court

Cause No. 05-1-00447-3

The Honorable Judge H. John Hall

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Ms. Lathrop was denied her constitutional right to a unanimous jury.
2. The trial court erred by failing to give a unanimity instruction.
3. The trial court erred by failing to properly determine Ms. Lathrop's criminal history.
4. The trial court erred by failing to properly determine Ms. Lathrop's offender score.
5. The trial court erred by entering Finding No. 2.2 of the Judgment and Sentence, which reads (in part) as follows:

CRIME	DATE OF SENTENCE	SENTENCING COURT	DATE OF CRIME	<u>A</u> <u>or J</u>	TYPE OF CRIME
1 Possession of a Controlled Substance Schedule II	03/16/2005	Multnomah, OR	08/12/2003	J	NV

CP 6.

6. The trial court erred by entering Finding No. 2.3 of the Judgment and Sentence, which reads (in part) as follows:

COUNT	SCORE	SERIOUSNESS	RANGE	ENHANCEMENTS	TOTAL RANGE	MAX
1	1	1	0 to 6 mos	N/A	0 to 6 mos	5 yrs

CP 7.

7. The trial court erred by sentencing Ms. Lathrop with an offender score of 1.
8. The trial court erred by sentencing Ms. Lathrop to 40 days in jail.

9. The trial court violated Ms. Lathrop's constitutional right to a jury trial by finding that she had criminal history without submitting the issue to a jury or obtaining a waiver of the right to a jury trial.

10. The trial court erred by using a preponderance of the evidence standard in determining that Ms. Lathrop had criminal history.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Lissa Lathrop was charged with one count of Possession of Methamphetamine, and one count of Use of Drug Paraphernalia. At trial, the prosecution offered proof of multiple acts of each offense. The court did not give a unanimity instruction, and the state did not elect which incident corresponded with each count.

1. Did the absence of a unanimity instruction violate Ms. Lathrop's constitutional right to a unanimous verdict? Assignments of Error Nos. 1 - 2.

2. Did the prosecution's failure to elect which incident corresponded to each count charged violate Ms. Lathrop's constitutional right to a unanimous verdict? Assignments of Error Nos. 1 - 2.

At sentencing, the state alleged that Ms. Lathrop had a prior Oregon felony conviction, and presented evidence that a "Lisa Lathrop" had been convicted of "Possession of a Controlled Substance Schedule II" in Multnomah County Oregon. The prosecution did not present any evidence (other than the similarity of names) proving that the prior conviction belonged to Ms. Lathrop, and did not provide any evidence allowing the Oregon conviction to be compared to a Washington felony.

Using a preponderance standard, the trial court found that Ms. Lathrop had a prior felony conviction and sentenced her with an offender score of one. The record does not indicate how the court arrived at this result.

3. Is the trial court's finding that Ms. Lathrop had a prior Oregon felony conviction based on insufficient evidence? Assignments of Error Nos. 3 - 8.

4. Must the judgment and sentence be vacated because the trial court failed to properly determine Ms. Lathrop's criminal history and offender score? Assignments of Error Nos. 3 - 8.

5. Did the sentencing court's finding that Ms. Lathrop had criminal history violate her constitutional right to a jury determination of all facts used to increase her sentence? Assignments of Error Nos. 9 - 10.

6. Did the sentencing court's decision finding criminal history by a preponderance of the evidence violate Ms. Lathrop's constitutional right to proof beyond a reasonable doubt of all facts used to increase her sentence? Assignments of Error Nos. 9 - 10.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Lissa Lathrop was charged in Superior Court in Lewis County with Possession of a Controlled Substance (Methamphetamine) and Unlawful Drug Paraphernalia Use. CP 16-18.

At trial, the state presented evidence that Ms. Lathrop was the passenger in a car that officers observed stopped by the side of the road. RP (10-20-05) 13-16. Ara Pugsley, the driver, was arrested on outstanding warrants, and the car was searched. RP (10-20-05) 16-20. In the car, Officers located two drug pipes, at least one of which (found protruding from a sweatshirt that matched Ms. Lathrop's pants) contained methamphetamine residue. The search of the passenger compartment also yielded an empty bindle, marijuana, and a cigarette box containing a plastic baggie of psilocybin mushrooms and a baggie of methamphetamine. A marijuana pipe and marijuana were found on Ms. Lathrop, and a fuse box (containing 3 bindles of methamphetamine) was recovered from Mr. Pugsley. RP (10-20-05) 26, 29, 33, 44-45, 47-48. Mr. Pugsley, who had pled guilty to drug possession testified that the methamphetamine, the pipe with methamphetamine residue, and the marijuana pipe found on Ms. Lathrop were all his. RP (10-20-05) 73-76.

The court did not give a unanimity instruction. In closing, the prosecutor argued that both Mr. Pugsley and Ms. Lathrop possessed “everything in the car,” and that Ms. Lathrop must have possessed methamphetamine earlier in the day because she admitted to smoking it. RP (10-21-05) 18. The jury reached a general verdict of guilty on both counts. Supp. CP (Verdict Forms).

At sentencing, the state claimed that Ms. Lathrop had a previous conviction from Oregon, and submitted a certified (but unsigned) Judgment of Conviction and Sentence, for “Lisa Lathrop.” Supp. CP. Other than the similarity of names, no evidence tied the document to Ms. Lathrop. The court included the Oregon conviction in Ms. Lathrop’s criminal history, determined that it was comparable to a Washington felony, and sentenced Ms. Lathrop with an offender score of one. CP 5-15.

This timely appeal followed. CP 4.

ARGUMENT

I. THE TRIAL COURT’S FAILURE TO GIVE A *PETRICH* INSTRUCTION DENIED MS. LATHROP HER CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been

committed. *State v. King*, 75 Wn. App. 899 at 902, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995). Where the state charges one count of criminal conduct and presents evidence of more than one criminal act, there is a danger that a conviction may not be based on a unanimous jury finding that the defendant committed any given single criminal act. *State v. Kitchen*, 110 Wn.2d 403 at 411, 756 P.2d 105 (1988).

In order to ensure jury unanimity, the state must elect a single act upon which it will rely for conviction, or the jury must be instructed that all must agree as to what act or acts were proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566 at 569, 683 P.2d 173 (1984); *State v. Brooks*, 77 Wn.App. 516 at 521, 892 P.2d 1099 (1995). Failure to follow *Petrich's* protections is constitutional error that raises “the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Kitchen* at 411. Because of this, the error can be raised for the first time on appeal, and is presumed prejudicial. *State v. Greathouse*, 113 Wn.App. 889 at 916, 56 P.3d 569 (2002); *Kitchen* at 411. The jury verdict will be overturned unless no rational juror could have a reasonable doubt as to any of the incidents alleged. *Kitchen, supra*, at 411.

Multiple incidents of possession can give rise to unanimity problems. *See, e.g., King, supra, at 903-904.*

In this case, Ms. Lathrop was charged with a single count of possessing methamphetamine and a single count of using drug paraphernalia. CP 16 - 18. Officers testified that after contacting Ms. Lathrop and her companion, and after searching their car, they found the following items: a marijuana pipe, a baggie of marijuana, a methamphetamine pipe containing methamphetamine residue, an empty paper bindle, a fuse box containing three bindles of methamphetamine, and a cigarette box containing a plastic baggie of psilocybin mushrooms and a baggie of methamphetamine. RP (10-20-05) 26, 29, 33, 44 - 45, 47 - 48. Although the state's closing argument generally focused on the methamphetamine pipe found protruding from the sweatshirt, the prosecutor also suggested that both Ms. Lathrop and her codefendant "basically possessed everything in the car." The prosecutor also argued that she possessed the methamphetamine earlier in the day when she smoked it. RP (10-21-05) 18.

Despite this, the trial court failed to give a unanimity instruction. Supp. CP Some jurors may have convicted Ms. Lathrop for possessing the methamphetamine residue found on the pipe, while others found her guilty

of possessing the methamphetamine found in the fuse box or in the cigarette box.

Similarly, some jurors may have convicted her of using the marijuana pipe as drug paraphernalia, while others may have focused on the methamphetamine pipe, the baggie containing the marijuana, the empty paper bindle found on her side of the car, the cigarette carton containing the mushrooms and methamphetamine, the baggies within the cigarette carton, the fuse box, or the bindles within the fuse box. Any of these items could have been considered paraphernalia, and the prosecutor did not make a proper election to eliminate the need for a unanimity instruction. RP (10-21-05).

The failure to give a *Petrich* instruction was error; the error is presumed prejudicial. Because of this, Ms. Lathrop's convictions must be reversed and her case remanded to the Superior Court for a new trial. *Kitchen, supra*.

II. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MS. LATHROP'S CRIMINAL HISTORY AND OFFENDER SCORE.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing "before imposing a sentence upon a defendant." Furthermore, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it

has found to exist. All of this information shall be part of the record...”

RCW 9.94A.500(1). Criminal history is defined to include all prior convictions and juvenile adjudications, and “shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.” RCW 9.94A.030)(13). To establish criminal history, “the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2). Illegal or erroneous sentences may be challenged for the first time on appeal.

State v. Ford, 137 Wn.2d 472 at 477, 973 P.2d 452 (1999).

Under RAW 9.94A.525(3): “Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” Where the state alleges a defendant’s criminal history contains out-of-state felony convictions, the state bears the burden of proving the existence and comparability of those convictions. *Ford*, at 480. An out-of-state conviction may not be used to increase an offender score unless the state proves the conviction would be a felony under Washington law. *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). The appellate court reviews the calculation of an

offender score de novo. *State v. Ortega*, 120 Wn. App. 165, 171, 84 P.3d 935 (2004).

To determine whether a foreign conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state offense to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Morley*, 134 Wn.2d 588 at 606, 952 P.2d 167 (1998). “If the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.” *Ford*, 137 Wn.2d at 479 (citing *Morely*, at 606). The goal under the SRA is to match the out-of-state crime to the comparable Washington crime and “to treat a person convicted outside the state as if he or she had been convicted in Washington.” *State v. Berry*, 141 Wn.2d 121 at 130-31, 5 P.3d 658 (2000) (citing *State v. Cameron*, 80 Wn.App. 374 at 378, 909 P.2d 309 (1996)).

In this case, Ms. Lathrop did not admit or acknowledge any criminal history. RP (11-16-05) 1- 11. The prosecutor asserted that she had a prior felony from Oregon. See Prosecutor’s Statement Re: Prior Record, Supp. CP. To establish the existence of this prior conviction, the prosecutor submitted a certified copy of an unsigned “Judgment of

Conviction and Sentence” entered on March 31, 2005. Supp. CP. The document was captioned “State of Oregon v. Lisa Lathrop,” and indicated that the defendant was found guilty of “Possession of a Controlled Substance Schedule II.” Supp. CP. The document does not disclose whether or not the conviction was a felony conviction.

The record is insufficient to establish the existence or classification of a prior felony. First, there is a discrepancy between the name on the document (Lisa Lathrop) and the defendant’s name (Lissa Lathrop). Although identity of names is generally sufficient to establish a prior conviction for sentencing purposes (*see, e.g., State v. Rivers*, 130 Wn.App. 689, 128 P.3d 608 (2005)), mere similarity of names is not.

Second, there is no evidence in the record that the alleged 2003 conviction (possession of an unnamed controlled substance from Oregon’s schedule II) would qualify as a felony under Washington law at the time of the offense.

Despite this, the trial court found that Ms. Lathrop had a prior Oregon felony, and sentenced her with an offender score of one. CP 6-7. There is no indication in the record showing how this finding was reached. RP (11-16-05) 1 – 11. A trial court’s findings are reviewed for substantial evidence. *In re Custody of Shields*, 120 Wn.App. 108 at 120, 84 P.3d 905 (2004). Because the state produced insufficient evidence to establish the

existence and classification of a prior Oregon offense, the finding is unsupported and must be stricken. *Shields, supra*. The sentence must be vacated, and the case remanded for resentencing.

III. THE TRIAL COURT VIOLATED MS. LATHROP'S CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER *BLAKELY* BY IMPOSING AN AGGRAVATED SENTENCE WITHOUT A JURY DETERMINATION OF HER PRIOR CONVICTIONS.

The Sixth Amendment requires any fact used to enhance a sentence to be proved beyond a reasonable doubt to a jury. *State v. Ose*, 156 Wn.2d 140, 124 P.3d 635 (2005), citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). The *Blakely* court left intact an exception for prior convictions; however, the continuing validity of that exception is in doubt. See, e.g., *State v. Mounts*, 130 Wn. App. 219 at n. 10, 122 P.3d 745 (2005), quoting Justice Thomas' observation in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254 at p. 1264, 161 L.Ed.2d 205 (2005) that *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which underlies the exception for prior convictions, "has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."

It now appears that five members of the U.S. Supreme Court (Justices Scalia, Stevens, Souter, and Ginsberg, all of whom dissented

from *Almendarez-Torres*, and Justice Thomas, who authored a concurring opinion urging a broader rule in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000)) believe that prior convictions which enhance the penalties for a crime must be proved to a jury beyond a reasonable doubt.¹

Here, Ms. Lathrop's prior felony conviction was not submitted to the jury.² Instead, the trial court, using a preponderance standard, found that Ms. Lathrop had one prior felony.³ CP 6. This violated Ms. Lathrop's constitutional right to a jury trial under the Sixth Amendment, and the resulting sentence was improper. The aggravated sentence must be vacated, and the case remanded for sentencing with no criminal history.

CONCLUSION

Because Ms. Lathrop was denied her constitutional right to a unanimous jury, her convictions must be reversed and the case remanded

¹ Division I has continued to rely on *Almendarez-Torres*, despite its apparent lack of support in the high court. *See, e.g.* *State v. Rivers*, 130 Wash .App. 689, 128 P.3d 608 (2005).

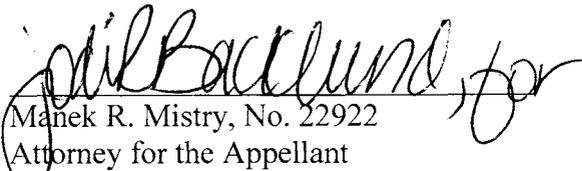
² Nor is there any indication in the record that she knowingly, intelligently and voluntarily waived her right to a jury determination of her prior convictions. RP (10-20-06) 1-109; RP (10-21-06) 1-36.

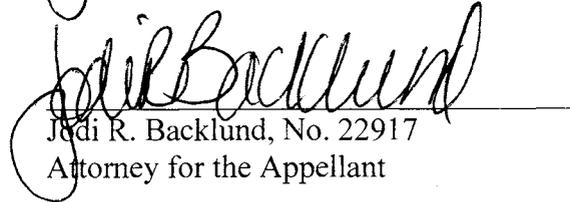
³ This finding is contested in the previous section of this brief.

to the superior court for a new trial. In the alternative, her sentence must be vacated, and the case remanded to the superior court for resentencing.

Respectfully submitted on April 3, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to the office of the Lewis County Prosecuting Attorney.

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 3, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 3, 2006.



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Attorney for the Appellant

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