

NO. 93668-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LINNELL BLUFORD,

Petitioner.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIA L. GARRATT

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

This Court has granted review on multiple issues raised by Bluford and the State of Washington. This supplemental brief will address the three narrow legal issues set forth below. A fuller discussion of the facts, the joinder issue, and the law of comparability, is set forth in the State's brief in the court of appeals.

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 disapprove a prior holding of the Court of Appeals that contradicts that precedent by blending the joinder and severance analyses?

2. Did Bluford invite the trial court to err in the giving of jury instructions when he told the court that indecent liberties was not legally a lesser included offense of robbery?

3. In determining the comparability of out-of-state prior convictions, may a sentencing judge in Washington consider written comments made by the out-of-state judge on the judgment and sentence, just as a Washington judge is permitted to consider oral statements of an out-of-state judge made during the prior sentencing hearing?

B. STATEMENT OF THE CASE

The defendant, Charles Linnell Bluford, committed a string of robberies over a seven-week period of time between January 22 and March 14, 2012. The robberies shared many common elements. They all occurred late at night as the victim was exiting a vehicle, the attacker wore a hood or hat, he approached each victim using either stealth or a ruse and then pulled out a black handgun, he patted down his victims during the robberies, his verbal instructions to his victims were similar, he was described as an African American male in his thirties or forties, many victims saw him drive away in a dark-colored, older-model Japanese sedan, and many victims' belongings were found in the possession of the same two people (Bluford and his girlfriend). Br. of Respondent, at 3-14. Two of the three female victims were sexually assaulted—the first, R.J., by groping of her breasts and pubic area, and the second, R.U., by forced fellatio and repeated digital penetration of her vagina after Bluford pushed her into a garage, pulled her pants down, and slapped her in the face twice. Br. of Respondent, at 7-8. The only other female robbery victim screamed and fled upon being confronted by Bluford; she was not sexually assaulted. Id. at 10.

Bluford was charged by amended information with seven counts of robbery in the first degree against the seven different victims, as well as

indecent liberties by forcible compulsion against R.J. and rape in the first degree against R.U. CP 11-14. A jury acquitted Bluford on one robbery charge, and found him guilty as charged on all other counts. CP 136-44.

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.¹ 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 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

¹ 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.

necessary. 1RP 44, 51; CP 16-17. The court also ruled that even if separate trials were granted, the evidence of the other offenses 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.

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.

The Court of Appeals made three holdings relevant to this brief: 1) that joinder was proper because Bluford was not unduly prejudiced; 2) that the trial court should have granted Bluford's request for a fourth degree assault instruction as a lesser included offense of indecent liberties, and that the error had not been invited; and 3) that a prior New Jersey robbery conviction was not comparable to a Washington robbery. State v. Bluford, ___ Wn. App. ___, 379 P.3d 163 (2016).

C. **ARGUMENT**

1. COUNTS MAY BE JOINED IF THEY ARE SUFFICIENTLY RELATED; A COURT CONSIDERS POTENTIAL PREJUDICE ONLY UPON THE FILING OF A MOTION TO SEVER THE COUNTS FOR TRIAL.

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. Consistent with the plain language of the criminal rules, Washington appellate courts have repeatedly held that joinder is proper so long as the charges are sufficiently similar or related. Only if the defendant subsequently moves to sever the counts for trial must the court balance, inter alia, the interests in judicial economy against the danger of unfair prejudice. Language in the Court of Appeals decision in State v. Bryant is incorrect and should be disapproved.

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 10.37.060² were satisfied).³

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). Related offenses can more efficiently proceed through the pretrial processes as a single case. If the case proceeds to trial, however, a counterbalance is needed to protect defendants from the potential prejudice of a single trial with many counts. CrR 4.4 serves this function 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

² RCW 10.37.060 is the joinder statute, which pre-dates, 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).

³ Bluford conceded below that he had 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.

court's ruling on a motion to sever is reviewed for manifest abuse of discretion. Id. at 717.

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. Indeed, 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.

Once it is understood that prejudice is 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 be disavowed.

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 on that point and should be abandoned.

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."⁴).

The clearest instance of a Washington court conflating the joinder and severance analyses occurred when the Bryant court held that prejudice

⁴ The federal joinder and severance rule, Federal Rules of Criminal Procedure 8 and 14, operate equivalently to CrR 4.3 and CrR 4.4.

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. 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.⁵ Id. Instead, the Bryant court simply noted the Wilson court's observation that the joinder and severance analysis have 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.⁶ 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. at 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

⁵ 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).

⁶ 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.

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, 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,⁷ Bayless v. United States,⁸ and 12 Royce A. Ferguson, Wash. Prac., Criminal Practice and Procedure § 1717 (2d ed.)⁹).

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

⁷ 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).

⁸ 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).

⁹ 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.

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 disavow that aspect 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.

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.¹⁰

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

In holding that Bluford did not invite the trial court's denial of an instruction on fourth degree assault lesser-included offense of indecent

¹⁰ For the reasons set forth in the State's brief in the Court of Appeals, even under Bryant's conflated framework these counts were properly determined by a single jury. Br. of Respondent, at 25-34.

liberties, the court of appeals' decision misreads the record and conflicts with other decisions of the court of appeals. Bluford, 379 P.3d at 171.

a. Relevant Facts.

Bluford asked the trial court to instruct the jury on fourth degree assault as a lesser included offense of indecent liberties. CP 60-66. The State conceded that the factual prong of the Workman test was met, but argued that under State v. Thomas¹¹ the legal prong was not met, because assault requires a mens rea of intent, while indecent liberties requires only knowledge. 29RP 73-75. Bluford did not contest the continued validity of Thomas, and explicitly conceded that the legal prong of Workman was not met because assault requires a higher mens rea than indecent liberties. 29RP 74-75 (“[W]e are basically conceding the fact that we are asking for a higher mental standard of intent with the assault than indecent liberties.”). However, Bluford argued that because *the facts* were sufficient in this case for the jury to find that he acted with the higher mens rea required for fourth degree assault, an instruction on assault was nevertheless appropriate. 29RP 75. He did not explain how his position could be reconciled with Workman's requirement that both the legal and factual prongs be met. The trial court agreed that assault requires a higher mens rea than indecent liberties, and therefore declined to give the

¹¹ 98 Wn. App. 422, 989 P.2d 612 (1999).

requested instruction because the legal prong of the Workman test was not met. 29RP 76.

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

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

Upon request, a defendant is entitled to have the jury instructed on a lesser included offense when two conditions are met: (1) each of the elements of the lesser offense must be a necessary element of the crime charged (known as the "legal prong"), and (2) the evidence in the case must support an inference that only the lesser crime was committed (known as the "factual prong"). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under the invited error doctrine, the

appellate courts will not review a party's assertion of an error to which the party "materially contributed" at trial. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). Where a party concedes a legal issue in the trial court, invited error prevents him from later challenging the trial court's ruling on that issue. In re Det. of Rushton, 190 Wn. App. 358, 371-72, 359 P.3d 935 (2015).

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

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

State's concession in the trial court that the statutory time restrictions were violated).

A defendant who asks a trial court to do something, but informs the trial court that it has no lawful authority to grant his request, should not then be allowed to challenge the denial of his request on appeal. Unfortunately, this is exactly the result that the court of appeals' opinion allows.

3. THE SENTENCING COURT PROPERLY RELIED ON HANDWRITTEN COMMENTS ON THE NEW JERSEY JUDGMENT THAT MAKE PLAIN THAT BLUFORD WAS CONVICTED IN NEW JERSEY OF A ROBBERY COMPARABLE TO A WASHINGTON OFFENSE.

Bluford contends that the trial court erred in ruling that his prior New Jersey robbery conviction was comparable to a Washington robbery conviction because it cannot be determined whether he committed the New Jersey robbery under a comparable prong of the New Jersey statute. This claim should be rejected. The written comments of the New Jersey judge who imposed sentence, together with the other available evidence, establish by a preponderance of the evidence that Bluford was convicted of a comparable New Jersey robbery.

a. Relevant Facts.

At sentencing, the State presented documents related to, inter alia, Bluford's 1994 New Jersey conviction for robbery. Sentencing Ex. 4;¹² CP 306-47. The New Jersey documents established that Bluford was originally indicted for a first degree violation of N.J. Stat. 2C:15-1, with the specific allegations that Bluford "in the course of committing a theft, did threaten immediate bodily injury to Joseph Salladino and/or did purposely put Joseph Salladino in fear of immediate bodily injury while armed with and/or threatening the immediate use of [a] deadly weapon." CP 316. This charging language corresponds to the second of three possible ways in which robbery can be committed in New Jersey. N.J. Stat. 2C:15-1(a)(2).¹³

¹² Copies of the exhibits appear in the Clerk's Papers as attachments to the State's sentencing brief. CP 305-47. The original 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.

¹³ 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. The other facts to which Bluford admitted as a basis for his plea are not clear from the record.¹⁴

At sentencing in the current case, the State argued that Bluford’s New Jersey conviction was legally and factually comparable to a

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

¹⁴ 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.

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 offense was comparable, but he offered no specific arguments challenging the State’s analysis. CP 413-16; 34RP 31-32. The trial court agreed with the State, and found that the New Jersey conviction was legally and factually comparable to a Washington conviction for first degree or second degree robbery. 34RP 34-38; CP 196.

- b. A Judge’s Comments At Sentencing May Be Considered As Circumstantial Evidence Of The Statutory Prong Under Which The Defendant Pled Guilty.

The court of appeals held that comments in the judgment and sentence pertaining to Bluford’s prior New Jersey robbery conviction may not be considered in evaluating whether the State has proven the legal comparability of that conviction. Bluford, 379 P.3d at 173. The court of appeals concluded that the State failed to prove the legal comparability of Bluford’s New Jersey conviction. Id. The former holding is inconsistent with opinions of this Court allowing the use of transcripts of prior proceedings to establish criminal history, and the latter holding fails to faithfully apply the preponderance of the evidence standard.

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). If the elements of an out-of-state offense are "substantially similar" to the elements of a Washington criminal statute in effect when the out-of-state offense was committed, or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction is legally comparable and counts toward the defendant's offender score.¹⁵ In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Although a certified copy of a judgment is usually the best method of proving the existence and nature of a prior conviction, this Court has held that "other comparable documents of record or transcripts of prior proceedings" may also be used. In re Pers. Restraint of Adolph, 170 Wn.2d 556, 568, 243 P.3d 540 (2010).

When a transcript of a proceeding is used to establish the details of a prior conviction, the court conducting a comparability analysis relies on the statements of the court and the parties in the prior proceedings as

¹⁵ A more detailed recitation of how courts determine whether out-of-state convictions are comparable to Washington offenses is presented in the State's brief below. Br. of Respondent, at 44-46.

circumstantial evidence of the crime of which the defendant was convicted. If the prior trial court made statements on the record in the prior proceeding suggesting that the defendant had pled guilty pursuant to a particular statutory prong, the current court would be permitted to rely upon that statement as evidence that the defendant's conviction was in fact entered under that prong. Cf. id.

There is no principled reason to distinguish between a trial court's oral statements recorded in the transcript of a prior proceeding and written statements recorded in the judgment and sentence. Whether those statements are sufficient to prove the prong under which the defendant pled by a preponderance of the evidence is a separate question, but it is illogical to say that written statements in a judgment and sentence may not be considered when this Court has established that oral statements documented in a transcript may be considered. The court of appeals therefore erred in holding that the New Jersey court's comments in the judgment and sentence could not be considered as circumstantial evidence of the prong under which Bluford pled guilty.

For the reasons set forth in the State's brief in the Court of Appeals, this Court should hold that the State established by a preponderance of the evidence that Bluford pled under the same prong under which he was originally indicted.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm (for different reasons) the court of appeals' decision as to joinder, reverse that decision as to the lesser included offense instruction, and reverse that decision as to the comparability of Bluford's New Jersey conviction.

DATED this 8th day of February, 2017.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Casey Grannis, the attorney for the petitioner, at Grannisc@nwattorney.net, containing a copy of the Supplemental Brief of Respondent, in State v. Charles Linnell Bluford, Cause No. 93668-4, in the Supreme Court, for the State of Washington.

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

Dated this 8th day of February, 2017.

L. Brame

Name:

Done in Seattle, Washington

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

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