73398-2

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Court of Appeals
Division I
State of Washington

No. 73398-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ROBERT MORTENSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Christopher Mortenson was convicted of felony driving under the influence (DUI) based on a finding he had four prior DUI convictions. Mr. Mortenson appealed and this Court reversed, holding the judge's inadvertent disclosure of Mr. Mortenson's prior conviction history to the jury panel during jury selection was unfairly prejudicial.

On remand, Mr. Mortenson renewed two motions he had made in his earlier trial. First, he moved to present the evidence of his prior DUI convictions to the jury in a separate proceeding from the evidence on the underlying offense. In the alternative, requested a separate jury instruction and verdict form regarding the prior convictions. The judge denied both motions, believing it had no discretion to reconsider the earlier judge's rulings, or provide different jury instructions, because those issues were not raised by Mr. Mortenson in his appeal.

The judge misapplied the "law of the case" doctrine. The judge had discretion to revisit issues that were not raised nor addressed by the Court of Appeals. Because either procedure proposed by Mr. Mortenson would have helped to ensure he received a fair trial by lessening the substantial risk that the jury would use the prior conviction evidence as propensity evidence, Mr. Mortenson was

entitled to have the judge give these motions meaningful consideration. The judge's failure to exercise its discretion was an abuse of discretion and the conviction must be reversed.

B. ASSIGNMENTS OF ERROR

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

2. The trial court abused its discretion in summarily denying the defense motion to present unfairly prejudicial prior conviction evidence to the jury in a bifurcated proceeding.

3. The trial court abused its discretion in summarily denying the defense motion to instruct the jury on the prior conviction element in a separate jury instruction and verdict form.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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

2. Prior conviction evidence carries a substantial potential of unfairly influencing the jury to conclude the defendant must have committed the current crime simply because he committed a crime in the past. When a prior conviction is an element of the crime but otherwise unrelated to the current charge, the trial court may avoid the danger of unfair prejudice by ordering that the prior conviction evidence be presented to the jury in a separate proceeding. A bifurcated proceeding is particularly warranted when the prior conviction is for the same crime as the current charge, and the evidence consists of multiple prior convictions. Here, Mr. Mortenson was charged with felony DUI, which contains as an element that the defendant has four prior convictions for DUI. Did the court abuse its discretion in refusing to allow the unfairly prejudicial prior conviction evidence to be presented to the jury in a separate proceeding?

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

D. STATEMENT OF THE CASE

On August 21, 2010, at around 1 a.m., Mr. Mortenson was driving a green Ford Thunderbird northbound on Military Road South in Auburn. 2/10/15RP 80-82, 127. King County Sheriff Deputy Jeffrey Petrenchak was driving southbound on the same road and saw the Thunderbird approaching him. 2/10/15RP 80-82, 127. The Thunderbird was not swerving or driving erratically but the deputy thought it was speeding. 2/10/15RP 82, 130. He checked his radar device and determined the Thunderbird was traveling at a speed of 65 miles per hour, while the posted speed limit was 45 miles per hour. 2/10/15RP 82-83. No other cars were on the road. 2/10/15RP 83-84.

Deputy Petrenchak made a U-turn, turned on his emergency lights and later his siren, and caught up to the Thunderbird. 2/10/15RP 83-85. The Thunderbird did not pull over immediately but instead made a few turns and eventually stopped on a residential street. 2/10/15RP 84-90. Deputy Petrenchak pursued the Thunderbird for about one mile before coming to a stop behind it. 2/10/15RP 92.

Catherine Lowrey, a friend of Mr. Mortenson's, was sitting in the passenger seat and her roommate, John Underdown, was sitting in the back. 2/11/15RP 19-20, 22. Ms. Lowrey testified that Mr.

Mortenson did not stop the car initially because he was in the "zone" and just wanted to get her and Mr. Underdown home. 2/11/15RP 26. He eventually came to a stop right in front of her house. 2/11/15RP 26.

Ms. Lowrey testified that Mr. Mortenson was not driving erratically. 2/11/15RP 35-36. Deputy Petrenchak said that although the Thunderbird was not swerving initially, after he caught up to it, it crossed the fog line and the center line several times while traveling in a "slow serpentine motion." 2/10/15RP 87, 131. Mr. Mortenson was traveling at the speed limit at that point. 2/10/15RP 87, 132-33. Mr. Mortenson parked his car at a 45-degree angle, with a portion of the car extending out into the road. 2/10/15RP 93.

Deputy Petrenchak drew his firearm and ordered Mr. Mortenson to get out of the car and show his hands. 2/10/15RP 94. Mr. Mortenson opened his door, got out of the car and walked toward the deputy. 2/10/15RP 95-97. Deputy Petrenchak said Mr. Mortenson was walking slowly and deliberately, "staggering almost in a zigzag or serpentine motion." 2/10/15RP 97. The deputy told him to get on the ground but he did not, nor did he put up his hands. 2/10/15RP 100-02. Deputy Petrenchak took out his taser and deployed it on Mr. Mortenson's chest. 2/10/15RP 102. The taser did not work, so the

deputy tried again, tasing Mr. Mortenson in the back. 2/10/15RP 104. Mr. Mortenson fell forward onto the ground. 2/10/15RP 105. Deputy Petrenchak and his partner Jeriod Lee, who had just arrived, put Mr. Mortenson in handcuffs and walked him to the patrol car. 2/10/15RP 106-07; 2/11/15RP 44.

Mr. Mortenson did not agree to take a breath test. 2/10/15RP 116-18, 126. The deputies did not perform any field sobriety tests. 2/10/15RP 144. No blood was taken from Mr. Mortenson and no tests were ever performed to determine his blood-alcohol level. 2/10/15RP 144, 147. Deputy Petrenchak and Deputy Lee said Mr. Mortenson's breath smelled strongly of alcohol, his face was flushed, and his eyes were red. 2/10/15RP 113-15; 2/11/15RP 54. His speech was slurred and Deputy Petrenchak had trouble understanding him. 2/10/15RP 111-13; 2/11/15RP 52. Ms. Lowrey said they had been driving home from a bar located about three miles from her house when Deputy Petrenchak pulled them over. 2/11/15RP 21, 24. Although Ms. Lowrey was drinking at the bar, she did not know whether Mr. Mortenson was drinking, or if he was, how much he had to drink. 2/11/15RP 22. Ms. Lowrey did not recall Mr. Mortenson acting as if he was impaired. 2/11/15RP 35-36

Mr. Mortenson was charged with one count of attempting to elude a pursuing police vehicle and one count of felony DUI.[1] CP 9-11. The felony DUI charge specifically alleged that Mr. Mortenson

> drove a vehicle within this state while under the influence of or affected by intoxicating liquor or any drug; while under the combined influence of or affected by intoxicating liquor and any drug; having at least four prior offenses, as defined under RCW 46.61.5055(14)(a), within ten years of the arrest for the current offense.
>
> Contrary to RCW 46.61.502 and 46.61.5055, and against the peace and dignity of the State of Washington.

CP 10.

1. First trial.

A trial began in King County Superior Court before Judge Brian Gain. Prior to trial, defense counsel moved to present the evidence of the prior convictions to the jury in a separate proceeding. 1/10/12RP 30-31. Otherwise, the jury would naturally find Mr. Mortenson was driving under the influence on this occasion simply because he had been convicted of DUI four times in the past. 1/10/12RP 31, 112-13. The State objected. 1/10/12RP 32-36.

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

Judge Gain denied the motion to bifurcate the evidence. 1/10/12RP 116-17. But the judge recognized the potential for unfair prejudice and in an effort to mitigate it, ruled he would "bifurcate" the jury instructions. 1/10/12RP 115. Judge Gain explained there would be "a two-step process," that is,

> the jury will have to determine beyond a reasonable doubt whether they are convinced that Mr. Mortenson was driving under the influence. If they do in fact make that determination, then they will make a determination given by special instruction and special interrogatory whether or not the State has also proved beyond a reasonable doubt that there are four prior convictions under the statute.

1/10/12RP 115; 1/24/12RP 9.

In light of Judge Gain's rulings, Mr. Mortenson agreed to stipulate that he had four prior convictions for violating RCW 46.61.5055, so that the jury would hear no additional information about the nature of the prior convictions. 1/24/12RP 8.

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

2. Second trial.

Mr. Mortenson's case was reassigned to Judge Lori Smith. CP 52. Before trial, defense counsel urged the court to reconsider Judge

Gain's ruling and order that the evidence of the prior convictions be presented to the jury in a separate proceeding. 3/14/12RP 15-22. Counsel pointed out that ordering separate proceedings might be the only way to ensure Mr. Mortenson "gets a fair trial," particularly given the nature of the charge. The jury would inevitably assume the prior convictions were for alcohol-related driving offenses, given that the current charge was for felony DUI. 3/14/12RP 22, 30-31.

The State and the court agreed that Judge Smith had discretion to reconsider the issue. 3/13/12(p.m.)RP 13-14; 3/14/12RP 15, 23, 37-38. Nonetheless, the court decided to "adopt the rulings that Judge Gain [sic] at the prior trial." 3/14/12RP 29, 37-38. Following Judge Gain's rulings, Judge Smith ordered that the evidence of the prior convictions would not be presented at a separate proceeding, but the jury would be instructed separately on the prior conviction element and use a separate verdict form. 3/14/12RP 38.

Under these circumstances—and in an effort to mitigate the inevitable prejudice of the prior conviction evidence—Mr. Mortenson once again agreed to stipulate that he had at least four prior convictions for violating RCW 46.61.5055. 3/15/12RP 5, 8-10.

At the beginning of jury selection, Judge Smith read the information verbatim to the prospective jurors. CP 48-49, 52-53. By doing so, Judge Smith informed the jurors that Mr. Mortenson was charged with committing felony DUI "[c]ontrary to RCW 46.61.502 and 46.61.5055," and that he allegedly had "at least four prior offenses, as defined under RCW 46.61.5055(14)(a), within ten years of the arrest for the current offense." CP 10, 48-49, 52-53. In this way, Judge Smith explicitly informed the jurors that Mr. Mortenson was previously convicted at least four times under the same statute as the current charge. CP 48-49. Judge Smith denied Mr. Mortenson's motion for a new venire and took no action to address the problem created by the inadvertent disclosure of his prior conviction history. CP 49, 53.

Ultimately, Mr. Mortenson declined to have the jury provided with bifurcated instructions as it had already learned about the prior convictions in voir dire and through the parties' stipulation. 3/22/12 RP 38-44, 62-63. Thus, Judge Smith did not instruct the jury separately on the prior convictions nor provide a separate verdict form, despite her earlier decision to adopt Judge Gain's rulings. Sub #157A at 21 (instruction 16); see 2/04/15RP 12-13. In addition to the other elements of felony DUI, the to-convict instruction contained the following element: "That at the time of arrest, the defendant had been previously convicted of

four or more prior offenses within ten years pursuant to RCW 46.61.5055(14)(a)." Sub #157A at 21 (instruction 16).

The jury convicted Mr. Mortenson of felony DUI and attempting to elude a pursuing police vehicle. CP 54.

Mr. Mortenson appealed. This Court reversed the conviction for felony DUI.[2] CP 48-65. The Court concluded that Mr. Mortenson was prejudiced by Judge Smith's inadvertent disclosure of his prior DUI conviction history to the venire. CP 49. The Court explained, "[t]he trial court's mention of RCW 46.61.5055 with respect to both the current offense and the prior offenses informed the jury that Mortenson had been convicted of DUI on four prior occasions within the last ten years." CP 56-57. The revelation was particularly prejudicial, given that the four prior convictions were for the same offense as the crime charged. CP 56-57. The Court rejected the State's argument that the jury likely did not recognize the significance of the statutory citation or conclude that Mr. Mortenson had four prior DUI convictions. CP 57. The Court pointed out that during voir dire, a prospective juror stated, in front of the entire panel, that she had "just heard prior that the defendant had four prior convictions." CP 57.

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

The Court explained the prejudicial effect of the trial court's comment was that the jury might infer that because Mr. Mortenson was convicted of four prior DUIs, he had a propensity for driving while intoxicated and acted in a manner consistent with that propensity on the date charged. CP 60. Moreover, "the prior offenses were not just similar to the current charged offense—they were identical to the current offense. This is exactly the type of evidence that Evidence Rule 404 normally seeks to exclude." CP 60-61. In addition, there was not just one prior offense introduced by the court, but *four*. CP 60-61. In light of these factors, there was a substantial likelihood the comment affected the outcome of the trial. CP 60-61.

3. Third trial.

A third trial was held before Judge Tanya Thorp, on the felony DUI charge only. Prior to trial, defense counsel once again moved to present the evidence of the prior convictions in a separate proceeding from the facts related to the underlying charge. CP 66-71; 2/04/15RP 11, 13; 2/11/15RP 64-65. Counsel once again pointed out that "[a] reasonable juror, hearing that [Mr. Mortenson had] been arrested for DUI and had four prior offenses, could not reasonably be expected to acquit, regardless of the strength [or weakness] of the State's case." CP

67-68. Counsel argued, even if the jury were told only that Mr. Mortenson was previously convicted for violating RCW 46.61.5055, "any reasonable juror is going to know what those prior convictions are for or at least surmise what they're four [sic]." 2/04/15RP 12.

In the alternative, counsel moved to provide the jury with a separate instruction regarding the prior conviction element, accompanied by a separate verdict form, in accordance with Judge Gain's original ruling.[3] 2/04/15RP 13; 2/11/15RP 64-65.

Judge Thorp denied both motions. 2/04/15RP 14-15. Judge Thorp reasoned she was bound by Judge Smith's rulings and the instructions given to the previous jury under the "law of the case" doctrine. 2/04/15RP 15; 2/11/15RP 66. Judge Thorp stated that because the to-convict instruction in the previous trial contained the prior conviction element, and Mr. Mortenson did not challenge that instruction in his appeal, she did not have discretion to instruct the jury in a different manner. 2/04/15RP 15; 2/11/15RP 66. Thus, the to-convict instruction contained the prior conviction element.[4] CP 115.

[3] In support of the motion, counsel filed proposed separate jury instructions and a special verdict form. CP 93, 94, 97.

[4] The to-convict instruction informed the jury it must find the following elements beyond a reasonable doubt: (1) that Mr. Mortenson drove a motor vehicle on the night in question; (2) that at the time he drove the motor vehicle, he was under the influence of or affected by

Under these circumstances, Mr. Mortenson once again stipulated "[t]hat at the time of the arrest, the defendant had been previously convicted of four or more prior offenses within ten years pursuant to RCW 46.61.5055(14)(a)." CP 99; 2/11/15RP 64-65. The court read the stipulation to the jury at the close of the State's case. 2/11/15RP 74. The jury was instructed it could use the prior conviction evidence only to establish the prior conviction element of the crime. CP 116.

The jury found Mr. Mortenson guilty of felony DUI. CP 100.

E. ARGUMENT

Judge Thorp abused her discretion in summarily denying the motion to present the inherently prejudicial prior conviction evidence in a separate proceeding, and in summarily denying the motion to instruct the jury on the prior conviction element in a separate instruction.

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

Before trial, defense counsel urged the court to adopt additional procedures that might reasonably lessen the prejudicial impact that would inevitably occur when the jury heard that Mr. Mortenson had

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intoxicating liquor; and (3) "[t]hat at the time of arrest, the defendant had been previously convicted of four or more prior offenses within ten years pursuant to RCW 46.61.5055(14)(a)." CP 115.

four prior convictions for violating RCW 46.61.5055. First, counsel argued the court should present the evidence of the prior convictions in a separate proceeding from the evidence regarding the present incident. CP 66-71; 2/04/15RP 11-13; 2/11/15RP 64-65. If the court had done so, there would have been *no* risk that the jury would unfairly conclude that Mr. Mortenson must have driven under the influence on the current occasion simply because he had done so at least four times in the past. Second, counsel argued the court should instruct the jury on the prior conviction element in a separate instruction. 2/04/15RP 13; 2/11/15RP 64-65. Doing so would have at least encouraged the jury to consider the allegations regarding the current incident separately from the allegations regarding the prior convictions.

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

The "law of the case" doctrine derives from both RAP 2.5(c) and the common law. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). It is a multifaceted doctrine that means different things in different circumstances. Id. The purpose of the doctrine is to promote finality and efficiency in the judicial process. Id.

Essentially, the law of the case doctrine stands for the proposition that once an appellate court enunciates a principle of law, that holding will be followed in subsequent stages in the same litigation. Id. It also refers to the principle that jury instructions not objected to are treated as the properly applicable law for purposes of appeal. Id.; State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998).

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

This principle is explicitly set forth in RAP 2.5(c)(1), which provides:

> **(c) Law of the Case Doctrine Restricted.** The following provisions apply if the same case is again before the appellate court following a remand:
>
> (1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case. . . .

The purpose of RAP 2.5(c)(1) is to restrict the law of the case doctrine by permitting the trial court upon remand to exercise independent judgment as to decisions to which error was not assigned in the prior review, and by permitting the appellate court to review the resulting decision. State v. Sauve, 33 Wn. App. 181, 183 n.2, 652 P.2d 967 (1982), aff'd, 100 Wn.2d 85, 666 P.2d 894 (1983). In order for RAP 2.5(c)(1) to permit appellate review of an issue raised in a second appeal, the trial court must have considered the issue on remand. Id. In other words, as with most appealable issues, the appellant must have raised an objection below. 2A Karl B. Tegland, Washington Practice: Rules Practice, at 258 (7th ed. 2011).

According to these principles, Judge Thorp had authority and discretion to reconsider Judge Gain's and Judge Smith's earlier rulings

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

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

erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Judge Thorp's refusal to exercise her independent judgment was based on an erroneous belief that she *had* no authority to exercise such judgment. Her failure to exercise discretion was itself an abuse of discretion and should not preclude appellate review. Garcia-Martinez, 88 Wn. App. at 329-30; Grayson, 154 Wn.2d at 342; Quismundo, 164 Wn.2d at 504.

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

2. The trial court should have bifurcated the proceeding in order to ensure that the jury would not be unfairly influenced by the prior conviction evidence.

Defense counsel moved Judge Thorp to bifurcate the proceedings so that the jury would not hear the evidence of Mr. Mortenson's four prior convictions for violating RCW 46.61.5055 until after it decided the question of whether he had committed DUI on the present occasion. CP 66-71; 2/04/15RP 11-13; 2/11/15RP 64-65. The judge should have granted the request because a bifurcated proceeding was the only procedure available to ensure that Mr. Mortenson received a fair trial. The potential for unfair prejudice was simply too great to overcome in any other way, given that the prior convictions were for the same crimes as the charged offense, and there were *four* of them rather than only one.

A trial court has broad discretion to control the order and manner of trial proceedings, including the decision whether to bifurcate the presentation of evidence. State v. Monschke, 133 Wn. App. 313, 334-35, 135 P.3d 966 (2006); ER 611. Moreover, the court has a fundamental duty to adopt a procedure that is reasonably designed to ensure that the trial is conducted fairly, expeditiously and impartially. State v. Johnson, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). Although

bifurcated trials are generally not favored, they are sometimes necessary to ensure a fair trial. Monschke, 133 Wn. App. at 335. In particular, bifurcation may be appropriate if a unitary trial would significantly prejudice the defendant, and there is no overlap between evidence relevant to the proposed separate proceedings. See id.

As stated, "[c]ourts should strive to afford defendants the fairest trial possible." State v. Roswell, 165 Wn.2d 186, 197, 196 P.3d 705 (2008). Part of that duty is to adopt a procedure that will minimize the risk that the jury will reach a verdict on an improper basis such as propensity. Old Chief v. United States, 519 U.S. 172, 182, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); ER 404. Under ER 403[5], the court must weigh the relative probative value of proffered evidence against the risk that the jury will misuse the evidence as propensity evidence. Old Chief, 519 U.S. at 182. If the risk that the jury will misuse the evidence as propensity evidence is high, and there is no significant need to conduct a unified trial, the court should exercise its discretion and order a bifurcated proceeding. See Monschke, 133 Wn. App. at 335.

[5] ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

It is well-recognized that prior conviction evidence carries a great potential to unfairly influence the jury to enter a verdict based on propensity. The well-entrenched rule barring evidence of other crimes to prove propensity is "thought to be indispensable to the presumption of innocence," as "[o]nce evidence of prior crimes reaches the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence." Thompson v. United States, 546 A.2d 414, 419 (D.C. Ct. App. 1988) (internal quotation marks and citations omitted). The danger of prior crime evidence is that the jury will generalize the defendant's earlier bad act into bad character and conclude that he must have committed the later bad act now charged, or worse, that he should be convicted as a preventative measure even if he should happen to be innocent momentarily. Old Chief, 519 U.S. at 180-81. When the sole purpose of prior conviction evidence is to prove an element of the crime, but the evidence is otherwise unrelated to the current charge, "revealing a defendant's prior offense is prejudicial in that it raises the risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged." State v. Young, 129 Wn. App. 468, 475, 119 P.3d 870 (2005).

The risk of unfair prejudice inherent in prior conviction evidence is significantly magnified when the prior crime is identical to the crime charged. "[I]f an element of the crime is a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime. We and other courts have recognized how highly prejudicial such evidence may be." Roswell, 165 Wn.2d at 198 (and cases cited). "Where a prior conviction was for a . . . crime . . . similar to other charges in a pending case the risk of unfair prejudice would be especially obvious." Old Chief, 519 U.S. at 185.

The risk of unfair is prejudice is magnified ever further if the evidence shows that the defendant has *multiple* prior convictions for the same kind of crime. See, e.g., United States v. Barfield, 527 F.2d 858, 861 (5th Cir. 1976) ("the danger of the jury convicting a 'bad man' is surely enhanced if multiple prior convictions are in evidence"); Dumes v. State, 718 N.E.2d 1171, 1176 (Ind. Ct. App. 1999) ("The evidence of Dumes' multiple convictions and license suspensions on his driving record unrelated to the crime with which he is currently charged may have resulted in the jury finding Dumes guilty based on his character, rather than the evidence presented at trial."); Commonwealth v.

Richardson, 674 S.W.2d 515, 517 (Ky. 1984) ("We recognize this prejudice particularly with multiple prior convictions on the same offense as the principal charge.").

Moreover, this risk may be especially acute when the crime is driving under the influence. Any jury could easily conclude that a defendant's multiple prior DUI convictions are the result of an alcohol addiction which likely compelled him or her to commit the same crime on the present occasion.

This Court recognized the risk of unfair prejudice caused by disclosure of Mr. Mortenson's four prior convictions for DUI in Mr. Mortenson's first appeal. The Court explained,

> The trial court's mention of RCW 46.61.5055 with respect to both the current offense and the prior offenses informed the jury that Mortenson had been convicted of DUI on four prior occasions with the last ten years. As in Young, [129 Wn. App. 468] this revelation was inherently prejudicial. Indeed, *given that it involves four prior convictions for the identical crime charged herein*, the error here is likely more prejudicial than the error in Young, which involved one prior conviction for a related offense.

CP 56-57 (emphasis added).

Although the trial court may attempt to minimize the risk of unfair prejudice caused by prior conviction evidence by providing a limiting instruction to the jury, such an instruction is likely to be

ineffective when the prior convictions consist of multiple prior offenses identical to the crime charged. While it is presumed that juries follow court instructions to disregard testimony, no instruction can remove the prejudicial impression created by evidence that is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. State v. Babcock, 145 Wn. App. 157, 164-65, 185 P.3d 1213 (2008). In particular, "the admission of evidence concerning a crime similar to the charged offenses is inherently difficult to disregard." Id.; see also State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968) (testimony of police officer concerning alleged plan to perpetrate robbery similar to crime charged was so prejudicial in nature that its effect upon the minds of the jurors could not be erased by instruction to disregard it); State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987) (because admission of evidence of Escalona's prior conviction for having "stabbed someone" was of a nature likely to "impress itself upon the minds of the jurors," jury would find it "extremely difficult, if not impossible" to ignore, despite court's instruction to do so).

Likewise, in a case such as this one, the "Old Chief" stipulation is unlikely to cure the potential for unfair prejudice. In Old Chief, the

defendant was charged with possession of a firearm by a convicted felon, which required proof that he had a prior conviction for any felony crime. 519 U.S. at 174. The United States Supreme Court recognized that if the prior conviction was for a crime similar to any of the current crimes charged, "the risk of unfair prejudice would be especially obvious." Id. at 185. Because "proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense," requiring the government to prove status without telling why that status was imposed and allowing it to be proved through a stipulation, would not prejudice the government or harm its ability to prove its case. Id. at 191. Thus, when a prior conviction is an element of the crime but otherwise unrelated to the current charge, and is for an offense that is likely to support conviction on an improper ground, the court must accept the defendant's stipulation that he has a predicate conviction while shielding the jury from hearing additional information about the nature of the conviction. Id.; Roswell, 165 Wn.2d at 195.

Under the circumstances of this case, although Mr. Mortenson entered an "Old Chief" stipulation, the stipulation was not sufficient to cure the unfair prejudice inherent in the prior conviction evidence. Mr.

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

In Mr. Mortenson's first appeal, this Court recognized the danger created when the jury heard about Mr. Mortenson's prior DUI conviction history. The Court reversed the conviction because Judge Smith had informed the potential jurors that Mr. Mortenson was charged with committing felony DUI "[c]ontrary to RCW 46.61.5055," and allegedly had "at least four prior offenses, as defined under RCW 46.61.5055(14)(a), within ten years of the arrest for the current offense." CP 10, 48-49, 52-53. Although Judge Smith did not explicitly inform the jury that the prior offenses were for DUI, the Court said the jurors must have inevitably drawn that conclusion. CP 56-57. The revelation was particularly prejudicial, given that the four

prior convictions were for the same offense as the crime charged, and there were *four* of them rather than only one. CP 56-57.

The prejudice created in this case cannot be meaningfully distinguished from the prejudice created in the first trial. Although Mr. Mortenson's stipulation did not expressly inform the jury that he had four prior DUI convictions, any jury would inevitably draw that conclusion. Thus, Mr. Mortenson was again denied a fair trial.

Given the highly prejudicial effect of the evidence of multiple prior convictions for the same crime, and given that there was no significant reason not to present that evidence in a separate proceeding, the court should have granted Mr. Mortenson's motion to bifurcate the evidence. The prior convictions constituted an element of the crime. State v. Chambers, 157 Wn. App. 465, 475, 237 P.3d 352 (2010). But they were otherwise unrelated to the current charge. As stated, a court has discretion to bifurcate the presentation of evidence if a unitary trial would significantly prejudice the defendant and there is no overlap between evidence relevant to the proposed separate proceedings. Monschke, 133 Wn. App. at 334-35. Here, it is plain that a unitary trial carried a great potential for unfair prejudice to Mr. Mortenson, and there was no overlap between evidence relevant to the proposed

separate proceedings. The court should have granted the motion for bifurcation. Id.

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

Before trial, defense counsel moved Judge Thorp to provide the jury with a separate instruction regarding the prior conviction element, accompanied by a separate verdict form. 2/04/15RP 13; 2/11/15RP 64-65. Counsel provided copies of proposed jury instructions and a verdict form in support of the motion. CP 93, 94, 97. Judge Thorp should have granted the motion, as this is a procedure that the Washington Supreme Court has strongly approved of as a means of mitigating the potential for unfair prejudice that arises when a prior conviction is an element of the crime.

As a general rule, the "to-convict" jury instruction must contain all essential elements of the crime. See State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). But when the statutory framework establishes a base crime with elevated penalties if certain facts are present, the trial court may bifurcate the elevating fact into a special verdict form. State v. Mills, 154 Wn.2d 1, 10, 109 P.3d 415 (2005); State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002). The jury must

find the elevating factor beyond a reasonable doubt before answering the special verdict form. Mills, 154 Wn.2d at 10.

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

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

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

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

F. CONCLUSION

The trial court misapplied the law of the case doctrine by concluding it did not have discretion to consider Mr. Mortenson's motions to hold a bifurcated proceeding or to provide the jury with a separate instruction regarding the prior conviction element. These procedures would have helped to ensure the jury was not unfairly influenced by the prior conviction evidence and would have safeguarded Mr. Mortenson's right to a fair trial. This Court should reverse the conviction and remand for further proceedings.

Respectfully submitted this 31st day of December, 2015.

/s/ Maureen M. Cyr

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER MORTENSON, Appellant.	)))))))))	NO. 73398-2-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF DECEMBER, 2015.

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