

District Court, Larimer County, Colorado 201 LaPorte Avenue, Fort Collins, CO 80521	DATE FILED: Apr 19, 2022 3:42 PM FILING ID: DA987F876CAEDC CASE NUMBER: 2020SA2485
THE PEOPLE OF THE STATE OF COLORADO Plaintiff v. KERRIE DEXTER, Accused	σ COURT USE ONLY σ
Megan Ring, Colorado State Public Defender HALEY BARTON, #50655 SAMANTHA HOUSE, #53748 Deputy State Public Defender Fort Collins Regional Office 1 Old Town Square, Suite 201 Fort Collins, Colorado 80524 Phone: (970) 493-1212 E-mail: ftcollins.defenders@state.co.us Fax: (970) 498-8867	Case Number: 20CR2485 Courtroom: 5C
MOTION TO BIFURCATE PRIOR CONVICTIONS	

Kerrie Dexter, through counsel, requests that this Court bifurcate the prior conviction portion of her upcoming felony DUI trial. In support, she states:

1. Ms. Dexter is charged with Driving Under the Influence with Three or More Priors and other traffic offenses. She is requesting a bifurcated trial into a substantive trial on the misdemeanor DUI and if a guilty verdict is returned, proceed to proof to the jury of the prior convictions.
2. Criminal defendants have the constitutional rights to a fair trial and impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. Admitting prejudicial evidence risks depriving a defendant of these rights. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *Bloom v. People*, 185 P.3d 797, 805-06 (Colo. 2008).
3. Prior convictions are an element of felony DUI. *Linnebur v. People*, 2020 CO 79, ¶ 2. Therefore, the prior convictions must be proved to a jury beyond a reasonable doubt. *Id.*
4. The danger of prior conviction evidence is that a jury may be tempted to convict a defendant based on the defendant's propensity to commit crimes. *Old Chief v. United States*, 519 U.S. 172, 180-181 (1997) (noting that "improper grounds" for conviction include "generalizing a

defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily).”).

5. The Colorado Supreme Court has recognized that, “[t]he reason for the general exclusion of evidence of prior criminality and bad character in the case of a criminal defendant is that he may be found guilty on the present charge, not because he is believed to be guilty, but because his bad character may be thought by the jury to deserve punishment or to deprive an erroneous verdict of its moral injustice.” *People v. Lucero*, 615 P.2d 660, 665 (Colo. 1980). C.R.E. 404(b) is intended to limit evidence of prior criminality to prevent that evidence from being used for propensity purposes.
6. A limiting instruction is not sufficient to cure the prejudice of admitting prior convictions. *People v. Goldsberry*, 509 P.2d 801, 803 (Colo. 1973); *see also Salas v. People*, 493 P.2d 1356, 1357 (Colo. 1972) (testimony that defendant had been convicted at a prior trial “could not be cured or eradicated by an instruction, but was compounded by it”). This is particularly true where the prior crime is identical to the crime for which the defendant is on trial. *Old Chief*, 519 U.S. at 185 (“Where a prior conviction was for a gun crime [in a felon-in-possession case] or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious....”).
7. Trial courts have the authority to manage proceedings in a way that ensures fairness to the parties and to promote judicial efficiency. *See People v. Aleem*, 149 P.3d 765, 774 (Colo. 2007). This includes the power to bifurcate offenses. *See* Crim. P. 14 (“If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or of defendants in any indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires.”).
8. The General Assembly has recognized the danger inherent in proving prior convictions in the same trial as the substantive offense by bifurcating habitual criminal proceedings. C.R.S. § 18-1.3-803(1).
9. The Colorado Supreme Court developed a three-part test to provide guidance as to when to bifurcate elements: (i) whether the substantive crime would exist without the prior-conviction element; (ii) the risk of prejudice to the defendant; and (iii) whether there is “undue interference with the administration of criminal justice.” *People v. Fullerton*, 525 P.2d 1166, 1167-68. All three factors weigh toward bifurcation here.
10. As to the first factor, misdemeanor DUI exists as a crime without prior criminality. Thus, it is not an “essential element” of the crime.¹ In contrast, the crime at issue in *Fullerton* was POWPO. *Compare id.* at 1167 (“This is not a case where the information charged a

¹ While the court made clear in *Linnebur* that the prior-conviction provision is an element for jury-trial purposes, it is just as clear that it is a sentence enhancer for double-jeopardy purposes (*i.e.*, simple DUI is a lesser-included offense of Felony DUI). *See Linnebur*, 2020 CO 79M, ¶ 15. In other words, in this context, the provision “go[es] merely to the punishment to be imposed....” *Fullerton*, 525 P.2d at 1167.

substantive offense and, in addition, a prior conviction unrelated to the substantive offense.”). In a POWPO case, the criminal conduct hinges on the existence of a prior felony. Thus, it does not present the same practical issue of trying to prove a crime without the element making it a crime.

11. Further, *Fullerton* was decided in 1974, decades before Colorado passed its felony DUI law. The court in *Fullerton* could not possibly have been contemplating the thorny issue of predicate priors in a felony DUI when holding that a court cannot bifurcate elements. The Court should not treat one decision in *Fullerton* as dispositive when the factors in *Fullerton* and the overwhelming equities, case law, and constitutional considerations weigh against a unitary trial.
12. Second, the potential prejudice to Ms. Dexter is great. Not only is this an issue of prior criminality (which is inherently prejudicial), but the prior offenses are the exact same offenses for which [client] would face trial. See *Old Chief*, 519 U.S. at 185. This is precisely the kind of case that risks a conviction based on the defendant’s propensity to commit a crime, not on the evidence showing that he committed a crime *this time*. See *id.* at 180-81.² And since the nature of the prejudice is of the highest order, it is unlikely that a limiting instruction could cure it. See *Goldsberry*, 509 P.2d at 803.
13. Third, there is no undue interference with the administration of justice in bifurcating the substantive DUI trial from the trial on the prior convictions. In contrast, a POWPO trial does not make sense without evidence that the defendant committed a felony. Further, the other statutes cited in *Fullerton* illustrate crimes that must “necessarily inform” the jury of the fact of prior criminality and would therefore be inappropriate for bifurcation:
 - Possessing contraband while confined in a detention facility;
 - Committing an assault while escaping from a place of confinement;
 - Holding a hostage by threat of force while in custody or confinement.

525 P.2d at 1168. The court did not cite to any crimes that simply impose elevated punishment after a finding of habituality. The concern, then, is with bifurcating elements where the trial simply would be nonsensical without evidence of prior convictions. Here, in contrast, a bifurcated trial would make perfect sense to a juror. A trial would be held on simple DUI, and if the jury finds the defendant guilty, the parties would proceed with the bifurcated portion of the trial where the prosecutor presents evidence of the prior convictions and of the identity of the defendant. Indeed, this is how most Felony DUI trials proceeded prior to *Linnebur* (except that the bifurcated portion was presented to the judge).

² The dissent in *Linnebur* reasoned that “[a] defendant’s prior convictions for drinking and driving related offenses now will be presented to a jury as an element of the felony offense—for drinking and driving—despite the risk of prejudice to the defendant.” 2020 CO 79, ¶ 54. However, this issue was not presented or briefed in *Linnebur*. *Id.* at ¶ 55. Therefore, the court did not have an opportunity to consider that arguments that *Fullerton* did not create a bright-line rule precluding bifurcation. Further, this purported concern for unfairness to the defendant did not persuade the majority of the court—perhaps because the majority saw bifurcation as an option. Finally, the dissent recognizes the harm inherent in a unitary trial. This concern indicates that bifurcation is the remedy.

14. Further, bifurcating the prior-conviction portion would be efficient. Presenting that evidence would take no more of the jury's time than if it were presented in a unitary trial. Indeed, deliberations would likely run more smoothly than in a unitary trial, since jurors would not be required to put the evidence of prior convictions out of their mind to determine whether the defendant was driving impaired this time. That is, jurors will not struggle with the knowledge of prior DUIs infecting their view of the evidence on the instant DUI.
15. Furthermore, Ms. Dexter has the right to decide whether to testify at her trial under the U.S. and Colorado Constitutions. U.S. Const. amend. V; Colo. Const. art. II, § 18. Not bifurcating this trial would impinge upon that right because Ms. Dexter may otherwise want to testify regarding her guilt or innocence of the charge of DUI, but the risk of being cross-examined on her prior criminal history may cause her not to testify. Bifurcation is the only way to preserve her right to testify.
16. Finally, other jurisdictions authorize the bifurcation of prior convictions in DUI trials. *Washington v. Wu*, 453 P.3d 975, 977 (Wash. 2019); *California v. Weathington*, 282 Cal. Rptr. 170, 181 (Cal. App. 1991).

For these reasons, Kerrie Dexter requests that this Court bifurcate her trial into a substantive trial on the misdemeanor DUI, and if a guilty verdict is returned, immediately proceed to proof to the jury of the prior convictions. This procedure is the only one that will fully respect Ms. Dexter's constitutional rights to a fair trial and impartial jury, and her right to testify or not at the trial. *See* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 18, 23, 25; *Payne*, 501 U.S. at 825; *Bloom*, 185 P.3d at 805-06.

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CERTIFICATE OF SERVICE
I certify that on 04-12-2022, I
served the forgoing document by e-filing same
to all opposing counsel.
/s/ hb
