

DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 100 Fort Collins, Colorado 80521	DATE FILED: May 19, 2022 3:20 PM EASINGBUM 82820101206 CASE NUMBER: 2022SA173
PEOPLE OF THE STATE OF COLORADO vs. KERRIE DEXTER, Defendant.	▲ FOR COURT USE ▲ Case No. 20CR2485 Courtroom: 5C
ORDER GRANTING MOTION TO BIFURCATE CONVICTIONS	

THIS MATTER comes before the Court on Defendant's Motion to Bifurcate Prior Conviction (filed April 12, 2022) and the People's Response to Motion for Bifurcation (filed April 25, 2022). The Court addressed the matter on April 26, 2022 and granted Ms. Dexter's Motion to Bifurcate Prior Conviction. The trial scheduled for May 4, 2022 was continued based on the prosecution's stated intention of filing an interlocutory appeal. After thorough review of the pleadings, the case file, and the case law, the Court ORDERS as follows:

Among other allegations, Ms. Dexter is charged with Driving Under the Influence (hereinafter "DUI") – Fourth or Subsequent Offense, pursuant to C.R.S. § 42-4-1301(1)(a), on October 4, 2020. Count 1 further alleges Ms. Dexter has been previously convicted of DUI on June 7, 1989 and Driving While Ability Impaired (hereinafter "DWAI") on May 15, 1984, March 18, 1996, and May 8, 2002.

In 2015, the General Assembly revised C.R.S. § 42-4-1301(1)(a) and its provisions regarding penalties, to classify a DUI after three or more prior convictions as a class four felony. Prior to this change, such an offense would be categorized as an unclassified misdemeanor regardless of the number of prior convictions. Ms. Dexter has requested bifurcation of the prior convictions portion of his felony DUI trial. For the reasons provided below, her request is GRANTED.

The Colorado Supreme Court, in an original proceeding pursuant to C.A.R. 21, established that a defendant accused of a felony DUI is entitled to a preliminary hearing. *People v. Tafoya*, 434 P.3d 1193 (Colo. 2019). In passing, the *Tafoya* Court recognized the looming issue of whether to categorize prior convictions in felony DUI trials are substantive elements or sentence enhancers; however, the *Tafoya* Court was not tasked with determining the issue.¹

Instead, in 2020, the Colorado Supreme Court tackled this difficult question head-on in *People v. Linnebur*: “[W]e conclude that the statutory provisions that define and provide penalties for felony DUI treat the fact of prior convictions as an element of the crime, which must be proved to the jury beyond a reasonable doubt, not as a

¹ “We recognize that section 42-4-1301(1)(a) raises difficult questions regarding . . . whether a repeat DUI offender’s prior convictions are elements of a felony DUI that must be proved at trial. These questions are inherent in the fact, noted above, that section 42-4-1301(1)(a) and its related penalty provisions alternately accord the prior convictions qualities of both elements of an offense and sentence enhancers. No party, however, has asked us to decide these difficult questions in this case, nor have those issues been brief before us. Accordingly, we cannot properly decide these issues, and we express no opinion on them. We note, however, that our General Assembly may wish to address these matters in order to clarify its intent in enacting section 42-4-1301(1)(a) and its related penalty provision.” *People v. Tafoya*, 434 P.3d 1193, 1197 n.2 (Colo. 2019).

sentence enhancer . . .” *People v. Linnebur*, 476 P.3d 734, 735 (Colo. 2020). Since the *Linnebur* opinion was announced, eighteen months ago, there have been thirty-five cases reversed and remanded to be consistent with the *Linnebur* opinion, six of which had originally been affirmed.² In short, the holding in *Linnebur* was contrary to the logic of many trial court judges, as well as multiple Court of Appeals panels, prior to its mandate.

Linnebur found the DUI statute ambiguous, failing to catalog priors as elements or sentence enhancers; therefore, it carefully analyzed the legislative intent to eventually decide the prior convictions are substantive elements. *Id.* In its rationale, the

² See *People v. Leppek*, No. 18-CA-0308, 2020 WL 5740901 (Colo. App. Sept. 24, 2020); *People v. Frank*, No. 18-CA-2150, 2020 WL 6471391 (Colo. App. Oct. 29, 2020); *People v. Manzanarez*, No. 18-CA1404, 2020 WL 7870607 (Colo. App. Dec. 24, 2020); *People v. Smith*, No. 17-CA-1977, 2020 WL 7873248 (Colo. App. Dec. 31, 2020) (Reversed and remanded to be consistent with *Linnebur* after previously affirming); *People v. Labrecque*, No. 17-CA-1757, 2021 WL 237284 (Colo. App. Jan. 21, 2021); *People v. Dorsey*, No. 17-CA-2050, 2021 WL 496686 (Colo. App. Jan. 28, 2021); *People v. Maestas*, No. 17-CA-2202, 2021 WL 496692 (Colo. App. Jan. 28, 2021); *People v. Gill*, No. 18-CA-0152, 2021 WL 497244 (Colo. App. Jan. 28, 2021); *People v. Cain*, No. 16-CA-1516, 2021 WL 622649 (Colo. App. Feb. 4, 2021) (Reversed and remanded to be consistent with *Linnebur* after previously affirming); *People v. Hoskins*, No. 17-CA-0215, 2021 WL 622735 (Colo. App. Feb. 4, 2021) (Reversed and remanded to be consistent with *Linnebur* after previously affirming); *People v. Roybal*, No. 17-CA-1587, 2021 WL 619681 (Colo. App. Feb. 4, 2021); *People v. Lakkari*, No. 17-CA-1866, 2021 WL 620829 (Colo. App. Feb. 4, 2021) (Reversed and remanded to be consistent with *Linnebur* after previously affirming); *People v. Lile*, No. 17-CA-2055, 2021 WL 538024 (Colo. App. Feb. 11, 2021) (Reversed and remanded to be consistent with *Linnebur* after previously affirming); *People v. Osland*, No. 18-CA-1213, 2021 WL 538027 (Colo. App. Feb. 11, 2021); *People v. Trusty*, No. 17-CA-1395, 2021 WL 720203 (Colo. App. Feb. 18, 2021) (Reversed and remanded to be consistent with *Linnebur* after previously affirming); *People v. Clevenger*, No. 18-CA-1948, 2021 WL 860955 (Colo. App. March 4, 2021); *People v. VanLewen*, No. 18-CA-2016, 2021 WL 1148200 (Colo. App. March 18, 2021); *People v. Piel*, No. 19-CA-0397, 2021 WL 1147770 (Colo. App. March 18, 2021); *People v. Bryan*, No. 18-CA-1969, 2021 WL 1856612 (Colo. App. May 6, 2021); *People v. Mason*, No. 18-CA-1215, 2021 WL 2154209 (Colo. App. May 20, 2021); *People v. Bollinger*, No. 19-CA-0898, 2021 WL 2231127 (Colo. App. May 27, 2021); *People v. McLaughlin*, No. 19-CA-0960, 2021 WL 2231129 (Colo. App. May 27, 2021); *People v. Crist*, No. 18-CA-2017, 2021 WL 3230508 (Colo. App. July 29, 2021); *People v. Howe*, No. 19-CA-1265, 2021 WL 3230625 (Colo. App. July 29, 2021); *People v. Simon*, No. 18-CA-1854, 2021 WL 3879452 (Colo. App. Aug. 26, 2021); *People v. Turner*, No. 17-CA-0008, 2021 WL 4067273 (Colo. App. Sept. 2, 2021); *People v. Quezada-Caro*, No. 17-CA-0356, 2021 WL 4067275 (Colo. App. Sept. 2, 2021); *People v. Kuhn*, No. 18-CA-0037, 2021 WL 4067282 (Colo. App. Sept. 2, 2021); *People v. Richendifer*, No. 20-CA-0355, 2021 WL 4446985 (Colo. App. Sept. 23, 2021); *People v. Ortega*, No. 18-CA-2189, 2021 WL 4762293 (Colo. App. Oct. 7, 2021); *People v. Balog*, No. 19-CA-0964, 2021 WL 4762318 (Colo. App. Oct. 7, 2021); *People v. Saelong*, No. 19-CA-0854, 2021 WL 5114287 (Colo. App. Oct. 28, 2021); *People v. Rector*, 19-CA-2338, 2021 WL 5984479 (Colo. App. Dec. 9, 2021); *People v. Gallegos*, 19-CA-1514, 2022 WL 348278 (Colo. App. Feb. 3, 2022); and *People v. Luis*, No. 20-CA-0473, 2022 WL 670143 (Colo. App. Mar. 3, 2022).

Court recognized the “numerous additional protections the legislature has provided for defendants” including entitlement to a preliminary hearing, and a twelve-person jury.

Id. at 739. *Linnebur* reasoned treating priors as sentence enhancers with a reduced standard of proof “is so significant that it risks running afoul of the Sixth Amendment.”

Id. at 741. The impact of *Linnebur* established, in no uncertain terms, that the prosecution is required to prove, beyond a reasonable doubt, the prior convictions necessary to achieve a felony DUI conviction.

The issue left unresolved by *Linnebur*, is whether a trial court is vested with authority to bifurcate *elements* of an offense. It seems impossible that the Colorado Supreme Court honored due process in *Tafoya* and *Linnebur*, only to cut due process off at the knees by forbidding trial courts from bifurcating the prior convictions.

Some may argue this issue was resolved by Justice Márquez’ dissent in *Linnebur*. “To the extent defendants anticipate that these prior convictions can be somehow bifurcated from the remaining elements of the felony offense, that may be wishful thinking.” *Id.* at 746 (Márquez, J., dissenting). “Though we are not presented with this issue today, our reasoning in *Fullerton* would appear to preclude bifurcation in the DUI context too.” *Id.* at 746 (Márquez, J., dissenting). Respectfully, while Justice Márquez predicted the dilemma before this Court today, this precise issue has not yet been properly analyzed by the Colorado Supreme Court. Interestingly, this matter was previously raised as a jurisdictional question after a trial court granted bifurcation of the

element of prior convictions in a felony DUI; however, the Petition for Writ of Certiorari was denied by the Colorado Supreme Court. *Barker v. People*, 2021 WL 161631, No. 18-CA-374 (Colo. App. Jan. 14, 2021), *cert. denied*, 2021 WL 4760105 (Colo. 2021)(No. 21-SC-191). One of the subjects outlined in the Petition for Writ of Certiorari included the very question of whether a trial court has authority to bifurcate the prior conviction element, subsequent to *Linnebur*. *Barker v. People*, 2021 WL 161631, No. 18-CA-374 (Colo. App. Jan. 14, 2021), *cert. denied*, 2021 WL 4760105 (Colo. 2021)(No. 21-SC-191). Similarly, the Colorado Court of Appeals tiptoed around the very dilemma on at least two occasions, involving cases where bifurcation was granted; however, the issue of whether bifurcation was compatible with *Fullerton* was not properly before the panels.³ This Court does not believe there is clear or binding precedence to prevent bifurcation of prior convictions in felony DUI trials.

In the 1974 case, *People v. Fullerton*, the Colorado Supreme Court overturned a Court's order granting bifurcation, reasoning that "where, as here, the issues sought to be tried separately are both elements of the same crime, the potential for disruption of the orderly trial of criminal cases is great." 525 P.2d 1166, 1168 (Colo. 1974). At first glance, this seems to imply that bifurcated trials of elements are not permitted.

³ *Barker v. People*, 2021 WL 161631, No. 18-CA-374, ¶24 (Colo. App. 2021) ("Moreover, Barker does not raise, and thus we do not address, whether a bifurcated jury trial requiring proof of the prior offenses beyond a reasonable doubt complied with *Linnebur*."); *People v. Chalmers*, No. 19-CA-579, 2021 WL 4506240 (Colo. App. 2021).

The facts in *Fullerton* involve a defendant who was charged with possession of a weapon by a previous offender (hereinafter “POWPO”), where the prosecution must prove merely two elements, namely, 1. the defendant possessed a weapon and 2. the defendant was previously convicted of a felony. One element without the other is not necessarily illegal. Bifurcation results in an absurdity and a clear interference with the administration of justice – leading the balancing test to weigh against bifurcation. This Court agrees that the balancing test weighs strongly against bifurcation in all of the charges mentioned in *Fullerton*: POWPO, possessing contraband while confined in a detention facility, committing an assault while escaping from a place of confinement, and holding a hostage by threat of force while in custody or confinement. This Court agrees applying the *Fullerton* balancing test to such charges “would unduly interfere with the administration of the criminal justice system.” *Id.* at 1168. Further, it would interfere with the administration of justice to a degree so severe that mention of a prior felony conviction and being incarcerated must necessarily be presented to the jury in a unitary trial. This Court even agrees that under these circumstances, jury instructions are the greatest tool available to the Court to protect due process.

In contrast, the Court notes that none of the charges in *Fullerton* ask a jury to find the defendant guilty of the exact same charge to which he/she was previously convicted, at least on three previous occasions, as a felony DUI does. Similarly, while the POWPO does require the jury to know the defendant was previously *convicted* of a crime, the detention matters leave to the jury’s imagination whether the defendant was

ever *convicted* of a previous crime. The same is simply not true in felony DUI cases where the evidence is a prior conviction, not to be confused with an allegation. Albeit the priors necessary to establish felony DUI are not necessarily prior *felonies*, they are prior criminality of the very same nature of the charge to which the jury is tasked to resolve. Undoubtedly this has the potential to lead to confusion, prejudice, and a greater likelihood that a defendant will be convicted based on propensity evidence. It is also likely to have a cumulative effect. For these reasons, other jurisdictions have also authorized the bifurcation of prior convictions in DUI trials after categorizing the prior convictions portion of the offense as an element. *See Washington v. Wu*, 453 P.3d 975 (Wash. 2019); *Florida v. Harbaugh*, 754 So.2d 691 (Fla. 2000); *Ostlund v. Alaska*, 51 P.3d 938 (Alaska Ct. App. 2002); *California v. Weathington*, 282 Cal. Rptr. 170 (Cal. App. 1991); and *Peters v. State*, 692 S.W.2d 243 (Ark. 1985).

Today, however, this Court reads *Fullerton* more broadly as providing a balancing test for bifurcation: “The potential prejudice to the defendant from a unitary trial of the issues *must* be weighed against the need to prevent undue interference with the administration of criminal justice.” *People v. Fullerton*, 525 P.2d 1166, 1167 (Colo. 1974) (emphasis added). The Court in *Fullerton* further provides, “[t]he trial judge has a duty to safeguard the rights of the accused and to ensure the fair conduct of the trial.” *Id.* at 1167-68. A narrow read of *Fullerton* places the trial court in an impossible position of assuring due process while being restricted from using one of the only available

safeguards it has available to shield the jury from propensity evidence until its disclosure is necessary.

Defendants have the right to a fair trial by an impartial jury and due process. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. A defendant in a criminal case also has the constitutional right to testify in their own defense under the due process clauses of the United States Constitution, amend. XIV, and the Colorado Constitution, Art. II, § 25.

The admission of prejudicial evidence may deprive an individual of their right to a fair trial. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *Bloom v. People*, 185 P.3d 797, 805-06 (Colo. 2008). Evidence of prior convictions has historically been recognized as uniquely prejudicial to a defendant. *People v. Anders*, 559 P.2d 239, 241 (Colo. App. 1976). “[E]vidence of prior criminality casts ‘damning innuendo likely to beget prejudice in the minds of juries.’” *People v. Lucero*, 615 P.2d 660, 665 (Colo. 1980) (en banc) (citing *Stull v. People*, 344 P.2d 455, 458 (Colo. 1959); accord, *People v. Honey*, 596 P.2d 751 (Colo. 1979); *Huerta v. People*, 450 P.2d 648 (Colo. 1969); *Naranjo v. People*, 419 P.2d 953 (Colo. 1966); *Kostal v. People*, 357 P.2d 70 (Colo. 1960); *Abbott v. People*, 299 P. 1053 (Colo. 1931); *Cargill v. People*, 214 P. 387 (Colo. 1923)). Evidence of prior crimes comes with the risk the jury will convict the defendant to punish them for past misconduct or based on a belief that the defendant is a bad person. *People v. Brown*, 342 P.3d 564, 568 (Colo. App. 2014). “Whether to allow an inquiry into specific instances of

prior conduct is within the discretion of the trial court.” *People v. Sweeney*, 78 P.3d 1133, 1136 (Colo. App. 2003). Such a ruling should not be disturbed on review absent an abuse of discretion. *People v. Caldwell*, 43 P.3d 663 (Colo. App. 2001). “Abuse of discretion occurs when the ruling is manifestly arbitrary, unreasonable, or unfair.” *People v. Sweeney*, 78 P.3d 1133, 1136 (Colo. App. 2003).

The General Assembly has recognized the danger in proving prior convictions in the same trial as the substantive offense by bifurcating habitual criminal proceedings. See C.R.S. § 18-1.3-803(1). The Colorado Rules of Criminal Procedure also recognize this danger: “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.” Crim. P. 14. (emphasis added). Admittedly, in habitual criminal proceedings, the Court is not bifurcating elements but rather sentence enhancers, but the logic remains the same – prior convictions are prejudicial and bifurcation can assist the Court in protecting the right to a fair trial.

A limiting instruction may be insufficient to cure the prejudice that necessarily lingers after 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 especially true when the prior crime is identical to the crime the defendant is on trial for. *Old Chief v. United States*, 519 U.S. 172, 180-181 (1996). Because of this, it is impossible to ignore the substantial risk that a jury may convict a defendant based merely on assumptions, rather than specifically finding each element of the offense beyond a reasonable doubt. Absent evidence to the contrary, the Court is to presume the jury understands and will follow the Court's instructions. *People v. Moody*, 676 P.2d 691 (Colo. 1984). This presumption is not mutually exclusive with bifurcation nor does it relieve the Court of its duty to protect the proceedings from evidence that may be unduly prejudicial or misleading.

Trial courts have "broad discretion" in determining when bifurcation is appropriate. *Gaede v. Dist. Court*, 676 P.2d 1186,1188 (Colo. 1984). Such a ruling should not be disturbed on review absent a clear showing that there has been an abuse of discretion. *Bjornsen v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 487 P.3d 1015, 1019 (Colo. App. 2019) (citing *O'Neal v. Reliance Mortg. Corp.*, 721 P.2d 1230, 1232 (Colo. App. 1986)). Ordering bifurcation is an abuse of discretion if it "virtually assures prejudice to a party." *Id.*

While not specifically raised in the defendant's pleading, the Court cannot ignore the inevitable tug of war between the constitutional rights at issue – the right to present a defense (including the right to testify) and the right to have all elements proven by the

prosecution. Bifurcation is the only avenue that simultaneously preserves both constitutional rights.

To be clear, this Court does not believe that bifurcation is *required* in every felony DUI trial, but merely that the plain language of Crim. P. 14 permits the Court to “provide whatever relief justice requires” to avoid prejudice to either party. This Court believes it is tasked with applying the balancing test from *Fullerton* to the facts of each case, if requested by either party. This Court can conceive of relative degrees of prejudice based on a myriad of factors: recency or remoteness of the convictions, the sheer number of prior convictions, whether a prior conviction is for vehicular homicide or assault, etc. There may be situations where the trial Court finds jury instructions to be an adequate safeguard and denies bifurcation. This Court can also fathom the defense choosing to waive the prejudice in an effort to adequately voir dire on the subject of prior convictions.

When applying the *Fullerton* balancing test to this case, the Court places great weight on the request by the defense for bifurcation and finds the potential prejudice to Ms. Dexter outweighs any undue interference with the administration of justice. Not only is this an issue of prior criminality being presented to a jury, but one prior offense is the exact same offenses (DUI) for which the defendant stands accused and three are a202 lesser-included of the same (DWA). This is the precise situation that risks a conviction based on a defendant’s propensity to commit this type of crime. And since

the nature of the prejudice is of the highest order, it is unlikely that a limiting instruction could cure it and may, in fact, emphasize the evidence.

There is also minimal interference with the administration of justice in bifurcating the substantive DUI trial from the trial on the prior convictions. In fact, bifurcating the prior-conviction portion of a felony DUI could arguably be more efficient than not bifurcating. Presenting the prior-conviction evidence immediately after the jury's decision whether the defendant is guilty of DUI would take no more of the jury's time than if it were presented unitarily. Indeed, there would likely be less confusion overall and deliberations would likely run more smoothly than in a unitary trial because jurors would not be required to put the evidence of prior convictions out of their minds to determine whether the defendant was driving under the influence or impaired this time. If the defendant is acquitted in the initial portion of the trial, the jury need not deliberate and determine the final element of prior convictions. As such, applying the reasoning of *Fullerton* produces a different outcome for felony DUI trials than it did for POWPO trials.

The prosecution aptly points out that this Court has been inconsistent in its analysis of whether prior convictions may be bifurcated in felony DUI trials. Without a doubt, it is a complex issue. The Court regrets its previous narrow reading of *Fullerton* and upon deeper reflection trusts that applying the general holding of *Fullerton* justifies bifurcation in this matter. Additionally, in applying the plain language of Crim. P. 14,

the Court is convinced, admittedly against popular opinion of her many esteemed colleagues, that bifurcation is authorized. Perhaps most notably, the Court finds that bifurcation permits this Court to honor its significant “. . . duty to safeguard the rights of the accused and to ensure the fair conduct of the trial” while also ensuring the fair administration of justice for both parties. *Fullerton*, 434 P3d at 1168. As such, the Court stands firm in granting Ms. Dexter’s Motion to Bifurcate Prior Convictions.

SO ORDERED on this 10th day of May, 2022.

BY THE COURT:



Sarah B. Cure
District Court Judge