Supreme Court No. 102066-0
(COA No. 38180-3-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER McCABE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Christopher McCabe asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. McCabe appealed his convictions. The Court of Appeals affirmed in a published decision. *State v. McCabe*, __ Wn. App. 2d ___, 526 P.3d 891 (2023). The Court of Appeals also declined to reconsider that decision. Order Denying Motion for Reconsideration, *State v. McCabe*, No. 38180-3-III (May 9, 2023).

C. ISSUES PRESENTED FOR REVIEW

1. All persons accused of a crime have a constitutional right to a fair trial. The trial court may join multiple charges in one trial under certain circumstances, but the court must sever charges where joinder causes prejudice that outweighs judicial economy. In order to preserve the issue for appeal, the rule governing severance requires the defendant to renew the motion to sever "on the same ground before or at the close of all the

evidence." CrR 4.4(a)(2). The plain language does not require the defendant to present any additional evidence to preserve the motion to sever. The Court of Appeals decision requiring more ignores the plain language of the rule, conflicts with decisions by this Court and the Court of Appeals, implicates the defendant's constitutional right to a fair trial, and warrants this Court's review. RAP 13.4(b).

2. All persons accused of a crime have a constitutional right to counsel. That right requires effective assistance of counsel. Mr. McCabe's trial attorney rendered ineffective assistance when he failed to request a jury instruction on the uncontrollable circumstances defense to bail jumping, despite uncontroverted evidence that Mr. McCabe was unable to appear due to a medical emergency. The Court of Appeals decision violates Mr. McCabe's right to effective assistance of counsel and warrants this Court's review. RAP 13.4(b).

D. STATEMENT OF THE CASE

1. Mr. McCabe goes to Home Depot to buy supplies for work. Even though he had a receipt in his hand, a security guard thinks he left without paying and files a police report.

In 2018, Mr. McCabe went to Home Depot to purchase paint for some apartment units he manages for his grandmother. RP 7/23/19 258-61. He put four buckets of paint into a cart, went to self-checkout, and paid for the paint. RP 7/23/19 261-62. He left with his receipt in his hand. RP 7/23/19 262.

When Mr. McCabe got to the apartment building and hauled two buckets of paint inside, he realized he had mistakenly purchased the wrong kind of paint. RP 7/23/19 261, 266. His girlfriend, Tana Lozano, was at the apartment and in a rush to run errands. RP 7/23/19 266-67. They decided to return the two buckets of paint that were still in the car and leave the other two in the apartment for the time being. RP 7/23/19 267.

When they arrived at Home Depot, Mr. McCabe realized he forgot his wallet and receipt at the apartment. RP 7/23/19 267. He knew he could not return or exchange an item without

his ID. RP 7/23/19 267-68. Ms. Lozano offered to exchange the paint for him so they could run her errands. RP 7/23/19 268. She took the two paint cans into the store and, instead of exchanging them for the correct paint, she returned them for store credit. RP 7/23/19 268. Later that day, Mr. McCabe went back to Home Depot with his ID returned the other two buckets of paint. RP 7/23/19 269.

That afternoon, a Home Depot security guard determined some buckets of paint were missing from the store. RP 7/23/19 151. She reviewed the store's security footage and saw Mr. McCabe leave the store with four buckets of paint and a receipt. RP 7/23/19 141, 263. She also saw Ms. Lozano return two buckets. RP 7/23/19 148-49. She determined the returned buckets matched the missing buckets and filed a report with the sheriff's office. RP 7/23/19 153-54, 203.

2. *Over a week later, police arrest Mr. McCabe. When they search him, they discover a small bag of drugs.*

A week and a half later, Mr. McCabe and Ms. Lozano were driving in Mr. McCabe's car. RP 7/23/19 173, 271-72.

Even though they had not violated any traffic laws, Officer Tyler Heiman saw their car and decided to follow it for several blocks. RP 7/23/19 170-71. While he was following the car, he noticed the car's registration was expired. RP 7/23/19 172.

The car was having some issues, so Ms. Lozano parked it on the side of the road. RP 7/23/19 171, 270-71. Officer Heiman parked behind them, and Mr. McCabe got out to tell him they were having car problems. RP 7/23/19 173, 271.

Officer Heiman ordered Mr. McCabe to return to his car. RP 7/23/19 173. He scanned the car's license plate, and his computer system alerted him to the Home Depot police report. RP 7/23/19 184-86. Officer Heiman arrested both Mr. McCabe and Ms. Lozano. RP 7/23/19 175-76, 271. When the police searched Mr. McCabe, they found a bag with "a crystalline substance in his wallet" and seized it. RP 7/23/19 209.

3. *The State charges Mr. McCabe, and he posts bail. When Mr. McCabe does not show up on time to a hearing, the State adds an additional charge of bail jumping.*

The State charged Mr. McCabe with trafficking in stolen property, theft, and possession of a controlled substance. CP 1-2. Mr. McCabe posted bail and was released prior to trial. Ex. 4, pg. 7-9. He attended the arraignment hearing. Ex. 4, pg. 14.

On January 15, 2019, Mr. McCabe did not appear on time for his afternoon hearing. Ex. 4, pg. 12. The court issued a bench warrant, but he appeared on time at the next hearing two weeks later and the court quashed the bench warrant. Ex. 4, pg. 12; CP 228-30. He also attended numerous subsequent hearings. CP 231-34. Still, the State added an additional charge of bail jumping. CP 88-89.

4. *Mr. McCabe moves to sever the drug possession charge from the other charges, but the court denies the motion.*

Prior to trial, Mr. McCabe moved to sever the drug possession charge from the other charges. CP 5-8. He argued that trying the charges together would cause him undue prejudice and violate his right to a fair trial because joinder

"creates a risk of the jury making decisions based on general 'criminal propensity' instead of on the facts of the case." CP 8. He pointed out the drug possession charge was completely separate from the other charges: "These are distinct charges with different dates of violation, different victims, and acts not occurring in the same course of conduct." CP 8. "[T]hey are in fact completely unrelated." CP 8.

The court acknowledged "there is a concern about an emotional response coming from the jury" as a result of joinder. RP 7/18/19 18; CP 134. But it concluded the separate charges were "a chain of events." CP 134; RP 7/18/19 19. The court held there was no substantial prejudice and, with no further explanation, conclusively stated: "The Court is ruling in the same matter as the *Bythrow*[1] case." CP 134; RP 7/18/19 18. Therefore, it denied Mr. McCabe's motion to sever. CP 133-35.

[1] *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990).

Mr. McCabe renewed his motion to sever prior to trial, and the court again denied the motion:

> Defense counsel: I just want to renew . . . the motion to sever as a practice for possible appealable issue, your Honor.
> The Court: Correct. So it's preserved. I'm not going to change the ruling. So it is preserved, then, for the record.

RP 7/22/19 19-20.

5. *At trial, the State presents extensive evidence relating to the drug possession charge.*

In its presentation of its case, the State called six total witnesses. One was the Home Depot security guard, who testified as to the theft and trafficking charges. RP 7/23/19 137. Another was a superior court clerk, who testified as to the bail jumping charge. RP 7/23/19 211.

The State called four witnesses to testify about the drug possession charge. Officers Heiman and Baxter testified about their search of Mr. McCabe and his belongings and their discovery of the drugs. RP 7/23/19 176, 209. Detective Vandenberg testified about his role transporting the evidence in this case from police custody to the crime lab for analysis. RP

7/23/19 223, 226. He stated, "the item description [was] 'meth.'" RP 7/23/19 225.

Next, Devon Hause, an analyst from the crime lab, testified in detail about her analysis of the evidence in this case. RP 7/23/19 237. She concluded the evidence the police collected from Mr. McCabe was methamphetamine. RP 7/23/19 253; Ex. 3.

6. *Mr. McCabe testifies as to his innocence on the bail jumping, theft, and trafficking charges.*

Mr. McCabe testified and admitted he had a small amount of drugs on him when he was arrested. RP 7/23/19 272. He also admitted he has previously sought treatment for his substance use. RP 7/23/19 272. When asked why he took this case to trial, he answered: "I wanted to go to trial because I'm not guilty of these other offenses." RP 7/23/18 272.

As to the theft and trafficking charges, Mr. McCabe explained he paid for the paint before leaving Home Depot. RP 7/23/19 261. He testified he committed no offense and legitimately returned the buckets of paint: "I didn't think it was

a big deal. I've been shopping there for years and have never had an issue." RP 7/23/19 281.

Regarding the bail jumping charge, Mr. McCabe explained he was not on time for his hearing because he and Ms. Lozano were dealing with a medical emergency at urgent care that afternoon. RP 7/23/19 273. He knew the conditions of bail and had attended numerous other hearings. RP 7/23/19 274. He knew he had to be at court at 1:30 p.m. that day, so he rushed from urgent care to court. RP 7/23/19 274. But, when Mr. McCabe got to the courtroom at 3 or 4 o'clock, only the court clerk was there, who told him to contact his attorney and schedule a new court date. RP 7/23/19 274. He contacted his attorney and attended the next hearing.[2] RP 7/23/19 274.

[2] Because Mr. McCabe attended his next hearing, the court quashed the bench warrant. CP 230. He also attended every hearing for the next several months. CP 231-34.

7. *The State loses the drug evidence, and the court dismisses the charge.*

After the State rested, it notified the court it lost the drug evidence. RP 7/24/19 287. Mr. McCabe moved to dismiss the possession charge for insufficient evidence, and the court granted it. RP 7/24/19 287, 289; CP 150-51. The court informed the jury the possession charge was removed but said nothing else. RP 7/24/19 295. The court did not instruct the jury on any defense to bail jumping, nor did it instruct the jury to disregard any evidence of the possession charge. CP 90-113.

The jury found Mr. McCabe guilty on all three charges. CP 114-16.

E. ARGUMENT

1. The Court of Appeals decision concluding Mr. McCabe's motion to sever was not preserved for appeal misconstrues the plain language of CrR 4.4 and conflicts with decisions by this Court and the Court of Appeals.

All persons accused of a crime have a constitutional right to due process and a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Where the State charges a person with

multiple offenses, the trial court can allow those charges to be joined in a single trial under certain circumstances. CrR 4.3(a). But where joinder would prejudice the accused, the court must sever the charges. CrR 4.4(b); *State v. Bluford*, 188 Wn.2d 298, 307, 393 P.3d 1219 (2017).

CrR 4.4 delineates when the defendant must make the motion to sever and how to preserve the issue for appeal. First, the defendant must move the trial court to sever offenses before trial. CrR 4.4(a)(1). The motion may be made at another time during or after trial "if the interests of justice require." *Id.*

Then, if the court denies the motion, the rule requires the defendant to renew it at some time before the conclusion of trial in order to preserve the issue for appeal: "If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence." CrR 4.4(a)(2). If the defendant does not renew the motion, the issue is waived. *Id.*

Courts employ the principles of statutory construction when interpreting a court rule. *State v. Blilie*, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). If the rule's meaning is plain on its face, then the court must follow that plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The court cannot add words or clauses to a rule. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

The plain language of CrR 4.4 is clear: to preserve the issue for appeal, the defendant must renew the motion on the same basis at some time before the close of all the evidence. The rule does not require the defendant to present more evidence or meet a different prejudice standard. Nothing else is required to preserve the issue.

This Court and the Court of Appeals have held a motion to sever is preserved for appeal where the defendant renews the motion at some time before the end of trial. *State v. Emery*, 174 Wn.2d 741, 754, 278 P.3d 653 (2012) (defendant must renew "before trial, before the close of evidence, or at the close of

evidence"); *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998) (defendant must "renew the motion to sever before the close of trial").

However, in this case the Court of Appeals construed the rule to require the defendant to renew the motion to sever after some evidence has been introduced that demonstrates "actual prejudice." *McCabe*, 526 P.3d at 897. The Court of Appeals cited to *State v. McDaniel*, 155 Wn. App. 829, 230 P.3d 245 (2010), to support its conclusion. *Id.* But in that case, the defendants never renewed their motion at all. Defense counsel moved to sever prior to trial, but the trial court declined to consider the motion without any briefing and did not rule on it. *McDaniel*, 155 Wn. App. at 857. The next day, defense counsel moved to sever prior to the court swearing the jury in. *Id.* The court weighed the prejudice factors and denied the motion on the merits. *Id.* at 857-58. Defense counsel did not renew the motion before the end of trial, and the Court of Appeals

correctly concluded the issue was not preserved for appeal. *Id.* at 859.

The Court of Appeals's conclusion in *McDaniel* is consistent with other holdings by this Court and the Court of Appeals that have repeatedly held the severance issue is not preserved for appeal where the defendant never renewed the motion before the end of trial. *See Bluford*, 188 Wn.2d at 306; *Bryant*, 89 Wn. App. at 864-65; *State v. Henderson*, 48 Wn. App. 543, 551, 740 P.2d 329 (1987); *State v. Ben-Neth*, 34 Wn. App. 600, 606, 663 P.2d 156 (1983). This holding is also consistent with the plain language of CrR 4.4(a)(2) requiring the defendant to renew the motion at some point prior to the conclusion of the evidence.

In this case, the Court of Appeals also cited to a secondary source that broadly discusses waiver of joinder or severance. *McCabe*, 526 P.3d at 897 (citing 5 Wayne R. LaFave et al., *Criminal Procedure* § 17.3(d) at 58 (4th ed. 2015)). But that source does not state renewal must include new

information for the trial court to consider. Nor does renewal require the court to apply a different prejudice standard. It simply states that, generally, "A defendant can lose his rights under joinder and severance law by failing to assert them in a timely fashion." LaFave, *Criminal Procedure* § 17.3(d) at 58. In fact, it emphasizes the importance of making the motion *prior to* trial. *Id.* at 59 n.46, n.47.

In addition, the source the Court of Appeals cited in its opinion does not specifically discuss CrR 4.4 in any detail. In fact, it only mentions CrR 4.4 in a footnote when discussing how some states, such as Washington, apply *the same*, "less demanding" prejudice standard whether the motion is made prior to or during trial. *Id.* at n.50. And while renewing the motion during or after trial may demonstrate actual prejudice, most rules—including CrR 4.4—do not require this. *Id.* at 59 ("However, in a pretrial setting the motion often can be assessed only in terms of the potential for prejudice, while events later occurring at trial may provide something more

concrete in terms of actual prejudice. This distinction is not often given formal recognition in the applicable statutes and court rules."). Where a defendant renews prior to trial but does not renew during or after trial, it may impact the *scope* of review, but it does not preclude appellate review. *Id.* at 60.

The plain language of CrR 4.4(a)(2) requires a timely motion (before trial) and a timely renewal (at any time before or at the close of evidence) to preserve the issue for appeal. No other Washington court has construed it to require anything more. The rule only requires timeliness, and it does not require more evidence or a different standard. Indeed, this Court in *Emery* heard the defendant's severance claim after he made his initial motion pretrial and renewed the motion before any evidence was presented. 174 Wn.2d at 749 (defendant renewed "before the State presented its first witness"). The defendant also renewed the motion after the State rested its case, which he is permitted to do under CrR 4.4 but is not required to do to preserve the issue for appeal. *Id.* This Court considered the

issue on the merits and did not hold the defendant was precluded from raising the issue. *Id.*

The Court of Appeals wrongly ignored the plain language of the rule and contradicted decisions by this Court and the Court of Appeals to require the defendant to prove actual prejudice with some evidence. *McCabe*, 526 P.3d 897. The court cannot add language where there is none. *Delgado*, 148 Wn.2d at 727. Joinder of the unrelated drug charge caused Mr. McCabe undue prejudice. This Court should grant review of this important issue that implicates the accused's right to due process and a fair trial. RAP 13.4(b).

2. The Court of Appeals decision affirming Mr. McCabe's convictions undercuts his right to effective assistance of counsel.

All persons accused of a crime have a constitutional right to counsel, which means the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (citations omitted).

A person receives ineffective assistance of counsel where their trial counsel's performance was deficient and the deficiency prejudiced them. *Strickland*, 466 U.S. at 687; *State v. Vazquez*, 198 Wn.2d 239, 247-48, 494 P.3d 424 (2021). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *Vazquez*, 198 Wn.2d at 247-48. A person is prejudiced where, but for counsel's deficient performance, there is a reasonable probability the outcome of trial would have been different.

Counsel's performance is deficient where they fail to raise an available defense when the facts support the defense. *State v. Powell*, 150 Wn. App. 139, 155, 206 P.3d 703 (2009); *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). In this case, it is an affirmative defense to the crime of bail jumping where:

> uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or

> surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

Former RCW 9A.76.170(2), Laws of 2001, ch. 264, § 3.[3] Uncontrollable circumstances include "a medical condition that requires immediate hospitalization or treatment." RCW 9A.76.010(4).

Counsel renders deficient performance where the evidence supports the uncontrollable circumstances defense to bail jumping but counsel fails to request a jury instruction on the defense. *State v. Bergstrom*, No. 37023-2-III, slip op. at 14-15, 15 Wn. App. 2d 92, 474 P.3d 578 (Wash. Ct. App. Oct. 15, 2020) (published in part),[4] available at https://www.courts.wa.gov/opinions/pdf/370232_pub.pdf, *reversed on other grounds by State v. Bergstrom*, 199 Wn.2d 23, 502 P.3d 837 (2022). In *Bergstrom*, the defendant testified

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[3] Since Mr. McCabe was charged, the legislature has amended the bail jumping statute to lower the standard from reckless to negligent disregard. RCW 9A.76.170(2), Laws of 2020, ch. 19, § 1.

[4] Unpublished opinion in part, cited pursuant to GR 14.1(a).

he was in the hospital on the day he was required to appear in court, and the State did not offer any evidence to rebut the defendant's claim. *Id.* at 14. The Court of Appeals held counsel rendered ineffective assistance when he failed to request an instruction on the affirmative defense to bail jumping, and this Court did not reverse that holding. *Id.* at 15; *see Bergstrom*, 199 Wn.2d at 27-28.

Similarly, Mr. McCabe presented uncontroverted evidence that uncontrollable circumstances prevented him from appearing on time for his January 15, 2019 hearing. Mr. McCabe testified he was late to his hearing because he was seeking medical attention for a medical emergency: "my girlfriend and I were at minor emergency." RP 7/23/19 273. This was through no fault of his own, and he rushed to court as soon as he could, though it was a couple of hours after the hearing was scheduled.[5] RP 7/23/19 273. The State did not

[5] This Court has acknowledged "the hardships many people have in accessing our courts" and "'the disproportionate

offer any evidence to dispute Mr. McCabe's testimony about why he was late. This was sufficient to require an instruction on the "uncontrollable circumstances" defense.

But the Court of Appeals concluded there was insufficient evidence to support such an instruction because Mr. McCabe's testimony did not include "specific[]" details or explicitly state "he or his girlfriend were experiencing a

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effect that criminalizing [failure to appear] has on persons of lower socioeconomic classes.'" *Bergstrom*, 199 Wn.2d at 41, 43 (quoting *State v. Slater*, 197 Wn.2d 660, 674, 486 P.3d 873 (2021)). The bail jumping statute often punishes people "not because of willful disobedience of a court order but by reasons of indigence, struggles with mental health, homelessness, and drug addiction." *Id.* at 44 (citing *Slater*, 197 Wn.2d at 674-76). This Court directed that lower courts should implement measures to clarify information and extend leniency where a person is late to appear. *Id.* at 43-45.

This Court also recognized the 2020 amendment to the bail jumping statute, indicating the legislature "began to move away from criminalization by allowing timely motions to quash to effectively nullify criminal liability for a [failure to appear.]" *Id.* at 44 (citing RCW 9A.76.170(1)(b)(ii)(A), Laws of 2020, ch. 19, § 1). The trial court quashed Mr. McCabe's warrant for failure to appear. CP 230. Unfortunately, like the defendant in *Bergstrom*, Mr. McCabe cannot benefit from this amendment, though it would have been a viable option in his case.

medical emergency." *McCabe*, 526 P.3d at 899. But a prima facie showing only requires "*some* evidence to support the defense." *State v. Arbogast*, 199 Wn.2d 356, 368, 506 P.3d 1238 (2022) (emphasis added). Mr. McCabe was not required to present evidence to prove why he was at urgent care or provide any medical records or other evidence. While such evidence would certainly *strengthen* his defense, it was not necessary to establish a prima facie showing.

Trial counsel's deficient performance prejudiced Mr. McCabe. Absent an instruction on the defense to bail jumping, the jury had "no way to understand the legal significance of the evidence" supporting that defense. *Hubert*, 138 Wn. App. at 932. Instead, the jury was left to believe it was required to convict Mr. McCabe, even if they believed he was late because of a medical emergency.

Mr. McCabe's counsel rendered deficient performance in failing to request the instruction, and there was a reasonable probability that counsel's deficient performance affected the

outcome of trial. The Court of Appeals decision affirming the conviction for bail jumping undermines Mr. McCabe's right to effective assistance of counsel. This Court should grant review of this important issue that implicates the accused's right to effective assistance of counsel. RAP 13.4(b).

F. CONCLUSION

Based on the preceding, Mr. McCabe respectfully requests this Court grant review pursuant to RAP 13.4(b).

This brief is in 14-point Times New Roman, contains 4,140 words, and complies with RAP 18.17.

Respectfully submitted this 5th day of June 2023.

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APPENDIX

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FILED
APRIL 6, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER LEE MCCABE, Appellant.	)	No. 38180-3-III PUBLISHED OPINION

STAAB, J. — Christopher McCabe appeals from his convictions of first degree trafficking in stolen property, third degree theft, and bail jumping. He argues that the trial court abused its discretion in denying his motion to sever his charge for possession of a controlled substance from his trafficking and theft charges. He also argues that defense counsel was deficient for failing to request a jury instruction for the affirmative defense of uncontrollable circumstances with regard to the bail jumping charge.

We hold that renewal of a motion to sever made before any evidence is either proffered or introduced is insufficient to preserve the issue for appeal. Even if we review the trial court's decision for abuse of discretion, we consider only the information known to the court at the time of its ruling. We reject McCabe's attempt to show prejudice by pointing to circumstances not yet known to the trial court at the time of the renewed

motion. While the trial court failed to evaluate the proper factors on the record, we find any error was harmless.

We also reject McCabe's claim that his trial attorney was ineffective for failing to request a jury instruction on the affirmative defense of uncontrollable circumstances for the bail jumping charge. Since the evidence did not support giving the instruction, the attorney's performance was not deficient for failing to request the instruction.

We affirm McCabe's convictions.

BACKGROUND

McCabe entered a Home Depot and exited with four buckets of paint without paying. He left the premises but returned about fifteen minutes later with his girlfriend. He put two of the stolen paint buckets into a shopping cart and gave the cart to his girlfriend. His girlfriend went into the store and returned the two buckets.

The same day, Home Depot determined the returned cans of paint had never been sold. The store's video footage showed McCabe loading the paint into his cart and then leaving the store without paying for it. Home Depot reported the theft to crime check.

Ten days later, a police officer stopped McCabe while he was driving because his vehicle's registration had expired. During the stop, the officer learned of the Home Depot incident and arrested McCabe.

McCabe was taken to jail where officials conducted a search of his person. During this search, officials recovered what appeared to be methamphetamine.

The State charged McCabe with first degree trafficking in stolen property, third degree theft, and possession of a controlled substance.

During pretrial proceedings, McCabe was released on bail conditioned on him reporting to all future court dates. After McCabe failed to appear for a hearing, the trial court authorized a warrant for his arrest. As a result, the State amended the information to include a charge for bail jumping.

Prior to trial, defense counsel moved to sever the possession of a controlled substance charge from the trafficking and theft charges.[1] The trial court held oral argument on the motion. McCabe raised three arguments with regard to severance. First, he argued joinder would allow the jury to draw impermissible propensity inferences and that the actions were separate courses of conduct. Second, McCabe pointed out that facts from the possession charge would not be admissible in the trafficking and theft case absent joinder. Third, he argued that the risk of substantial prejudice outweighed the concern for judicial economy because the State's evidence for the trafficking charge was inadequate as it was "not beyond a reasonable doubt." Rep. of Proc. (RP) (July 18, 2019) at 7.

The trial court denied defense counsel's motion, determining that there was not substantial prejudice that outweighed the judicial economy consideration:

[1] The bail jumping charge was not a part of the motion to sever as McCabe had not yet been charged with bail jumping when defense counsel brought the motion.

> Case law is further instructive, and ultimately what the Court must do, as counsel has indicated, is determine whether the prejudice to the defendant outweighs the concern for judicial economy. *Ramirez*,[2] cited to by the defense, and *Bythrow*[3] cited to by the prosecution, are both instructive and point the Court to looking at substantial prejudice. Certainly, there may be prejudice to the defendant but the question for the Court is whether it is substantial and whether it outweighs judicial economy.
>
> . . . .
>
> The Court is ruling in the same matter as the *Bythrow* case, finding that there's not been a demonstration of substantial prejudice to the defendant that would outweigh the consideration of judicial economy based upon the Court's reasoning in that case.

RP (July 18, 2019) at 17-18.

Defense counsel renewed the motion to sever on the first day of trial during the motions in limine but prior to voir dire. Defense counsel stated that he was simply renewing the motion to preserve the issue. The trial court informed defense counsel that it was not going to change its ruling.

During his opening statement, defense counsel admitted that McCabe had been in possession of a controlled substance at the time of his arrest.

One police officer, along with the officer who arrested McCabe, provided testimony related to the possession charge along with the theft and trafficking charges. A detective from the police department also offered testimony pertinent to both the

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[2] *State v. Ramirez*, 46 Wn. App. 223, 730 P.2d 98 (1986).
[3] *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990).

possession and bail jumping charges. Two individuals, a forensic scientist for the Washington State Patrol Crime Laboratory and a police officer offered testimony solely related to the possession charge.

McCabe testified in his own defense. He explained that he maintained rental properties and had gone to Home Depot to purchase paint. McCabe said he purchased the paint and then left the store with the receipt in his hand. When McCabe returned home, he realized he had accidentally purchased exterior paint instead of interior paint.

After realizing his mistake, McCabe testified that he returned to the store with his girlfriend. When he got there, he realized he had forgotten his wallet, and he knew he needed a receipt or identification to return an item. His girlfriend was in a hurry, so he asked her to go in and exchange the paint for interior paint. Instead of exchanging the paint, his girlfriend returned it for in-store credit. McCabe claimed that he only returned two of the buckets because he was in a rush and thought he might be able to use the other two later.

In response to a question from defense counsel, McCabe admitted during his testimony that he had been in possession of methamphetamine at the time of his arrest. Defense counsel also elicited testimony from McCabe that he had previously sought treatment for drug use.

In regard to the bail jumping charge, McCabe maintained that he was in court on the date that he had been accused of failing to appear. He said that he had arrived late

because he and his girlfriend were "at minor emergency on 29th." RP (July 23, 2019) at 273. When he finally arrived, the only person in the courtroom was the clerk. On cross-examination, McCabe insisted he had shown up for his hearing, he had just been late.

After McCabe testified, the prosecutor informed the trial court that the methamphetamine had been lost in transport and therefore the State was not going to be able to present it as evidence. Upon learning of this, defense counsel moved to dismiss the possession of a controlled substance charge based on insufficient evidence. The trial court granted the motion and dismissed the possession charge and then informed the jury that the charge would not be submitted for deliberation.

Defense counsel did not request any affirmative defense instructions. The trial court instructed the jury that it must consider each charge separately:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Clerk's Papers at 98.

The jury found McCabe guilty of third degree theft, first degree trafficking in stolen property, and bail jumping.

McCabe appeals.

ANALYSIS

SEVERANCE

McCabe argues that the trial court abused its discretion in denying his motion to sever because it applied the wrong legal standard. The State contends that McCabe's renewal of the motion on the first day of trial was insufficient to preserve the issue for appeal. Alternatively, the State argues that the trial court did not abuse its discretion. We conclude that McCabe's renewal of his motion to sever before the introduction of any evidence, and without proffering any anticipated evidence, failed to preserve the issue. Even considering the merits of his motion to sever, McCabe's contentions on appeal demonstrate why the timely renewal of a motion to sever is critical.

"The law does not favor separate trials." *State v. Huynh*, 175 Wn. App. 896, 908, 307 P.3d 788 (2013). However, upon motion of a defendant, the trial court shall grant severance if the trial court "determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). The defendant bears the burden of showing severance is necessary. *State v. Emery*, 174 Wn.2d 741, 752, 278 P.3d 653 (2012).

"If a defendant's pretrial motion for severance was overruled he may renew the motion . . . before or at the close of all the evidence." CrR 4.4(a)(2). A defendant waives the severance issue if he or she fails to properly renew their motion at trial. *Id.*; *State v. McDaniel*, 155 Wn. App. 829, 859, 230 P.3d 245 (2010) (determining that defendants'

failure to renew their motions to sever before or at the close of the evidence resulted in waiver of the issue on appeal).

Renewing a motion "before or at the close of all the evidence" does not mean renewing it before the admission of *any* evidence. When a court considers a pretrial motion to sever, it is generally considering the potential for prejudice. The purpose behind the requirement for renewal is to give the court an opportunity to assess whether there is actual prejudice based on the evidence presented or proffered. 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.3(d) at 58 (4th ed. 2015). For this reason, renewal of a motion to sever during motions in limine, before any evidence has been submitted or proffered, fails to preserve the issue for appeal. *McDaniel*, 155 Wn. App. at 859. McCabe's arguments on appeal pertaining to his motion to sever demonstrate why the timing of renewal is relevant.

A trial court's denial of a motion to sever is reviewed for a manifest abuse of discretion. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Where a trial court abuses its discretion in denying a motion to sever, we reverse only if the defendant can show that he or she was prejudiced by the decision. *Emery*, 174 Wn.2d at 754-56.

A trial court must consider the following factors to determine whether the potential for prejudice necessitates severance:

> "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each

> count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial."

State v. Slater, 197 Wn.2d 660, 677, 486 P.3d 873 (2021) (quoting *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). The trial court must also weigh prejudice to the defendant against the need for judicial economy. *Slater*, 197 Wn.2d at 677.

McCabe asserts that the trial court abused its discretion by failing to conduct a complete analysis of the prejudice to McCabe on the record. Our Supreme Court explained in *State v. Bluford*, "[a]s in other contexts where trial courts are asked to exercise discretion, a court considering a pretrial joinder motion should conduct its analysis on the record to ensure that its 'exercise of discretion was based upon a careful and thoughtful consideration of the issue.'" 188 Wn.2d 298, 310, 393 P.3d 1219 (2017) (quoting *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

The trial court's decision on the issue did not include an analysis of the four factors referred to above. Thus, we agree that the trial court failed to properly analyze the relevant standard on the record. However, McCabe must still show he was prejudiced by the trial court's denial of his motion. *See Emery*, 174 Wn.2d at 754-56. We consider the factors listed above from the perspective of the trial court in determining whether denying the motion to sever resulted in prejudice.

In support of his argument that the denial of his motion to sever was prejudicial, McCabe points to information that was not yet known to the trial court at the time it

considered McCabe's renewed motion. With regard to the first factor, the strength of the State's evidence on each count, McCabe contends that the strength of the evidence for the possession charge bolstered the weaker charges of theft, trafficking, and bail jumping, and points to his trial testimony to support this argument. Addressing the second factor, clarity of defenses for each charge, McCabe argues prejudice is shown because he admitted the possession charge while raising a general denial of the theft and trafficking charge.

Neither McCabe's testimony nor his admission was known or proffered to the court at the time it considered McCabe's renewed motion to sever. "[A] judge cannot abuse his or her discretion based on facts that do not yet exist." *Bluford*, 188 Wn.2d at 310. Because this information was not known by the trial court when it ruled on severance, it is not relevant to our review for prejudice.

As to the third factor, instructions to the jury, McCabe now argues that the trial court should have instructed the jury to disregard the evidence relating to the possession charge after it dismissed the possession charge. However, McCabe never proposed such an instruction, and as the trial court did instruct the jury that it must consider each charge separately, there was no error. *Russell*, 125 Wn.2d at 66 (determining there was no error where defendant claimed on appeal that trial court should have provided additional instruction to jury regarding deciding charges separately because trial court properly instructed jury on the law). We presume the jury followed this instruction as there is

nothing indicating it did not. *See State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015) ("Jurors are presumed to follow the court's instructions.").

The fourth factor is cross-admissibility of evidence. McCabe claims that the evidence related to the possession charge would not have been admissible in a trial for the other charges and vice versa. He claims that he was prejudiced because several witnesses testified regarding the possession charge and the State also presented forensic evidence supporting the charge. However, the mere fact that evidence supporting the possession charge would not have been admissible in a trial for theft and trafficking is insufficient to show that the trial court erred in denying severance. The burden is on McCabe to point to specific prejudice. *See Bythrow*, 114 Wn.2d at 720-21. Other than broadly claiming that the admission of evidence of the possession charge prejudiced him, McCabe has made no argument for prejudice. He does not explain how the evidence supporting the possession charge resulted in prejudice to him in regard to the other charges.

Finally, we must weigh prejudice to the defendant caused by joinder against the need for judicial economy. McCabe broadly asserts that joinder here did not serve judicial economy but fails to actually analyze the issue. Joinder here served judicial economy because there was one trial instead of two. Additionally, because the drugs that were the subject of the possession charge were found on McCabe's person during a search incident to his arrest for theft and trafficking, it is likely that some of the same

witnesses would have had to testify at both trials. In fact, two of the witnesses who testified with regard to the possession charge also provided testimony related to other charges. Thus, the need for judicial economy outweighs any prejudice to McCabe.

The posture of this case demonstrates how the timely renewal of the motion to sever would have changed the information available to the trial court in considering McCabe's motion to sever. Even if counsel had proffered anticipated evidence in support of a motion to sever, it would have given the trial court an opportunity to consider any actual prejudice. This was not done. In light of the information before the court when it decided McCabe's motion to sever and the renewal of this motion, the trial court did not abuse its discretion.

INEFFECTIVE ASSISTANCE OF COUNSEL

McCabe argues that his trial attorney was ineffective for failing to request a jury instruction on the uncontrollable circumstances affirmative defense to bail jumping. We disagree.

Criminal defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Claims of ineffective assistance

of counsel are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

A defendant bears the burden of showing (1) that defense counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, (2) that there is a reasonable probability that but for counsel's poor performance, the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either element is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In reviewing the record for deficiencies, there is a strong presumption that counsel's performance was reasonable. *McFarland*, 127 Wn.2d at 335. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation. *McFarland*, 127 Wn.2d at 335. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo*, 166 Wn.2d at 863.

Even if we find that the performance was deficient, a defendant must affirmatively prove prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). This requires more than simply showing "the errors had some conceivable effect on the outcome." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d

674 (1984). A defendant demonstrates prejudice by demonstrating that "the proceeding[s] would have been different but for counsel's deficient representation." *McFarland*, 127 Wn.2d at 337. If a defendant fails to satisfy either prong, a court need not inquire further. *Strickland*, 466 U.S. at 697.

Washington law criminalizes a defendant's failure to appear when that person has been released on bail and knew they were required to appear. Former RCW 9A.76.170(1) (2001). However, it provides an affirmative defense if the defendant can demonstrate they did not appear due to "uncontrollable circumstances." Former RCW 9A.76.170(2) (2001). To establish the uncontrollable circumstances defense, a defendant must prove that the circumstances prevented the defendant "from appearing or surrendering" and that the defendant "did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender." *Id.* The law defines uncontrollable circumstances as:

> an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4). To be entitled to an affirmative defense jury instruction, a defendant is required to offer "some evidence on each prong" of the defense. *State v. Arbogast*, 199 Wn.2d 356, 381, 506 P.3d 1238 (2022).

Defense counsel was not deficient for failing to request a jury instruction on the affirmative defense of uncontrollable circumstances because there was insufficient evidence to support such an instruction. McCabe testified that he did not appear in court because he and his girlfriend were "at minor emergency on 29th." RP (July 23, 2019) at 273. Otherwise, he did not offer any specifics and did not testify that either he or his girlfriend were experiencing a medical emergency.

Defense counsel's decision not to request the instruction and to instead rely on a general denial defense was consistent with McCabe's testimony that he had attended the hearing, he had just arrived late. The tactical decision by defense counsel not to request the defense can be characterized as a reasonable trial strategy.

McCabe's vague statement of being at minor emergency was insufficient to entitle him to a jury instruction on the uncontrollable circumstances affirmative defense. Additionally, defense counsel's decision not to request the instruction was likely tactical. Accordingly, defense counsel was not deficient for deciding not to request it and McCabe fails to demonstrate that his trial attorney was constitutionally ineffective.

Affirmed.

Staab, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 38180-3-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Joseph Edwards
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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: June 5, 2023
Washington Appellate Project

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