Supreme Court No. 89528-7

(Court of Appeals No. 68421-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,
Respondent,

JORDAN PORTCH,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jordan Portch, through his attorney, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Mr. Portch seeks review of the Court of Appeals' opinion in State of Washington v. Jordan J. Portch, No. 68421-3-I (Slip Op. filed September 30, 2013). A copy of the opinion is attached as an Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The right to counsel is guaranteed under the Sixth Amendment to the United States Constitution and article I, section 22. The effective assistance of counsel includes the use of the services of defense investigators, who share a confidential relationship with defense counsel and clients. Did the trial court's decision allowing the State to call the defense investigator as a prosecution witness violate Mr. Portch's right to counsel, and was the Court of Appeals decision affirming the conviction thus in conflict with another decision of the Court of Appeals, and with decisions of this Court, requiring review under RAP 13.4(b)(1) and (2)?

2. The attorney-client privilege exists in order to allow a client to communicate freely with an attorney without fear of compulsory discovery. Where the former defense investigator was called as a State's witness at trial, despite his confidential knowledge of the defense case, did this violate Mr.

Portch's attorney-client privilege, and does the Court of Appeals decision require review under RAP 13.4(b)(1) and (2)?

D. STATEMENT OF THE CASE

1. Factual Background

In January 2011, Jordan Portch was charged with a residential burglary that occurred at the home of his former girlfriend, who resided with her parents in Lynnwood. RP 80-84, 95. Mr. Portch had previously lived with the family, and according to the girlfriend's mother, was found in the home next to a broken glass door, although nothing was taken from the home. RP 80-84, 92-94.[1]

Mr. Portch always denied entering the home of his girlfriend on the date of the burglary, and the only non-family civilian to testify – a neighbor walking her dog who claimed to have seen a man run past her and get into a waiting car – identified someone else in a photo array. RP 144, 173-79.

Mr. Portch was charged with residential burglary. CP 101-02. He denied the charges, maintaining he had an alibi. CP 93-94.

2. Trial Preparation

In September 2011, approximately eight months after the burglary at the Gates home, the case was scheduled for trial. RP 196. In preparing Mr.

[1] The verbatim report of proceedings consists of two consecutively paginated volumes from proceedings between November 14, 2011, and February 28, 2012.

Portch's defense, defense investigator Joel Martin, who was employed by the Snohomish County Public Defender Association (PDA), conducted an investigation. RP 149-52. During the investigation it was revealed that seven months after the burglary, Mr. Portch had gone to an auto body shop to have an estimate performed for some repairs on his car. RP 190-95. He never had the repairs performed. RP 210.

On September 15, 2011, the week before the first trial date, Mr. Portch had asked to have the body shop estimate deleted from the store's computer system. RP 208, 226-28. Mr. Portch allegedly told the body shop owner that he was instructed by his attorney to have the estimate deleted; therefore, the Snohomish County PDA cited a conflict of interest and asked to be removed from the case before trial. RP 29. The trial court agreed, noting that defense counsel could not argue to the jury that his office had no role in the tampering allegation, which would undercut his client's credibility, and if the attorney conceded responsibility, "it undercuts everybody's credibility on the defense side." RP 29.

Mr. Portch was appointed new counsel and proceeded to trial approximately one month later. The State also amended the information to include one misdemeanor count of tampering with physical evidence and one misdemeanor count of tampering with a witness. CP 48-49. Mr.

Portch's new counsel moved for severance of the tampering counts and objected to improper joinder, which were denied. RP 40-44, 54; CP 58-61.

In the interim, the State had also added former defense investigator Joel Martin to its witness list. RP 65. Mr. Portch's new counsel moved in limine to preclude the State from calling Mr. Martin as a prosecution witness. RP 65, 118. Both Mr. Portch's new defense counsel and the director of the Snohomish County PDA objected to the State's efforts to subpoena Mr. Martin, based on attorney-client privilege and work product. RP 118-28. The Snohomish County PDA argued that under Rule of Professional Conduct 1.6 and RPC 5.3, his office maintained an ethical obligation to Mr. Portch in perpetuity. RP 123. He argued that the defense investigator's communications with prior counsel were protected by the work product doctrine, and those with Mr. Portch, by attorney-client privilege. RP 124. Mr. Portch maintained that he had not opened the door to the use of any of these statements. RP 125-26.

The trial court denied the defense motion to exclude the investigator's testimony and allowed the State to call Mr. Martin. RP 129-32, 149-79.

3. Trial

At trial, investigator Martin testified for the State, over defense objection, regarding the interviews he had conducted while he was assigned

to the case. RP 154. He also testified about the measurements and photographs he had prepared, his examination of Mr. Portch's odometer, and his preparation of the photo montage for the eye-witness. RP 156-79.

Mr. Portch presented an alibi defense through his friend Ryan Danekas, who testified that the two were together on January 14, 2011, for the entire day. RP 248. Mr. Danekas described his activities with Mr. Portch that day, and shared an electronic banking receipt indicating the purchase of a soft drink from the corner store near his own home at approximately the same time as the burglary at the Gates home. RP 256-58.

Following the State's presentation of evidence, the trial court dismissed the tampering with a witness count as insufficient. RP 244. The jury convicted Mr. Portch of residential burglary and tampering with physical evidence. CP 23-25; RP 298-300.

On appeal, Mr. Portch argued that the trial court violated his right to counsel by permitting the State to call the defense investigator as a witness; that the trial court violated the attorney-client privilege and the work product doctrine; and that the trial court erred in permitting joinder of the burglary and tampering counts and denying the motion for severance. He seeks review of this Court exclusively on the right to counsel and attorney-client privilege issues. RAP 13.4(b)(1), (2).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

BECAUSE THE TRIAL COURT PERMITTED THE FORMER DEFENSE INVESTIGATOR TO TESTIFY AGAINST MR. PORTCH IN VIOLATION OF THE RIGHT TO COUNSEL, REVIEW IS REQUIRED. RAP 13.4(b)(1), (2).

1. An accused person has the right to the effective assistance of counsel. A criminal defendant has the constitutional right to the effective assistance of counsel in a criminal proceeding. Gideon v. Wainwright, 372 U.S. 335, 344-45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 68, 53 S.Ct. 55, 77 L.Ed. 158 (1932); U.S. Const. Am. VI; art.I, sec. 22. "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)). The effectuation of this right imposes a duty to fully investigate known potential defenses, and where necessary, to retain qualified experts to assist in the preparation of that defense. See, e.g., In re Personal Restraint Petition of Brett, 142 Wn.2d 868, 880, 16 P.3d 601 (2001) (counsel

ineffective for failing to investigate and retain experts for potential mental defense).

Because Mr. Portch's first attorney was constitutionally required to thoroughly investigate his defense, the product of that investigation is an essential part of the attorney's representation of Mr. Portch. RP 124-25 (Director of Snohomish County PDA argues that investigator stands in "position of a lawyer" as far as confidential communications with client and work product created for defense counsel).

A "prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant." State v. Garza, 99 Wn. App. 291, 299, 994 P.3d 868 (2000) (citing Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir. 1995)). Although Garza discussed jail staff's seizure of the legal materials of pre-trial inmates, its logic is applicable here to the intrusion upon Mr. Portch's confidential relationship with, and materials created by, the defense investigator.

2. The trial court violated the attorney-client privilege by permitting Joel Martin to testify for the State. Because Mr. Martin was the defense investigator for Mr. Portch's original defense counsel, it was a violation of privilege for the court to order him to testify for the prosecution during its case in chief.

In Washington, the attorney-client privilege is codified in RCW 5.60.060(2).[2] The privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery. Dietz v. Doe, 131 Wn.2d 835, 842, 935 P.2d 611 (1997) (citing State ex rel. Sowers v. Olwell, 64 Wn.2d 828, 832, 394 P.2d 681 (1964); Pappas v. Holloway, 114 Wn.2d 198, 203, 787 P.2d 30 (1990)). The privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication. Dietz, 131 Wn.2d at 842 (citing Pappas, 114 Wn.2d at 203). The attorney-client privilege operates independently of the work product rule and vice versa. 5 A K. Tegland, Wash.Prac., Evidence § 501.9, at 145 (5th ed. 2007).

Joel Martin, in his capacity as defense investigator, was privy to confidential attorney-client communications during Snohomish County PDA's representation of Mr. Portch. RP 123-24, 154, 169-72. Mr. Martin conducted his investigation, prepared reports, and interviewed witnesses as a result of these privileged conversations with both Mr. Portch and with prior defense counsel. RP 150-72. His testimony was a direct result of this privilege, and therefore, it was a violation of the attorney-client

[2] RPC 1.6(a) also preserves a client's confidences and secrets: "A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation except for disclosures that are impliedly authorized in order to carry out representation."

privilege for the trial court to require its disclosure. See, e.g., Dietz, 131 Wn.2d at 842.

For example, during his testimony, Mr. Martin was asked by the deputy prosecutor if he knew why one of the body shop employees was initially subpoenaed by the defense team. RP 154. Although Mr. Portch promptly objected, arguing that this question directly related to conversations concerning trial strategy, the trial court allowed the question. Id. The trial court also permitted the State to introduce exhibits and testimony through Mr. Martin concerning Mr. Portch's odometer reading during the State's direct examination, although Mr. Portch had not put the odometer reading at issue. RP 156-62, 171-72.[3]

Finally, the court permitted the jury to hear unduly prejudicial information concerning Mr. Portch's claim that his attorney had instructed him to get the body shop estimate deleted – an event that the court itself had warned would "undercut[ ] everybody's credibility on the defense side." RP 29. The prosecutor first attempted to elicit this information from Mr. Martin by asking him the date he "was no longer the investigator on this case." RP 169. Defense counsel objected, reminding the court at sidebar that the fact that the public defender's office had been removed from the case was a "can

[3] The Supreme Court has held, concerning the related but independent work product doctrine, that the State is entitled to discovery in order to rebut certain defenses. See State v. Pawlyk, 115 Wn.2d 457, 475, 800 P.2d 338 (1990). The work product doctrine was addressed separately on direct appeal.

of worms we didn't want to open." RP 184. The prosecutor elicited this information from other witnesses, asking the body shop owner why Mr. Portch had asked for the estimate's deletion. RP 226-29.

The Court of Appeals found that Mr. Martin's testimony focused primarily on his own actions in investigating the estimate and mileage issues, and did not reveal any direct or implicit communications between Mr. Portch and defense counsel. Opinion at 7. The Court held that under the circumstances, Mr. Martin's testimony did not violate the attorney-client privilege or the right to counsel. Id. However, the presence of the defense investigator did, indeed, open the "can of worms" alluded to by new defense counsel – the fact that the evidence tampering had actually been encouraged by prior defense counsel, and that this had necessitated that change in representation. RP 184, 226-29. Mr. Martin's testimony was highly prejudicial to Mr. Portch, and it was error for the trial court to allow it, as a violation of attorney-client privilege and the right to counsel. Dietz, 131 Wn.2d at 842; RCW 5.60.060(2).

Because Mr. Martin's testimony arose from confidential communications made between himself and Mr. Portch, in the course of his professional employment with the Snohomish County PDA, and because Mr. Portch did not consent to his testimony, Mr. Martin's testimony violated attorney-client privilege and the right to counsel. RCW 5.60.060(2).

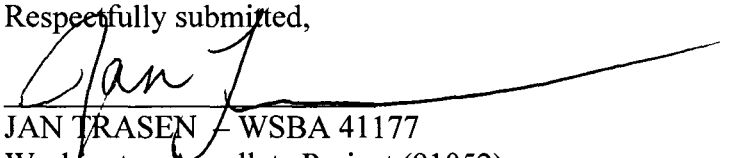
Accordingly, because the Court of Appeals decision affirming the conviction is in conflict with decisions of this Court and with decisions of the Court of Appeals, relief should be granted under RAP 13.4(b)(1), (2).

F. CONCLUSION

Mr. Portch respectfully requests that review be granted pursuant to RAP 13.4(b)(1), (2).

DATED this 29th day of October, 2013.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JORDAN J. PORTCH, Appellant.	DIVISION ONE No. 68421-3-I UNPUBLISHED OPINION FILED: September 30, 2013

DWYER, J. – Jordan Portch appeals from his conviction for residential burglary and tampering with physical evidence. He contends that the trial court violated the attorney-client privilege and work product doctrine when it permitted a defense investigator to testify about his investigation into an alibi defense. But to the extent the investigator's testimony involved information that the defense had voluntarily disclosed when it notified the State of its planned alibi defense, Portch has waived the right to assert the privileges. And Portch has failed to demonstrate that the remainder of the investigator's testimony disclosed any confidential attorney-client communications or defense theories. Portch's challenge to the joinder of charges for trial is also without merit. We affirm.

I

Jordan Portch and Megan Gates began dating in late 2009. From February 2010 until the couple broke up in May 2010, Portch lived with Gates in the Lynnwood home she shared with her parents.

On the afternoon of January 14, 2011, Lynnette Gates, Megan's mother, was at home watching television in an upstairs bedroom. At about 4:30 p.m., the family's two dogs suddenly jumped off the bed and ran downstairs. When she heard a rustling noise, Lynnette thought the dogs had gotten into the garbage and went to investigate.

At the bottom of the stairs, Lynnette encountered Portch in the hallway. Portch was wearing a dark, possibly leather, coat and dark jeans. When Lynnette asked what he was doing in her house, Portch shuffled around briefly without responding and then ran toward the rear of the house. Lynnette followed and saw Portch leave through a broken sliding glass door. Shattered glass from the door lay on the carpet and back deck. Lynnette called 911.

At about the same time, Rebecca Tindall, a neighbor, was walking her dog near the Gates's home. She noticed a late-model blue sedan parked in an unusual spot. The car had a dent near the front passenger side. The engine appeared to be running, and someone was sitting in the front passenger seat. A man wearing dark jeans and a leather jacket suddenly sprinted past Tindall, got into the car, and drove off.

The State charged Portch with one count of residential burglary.

Prior to trial, defense counsel notified the State that Portch would present an alibi defense. See CrR 4.7(b)(2)(xii). Defense counsel also provided what purported to be a body shop repair estimate for Portch's car. The one-page document, dated December 10, 2010, recorded the mileage on Portch's car as 115,721. The defense also informed the State that Joel Martin, a defense investigator, had inspected Portch's car after charges were filed, taken photographs, and recorded an odometer reading of 115,726. Based on the distance from the body shop to the Gates's home, the defense indicated it would use the odometer evidence to establish that Tindall could not have seen Portch's car after the burglary on January 14, 2011.

Upon further investigation, the State discovered that shortly before the initial trial date, Portch asked Shayne Hedahl, the owner of the body shop, to delete the estimate from the shop's computer system. Hedahl complied with the request. Portch later returned and asked Hedahl to recreate the estimate. Initially, Hedahl could not reproduce the estimate, but he later found a way to recover the data. The restored estimate, which consisted of several pages, reflected an odometer reading of 114,979 on December 10, 2010, and noted damage to the right front side panel of Portch's car, consistent with Tindall's observations. Some evidence indicated that Portch told the body shop employees that his attorney had asked him to have the estimate removed. The

State asserted that Portch's actions after the burglary charge were relevant to show a consciousness of guilt.

The trial court ruled that any statements Portch voluntarily made to the body shop employees about his attorney having requested destruction of the evidence were admissible and fell outside the attorney-client privilege. Based on the potential conflict, the court allowed defense counsel to withdraw and appointed new counsel.

The State then amended the information to add charges of tampering with physical evidence and tampering with a witness. The trial court denied Portch's motion to sever the tampering counts.

Portch moved to preclude the State from calling Joel Martin as a witness. The State intended to question Martin about his investigation into Portch's alibi defense, including the body shop estimate and the related evidence involving the odometer reading on Portch's car. Defense counsel objected, arguing that Martin's testimony would violate both the attorney-client privilege and the work product doctrine. The defense also maintained that Martin's testimony was not relevant because it no longer planned to introduce the odometer evidence as part of Portch's alibi defense.

The trial court denied Portch's motion, concluding that Martin's proposed testimony fell outside the scope of the attorney-client privilege and the work product doctrine and that Portch had waived any privileges by asserting the alibi

defense. The court also ruled that Martin's testimony remained relevant even though Portch was now relying on different evidence to support his alibi defense.

At trial, Martin testified about his investigation of the body shop estimate and the odometer readings on Portch's car. On behalf of the defense, Martin testified that he prepared a photomontage and showed it to Rebecca Tindall, who identified someone other than Portch as the man she saw running after the burglary.

Ryan Danekas testified that he had known Portch since elementary school and continued to "hang out" with him about once a month. Danekas recalled that he got off work on the morning of January 14, 2011, and that Portch drove over to his apartment on a motorcycle at about 11:00 a.m. The two then "sat around, hung out, [and] talked." At about 4:00 p.m., Danekas and Portch walked to a nearby convenience store to buy soft drinks. Danekas estimated that Portch left the apartment at about 7:00 p.m.

The jury found Portch guilty as charged of residential burglary and tampering with physical evidence.[1]

[1] The trial court dismissed the witness tampering charge at the conclusion of the State's case.

II

Portch contends that the trial court violated the attorney-client privilege and the work product doctrine when it permitted the defense investigator to testify about his investigation into the odometer readings on Portch's car. But because the defense had previously disclosed the essence of Martin's testimony when it provided the State with details about the alibi defense, Portch has failed to demonstrate any error.

The attorney-client privilege, codified in RCW 5.60.060, "protects confidential attorney-client communications from discovery so clients will not hesitate to fully inform their attorneys of all relevant facts." Barry v. USAA, 98 Wn. App. 199, 204, 989 P.2d 1172 (1999). But the privilege is generally limited to communications between attorney and client; it does not generally extend to "communications between an attorney and a third party on a client's behalf, nor does it protect materials compiled by an attorney from outside sources on a client's behalf." 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 501.10, at 145-46 (5th ed.2007).

Portch contends that Martin was "privy to confidential attorney-client communications" and that his entire testimony was protected because it was "a direct result of this privilege." But he fails to identify any specific portion of Martin's testimony that violated the privilege.

Martin testified that he was assigned to investigate Portch's alibi defense by defense counsel and that he served a subpoena on Scott Hardy, the body shop employee who had prepared the original estimate for Portch on December 10, 2011. But Martin did not know the subject of Hardy's testimony. As part of his investigation, Martin also took pictures of Portch's car and the current odometer reading and compared the current reading with the reading on the estimate. He then determined the driving distance between the body shop and the Gates's home. Martin also interviewed Hedahl, the body shop owner, who gave him a copy of the recreated complete estimate with the lower odometer reading.

Martin's testimony focused primarily on his own actions in investigating the estimate and mileage issues. The testimony did not reveal any direct or implicit communications between Portch and defense counsel. At one point, when Martin volunteered something that Portch had told him, the trial court sustained the defense objection. The trial court also sustained objections to questions about why Martin was no longer an investigator for Portch and how Martin would have testified in support of the original alibi claim. Under the circumstances, Martin's testimony did not reveal any confidential communications. The trial court properly concluded that the testimony did not violate the attorney-client privilege.

III

Portch also contends that Martin's testimony violated the work product doctrine. "The work product doctrine protects from discovery an attorney's work product, so that attorneys can 'work with a certain degree of privacy and plan strategy without undue interference.'" State v. Pawlyk, 115 Wn.2d 457, 475, 800 P.2d 338 (1990) (quoting Coburn v. Seda, 101 Wn.2d 270, 274, 677 P.2d 173 (1984)). The doctrine applies to "research, . . . records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies." CrR 4.7(f)(1); Pawlyk, 115 Wn.2d at 477. But the voluntary disclosure of work product to a third party generally results in a waiver of the privilege. See Limstrom v. Ladenburg, 110 Wn. App. 133, 145, 39 P.3d 351 (2002).

Portch's arguments on work product rest solely on Martin's identity as a defense investigator. In argument before the trial court, Portch did not dispute the fact that Martin's proposed testimony involved information that had already been disclosed to the State in conjunction with the defense's claim of alibi, including the nature of the alibi defense, the original body shop estimate, the potential defense witnesses that Martin had subpoenaed, and the photos of Portch's car and odometer. Portch has not addressed the substance of Martin's testimony or identified any testimony disclosing defense "opinions, theories or

conclusions" that had not already been voluntarily disclosed. The trial court properly determined that Portch had waived any work product privilege.

IV

Citing State v. Garza, 99 Wn. App. 291, 994 P.2d 868 (2000), Portch contends that the trial court violated his Sixth Amendment right to counsel when it permitted the State to call the defense investigator as a witness. But Garza involved a potential "'intentional intrusion into the attorney-client relationship'" when jail officers searched inmates' legal materials. Garza, 99 Wn. App. at 299 (quoting Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir. 1995)). Because Portch has failed to demonstrate any violation of the attorney-client privilege or work product doctrine, Garza has no application to the facts of this case. Moreover, our Supreme Court has rejected the contention that the attorney-client privilege is part of the Sixth Amendment right to counsel. Pawlyk, 115 Wn.2d at 468-69.

V

Portch contends that the trial court erred in permitting joinder of the burglary and tampering offenses and denying his motion for severance. Because Portch failed to renew the motion to sever before the close of trial, he has waived the issue of severance. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Consequently, only the issue of joinder is preserved for review. Bryant, 89 Wn. App. at 865. The question of whether multiple offenses are properly

joined "is a question of law subject to full appellate review." Bryant, 89 Wn. App. at 864.

Portch concedes that joinder of the burglary and tampering charges was proper under CrR 4.3(a)(1) and (2) because the offenses involved "the same or similar character" or were "a series of acts connected together." He contends, however, that joinder was unfairly prejudicial because the evidence was not cross-admissible and likely caused the jury to cumulate evidence to find guilt.

The joinder of multiple offenses may prejudice the defendant because:

> "(1) [the defendant] may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find."

State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990) (quoting State v. Smith, 74 Wn.2d 744, 755, 446 P.2d 571 (1968) vacated in part, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), overruled on other grounds in State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975)). Factors that offset the potential prejudice of joinder include: "(1) the strength of the State's evidence on each count; (2) the clarity of defenses to each count; (3) the court's instruction to the jury as to the limited purpose for which it was to consider the evidence of each crime; and (4) the admissibility of the evidence of the other crimes even if they

had been tried separately or never charged or joined." State v. Eastabrook, 58 Wn. App. 805, 811-12, 795 P.2d 151 (1990).

Here, the charges were based primarily on eyewitness testimony. The relatively strong evidence supporting each charge reduced the possibility that the jury might base its "finding of guilt on any one count on the strength of the evidence of another." Bythrow, 114 Wn.2d at 721-22. Portch's defenses were also clear and distinct. He claimed that he was not the intruder at the Gates's home and that the State had failed to prove that any tampering occurred. In addition, the instructions directed the jury to consider each count separately and provided that the "verdict on one count should not control [the] verdict on any other count." Instruction 2; see also 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 3.01 (3d ed. 2008); Bythrow, 114 Wn.2d at 723. We must presume that the jury followed those instructions. State v. Howard, 52 Wn. App. 12, 24, 756 P.2d 1324 (1988). Finally, contrary to Portch's assertions, the trial court correctly determined that the evidence was cross admissible. See State v. Sanders, 66 Wn. App. 878, 885-86, 833 P.2d 452 (1992) (in prosecution for rape and witness tampering, fact of rape charge admissible in separate witness tampering trial to show why the tampering occurred; evidence of witness tampering admissible in separate rape trial to show consciousness of guilt).

Under the circumstances, the concern for judicial economy clearly outweighed the potential prejudice. See Bythrow, 114 Wn.2d at 723. The trial court properly joined the charges for trial.[2]

Affirmed.

We concur:

[2] The State contends that contrary to our decision in Bryant, Portch also waived any right to challenge the prejudice resulting from joinder when he failed to renew his severance motion. Because the offenses were properly joined, we do not address this contention.

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. 68421-3-I**, 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 or residence address as listed on ACORDS:

☒ respondent Mary Kathleen Webber, DPA
Snohomish County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 29, 2013