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NO. 69036-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

WAYNE DUBOIS,

Appellant.

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

The Honorable Susan Craighead, Judge
The Honorable Teresa Doyle, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to sever the charges.

2. Appellant was denied effective assistance of counsel when his attorney failed to renew the motion to sever.

Issue Pertaining to Assignments of Error

Appellant was tried jointly on one count each of first degree assault, unlawful possession of a firearm, and possession of cocaine. The assault and firearm charges stemmed from a single incident in November 2011. The cocaine possession charge arose from a separate incident in June 2011. Before trial, defense counsel moved to sever the cocaine possession charge, contending it was not relevant to the other two charges. The trial court denied the motion. Counsel did not renew the motion to sever. Where the possession charge allowed the jury to unfairly cumulate the evidence against appellant and improperly inferred a criminal disposition, was defense counsel ineffective for failing to renew the motion to sever?

B. STATEMENT OF THE CASE

1. Trial Testimony

In June 2011, appellant Wayne DuBois was talking with a friend in the back stairwell of a bar. 7RP[1] 36, 39, 76, 79, 97, 114-16, 127. DuBois and his friend went inside after seeing sheriff deputies walk toward the bar. 7RP 45, 79, 97-98, 116. The officers followed DuBois through an adjoining bar but did not see him inside. 7RP 46-47, 71, 81, 129. Once outside, Officer John McSwain saw DuBois and several other people enter a dark green Crown Victoria car and quickly drive away. 7RP 117-18, 130-31.

About two hours later, the officers saw the same car stopped on a highway shoulder. 7RP 49-50, 118-19. DuBois got out of the driver's seat door. 7RP 51, 63-64, 83, 120. Three other men also got out of the car. 7RP 103. DuBois was uncooperative when questioned by officers, and told them to "stay away from my fucking car." 7RP 52, 84, 121-22. Officers looked through the car windshield and saw a baggie near the driver side door handle. 7RP 53, 67, 85-89, 105, 125, 135-36. Officers

[1] This brief refers to the verbatim report of proceedings as follows: 1RP – February 22, 2012; 2RP – March 7, 2012; 3RP – May 16, 2012; 4RP – May 17, 2012; 5RP – May 21, 2012; 6RP – May 22, 2012; 7RP – May 23, 2012; 8RP – May 24, 2012; 9RP – May 29, 2012; 10RP – July 13, 2012.

searched DuBois and seized identification and Ford symbol car keys. 7RP 92, 122, 124.

Officers also seized the car intending to search it. 7RP 151, 157-58. Two baggies found inside a driver door handle compartment tested positive for cocaine. 7RP 175-76, 208, 213. Checks signed by DuBois and mail addressed to him were found inside the trunk and glove compartment of the car. 7RP 183-87, 189-90. The car was not registered to DuBois. 6RP 128-29; 7RP 195.

Almost five months later, Alvin Hillis was shot. 6RP 23. Hillis told police DuBois was the shooter. 6RP 23-24, 71; 9RP 11-13.

Based on this evidence, DuBois was charged with one count each of first degree assault, second degree unlawful possession of a firearm, and possession of cocaine. CP 8-9, 16-17; 1RP 2, 7-8.

At trial, Hillis explained he dated DuBois' girlfriend's mother. 6RP 32-33. A week before the shooting Hillis found cocaine on the floor of his girlfriend's house. Hillis took the drugs believing they were abandoned. 6RP 34-35, 59-60.

The day of the shooting, Hillis walked to a local min-market. While walking, a dark colored Crown Victoria drove up and parked near Hillis. 6RP 29-31, 62. DuBois got out of the driver's seat and approached Hillis. DuBois told Hillis to return what he had taken from him. He then

told Hillis to leave before he returned. 6RP 36-39. DuBois got into the passenger seat of the car and drove off. 6RP 38-39.

Hillis continued walking. A short time later the car returned. DuBois got out of the passenger seat, walked toward Hillis, and told him to give him money. Hillis then heard five or six shots but did not see a gun. 6RP 40-44. He was hit once in the lower right abdomen. 6RP 45.

Erick Martinez heard five or six gunshots from inside his apartment. 6RP 90, 97. After the gunshots ended, he looked outside and saw someone get into the passenger side of a dark colored Crown Victoria car. 6RP 90-97. Martinez did not see a gun or the shooter. 6RP 96-98.

EuRhonda Riggins heard three or four gunshots while walking. 9RP 31, 35. She saw an African-American man with dreadlocks. 9RP 35-36, 39. The man's arm was extended outward. 9RP 35, 37. The person being shot did not fall down but appeared to move around to avoid the shots. 9RP 34. Riggins saw a green car in the street but did not see anyone enter or exit the vehicle. 9RP 36-37.

After the shooting, Hillis' cousin drove him to the hospital. 6RP 46, 65; 9RP 9-10, 23. A single bullet passed through Hillis' small intestine and fractured part of his pelvic bone. 8RP 12, 19-20, 49. Surgeons removed the bullet from Hillis' abdominal cavity and one and

half feet of his small intestines. 8RP 15-16, 18, 25, 29-30. Hillis suffered no long term complications from the injury. 8RP 23-24.

Police spoke with Hillis at the hospital. 6RP 70, 126. He said DuBois was the shooter and identified him in a photo montage. 6RP 48, 54-57, 66, 71, 77, 100-07.

DuBois was arrested nine days after the shooting. 6RP 109, 127-28. DuBois told police he and Hillis had an argument about money. He denied shooting Hillis. DuBois said the Crown Victoria car belonged to his girlfriend. Supp. CP ___ (sub no. 67, Transcript of Wayne Richard DuBois Interview, dated 5/6/12, at 14-18, 24-25, 28, 35-37, 45, 57); 6RP 109, 127. DuBois did not know where the car was and police were not able to locate it. Supp. CP ___ (sub no. 67, Transcript of Wayne Richard DuBois Interview, dated 5/6/12, at 17); 6RP 129.

After hearing the above, a King County jury found DuBois guilty as charged. CP 51-53. The jury also found DuBois was armed with a firearm during the assault. CP 54. The trial court sentenced DuBois to standard range concurrent prison sentences of 174 months for the assault and 29 months each for the firearm and cocaine possessions. The court also imposed a consecutive 60-month firearm enhancement. CP 58-66; 10RP 23-24, 27. DuBois timely appeals. CP 68.

2. Motion to Sever

Before trial DuBois' attorney moved to sever the cocaine possession charge from the assault and firearm charges. 1RP 4-5; 2RP 2-13; Supp. CP ___ (sub no. 34, Motion & Certification for Severance of Offenses, dated 2/29/12). Defense counsel argued the cocaine evidence was not relevant to any fact at issue in the assault and firearm charges. Supp. CP ___ (sub no. 34, Motion & Certification for Severance of Offenses, dated 2/29/12, at 4).

The State maintained joinder of the crimes was appropriate because of "factual crossover between the counts," and the "minimal" risk of prejudice to DuBois. Supp. CP ___ (sub no. 39, State's Response to Motion to Sever, dated 3/6/12, at 3-5). The State noted it was "critical to both cases [cocaine possession and assault] that the State prove that the defendant is connected to, and may have possessed and owned at various times, the Crown Victoria." 1RP 4; Supp. CP ___ (sub no. 39, State's Response to Motion to Sever, dated 3/6/12, at 3-4). The prosecutor argued DuBois' use of a Crown Victoria could serve as ER 404(b) evidence if the cocaine and assault charges were severed. Supp. CP ___ (sub no. 39, State's Response to Motion to Sever, dated 3/6/12, at 3-4).

In arguing the motion to sever, defense counsel noted the probative value of the cocaine possession to establish DuBois' identity through the

car was "extremely low" because DuBois admitted to driving a dark-green Crown Victoria on the day of the shooting. 2RP 4. Counsel pointed out that long-term possession of the car had little, if any, probative value as to who was driving it. 2RP 12-13. In contrast, counsel noted DuBois would be prejudiced by the cumulative effect of having to defend two separate and distinct crimes. 2RP 4, 6-8, 12.

The prosecutor responded that use of the car in both incidents demonstrated DuBois' long-term use and therefore made it unlikely he would have lent it to someone else before the shooting. 2RP 8-10. The prosecutor acknowledged however, that "there's no way for the State to argue that it's not at least somewhat prejudicial..." that drugs were allegedly involved in both unrelated incidents. 2RP 11.

The trial court denied the motion to sever, reasoning "the facts supporting the VUCSA charge tie the defendant to the vehicle which makes it more likely the defendant was in the vehicle at the time of the shooting." CP 10. DuBois' attorney did not renew the motion to sever during trial.

C. ARGUMENT

DUBOIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO RENEW THE MOTION TO SEVER COUNTS DURING TRIAL.

DuBois' trial counsel was ineffective for failing to renew the severance motion during trial. A renewed severance motion would likely have been granted, and there is a reasonable probability that the outcomes of trials on severed assault and possession charges would have been different. See State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009) (Where counsel's failure to litigate a motion to sever is the basis of defendant's claim, prejudice is demonstrated by evidence the motion should have been granted and but for counsel's deficient performance the outcome of the proceeding would have been different).

The federal and Washington constitutions guarantee the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. A defendant is denied the right and is entitled to reversal of his convictions when his attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney's conduct. State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2d 155 (1996) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The defendant "need not show that

counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694.

CrR 4.4 governs severance of counts in a criminal trial. Counts that are properly joined may be severed "to promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). A defendant's motion to sever "must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require." CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed up until the close of all the evidence. CrR 4.4(a)(2). Failing to renew an unsuccessful severance motion constitutes a waiver. State v. Henderson, 48 Wn. App. 543, 545, 551, 740 P.2d 329, rev. denied, 109 Wn.2d 1008 (1987).

Joinder is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). A defendant may be prejudiced by having to present separate defenses, the jury may use evidence of one or more of the charged crimes to infer a criminal disposition, or the jury may cumulate evidence of the charges and find guilt when, if considered separately, it would not. State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984). A more subtle prejudicial effect may be present in a '"latent

feeling of hostility engendered by the charging of several crimes as distinct from only one.'" Harris, 36 Wn. App. at 750 (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)).

In determining whether to sever charges, the trial court considers (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) whether the court instructs the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. Sutherby, 165 Wn.2d at 884-85.

In this case, DuBois was prejudiced by the joinder of the cocaine possession and assault charges. In light of the evidence presented at trial, and after proper application of the four severance factors, the trial court would likely have granted a renewed motion for severance.

First, the strength of the State's evidence as to possession of cocaine was less than that as to assault and firearm possession. Eyewitness testimony, medical records and testimony, photographs, a recovered bullet, and Hillis' testimony and statements to medical and emergency providers supported the assault and firearm charges.

No such corroborating evidence existed to support the cocaine charge. No one saw DuBois in actual possession of the cocaine and no fingerprints were recovered from the bindle. The car in which the cocaine was found was not registered to DuBois and three other men were seen

exiting the car at the same time as DuBois. Although police found car keys when searching DuBois, no evidence shows they operated that particular car, and no officers saw DuBois driving the car.

Instead, the trial court's denial of the motion to sever allowed the jury to cumulate the evidence and infer that because the assault incident allegedly stemmed from a dispute over drugs, DuBois must also be guilty of the unrelated drug possession five months prior. If considered separately, the jury would likely have found the cocaine evidence weak and may have acquitted DuBois.

The second factor, clarity of defenses, also favored severance. General denial was a defense to all the counts. However, DuBois' defense to the first degree assault also provided that there was insufficient evidence of his intent to inflict great bodily harm. 9RP 71-72; CP 32-33, 39 (instructions 11, 12, and 18).

The third factor also supports severance despite the instruction to "decide each count separately." CP 46 (instruction 25). The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. State v. Bythrow, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). In Bythrow, the court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence,

different witnesses testified as to the different counts, the jury was properly instructed to consider the counts separately, and the issues and defenses were distinct. Bythrow, 114 Wn. App. at 723. On that basis, the court concluded the jury was not likely influenced by evidence of multiple crimes, and the failure to sever was not error. Bythrow, 114 Wn. App. at 723.

Unlike in Bythrow, here the jury was unlikely to properly compartmentalize the evidence of the different counts. First, DuBois' trial spanned one week, with four days of testimony. Moreover, testimony on the different counts was not presented in sequence, with testimony of various witnesses jumping from month to month and incident to incident.

Although the jury was instructed to decide each count separately, there was no limiting instruction directing the jury that evidence of one crime could not be used to decide guilt for a second crime. See Sutherby, 165 Wn.2d at 885-86 (recognizing the difference between an instruction to decide each count separately and one limiting the jury's use of evidence of one crime to decide guilt for a second crime). Given the length of trial, non-sequential testimony, and repeated references to drug incidents, both charged and uncharged, the jury was likely to cumulate the evidence and simply find DuBois guilty on all counts.

The fourth factor also favored severance. Evidence of the cocaine and dark-colored car would not have been admissible in a trial for the assault and firearm charges had the incidents been tried separately. In denying the motion to sever, the court opined the possession charge tied DuBois to the car, thereby making it more likely he was in the car at the time of the shooting. CP 10. But evidence is relevant to identity only if the method employed in the commission of both crimes is so unique that mere proof that the accused committed one of them creates high probability that he also committed the act charged. State v. Watkins, 53 Wn. App. 264, 271, 766 P.2d 484 (1989). "When identity is at issue, the degree of similarity [between the prior bad act and the current offense] must be at the highest level and the commonalities must be unique because the crimes must have been committed in a manner to serve as an identifiable signature." State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003).

Here, the only similarity between the incidents is that all allegedly involved drugs and a dark-colored Crown Victoria. The State presented no evidence, however, that the cars involved in each incident were in fact the same. No license plates, vehicle identification numbers, or other identifying marks proved the cars were the same. The car associated with the cocaine charge was not registered to DuBois and the police never

found the Crown Victoria allegedly associated with the assault. 6RP 128-29; 7RP 195. Thus, the car could not have been used for the purpose of proving DuBois' identity.

The only purpose for which the evidence could have been used was to show DuBois was predisposed to commit drug crimes and therefore must have been involved in both the cocaine possession and the assault of Hillis, which stemmed from a dispute over unrelated drugs. This is the "forbidden inference" ER 404(b)[2] is designed to prevent. State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). The trial court, therefore, would likely have sustained counsel's objections to the admissibility of the cocaine charge in a separate assault trial.

Even assuming evidence of the dark-colored car would be admissible in a trial for the assault and firearm charges, evidence of the cocaine was not relevant to any fact at issue in either charge. Thus, the risk of unfair prejudice could have been reduced by sanitizing evidence of the car to remove any mention of the cocaine found inside.

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[2] The rule provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

For these reasons, a renewed motion should have resulted in a severance of the cocaine charge. Counsel's failure to renew the motion to sever fell below the standard expected for effective representation. As evidenced by his original motion to sever, trial counsel was well aware of the significant prejudice inherent in the joinder of the charges in one trial.

Nothing happened during trial to mitigate the prejudice counsel anticipated when bringing the motion in the first place. Thus, there was no reasonable trial strategy that would lead counsel to abandon the motion to sever offenses. Counsel simply neglected to renew the motion as required by the rules. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. Sutherby, 165 Wn.2d at 887.

This failure to renew the motion to sever was prejudicial. For the reasons discussed above, there is great danger the jury used evidence of the assault and firearm charges to infer a criminal disposition. Likewise, the jury may have cumulated the evidence of the crimes to find guilt. At the very least, trying the unrelated cocaine and assault charges together necessarily engendered a latent feeling of hostility toward DuBois. DuBois' constitutional right to effective assistance counsel was violated.

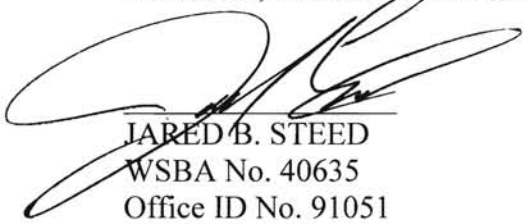
D. CONCLUSION

For the reasons discussed above, DuBois' convictions should be reversed and the case remanded.

DATED this 12th day of April, 2013

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION ONE

STATE OF WASHINGTON	)	
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Respondent,	)	
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	)	
WAYNE DUBOIS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF APRIL 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WAYNE DUBOIS
DOC NO. 346114
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF APRIL 2013.

X Patrick Mayovsky