69036-1

69036-1

NO. 69036-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WAYNE DUBOIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD AND THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES

1. To establish that counsel was ineffective at trial, a defendant must show that counsel's conduct was deficient and that this resulted in prejudice. Dubois' counsel moved to sever the charges against him prior to trial, but did not renew this motion before the end of trial because nothing had changed. Did the performance of Dubois' counsel meet the objective standard of reasonableness required for defense attorneys? If not, would the outcome of the severance motion have been the same even if counsel had renewed the motion to sever?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Wayne Dubois with Assault in the First Degree with a firearm enhancement, Unlawful Possession of a Firearm in the Second Degree, and Violation of the Controlled Substances Act (Possession of Cocaine). CP 16-17. The jury convicted Dubois as charged. CP 51-54. The trial court imposed a sentence totaling 234 months, including a standard range sentence

of 174 months plus a 60 month firearm enhancement. CP 58-66; 10RP 23-24, 26-27.[1]

2. SUBSTANTIVE FACTS

a. Possession Of Cocaine In The Crown Victoria

In the late evening hours of June 25, 2011, and early morning hours of June 26, 2011, King County Sheriff's personnel[2] twice came into contact with Wayne Dubois in Seattle's White Center area, temporarily detained him, and ultimately investigated him for constructively possessing cocaine. 7RP 38, 45-47, 123-24, 170-72. Shortly after 10 p.m. on June 25, 2011, the deputies initially observed Dubois, who appeared to be underage, go quickly into the back of a bar and then flee in a dark green Ford Crown Victoria from in front of the bar. 7RP 42, 45-47, 114, 116-18.

Around 1:40 a.m., while still on foot patrol in the same neighborhood, deputies recognized the same dark green Ford Crown Victoria that they had seen leave from the front of the bar earlier. 7RP 35-36, 49, 62-63, 119-20. The Crown Victoria turned

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[1] The Verbatim Report of Proceedings consists of ten volumes, with the State adopting the same reference system used in the Appellant's Brief: 1RP (2/22/12), 2RP (3/7/12), 3RP (5/16/12), 4RP (5/17/12), 5RP (5/21/12), 6RP (5/22/12), 7RP (5/23/12), 8RP (5/24/12), 9RP (5/29/12), and 10RP (7/13/12).

[2] The King County Sheriff's personnel on scene during the drug investigation consisted of a sergeant and two deputies; they will be referred to as "deputies" for the purposes of this appeal. 7RP 109.

on to the street where the deputies were walking. 7RP 49. This vehicle was unlike a typical Crown Victoria in that it had push bars and a spotlight in the upper left-hand corner of the vehicle, both standard equipment on a police vehicle. 7RP 46, 56.

Without any signaling from the deputies, the Crown Victoria pulled over to the side of the road approximately three-quarters of a block away from the deputies. 7RP 103. Four people got out of the car; three passengers from their respective doors and then Dubois from the driver's door. 7RP 51, 63-64. The four walked towards the deputies after exiting the car. 7RP 103. Two of the deputies crossed the street towards the group, while another obtained his patrol car and pulled in behind the parked Crown Victoria. 7RP 50, 52, 64-65, 102, 121-22.

As they stood with the deputies, Dubois' three passengers were cooperative, while Dubois was belligerent, boisterous, agitated, and loud. 7RP 52, 83-84, 121. Dubois yelled at one of the deputies, "Hey, stay away from my [expletive] car," as he walked towards the Crown Victoria. 7RP 121-22.

When the deputies looked through the windows of the Crown Victoria, they observed what appeared to be a bag of crack cocaine. 7RP 53, 87, 92, 125-26. Dubois was temporarily detained

and keys that appeared to be from the Crown Victoria were lawfully seized. 7RP 123-24.

The car was impounded and later searched. 7RP 124, 173. Several documents containing Dubois' name, along with two bags of cocaine, were located within the vehicle. 7RP 175, 183-87, 213-14. Dubois' fingerprints were found inside and outside the car. 7RP 89, 191, 197-98; 8RP 41. Dubois was released from custody at the scene that evening. 7RP 136.

b. Assault With Firearm In The Crown Victoria

Over four months later, on November 6, 2011, Alvin Hillis was shot in the torso at around noon in the Central District of Seattle. 6RP 23-24. Hillis identified Dubois as his assailant and said, prior to and after the shooting, Dubois had been in a greenish-black Ford Crown Victoria, which Hillis knew to be associated with Dubois. 6RP 23-24, 29, 31, 40, 44-45.

While Hillis did not know Dubois well, he knew who Dubois was because Hillis used to date the mother of Mykia Marks. 6RP 32-33. Marks is the mother of one of Dubois' children. 6RP 32-33. Hillis had seen Dubois a couple times at Marks' mother's home. 6RP 32-33. About a week before the shooting, Hillis found what he considered to be an abandoned package of cocaine on the floor of

the home and kept it for himself. 6RP 34-35. Dubois had several people talk to Hillis about whether or not he had taken the cocaine, but Hillis denied taking anything. 6RP 35-36.

Around noon on November 6, 2011, Hillis was standing near a neighborhood market when he saw Dubois coming up the street in a greenish-black Ford Crown Victoria. 6RP 28-29. Hillis recognized the car and Dubois. 6RP 29-30. Hillis had seen Dubois driving this particular car in the past. 6RP 31.

Dubois exited the vehicle and confronted Hillis about the missing cocaine. 6RP 35-37. The verbal confrontation ended with Dubois stating to Hillis, "[I]f you're still here when I get back…", then getting in the passenger seat of the Crown Victoria and leaving. 6RP 38. Hillis felt threatened and tried to leave the area. 6RP 38-39. However, the dark green Crown Victoria followed Hillis before pulling up near him at an intersection. 6RP 40-42. Dubois got out of the passenger seat, steadily walked towards Hillis on the sidewalk, and told him to "break himself." 6RP 42.

Dubois then shot Hillis in the lower abdomen from approximately ten to fifteen feet away. 6RP 43, 46. Hillis then successfully avoided getting hit by another bullet while Dubois fired five more shots at him at close range. 6RP 44. Hillis ran away, but

not before seeing Dubois get back in the same Crown Victoria and pull away. 6RP 44-45. Hillis was helped to the hospital by an acquaintance. 6RP 46-47.

Hillis, who believed he was going to die, had a gunshot wound to the right lower quadrant of his abdomen, as a bullet crossed the midline of his abdomen, tore through his small intestine, and lodged in the opposite side of his pelvis. 6RP 50; 8RP 12-13, 18-19. A portion of his intestine was removed and damage to his abdomen and pelvis was repaired. 8RP 9, 13, 18-19, 21. The recovered bullet was determined to be a certain type of .38 caliber bullet that appeared to have been fired from a handgun. 6RP 144-45; 8RP 15.

When law enforcement reported to the hospital and spoke with Hillis during his initial medical treatment, Hillis was able to identify the person who shot him and gave a basic outline of what had occurred. 9RP 13. Hillis also picked Dubois from a photo montage as the person who shot him. 6RP 56, 77, 131.

Several days after the shooting, Dubois was located and arrested for the assault of Hillis. 6RP 109. Dubois agreed to speak with police officers on November 15, 2011. CP 83-157; 6RP 109, 111. He confirmed that on the day of the shooting he had been

driving a green Crown Victoria, he talked to Hillis about something belonging to Dubois that he believed Hillis took ("I'll just say money"), and then Marks drove once they got back in the car. CP 93, 96-97, 100-01.

Dubois had previously asked others if Hillis had taken his "money" because, as he explained during the interview, "it's a respect thing to me." CP 95-96. Dubois denied that he was involved in the shooting of Hillis and said that he did not possess or own the Crown Victoria. CP 100, 110, 116.

c. Motion To Sever

The State charged Dubois with Assault in the First Degree with a firearm enhancement and Unlawful Possession of a Firearm in the Second Degree on November 18, 2011. CP 1-6. The deputy prosecuting attorney assigned to the assault case received the referral for the VUCSA charge on February 15, 2012, and the case was added to the information on February 23, 2012. CP 8-9, 73; 1RP 3.

Dubois moved to sever the VUCSA offense from the assault and firearm possession offenses on March 7, 2012, prior to trial, before the Honorable Theresa Doyle. CP 69-76; 2RP 2-8. Dubois argued that the fact that he was known to be driving a dark green

Ford Crown Victoria during the drug investigation over four months prior to the shooting had little probative value because he admitted to driving a dark green Ford Crown Victoria on the day of the shooting. 2RP 4-5. The harm of joinder was "that of defending two separate, distinct crimes," that it could create a cumulative effect, and bias the jury. 2RP 4, 12.

The State explained that, while Dubois admitted to police he had driven the Crown Victoria on the day of the shooting and had been nearby when the shooting occurred, he denied being the shooter or owner of the Crown Victoria. CP 100, 110, 116; 2RP 8. The State argued that the evidence from the earlier incident was cross-admissible and highly probative as to who shot Hillis because it demonstrated that the Crown Victoria belonged to Dubois, making it more likely Dubois assaulted Hillis since his distinctive car was observed at the scene of the shooting rather than simply "near" the area. 2RP 8-9.

Judge Doyle denied Dubois' motion to sever based on the cross-admissibility of the evidence and because "[a]ny prejudice does not outweigh the concern for judicial economy." CP 10. The court noted that, "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.

d. Time For Trial And Alleged Ineffective Assistance

The Honorable Susan Craighead received the case for trial on May 16, 2012. 3RP 3. Dubois never raised the issue of severance again throughout the course of the trial. The jury convicted Dubois on all of the counts charged and found that Dubois was armed with a firearm at the time of the assault. CP 51-54. Dubois timely appealed. CP 68.

C. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO RENEW THE MOTION TO SEVER IS NOT INEFFECTIVE ASSISTANCE OF COUNSEL

Dubois contends that he was denied effective assistance of counsel when his attorney failed to renew the motion to sever. Counsel's decision not to renew the motion to sever does not constitute deficient performance, when considering all the circumstances. Even if counsel's conduct does qualify as deficient performance, there is no reasonable probability that the outcome of the proceeding would be different but for that performance because joinder was appropriate in this case.

The United States and Washington Constitutions guarantee the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22. In order to establish that counsel was ineffective, a defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To show deficient representation, the defendant must show that the representation fell below an objective standard of reasonableness based on consideration of all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id.

Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional

errors, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A court need not determine whether counsel's performance was deficient before examining prejudice. Id. at 697.

CrR 4.3(a) permits joining two or more offenses of the same or similar character, even if the offenses are not part of a single scheme or plan, or if the offenses are "based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." Washington courts construe CrR 4.3(a) expansively so as to "promote the public policy of conserving judicial and prosecution resources." State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998).

Under CrR 4.4(b), the trial court shall sever the charges against the defendant if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." Properly joined offenses may be severed if the defendant is prejudiced in presenting separate defenses, or if a single trial would encourage the jury to cumulate evidence or infer a criminal disposition. State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989).

The defendant must make a motion to sever offenses before trial, unless the interests of justice require otherwise. CrR 4.4(a)(1). If the motion is denied, then the defendant must renew it "before or at the close of all the evidence," or the issue may not be raised on appeal. CrR 4.4(a)(2); Bryant, 89 Wn. App. at 864. "Before or at the close of all the evidence" means before the close of trial. 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).

Dubois chose not to challenge Judge Doyle's denial of his motion to sever by failing to renew the motion before the close of evidence, as required by the rule and case law. However, based on the present record, Dubois cannot show that his counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. A complete review of the court record shows that Dubois' defense counsel provided sound representation, understood the relevant law, and advocated zealously on behalf of his client prior to and throughout the trial. 7RP 8-9; 9RP 67-78.

For example, when Dubois made a verbal motion to substitute counsel on the fifth day of trial, the trial court told Dubois that, despite how very critical she is of defense attorneys as a

judge, having previously been a defense attorney, she "could not do better than what Mr. McGuire is doing." 7RP 8. In denying Dubois' motion for a new defense counsel, the court told Dubois:

> "[Mr. McGuire] is one of our strongest defense attorneys. Sometimes you're in a situation where there isn't a whole lot that Defense Counsel has to work with, and so you have to realize that they can't make stuff up. I mean, if there isn't evidence for them to work with, then they can't make it up, okay?..... Mr. McGuire is doing a good job."

7RP 8-9.

Dubois' counsel decided not to raise a severance motion prior to the end of trial, not because he was ineffective and didn't know the court rule, but rather because he did know the court rule. CrR 4.4. Defense understood, as he explained during his oral argument on the severance motion, that, "judicial economy is really only achieved if the evidence in the VUCSA case is considered admissible in the assault case." 2RP 6.

What changed between the time defense counsel made his initial motion to sever and the end of trial is that the evidence showing Dubois' possession of the Crown Victoria was deemed cross-admissible and was shown to be a key piece of evidence in both the State's assault and drug case. CP 10; 9RP 51. Due to the trial court's ruling that the evidence was cross-admissible, counsel

had no reason to believe a different outcome would result if the motion was renewed. A defense counsel is not required to bring frivolous motions; he is not required to renew a motion to sever prior to the end of trial at the expense of losing credibility with the court or his own professional reputation.[3]

Dubois' counsel's statements that a jury would not be likely to confuse the issues between the two distinct, unrelated cases suggest that his failure to renew the motion to sever or move for a mistrial after the initial pretrial severance motion was because the joinder did not appear critically prejudicial to Dubois in the context of trial. 2RP 5; 9RP 7; State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991) ("The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial."). Defense counsel properly moved to sever counts before trial, but reasonably chose not to renew the motion because the evidence was cross-admissible and nothing else had changed. Refraining

[3] "No party shall remake the same motion to a different judge without showing by affidavit what motion was previously made, when and to which judge, what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judge." LCR 7(b)(7).

from bringing a frivolous severance motion prior to the end of trial does not fall below an objective standard of reasonableness.

Dubois failed to demonstrate the required prejudice to warrant severance. The defendant bears the burden of showing that trial on two or more counts "would be so *manifestly prejudicial* as to outweigh the concern for judicial economy." State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990) (emphasis added). When weighing the potential for prejudice, the trial court must consider "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) the court's 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. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

None of these factors is dispositive. Watkins, 53 Wn. App. at 272-73 n.3; Bythrow, 114 Wn.2d at 720-22; State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992). Any potential prejudice to the defendant must be weighed against concerns of judicial economy. Bythrow, 114 Wn.2d at 723 (concluding that conserving judicial resources and public funds are the cornerstones of judicial

economy and noting the significant savings resulting from having one courtroom, one judge, and one jury to empanel).

Dubois cannot show based on this record that the trial court committed a "manifest abuse of discretion" by denying his motion to sever. See State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993) (judicial economy outweighed potential prejudice resulting from joining five rape counts with separate victims based on the strength of the State's evidence, ability to compartmentalize evidence, and court's instruction to consider the crimes separately).

Examining the four factors shows that the trial court ruling was correct: the relative strength of the evidence was the same; the defenses were clear; instructions were given; and the evidence was cross-admissible. Any prejudice resulting from the fact that Dubois happened to be located at the scene of two separate and distinct crimes does not overcome the public interest of conserving judicial and prosecution resources. Bryant, 89 Wn. App. at 864.

Dubois contends that the State's evidence as to the assault and firearm possession charge was stronger than that as to the possession of cocaine charge, and that the 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 earlier." Appellant's Br. at 11. However, Dubois' argument is not supported by this record. The evidence was strong as to both counts.

In the firearm/assault case, Hillis knew Dubois, had felt threatened by him shortly before the time of the shooting, and saw Dubois shoot him at very close range. 6RP 32-33, 35-37, 43, 46. Hillis provided an unambiguous identification of Dubois, both while at the hospital after the shooting and later at trial. 6RP 23-24, 56.

Additionally, two independent civilian eyewitnesses described the vehicle and suspect involved in the shooting. Eric Martinez-Mota looked out his window upon hearing gunshots and saw a male figure run towards and get in on the passenger side of a Ford Crown Victoria. 6RP 90-93, 97. The vehicle appeared to try to speed off after the gunshots, but had to sit for several seconds while a string of cars came through the intersection. 6RP 96. Martinez-Mota noticed during this time that the Crown Victoria was dark in color and had a spotlight next to one of its side mirrors like an old police vehicle. 6RP 91-92.

EuRhonda Riggins heard shots fired behind her and turned to see a man extending out his arm shooting with what she

believed to be a firearm at another man who was dodging bullets and then running from his assailant. 9RP 33-35. Riggins believed the shooter was African American, that his skin tone looked "maybe more of a caramel" color, and that he had dreads with frosted tips. 9RP 35-36, 39. Riggins also saw a green car in the street when the shooting was happening. 9RP 36.

When interviewed by police, Dubois acknowledged that he had first been driving and then later been a passenger in a dark green Ford Crown Victoria in close proximity to the location of the shooting when it occurred. CP 96-97, 100-01. Dubois also verified Hillis' account of being verbally confronted by Dubois shortly before the shooting occurred. CP 96-97. Dubois conceded during the interview that he was "way recognizable" due to being an African American with light-skinned complexion with highlighted dreadlocks. CP 103-04, 110, 116.

In addition to this evidence, the State also produced evidence to support the gun charge, including medical testimony and records, a firearm expert's testimony and report, photographs, and a bullet recovered from Hillis' body. 6RP 25-26, 132, 145-46; 8RP 6, 15-16, 25-26.

Dubois' argument that the drug case was weak because no one saw him in *actual* possession of the cocaine is meritless; the drug charge was based on strong evidence of *constructive* possession. Appellant's Br. at 11; CP 44 (jury instruction #23); 9RP 62-64. Police observed the defendant getting out of the driver's seat of the green Crown Victoria, lawfully stopped him, and a substance suspected to be cocaine was seen in the door handle area of the driver's side door. 5RP 30; 7RP 51, 53, 87, 125. Later testing of the substance confirmed that the substance did in fact contain cocaine. 7RP 213.

Several factors tied the cocaine to Dubois, including that Dubois exited the car from the driver's seat, the drugs were located in the driver's door handle, and Dubois asserted that the Crown Victoria was his car. 7RP 51, 87, 121-22. Dubois' belligerent and agitated demeanor as the deputy walked over to the car, while the other three occupants who had gotten out of the vehicle remained cooperative, supports a strong inference that Dubois knew there was cocaine in the car. 7RP 52, 83-84, 121. Additionally, car keys matching the make and manufacturer of the Crown Victoria were

found in Dubois' pocket. 7RP 123-24. Dubois' fingerprints[4] and several types of documents containing his name were also found inside the vehicle. 7RP 197-98; 8RP 41. This evidence conclusively established that both the Crown Victoria and the cocaine found within it belonged to Dubois. Because the firearm assault and drug offenses are clear and distinct, with substantial proof for each charge, the possibility of prejudice resulting from joinder is minimal.

Dubois' claim of general denial as his defenses for the drug charge and the firearm assault charge supports the court's denial of Dubois' motion to sever. Dubois argued, respectively, that there wasn't sufficient evidence to prove the drugs were his, nor to prove he shot Hillis or intended to inflict great bodily harm. His defenses to each of the counts are separate and there is nothing inconsistent about them. Nothing in the record suggests that, by trying the drug and assault cases together, Dubois' defenses were muddled or contradicted each other.

The court's proper instruction to the jury also supports the court's denial of Dubois' motion to sever. At the severance motion,

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[4] AFIS matched prints from the rearview mirror of the Crown Victoria, the interior of the rear, the exterior driver's side front window, and the driver's side rear window to an individualized set of prints for Dubois. 7RP 197-98.

Judge Doyle noted that, "there's still the presumption in the case law that jurors follow the jury instructions." 2RP 5. The trial court instructed the jury to consider each count separately.[5] CP 46. The court also gave the jury separate to-convict instructions and verdict forms for each count establishing the different elements to be found and reaffirming the requirement to consider the counts separately. CP 46, 112-13, 116-17, 121, 126, 133-36.

Because the jurors were instructed properly and the State had to prove separate and distinct elements under each count (with the exception of the crime occurring in Washington), there was limited threat of the jury cumulating the evidence or inferring a general criminal intent. CP 31, 41, 45, 46. Further, Dubois' counsel reminded the jury in closing arguments about their obligation to consider the charges separately by stating, "Count III is completely unrelated to Counts I and II. It doesn't have anything to do with what happened in November of last year." 9RP 76.

The cross-admissibility of the evidence also supports the court's decision to leave the charges joined for trial. If the gun assault incident and the drug possession incident were tried

[5] "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." WPIC 3.01.

separately, evidence of the other event would be admitted as ER 404(b) evidence in the trial on the other charge. Holding two separate trials with many overlapping witnesses would not have promoted judicial economy.

Dubois possessed and claimed ownership over the distinctive Crown Victoria during the drug incident; this evidence was admissible to help prove identity on the firearm assault incident. ER 402; ER 404(b). The evidence showing Dubois owned the Crown Victoria, which supported the constructive possession argument in the drug case, also supported the reasonable inference that Dubois was involved in the assault since his car was observed at the scene of the shooting. This evidence was especially probative in light of defense counsel's argument during closing that the shooter could have been someone other than Dubois. 9RP 69. Similarly, witnesses in the assault case with knowledge about the association between Dubois and this Ford Crown Victoria would have been admissible in a separate trial on the drug charge to support the State's constructive possession argument. 1RP 4.

Even if the evidence was not cross-admissible, the lack of cross-admissibility does not automatically result in severance.

Bythrow, 114 Wn.2d at 720-22; Markle, 118 Wn.2d at 439. Dubois still must show that a joint trial was "so *manifestly prejudicial* as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718 (emphasis added).

It would not have been difficult for jurors in this case to compartmentalize the evidence according to the various counts, thus lessening the potential for prejudice caused by joinder. Bythrow, 114 Wn.2d at 721. The trial involved the relatively simple, distinct defenses and issues of whether Dubois (1) possessed cocaine on June 25-26, 2011, and (2) shot a firearm at Hillis on November 6, 2011. The possibility that jurors would misapply evidence to the wrong count was very limited since the two incidents occurred over four months apart in separate locations. As Dubois' counsel stated at the pretrial motion to sever, "There's not any risk... of confusion of the issues in the two cases because clearly they are two separate cases." 2RP 4.

Additionally, the presentation of evidence was not so unduly lengthy or complicated that jurors would have difficulty compartmentalizing evidence. While the full length of trial was seven court days, the actual testimony in the case lasted only two

and a half days in the aggregate.[6] All of the witnesses for the drug charge (except one AFIS print examiner) were presented consecutively during one day of testimony. 8RP 34. Thus, jurors were focused on the drug charge during a designated portion of trial, increasing the likelihood they could effectively compartmentalize the evidence.

In State v. Sutherby, counsel's complete failure to litigate a motion to sever was found to be ineffective assistance where the strength of the State's evidence differed on each count, the defendant offered separate defenses, and the State argued that evidence of one count could be used to convict on another count even though the evidence was not cross-admissible. 165 Wn.2d 870, 883-86, 204 P.2d 916 (2009). However, here, unlike in Sutherby, Dubois' defense counsel *did* move to sever, general denial was claimed on all counts, the State had strong evidence on all the offenses, and the evidence was ruled to be cross-admissible. CP 10; 2RP 3-13.

The Court should find that counsel's decision not to renew the severance motion did not constitute deficient performance, and

[6] After two full days hearing from witnesses, the third day of testimony consisted of an hour of testimony due to scheduling difficulties. 8RP 46. On the fourth day of testimony, all testimony in the case concluded by 11am. 9RP 42-43.

that, even if it did, there was no prejudice to Dubois because no reasonable probability exists that the outcome of the proceeding would have been different if counsel had renewed the motion.

D. CONCLUSION

For the reasons stated above, the Court should affirm Dubois' convictions and the court's joinder of offenses in this case.

DATED this 10th day of June, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared B. Steed, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. WAYNE DUBOIS, Cause No. 69036-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of June, 2013

Name
Done in Washington