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NO. 71564-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID RAY HAILEY, Jr.,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

Did the trial court proper exercise its discretion in denying defendant's motions to sever counts 1 and 2 for trial?

II. STATEMENT OF THE CASE

On January 2, 2013, Deputy Phillips was driving his assigned police vehicle, an unmarked black Ford F-150, southbound on I-5 in Marysville. The vehicle had exempt plates, two police radio antennas, red and blue lights mounted in the front and rear and just above the rear-view mirror in the front windshield, and was equipped with a siren. Deputy Phillips was wearing his department issued uniform. Deputy Phillips observed David Ray Hailey, Jr., defendant, driving a blue Ford Mustang. Deputy Phillips recognized defendant from prior contacts. Defendant looked at Deputy Phillips and then slumped down in the driver's seat and turned the baseball hat he was wearing to partially conceal his face. RP (1/21/14) 55-62, 65-66, 122-124.

Deputy Phillips knew that defendant did not have a driver's license, so he contacted Deputy Robinson by radio and informed him of his plan to stop defendant for the violation. Deputy Robinson was driving behind Deputy Phillips in a similar police vehicle. Deputy Robinson pulled forward and observed defendant

driving the blue Mustang. Deputy Robinson recognized defendant from prior contacts. RP (1/21/14) 62-63; RP (1/22/14) 122-123, 127-133, 138.

Deputy Phillips told Deputy Robinson that when they attempted to stop the Mustang, they should do so in a manner to preclude defendant from having an opportunity to flee. Deputy Phillips attempted to position his vehicle in front of the Mustang, but defendant changed lanes. Deputy Phillips moved behind the Mustang and defendant changed lanes again. Deputy Phillips told Deputy Robinson to activate his lights and simultaneously pulled in front of the Mustang attempting to box it in against the guardrail. The Mustang slowed to 20 mph and then accelerated driving between Deputy Phillips patrol vehicle and the guardrail. Defendant continued driving on the shoulder and took the exit from I-5 onto Highway 529. Deputy Phillips activated the emergency lights and siren on his patrol vehicle and began pursuit. Deputy Robinson was immediately behind him with the emergency lights and siren of his patrol vehicle activated. RP (1/21/14) 62-66, RP (1/22/14) 133-134, 139.

Deputy Phillips notified dispatch that he was in pursuit and accelerated to try to keep up with defendant. Deputy Phillips was

going 98 mph, the maximum his vehicle is governed to go, and was falling behind defendant. Defendant was using the shoulder to pass other vehicles on the roadway. After approximately 30 seconds, Deputies Phillips and Robinson terminated the pursuit for safety because defendant was driving too fast and too reckless. Deputy Phillips estimated that defendant was driving well over 110 mph. Deputies Phillips and Robinson lost sight of the Mustang as it crossed the bridge into Everett. RP (1/21/14) 66-72; RP (1/22/14) 134-137.

Deputy Phillips notified dispatch and the Everett Police that defendant had entered North Everett. He provided a description of the vehicle, license number, and the last known location. Deputy Phillips continued into Everett attempting to locate the Mustang. In the area of 13th Avenue, he observed defendant in an alley just east of Marine View Drive. Defendant looked at Deputy Phillips and took off running. Deputy Phillips notified dispatch and requested assistance in setting up a containment perimeter. The police were unsuccessful in locating defendant. However, Deputy Phillips did locate the Mustang with the headlights on a few blocks from where he saw defendant in the alley. A search warrant was obtained for the Mustang and four documents containing defendant's name

were located in the vehicle. The Mustang was not registered to defendant. RP (1/21/14) 68, 70, 72-76, 121-122, 124-125.

On January 15, 2013, Deputies Phillips and Dill were looking for defendant to arrest him for the January 2, 2013 incident. Deputy Phillips was driving his unmarked F-150 patrol vehicle and wearing his department issued uniform. Deputy Dill was driving an unmarked Crown Vic patrol vehicle equipped with emergency lights and siren. He was wearing his department issued uniform. They had received information that defendant was driving a purple Nissan Altima rental car and staying at a house just west of Hewitt and Marine View Drive in Everett. Deputy Phillips observed a purple Nissan Altima back out of the driveway of the suspect house, exit the alley on to Hewitt and stop for a red light at Marine View Drive. Deputy Phillips pulled behind the Altima and could see that there were two individuals in the Altima. It was nighttime and the intersection was lit by streetlights. Deputy Phillips turned on his high beams to try to get a better look at the driver. As the Altima turned north onto Marine View Drive into the headlights Deputy Phillips recognized defendant as the driver. He did not recognize the passenger. RP (1/21/14) 76-84; RP (1/22/14) 125, 147-149, 151.

Deputy Phillips notified dispatch and without activating his emergency lights or siren followed the Altima waiting for other officers to assist. Deputy Dill pulled behind Deputy Phillips on Marine View Drive. As defendant turned onto 25th Avenue all the exterior lights on the Altima turned off and it accelerated. Deputies Phillips and Dill activated the emergency lights and siren on their patrol vehicles and pursued. Defendant made an immediate turn on to Grand and ran the stop sign at 20th Avenue. The area is a residential part of Everett and the streets are very narrow. Deputy Phillips attempted to maintain visual of the Altima. He estimated his own speed at 50 to 60 mph, but was not able to keep up with defendant. Deputy Phillips terminated the pursuit when defendant got five to six blocks ahead of him. RP (1/21/14) 85-91; RP (1/22/14) 103-104, 151-157.

On January 16, 2013, Deputies went to Granite Falls to try to locate defendant. They learned that defendant was possibly hiding in a residence just outside the city limits. They approached the residence on foot around 9:00 p.m. As they were walking up the front door opened and a male and a female exited the residence. Deputies Phillips and Dill recognized the male as defendant. They announced that they were the police and ordered defendant to

stop. Defendant fled back into the residence. Police set up a perimeter around the residence, using the public address system to order defendant to exit the residence while they sought a search warrant. Defendant did not exit of the residence. RP (1/22/14) 104-108, 158-160.

A search warrant was obtained and police entered the residence to search for defendant. Using an infrared sensor defendant was located hiding in the attic under the insulation. He did not respond to police announcements or orders to come out of the attic. A K-9 had to be used to get defendant out of the attic. Defendant was placed under arrest, advised of his constitutional rights and informed that he was under arrest for the pursuits. Defendant replied, "What pursuits?" Deputy Dill told defendant he was referring to the pursuits involving the Mustang and the Nissan Altima. Defendant stated that he was just being stupid again. Deputy Dill told defendant that he needed to stop doing this because he was going to hurt someone by running. Defendant replied, "I just don't know why I keep fucking up." RP (1/22/14) 108, 115-121, 161-166.

Defendant was charged with two counts of attempting to elude a pursuing police vehicle arising from the January 2, 2013 and January 15, 2013 incidents. CP 58-62, 63-64.

On November 22, 2013, defendant moved to sever the counts. CP 48-54, 67-72; RP (11/22/13) 3-8. The trial court denied the motion. CP 47; RP (11/22/13) 8-13; RP (11/26/13) 26-28. On January 21, 2014, defendant was arraigned on amended information adding an endangerment by eluding allegation. CP 44, 45-46; RP (1/21/14) 5-7.

On the first day of trial, prior to any evidence being presented by the State, defendant renewed his motion to sever the counts. RP (1/21/14) 11-12. The trial court again denied the motion to sever incorporating the court's prior reasoning and noting that the jury would be instructed to consider each count separately and that their verdict on one count should not influence their verdict on any other count. RP (1/21/14) 12-14.

At the conclusion of the trial the jury found defendant guilty on both counts and returned a special verdict finding that one or more persons other than defendant or the pursuing law enforcement officers were endangered by defendant's actions

during the commission of the crime in count 2. CP 19, 20, 21; RP (1/22/14) 222-227.

III. ARGUMENT

A. THE OFFENSES WERE PROPERLY JOINED.

Two or more offenses may be joined in one charging document when they are of the same or similar character. CrR 4.3(a). State v. Williams, 156 Wn. App. 482, 500-501, 234 P.3d 1174 (2010). This rule is construed expansively to promote the public policy of conserving judicial and prosecution resources. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Here, the allegation in both counts was of the same character. CP 45-46; RP (1/21/14) 12. As the trial court found, joinder was appropriate under CrR 4.3. RP (11/22/13) 8-9; RP (11/26/13) 26.

B. THE COURT'S DENIAL OF DEFENDANT'S MOTIONS TO SEVER WERE A PROPER EXERCISE OF ITS DISCRETION.

Offenses properly joined under CrR 4.3 are consolidated for trial unless the court severs them under CrR 4.4. CrR 4.3.1. The trial court may sever joined offenses if doing so will promote a fair trial. CrR 4.4(b). A defendant seeking severance has the burden of demonstrating that a trial involving all 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). “Defendants seeking severance must not only establish that prejudicial effects of joinder have been produced, but they must also demonstrate that a joint trial would be so prejudicial as to outweigh concern for judicial economy.” *Id.* at 722. “Severance is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial.” State v. McKee, 141 Wn. App. 22, 38, 167 P.3d 575 (2007).

The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with the consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

CrR 4.4(b). Defendant bears the heavy burden of demonstrating that the trial court's refusal to grant severance was an abuse of discretion. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994); State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982) rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983). The law does not favor separate trials. A trial court's denial of a motion to sever is reviewed for manifest abuse of discretion. Bythrow, 114 Wn.2d at 717; State v. Medina, 112 Wn. App. 40, 54, 48 P.3d 1005 (2002). To show that the trial court abused its

discretion in denying severance, “the defendant must be able to point to specific prejudice.” Bythrow, 114 Wn.2d at, 720.

A motion to sever offenses focuses on potential prejudice to the defendant. State v. Gatalski, 40 Wn. App. 601, 606, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985). To determine whether the inherently prejudicial effect of joinder requires severance, the court considers all of the following factors, none of which is preeminent: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses as to each count; (3) the existence of an instruction to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. Russell, 125 Wn.2d at 63; State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989).

Here, the trial court made the following findings regarding the Russell factors. Regarding the first factor, the trial court found that the evidence on each count was fairly strong and of equal strength. RP (11/22/13) 10-12. Regarding the clarity of the defenses, the trial court found that they were the same for each count. RP (11/22/13) 12. Regarding the third factor, the jury was instructed that it must consider each count separately. CP 31; RP (11/22/13) 12-13; RP (1/21/14) 13. Jurors are presumed to follow

the trial court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Regarding the admissibility of evidence the trial court found that the evidence from each case would be cross admissible in separate trials. RP (11/22/13) 11-13; RP (11/26/13) 27-28; RP (1/21/14) 12-13.

Applying the first three Russell factors, the record establishes: the State's evidence on each count was substantial; the defense of general denial on each count was clear; and the jury was adequately instructed that it must consider each count separately. Applying the fourth Russell factor requires an analysis of ER 404(b). State v. Vermillion, 66 Wn. App. 332, 341, 832 P.2d 95 (1992). Whether evidence is admissible under ER 404(b) requires the court to determine: (1) whether the evidence is relevant to prove any of the issues permitted by ER 404(b); (2) whether any prejudicial effect is outweighed by the probative value; and (3) whether limitation of the purpose for which the jury may consider the evidence can be accomplished. Watkins, 53 Wn. App. at 270. The trial court properly analyzed the evidence of counts 1 and 2, determined it was relevant to show no mistake of identity, any prejudicial effect was outweighed by its probative value, and

that the jury would be adequately instructed on the limited use it could make of that evidence. RP (11/26/13) 26-29.

A defendant arguing for severance of offenses must be able to point to specific prejudice resulting from the denial of the motion to sever. State v. Huynh, 175 Wn. App. 896, 910, 307 P.3d 788 review denied, 179 Wn.2d 1007, 315 P.3d 531 (2013); State v. Emery, 174 Wn.2d 741, 752, 278 P.3d 653 (2012). The trial court specifically found that defendant failed to point to any specific prejudice. RP (11/22/13) 13. Defendant's argument both at the time he moved for severance and on appeal is that there was danger that the jury: (1) may have used evidence of one of the attempting to elude charges to infer guilt on the other charge; (2) may have cumulated the evidence of the crimes to find guilt; and (3) that trying similar charges together engendered a latent feeling of hostility toward him. This does not show the requisite specific prejudice. Given that the crimes were not particularly difficult to "compartmentalize", that the State's evidence on each count was strong, and that the trial court instructed the jury to consider the crimes separately, this court should conclude that defendant has not established the joint trial was so manifestly prejudicial it outweighed the concern for judicial economy. The trial court was

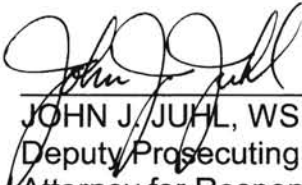
well within its broad discretion in finding that the potential prejudice did not outweigh the concern for judicial economy. State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993). The trial court's refusal to sever counts was a proper exercise of its discretion. State v. Vermillion, 66 Wn. App. 332, 342, 832 P.2d 95 (1992). The trial court did not abuse its discretion in denying defendant's motions to sever.

IV. CONCLUSION

For the reasons stated above, defendant's convictions should be affirmed.

Respectfully submitted on December 30, 2014.

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