63779-7 63779-7

COA No. 63779-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARCUS ANDERSON,

Appellant.

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

The Honorable Thomas J. Wynne
The Honorable David A. Kurtz

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. MR. ANDERSON PRESERVED HIS MOTION TO SEVER.

Respondent argues that Mr. Anderson failed to renew his motion to sever during trial, and therefore waived the objection. This is incorrect.

Mr. Anderson first moved to sever charges on June 4, 2009, after the court ruled on the CrR 3.5 and 3.6 motions. CP 104; 6/4/09RP 28-31. He then renewed the motion on the morning of trial, June 8, 2009. 6/8/09RP 19-28. Although several motions in limine were made that morning and the jury was not yet empanelled, this does not negate the renewal of the motion.

CrR 4.4(a)(2) provides:

> If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

Nothing in the rule suggests that a motion made on the day of trial but before the jury is empanelled is not effective to renew the prior motion.

None of the cases relied on by Respondent address that question, because none involve a motion to sever made on the day of trial. See State v. MacDonald, 122 Wn.App. 804, 95 P.3d

1248 (2004); State v. McDaniel, __ Wn.App. __, 230 P.3d 245, 2010 WL 1694522 (April 28, 2010); State v. Sandifer, 48 Wn.App. 121, 737 P.2d 1308 (1987); State v. Bryant, 89 Wn.App. 857, 950 P.2d 1005 (1998). Only one is helpful: State v. Hernandez, 58 Wn.App. 793, 794 P.2d 1327 (1990),

In Hernandez, this Court ruled that a motion to sever made on the morning of trial was "not a motion made 'before trial' as that term is used in CrR 4.4(a)." Id. at 797 (emphasis added). Respondent reads this holding to refer only to the first motion, not the renewed motion; in other words, Respondent argues the Court actually meant to say "as that term is used in CrR 4.4(a)(1)." SRB at 8-9. Of course, that is not what this Court said or what it meant, and it would not be logical for a phrase to have one meaning for section (a)(1) but an entirely different meaning for section (a)(2) of the same rule. A motion is either made before trial or during trial. There is no in-between point. If the morning of trial is not "before trial" for purposes of CrR 4.4(a), then it logically must be during trial for purposes of CrR 4.4(a), and Mr. Anderson's motion was properly renewed.

Respondent argues that the renewed motion on the morning of trial "precluded the court from rendering a decision informed by

an evidentiary record." SRB at 9. But this ignores the rule itself. CrR 4.4(a)(2) permits renewal of the motion "before or at the close of all the evidence." If the rationale of the rule was to ensure a ruling based on the full evidentiary record, then the rule would require that the motion be renewed at the close of the evidence.

This is particularly clear on the facts of this case, where there was significant pre-trial litigation and where the defense conceded one count but contested the other. Through the CrR 3.5 hearing, the court heard testimony from two police witnesses, giving him a fairly complete picture of the evidence which would be presented at trial. While renewing the motion to sever on June 8, 2009, defense counsel told the court Mr. Anderson planned to "essentially admit to" the misdemeanor violation of no-contact order. Thus, even without the full evidentiary record that would be developed at trial, the court knew that the amount of evidence and defense strategy as to each count would differ greatly.

The motion was properly renewed at a time when the court was capable of ruling on it but unfortunately, abused its discretion in denying the motion.

2. THE COURT ABUSED ITS DISCRETION IN DENYING THE RENEWED MOTION TO SEVER.

When the court denied Mr. Anderson's renewed motion to sever, it was aware the evidence of the misdemeanor was much stronger than the evidence of the felony. Even then, the court knew that Mr. Anderson's defense as to the felony charge of November 24 would be general denial, while he had no defense to the misdemeanor charge of November 25. 6/8/09RP 24-25. This is a clear-cut case of the evidence on one count being remarkably stronger than the other.

Respondent argues the misdemeanor charge was supported "solely" by eyewitness testimony (SRB at 16) but ignores the fact that Mr. Anderson conceded that offense when he renewed the motion to sever. 6/8/09RP 24. Defense counsel told the court, "it is very clear that he was in violation of the order [on November 25] because he was at her residence, and there really will be no factual dispute as to that." Id. Respondent argues that despite this statement, the court could not have known that Mr. Anderson would not argue lack of knowledge. SRB at 20. But lack of knowledge is a factual issue, and defense counsel plainly assured the court there was no factual dispute as to the misdemeanor

charge. Defense counsel did not just concede that Mr. Anderson was at the apartment, but actually conceded he was "in violation of the order," with all the factual and legal elements that implies.

Respondent goes on to wonder why Mr. Anderson would not have pled guilty to the misdemeanor charge if he had no defense to it. SRB at 20. There are any number of reasons why Mr. Anderson might have made that decision. Perhaps the State did not offer a deal, or the deal was not worthwhile, or Mr. Anderson has a principled objection to plea bargains. Although the State argues that the court "would have necessarily wondered" about this, there is no reason to make this assumption. The court may have known what happened with plea negotiations (which is not uncommon), or the court might not have cared, since that was not the question before it. The question was, given that Mr. Anderson was going to trial on both counts, should the counts be severed? Mr. Anderson's decision to plead not guilty is a red herring that does not help to answer this question.

Respondent contends, without support in the record, that it "would have been certain to the trial court ... that defendant had *some defense*." SRB at 21. Defense counsel had very frankly told the court there was no defense to the misdemeanor. Mere minutes

later, the court remarked, "as to... the clarity of the defenses, again, I have not heard from [defense counsel] on this point." 6/8/09RP 27. This remark is puzzling, since the record very clearly shows that defense counsel had just spoken on this point, and underscores the fact that the court based its ruling on untenable grounds, abusing its discretion.

Respondent also argues that the evidence would have to have been cross-admissible. SRB at 26-29. Respondent fails to explain, however, why the jury would need to know what brought the deputy to Ms. Jackson's apartment on November 25. SRB at 27. Police testimony is frequently sanitized to remove the risk of prejudice, juries are instructed not to speculate, and no harm results. The officer would only need to testify that he had Ms. Jackson's permission to enter her apartment, without suggesting how or why she gave her permission. This would not cast a negative light on anyone involved.

Respondent also argues Mr. Jackson's statement, "if you didn't say anything, nothing would happen," must refer to the events of November 24 and not November 25, because Mr. Anderson had just been found in violation of the no-contact order, regardless of whether Ms. Jackson said anything. SRB at 28. But

the most obvious inference is that Mr. Anderson was accusing Ms. Jackson of reporting his violation to the police on November 25. Since it was happening on the same date and he had been caught red-handed, this was the most immediate issue as he was being arrested. Whether or not she did so – whether or not her reporting, investigation of another crime, or some other reason brought the police to her door – was not a question the jury needed to answer, or likely would spend much time on. There was no prima facie showing that this statement was relevant to the felony charge. Therefore it would not have been cross-admissible.

Respondent offers no authority to support its contention that the evidence could have been cross-admissible to prove a common scheme or plan. SRB at 31-32. The "similar nature" of being in the same place twice in two days does not come close to passing the "stringent test of uniqueness" required for a common scheme or plan. Smith, 106 Wn.2d at 778. Respondent is unable to argue that it does. If Mr. Anderson had been tried for the felony alone, it would have been improper to admit evidence that he was found in the apartment some 36 hours later. This would be inadmissible propensity evidence.

Finally, Respondent does not explain its assertion that all

witnesses would have had to testify for all dates. As Respondent pointed out, Ms. Jackson was essentially irrelevant to the misdemeanor charge. For a trial on that charge alone, either Deputy Koster or Deputy Dawson could have testified to finding Mr. Anderson in her apartment and verifying the validity of the no-contact order. Only one officer would be needed; the testimony of the other officer and/or Ms. Jackson would add nothing to the State's evidence. Thus, concerns of judicial economy weigh in favor of severance.

Because the court erroneously denied the motions to sever, Mr. Anderson's trial was tainted by propensity evidence, unfairly prejudicing the jury against him on the felony charge. Reversal is therefore required.

B. CONCLUSION

For the reasons presented above and in the opening brief, Mr. Anderson respectfully requests this Court reverse his felony conviction and remand that case for a new trial.

Respectfully submitted this 9th day of June, 2010.

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Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63779-7-I
	)	
	)	
MARCUS ANDERSON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	MATTHEW PITMAN, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	MARCUS ANDERSON 752360 AIRWAY HEIGHTS CC PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 9TH DAY OF JUNE, 2010.

X_____

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