

No. 67469-2-I

IN THE
WASHINGTON STATE COURT OF APPEALS
DIVISION I

STATE OF WASHINGTON,
Respondent,
VS.
DANIEL JAMES MILLER,
Appellant.

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STATE OF WASHINGTON
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STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

DANIEL JAMES MILLER
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

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government: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; (3) multiple punishments for the same offense. North Carolina v. Pearce, 295 U.S. 711, 717, 99 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The United States Supreme Court has explained the rationale behind the Double Jeopardy Clause:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense.
...

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Washington State follows the "same evidence" rule. State v. Calle, 125 Wn.2d 763, 776, 777, 888 P.2d 922 (1995)("[T]he defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and law."). The "same evidence" rule is sometimes referred to as the "same elements test." United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556

I N T H E
W A S H I N G T O N C O U R T O F A P P E A L S
D I V I S I O N I I

STATE OF WASHINGTON,)	No. 67469-2-I
Respondent,)	
vs.)	
DANIEL JAMES MILLER,)	
Appellant.)	ADDITIONAL AUTHORITY
<hr/>)	

A. Identity of Moving Party

Movant' DANIEL JAMES MILLER, [hereinafter petitioner] requests the Court take into consideration the following authority in consideration of the issues raised in the appellant's opening brief.

B. Additional Authority

The following cases and constitutional provisions support ground 1 of the Opening Brief of Appellant: Boyd v. United States, 142 U.S. 450, 458, 12 S.Ct. 292, 295, 35 L.Ed. 1077 (1892)(finding that admission of prior crimes committed by defendants so prejudiced their trial as to require reversal); Brinegar v. United States, 338 U.S. 160, 174, 69 S.Ct. 102, 1310, 93 L.Ed. 1879 (1949)(similar); Old Chief v. United States, 519 U.S. 172, 179, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)(stating in dicta that

"[t]here is ... no question that propensity would be an 'improper basis' for conviction); U.S.C.A. V, VI and XIV.

C. Conclusion

Wherefore, appellant respectfully requests that the Court take into consideration the aforementioned authority.

DATED this ___ day of March, 2012.

Respectfully submitted,

DANIEL JAMES MILLER
Appellant

D e c l a r a t i o n

I, DANIEL JAMES MILLER, declare that, on March ___, 2012, I deposited the foregoing ADDITIONAL AUTHORITY, or a copy thereof, in the internal mail system of the Coyote Ridge Corrections Center, and made arrangements for postage, addressed to: DANIEL T. SATTERBERG County Prosecutor, 401 Fourth Avenue North, Kent WA 98032-4429

I declare under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

DATED at Connell, Washington on March ___, 2012.

DANIEL JAMES MILLER
Appellant

ASSIGNMENTS OF ERROR

1. Appellant Was Deprived Of Effective Assistance Of Counsel Where Counsel Failed To Move For Severance Of Appellant's Trial From That Of His Co-defendants.
2. Appellant's Multiple Convictions & Sentences Violates Double Jeopardy Where The Burglary And Robbery Amounts To the Same Criminal Conduct.
3. The Accomplice Liability Instructions Relieved The State Of Proving All Elements Of The Crimes Charged And Mislaid The Jury.
4. The Trial Court's Failure To Declare A Mistrial Violated Appellant's Right To A Fair And Impartial Jury.
5. The Trial Court Denied Appellant His Right To A Speedy Trial When Continuances Were Granted Over His Objections.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is A Criminal Defendant Deprived Of His Right To Effective Assistance Of Counsel When His Counsel Fails To Move For Severance Of Trials?
2. Does Multiple Convictions & Sentences For The Same Criminal Conduct Implicate The Prohibition Against Double Punishment?
3. Does Accomplice Liability Instructions Relieve The State Of Its Burden of Proving All Elements Of The Offenses Charged Where The Jury Was Confused As To How Accomplice Liability Attached To All Offenses?
4. Does A Juror's Exposure To Out-side Influences, And A Failure To Come Forward With That Information Show A Presumption Of Prejudice?

5. Is A Defendant Denied A Speedy Trial When The Trial Grants His Co-defendants Continuances Over His Objections?

I.

Statement of the Case

DANIEL JAMES MILLER [hereinafter Appellant] is currently serving a sentence of 171-months and 87-months in prison after having been convicted in a jury trial of 1° Burglary and 1° Robbery.

Appellant incorporates by reference the remainder of the statement of the case from the Opening Brief of Appellant and invites the Court to refer to the same.

II.

Argument

- A. APPELLANT WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." This fundamental right is assured in the State Court's by the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, 53 S.Ct. 55, 77 L.Ed. 158 (1932); U.S.C.A. VI; XIV.

A criminal defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984)), cert. denied, 510 U.S. 944 (1993)(emphasis in original).

The Constitutional right to counsel includes the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 N.14 (1970).

The 2-two prong Strickland test requires proof that the attorney acted deficiently and that the deficient performance prejudiced the defense. Id. Deficient conduct by an attorney must show errors so serious that the defendant in effect has been deprived of his Sixth Amendment right to counsel. Id. That means performance falling below the "customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." Id. The prejudice prong is met by showing a reasonable probability that, absent the deficient performance, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694.

Such a reasonable probability need only undermine confidence in the outcome and need not show that the deficient conduct "more likely than not" altered it.

Id.

(a) Defense Counsel Failed To Move For Severance Of Appellants Trial From His Co-Defendant's Resulting In Prejudicial Evidence Invading The Province Of The Jury.

Under CrR 4.4(c)(2)(i), a trial court has broad discretion to grant a severance when "it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant." In Re Davis, 152 Wn.2d 647, 101 P.3d 1, 36, (2004). Separate trials are not favored in Washington because of concerns for judicial economy, "[f]oremost among these concerns is the conservation of judicial resources and public funds.

Id.

A defendant seeking to sever trials from a co-defendant has "the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy." Id.

The United States Supreme Court has held that severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial

right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. U.S., 506 U.S. 534, 539 (1993). If a court finds sufficient prejudice, it may order severance even though the initial joinder of defendants was proper. U.S. v. Lane, 474 U.S. 438, 449 n.12 (1986).

In this case, defense counsels failure to move for severance of trials was not based on any identifiable defense strategy, there simply was no justification in allowing appellant to be tried jointly with Bingham and Cooper. The evidence of their prior criminal confrontations with Keatts only magnified the jury's consideration of the 404(b) prior bad acts evidence which came in from Keatts (RP 769-795; 8338-41; RP 776; 870). Moreover, the prosecution used the evidence of the prior criminal activity (counts III & IV) of Bingham & Cooper to implicate appellant in the more current event at Anways house. RP 1034

Court's have held that the "spillover" of direct evidence from a co-defendant's to defendants, against whom only circumstantial evidence presented warrants a severance of trials. See United States v. Fernandez, 892 F.2d 976, 989-91 (11th Cir. 1989); cert. dismissed,

495 U.S. 944 (1990); U.S. v. Davidson, 936 F.2d 856, 861 (1991)(defendant suffered substantial prejudice from spillover effect of co-defendants unrelated tax charges); U.S. v. Sarkisian, 197 F.3d 96, 976 (9th Cir. 1999)(joinder of counts improper because counts did not "naturally flow" from each other, counts did not fall into category of single conspiracy, and there was no substantial overlap in evidence).

Here counsels performance in failing to move for severance of trials fell below the "customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." Id. After all, the evidence used at trial against the co-defendants was highly prejudicial and not at all connected to counts I and II, and as noted the prosecutor used evidence associated with counts III & IV against appellant even though he was not charged in those counts, and they were totally unrelated. RP 1034 There is a reasonable likelihood that the outcome would have been different had counsel moved for severance.

Finally, the need for judicial economy was far outweighed here by the overwhelming prejudice, thus, counsel should have moved for severance. Williams

v. Washington, 59 F.3d 673 (7th Cir. 1995)([T]rial counsel's failure to move for severance constituted ineffective assistance).

Reversal of appellants conviction is therefore warranted.

B. THE COMBINATION OF THE FIRST DEGREE BURGLARY, AND ROBBERY SENTENCES VIOLATE DOUBLE JEOPARDY.

(a) The State Obtained a Conviction and Sentence's For First Degree Burglary; & First Degree Robbery Even Though the Crimes Constituted the Same Criminal Conduct.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington State Constitution prohibit the imposition of multiple punishments for the same offense. Ball v. U.S., 470 U.S. 856, 862 (1985); Whalen v. United States, 445 U.S. 684, 688, 63 L.Ed.2d 715, 100 S.Ct. 1452 (1980); Albernaz v. United States, 450 U.S. 333, 344, 67 L.Ed.2d 275, 101 S.Ct. 1137 (1981); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1990)(citing State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995); State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995)).

The Double Jeopardy Clause protects accused individuals from three distinct types of abuse by

(1983). "Washington's "same evidence" test is very similar to the rule set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 100, 76 L.Ed.2d 306 (1932); Calle, 125 Wn.2d at 777.

The same evidence rule controls "unless there is a clear indication that the legislature did not intend to impose multiple punishment."

[O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other". Calle, 125 Wn.2d 777-78.

In this case, the State convicted and sentenced appellant on one count of first degree burglary, and one count of first degree robbery and imposed multiple concurrent sentences 171-months and 87 months.

The basic rule applicable to this issue is that it is impermissible to convict a defendant of both a greater and lesser crime occurring at the same time and place. Whalen, Id., at 693-94; Ball, Id., at 862; Rutledge v. U.S., 517 U.S. 292, 304 (1996). Also See State v. Jones, 117 Wn.App. 721, 725-27, 72 P.3d 1110 (2003), review denied, 151 Wn.2d 1006 (2004)(charging

conduct occurring at same time and location as both attempted possession of cocaine and possession of cocaine violates double jeopardy protections).

As the Washington Supreme Court explained in State v. Pelky, 109 Wn.2d 484, 488, 745 P.2d 354 (1987):

"A lesser included offense exists when all of the elements of the lesser offense are necessary elements of the greater offense. Put another way, if it is possible to commit the greater offense without having committed the lesser offense, the later is not an included crime". (citations omitted).

In this case, appellant, as noted, was convicted and sentenced on one count of first degree burglary; one count of robbery in the first degree; both of these crimes happened at the same time, place and involved the same victim and criminal intent, thus, the multiple sentences and convictions implicate double jeopardy and the lower degree crime and sentence should be vacated. State v. Womac, 160 Wn.2d 64, 160 P.3d 40 (2007).

C. THE INSTRUCTION ON ACCOMPLICE LIABILITY RELIEVED THE STATE OF ITS BURDEN OF PROVING ALL ESSENTIAL ELEMENTS OF ALL OFFENSES.

(a) The Jury Instructions on Accomplice Liability Confused the Jury in Relation to All Offenses.

The Sixth Amendment provides that "[i]n all

criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The fourteenth Amendment states that no person shall be deprived of liberty without "due process of law." Taken together, these provisions of the constitution "requires criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." See United States v. Gaudin, 515 U.S. 506, 509-510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Also see Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

Here, the jury was confused about how the accomplice liability instruction applied to the various crimes. RP 1052-63(June 7, 2011); RP 3-7 (June 8, 2011) The trial court instructed the jury to follow your instructions. RP 7-8 (June 8, 2011). The defense told the court it would file a motion for a new trial based on the accomplice instructions, and juror issue. RP 1070-73.

Appellant did not receive the clerk's paper's

(CP) "counsel's briefing" related to jury instruction, and the trial transcripts of the new trial motion do not contain the legal arguments presented by counsel and co-counsel's, (see RP 1-7 July 22, (2011), thus appellant cannot adequately present all the issues related to the accomplice instruction, however, for all of the reasons stated in the superior court on the new trial motion, and briefing submitted, appellant believes, for those reasons, that the accomplice instructions denied him due process, and relieved the State of its burden to prove all the elements of the crimes beyond a reasonable doubt.

D. THE TRIAL COURTS FAILURE TO DECLARE A MISTRIAL VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY.

A defendant in a criminal proceeding is entitled to a trial by an impartial jury. U.S. Const. Amend. VI; Wash. Const. Art. 1, §22. A defendant's Sixth Amendment rights are violated even if only one juror was unduly biased or improperly influenced. See United States v. Keating, 147 F.3d 895, 903 (9th Cir. 1998)(citing Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988).

The United States Supreme Court has declared:

In a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror during a trial about a matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial ... The presumption is not conclusive, but the burden rests heavily upon the government to establish ... that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed 654 (1954).

The remedy for allegations of jury bias is a hearing, in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial. Remmer, 347 U.S. at 229-30; Smith v. Phillips, 455 U.S. 209, 216, 102 S.Ct. 940, 945, 71 L.Ed.2d 78 (1982).

The appellate court than reviews for an abuse of discretion from the trial courts denial of a mistrial. United States v. Randall, 163 F.3d 557, 559 (9th Cir. 1998). Accordingly, this court should determine whether the comments overheard by juror 1 "so affected the jurors ability to consider the totality of the evidence fairly that it tainted the verdict." United States v. Smith, 962 F.2d 923, 9335 (9th Cir. 1992).

When there is a reasonable basis to believe that the defendant was prejudiced by the jury's consideration of extraneous evidence, the trial court must grant a new trial. State v. Cummings, 31 Wn.App. 427, 430, 642 P.2d 415 (1982). And as in the federal cases, the trial court's decision will not be overturned absent abuse of discretion. State v. Balisok, 12 Wn.2d 114, 117, 866 P.2d 631 (1994).

In determining the effect of an irregularity, an appellate court should examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Each case of alleged juror misconduct is reviewed on its own facts. Cummings, 31 Wn.App. at 429, and any reasonable doubt must be resolved against the verdict. State v. Briggs, 55 Wn.App. 44, 55-56, 776 P.2d 1347 (1989).

In this case, appellants co-defendants counsel approached the trial court and moved to withdraw. RP 1065 The basis of the motion was that juror 1 had overheard counsel discussing a possible sentence that one of his clients might expect. RP 1066-71

The trial court and co-counsel's questioned the juror. Id. Appellant's counsel [Cruz] brought to the courts attention that the juror did not approach the bailiff or the court about the incident. RP 1071-72 The incident happened during deliberations. RP 1066

Here, the incident was clearly serious, as it revealed speculative evidence of the possible punishment in the case, possibly swaying the jurors deliberations. Moreover, the information was not cumulative. Finally, the trial court did not voir dire any other jurors to determine whether this evidence was shared with other jurors, and failed to provide any necessary curative instructions.

Here, the fact that the juror did not come forward and share this information with the court when it was overheard [during deliberations] and was therefore not questioned until after the verdict shows a presumption of bias and prejudice. Id.

Because any reasonable doubts regarding prejudice must be resolved against the verdict, appellants conviction must be reversed and he must be allowed a new trial with an untainted jury. Id.

E. THE TRIAL COURT DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT UNDER THE SIXTH AMENDMENT AND CrR 3.3 WHEN IT GRANTED THE CO-DEFENDANT'S COUNSEL'S MOTION TO CONTINUE THE TRIAL DATE OVER APPELLANT'S OBJECTION.

Under CrR 3.3(a), the time for trial for a person held in custody is 60 days after the commencement date specified in this rule. CrR 3.3(b)(1)(i). Under CrR 3.3(h). "[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice." CrR 3.3(h) See Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1997); Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992); Klopfer v. North Carolina, 386 U.S. 213, 223, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967).¹ The State is responsible for bringing a defendant to trial in a timely manner. State v. Lemly, 64 Wn.App. 724, 828 P.2d 587, rev. denied 119 Wn.2d 1025 (1992). The speedy trial rule imposes upon the prosecution a duty of good faith and due diligence. State v. Stewart, 78 Wn.App. 931, 935, 899 P.2d 128 (1995) aff'd, 130 Wn.2d 351, 922 P.2d 1356 (1996). The failure to

¹ Appellant is challenging the denial of his speedy trial rights under both Wash. Const. Art. 1, §22, and U.S.C.A. VI.

strictly comply with the speedy trial rule requires outright dismissal, regardless of prejudice. State v. Ralph Vernon G., 90 Wn.App. 16, 20-21, 950 P.2d 971 (1998).

Under CrR 3.3, art. 1,§22, and U.S. const. amend. VI, appellant had a right to be brought to trial within 60 days of his arraignment on this information. The speedy trial period could have commenced on December 28, 2010 when appellant was originally arraigned, thus, the State had at the latest until February 28, 2011 to bring him to trial, however, trial did not begin until April 28, 2011 because of co-defendant's counsel's moving for continuances over appellants objections.

Because the pre-trial transcripts have not been provided, and because appellant does not have any of the clerk's papers (CP'S), he cannot provide the court with all the dates where continuances were granted over his objections, he therefore requests that the court order the relevant portions of the pre-trial hearings and clerk's papers for proper consideration of this issue. RAP 9.10

As a result, because appellant was not brought to trial in a timely manner, under CrR 3.3(h), and

art. 1 §22; U.S. const. VI, this court should dismiss the charges with prejudice.

F. Conclusion

For the reasons stated, this Honorable Court should reverse Millers' conviction, and remand for a new trial, and resentencing, based on individual reversible error, or if the court finds none by itself to be prejudicial, than on the accumulation of error that denied appellant a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); U.S. v. Necochehea, 986 F.2d 1273, 1281 (9th Cir. 1993).

DATED this 13 day of March, 2012.

Respectfully submitted,


DANIEL JAMES MILLER
Appellant

D e c l a r a t i o n

I, DANIEL JAMES MILLER, declare that, on March 13, 2012, I deposited the foregoing STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW, or a copy thereof, in the internal mail system of the Coyote Ridge Corrections Center, and made arrangements for postage, addressed to: DANIEL T. SATTERBERG County Prosecutor, 401 Fourth Avenue North, Kent WA 98032-4429

I declare under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

DATED at Connell, Washington on March 13, 2012.


DANIEL JAMES MILLER
Appellant