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NO. 35145-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

DONTEZ M. JOHNSON,
Appellant.

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APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NOS. 05-1-02255-1 and 06-1-00326-1

HONORABLE RICHARD A. STROPHY, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in joining the charges against the defendant in Cause 05-1-02255-1 with those in Cause 06-1-00326-1 for trial.

B. STATEMENT OF THE CASE

On September 20, 2005, Hattie Englund returned to her apartment on Magnolia Street in Lacey at about 3:15 in the afternoon. She observed that two screens on her bedroom window had been removed, and the window was open. Trial RP 109-110. When she looked inside, she observed that her bedroom had been ransacked. She contacted police. Trial RP 110.

Lacey Police Officer Newcomb responded to the apartment at about 3:45 p.m. and contacted Englund. He entered and found there was no one inside. He attempted to obtain fingerprints at the point of entry, but was unsuccessful. Trial RP 138-141. Englund then determined the property that was missing consisted of two guitars, a DVD player, and \$100 taken from a drawer. Trial RP 111-112.

At an interview with Lacey Police Officer Corey Johnson on November 24, 2005, defendant Dontez Johnson admitted that he had knowingly participated in this burglary. He claimed that his role had been to be the get-away driver, while others went inside the residence to steal property. Trial RP 469-470; Ex 16B. The defendant explained that his practice in the burglaries was to park the vehicle a few houses away from the residence being burglarized, and leave the engine running while he waited for the others to return with the stolen property, and when the others returned he would drive all those involved and the stolen property away from the location of the burglary. Trial RP 472. This residential burglary was ultimately charged as Count 1 of the Second Amended Information in Cause No. 05-1-02255-1. 05-1-02255-1 CP 13-14.

On the evening of September 27, 2005, Jay Newcomb and his father returned from work to their residence on Goldfinch Drive in Lacey. This was a single family residence. Trial RP 120, 143. When

they had left the residence earlier that day, they had locked all the doors, but the kitchen window had been left unlocked. Trial RP 144-145. When they entered the residence that evening, they noted that the kitchen window was partially open. They found that their DVD player, some DVDs, a Playstation 2 game console, and several computer games were missing. Trial RP 119-121. In the 11-24-05 interview with Officer Johnson, defendant Dontez Johnson admitted that he had also participated in this burglary as the get-away driver. Trial RP 470-471; Ex 16B. This residential burglary was ultimately charged as Count 2 of the Second Amended Information in Cause 05-1-02255-1. 05-1-02255-1 CP 13-14.

As of October, 2005, Ingrid Hall resided in a double-wide mobile home on 14th Avenue SE in Olympia. During the period of October 11-12th, 2005, Hall had gone to stay with her daughter in Woodinville. Trial RP 158-159. Hall had locked the doors to her residence when she left. She had also secured the windows by positioning a stick by

each window to prevent it from being opened.
Trial RP 160-161.

On October 15, 2005, Hall's son went by her residence and observed that a door to the residence was ajar and one of the windows was open. Trial RP 242. He called his mother and asked her to return home right away. Hall arrived back home that afternoon. Trial RP 159. At that point, Hall and her son reported the matter to police. Trial RP 161.

Olympia Police Officer Chris Cook responded to the residence. A screen had been removed from the window that was open, and that was the apparent point of entry. The stick in this window had been tilted, such that it could be dropped out of place by jiggling the window. Trial RP 161, 166, 243. A screen had also been removed from another window, and bent in the process, but that window had not been opened. Trial RP 168, 243. The house had been ransacked. Missing property included a DVD player, jewelry, watches, and coins. Trial RP 162-165.

Officer Cook dusted for fingerprints on the opened window. He was able to lift good quality latent prints from that location. Trial RP 248-250. Those latent prints were transferred to the Washington State Patrol Crime Laboratory for fingerprint comparison. Examine Eileen Slavin compared the latents to inked fingerprints from the defendant. She concluded that two of the latent prints had been made by the left index finger of the defendant. Trial RP 433-444. This residential burglary was ultimately charged as Count 7 of the Second Amended Information in Cause 05-1-02255-1. 05-1-02255-1 CP 13-14.

During the early morning of October 18, 2005, James Thompson and his wife returned from work to their residence on Lacey Boulevard. When they had left the residence, they had locked all the doors but could have left one of the windows unlocked. Trial RP 171-172, 175. Upon their return, Thompson and his wife found that the back door and the door to the garage were open. Trial RP 173. There was also an opened window, which was the

likely point of entry. Trial RP 151. Property determined to be missing from the residence included a surround sound system, DVDs, computer games, a digital camcorder, a digital camera, a Playstation, a Nintendo Game Cube, some knives and jewelry. Trial RP 152, 173.

Lacey Police Officer Aaron Gardner responded to the residence to investigate the burglary that same morning. Trial RP 150. Gardner dusted for fingerprints but was unable to find any. Trial RP 152. During the 11-24-05 interview with Officer Johnson, the defendant admitted he was the get-away driver for this burglary as well. Trial RP 471-472; Ex 16B. This residential burglary was ultimately charged as Count 3 in the Second Amended Information in Cause 05-1-02255-1. 05-1-02255-1 CP 13-14.

On November 14, 2005, Louise Weight returned to her apartment on 14th Avenue in Lacey at about 10 that evening. Trial RP 177-178. She came inside and went straight to bed. When she woke up the next morning, she discovered that a screen had

been taken off a window that she had left open a crack, and that window was now wide open. Trial RP 178-180. A screen had also been taken off another window to her apartment, but she had locked that window and it was still secured. Trial RP 179-180. Weight determined that a candy dish containing approximately \$150 had disappeared from her coffee table. Trial RP 178.

Lacey Officer Sean Bell responded on the morning of November 15, 2005, to investigate this burglary. He looked for latent prints around the window that was the point of entry, but found only prints that were too smudged for identification. Trial RP 255-258. In the interview with Officer Johnson, the defendant admitted he participated in this burglary as the get-away driver. He mentioned the glass container with over \$100 that was taken from this residence. Trial RP 472; Ex 16B. This residential burglary was ultimately charged as Count 4 in Cause 05-1-02255-1. 05-1-02255-1 CP 13-14.

As of November, 2005, Kasey Soto lived in an

apartment on "E" Street in Lacey with her son, Daniel. Trial RP 205-206, 213. On November 16, 2005, Daniel was at school. Kasey and her friend, Erin Wooten, went shopping. Kasey had locked the doors. She had left the window to her son's room open, but covered by a screen. Trial RP 210. Kasey and Erin returned in the afternoon. The window to her son's room was open, but now the screen had been removed. Trial RP 207, 210.

Kasey went inside the apartment while Erin remained in the vehicle. Trial RP 207, 215. Kasey observed that her DVD player was missing. Trial RP 207. She also observed that the blinds in front of the back door were moving, indicating someone had just left through that opening. Trial RP 207, 211-212. Kasey ran outside. Trial RP 207.

While waiting for Kasey, Erin observed a young man walk from behind Kasey's apartment complex. He had on a grey hooded sweatshirt and jeans, and was carrying a backpack. Trial RP 208, 215-216. Then Kasey ran out yelling that she had

been robbed. Erin pointed to the young man. Kasey yelled at him, and the young man took off running. Trial RP 216. Neither Kasey nor Erin got a good enough look at the young man's face to be able to identify him later. Trial RP 209, 217. Kasey later determined that her digital camera and her son's Nintendo 64 game console were also missing. Trial RP 209.

Lacey police officers responded to Kasey's call for assistance. A K-9 police dog was used to try and track the burglar, but that effort failed. Trial RP 267. An attempt was also made to find latent fingerprints, but none could be located. Trial RP 267. This residential burglary was ultimately charged as Count 5 of the Second Amended Information in Cause No. 05-1-02255-1. 05-1-02255-1 CP 13-14.

As of November 22, 2005, the defendant was residing with Tangelette Johnson at her residence on Boone Street in Lacey. Trial RP 367-368. On November 22, 2005, Lacey Police Detective Shannon Barnes contacted Tangelette at the Boone Street

residence. Trial RP 287. While there, Barnes obtained a Nintendo 64 game console with the name "Daniel Soto" on it. Trial RP 288-290. At trial, Kasey Soto identified this console as the one taken from her residence on November 16, 2005. Trial RP 212-213.

In his interview with Officer Johnson, the defendant claimed that Richard Bizzle had committed the burglary of Kasey Soto's apartment, and had then come and told the defendant about it, and had showed him where the burglary had taken place. The defendant stated that another person involved in these burglaries, E.J. Sims, had given him the Nintendo 64 console with Daniel Soto's name on it. Trial RP 473-474; Ex 16B.

On the morning of November 21, 2005, Renae Gideon was alone at her home on 58th Street in Lacey. A little after 8 that morning, she was awakened by her front doorbell. Trial RP 186-188. Renae got up and looked through the peephole of her front door. She observed a young man standing outside the door, wearing a hooded sweatshirt and

a black coat. Trial RP 189. The young man continued to ring the bell and knock, but Renae did not answer the door. Eventually, she observed him get into an older, blue car driven by someone else. Trial RP 190-193.

A few minutes later, the same young man returned and again rang the front doorbell and knocked, but Renae still did not answer. Trial RP 195-196. Renae then heard him move to the side of the house and take off the screen on one of the windows. She heard him trying to open the window but without success. He then left and Renae contacted police. Trial RP 196-198.

Lacey Police Officer Ed McClanahan responded to Renae's residence and contacted her. She appeared to be frightened. Trial RP 201-203. McClanahan walked around the side of the house and found that a screen had been taken off one of the windows. Trial RP 203.

Lacey Police Sergeant David Campbell also responded to Renae's call about an attempted burglary. He heard from Dispatch that an older

blue sedan was involved. Trial RP 316, 319. As he approached the area of Renae's residence, he observed a vehicle fitting that description and stopped it. Tangelette Johnson was driving the vehicle. Her infant child was the only other occupant. Trial RP 318.

The night before, Tangelette had heard the defendant discussing with another male friend named E.J. a residence that E.J. had "cased" for a possible burglary. Trial RP 371, 373-374. The next morning, November 21st, Tangelette drove the defendant in her blue car to the house that E.J. had previously "cased". Trial RP 368, 374. This was shortly before Tangelette's vehicle was stopped by Sergeant Campbell. Trial RP 371-372.

On November 22, 2005, Detective Barnes obtained a black coat which Barnes understood to belong to the defendant from the residence of Tangelette Johnson, where the defendant was residing. Trial RP 288. At trial, Renae testified the coat looked like the one worn by the young man who had been outside her door on

November 21, 2005. Trial RP 199.

During the defendant's interview with Officer Johnson on November 24, 2005, the defendant stated that it was E.J. who was supposed to commit the burglary at the residence on 58th Street, but the defendant admitted he was there on the day when it was supposed to take place. Trial RP 475. The defendant stated that the plan was for the defendant to be the lookout for this burglary. Ex 16B.

The defendant claimed that a girl had dropped him off near the targeted residence. According to the defendant, he did not see E.J. at that point. The defendant stated he did go to the targeted residence and did take a screen off one of the windows. He then tried to open the window but found it was locked. The defendant claimed he only intended to look inside the residence to see if E.J. was there. Ex 16B. This incident was ultimately charged as attempted residential burglary, Count 6 of the Second Amended Information in Cause 05-1-02255-1. 05-1-02255-1

CP 13-14.

As of February, 2006, Sharon Morrow lived at the Surrey Lane Apartments in Lacey, at building 4, unit 5. Trial RP 334. Morrow had become acquainted with Tangelette Johnson, since Tangelette had also lived in building 4 of the Surrey Lane Apartments until the Fall of 2005. Trial RP 330, 337. Morrow had also become acquainted with the defendant because for a period of time the defendant had lived with Tangelette at the Surrey Lane Apartments. Trial RP 330, 337.

In late January or early February, 2006, the defendant stayed the night at Morrow's apartment. The next day she allowed him to leave several t-shirts and a bandanna at her place. As of February 20, 2005, the defendant had not returned to pick up his clothing. Trial RP 339-340. Morrow had discussed with the defendant where she worked and what her work hours were, including that she started work at 8 in the morning. Trial RP 340.

On February 19, 2006, the defendant spent the night at Tangelette's residence on Boone Street. When Tangelette woke up the next morning, February 20th, the defendant had already left. Trial RP 376.

On February 20, 2006, a meeting began at 8 a.m. between the manager of the Surrey Lane Apartments, Marguerite Thompson, and the maintenance supervisor for those apartments, Jack Kantzenberger. The meeting took place at Thompson's office in the Surrey Lane Apartment complex. Trial RP 326. While the meeting was taking place, a resident from building 4 came by and complained of noises coming from the back of unit 5 of building 4, which was Morrow's apartment. Trial RP 346. Katzenberger walked over to that location to investigate. Trial RP 346.

When Katzenberger arrived, he observed a male prying at a window of Morrow's apartment with a screwdriver. Initially, the male's back was to Katzenberger. Trial RP 346-347. Katzenberger

yelled at the male, who turned in response. Trial RP 347-348. Katzenberger recognized the defendant, whom he had seen at times when the defendant resided there with Tangelette. Trial RP 349-350. The defendant was wearing a hooded grey or dark-colored sweatshirt, jeans, and a backpack. Trial RP 350-351.

After the defendant turned toward Katzenberger, he struck Katzenberger in the head. Katzenberger fell to the ground unconscious. Trial RP 348. When Katzenberger regained consciousness, the defendant was gone. Katzenberger's head was hurting him badly. He made his way back to the manager's office and told her to call the police. Trial RP 349. Shortly thereafter, Katzenberger was checked by medics. Trial RP 359-362.

Lacey Police Officer Don Arnold responded to Thompson's office and spoke with Katzenberger. He then went over to Morrow's apartment, and subsequently met Morrow, who returned home from work upon learning from Marguerite Thompson want

had occurred. Trial RP 335, 390-392. Arnold observed that a screen had been taken off a window on the side of the apartment. That screen had a small tear at the bottom, but the side window was locked. Trial RP 393. Arnold then went to the back of the apartment, where he found a second window with the screen removed. This window had been broken. Trial RP 393.

Based on Katzenberger's identification of the defendant, and knowing that the defendant had been staying with Tangelette on Boone Street, Lacey officers went to that address. Trial RP 401. The defendant had returned to Tangelette's residence around 9:30 that morning. Trial RP 377. After his return, Tangelette observed a screwdriver next to a sweatshirt and jeans that were piled on the floor. Trial RP 378.

When the police arrived, Tangelette confirmed that the defendant was present. Trial RP 404. The defendant came outside and was placed in custody. Trial RP 404-405. Shortly thereafter, the defendant was informed of his Miranda rights.

Trial RP 408. He was then questioned concerning the attempted break-in at Morrow's apartment and the reported assault upon Katzenberger.

The defendant admitted he was the one who had tried to break into the apartment. He stated that his purpose was to retrieve the clothes he had left there. He acknowledged he had removed both window screens and had used the screwdriver to break the window in the back. Trial RP 409-411. The defendant further related that he had heard the maintenance man yell at him. He claimed that he had then started to walk away, and that the maintenance man then grabbed him, so he shoved the maintenance man to the ground and walked away. Trial RP 412.

The defendant admitted he had been wearing the sweatshirt and jeans when he did these things. Arnold inquired about this by asking whether the defendant had worn that clothing during the "burglary", and the defendant nodded in response. Trial RP 418-419.

On November 30, 2005, the defendant was

charged with four counts of residential burglary by Information in Thurston County Superior Court Cause No. 05-1-02255-1. 05-1-02255-1 CP 4-5. He ultimately went to trial on charges set forth in a Second Amended Information in that case filed on March 28, 2006. 05-1-02255-1 CP 13-14. In that charging document, the defendant was charged with residential burglary in Counts 1 through 5 and in Count 7, while he was charged with attempted residential burglary in Count Six. The particular alleged offense related to each of these counts has been set forth above.

On February 22, 2006, the defendant was charged with one count of attempted burglary in the first degree and one count of assault in the second degree in Thurston County Superior Court Cause No. 06-1-00326-1. 06-1-00326-1 CP 6. These charges concerned the events at the Surrey Lane Apartments on February 20, 2006, as summarized above.

At a hearing on June 19, 2006, the Honorable Judge Wm. Thomas McPhee considered the State's

motion to join Cause No. 05-1-02255-1 and Cause No. 06-1-00326-1 for trial. The court granted this motion. 6-19-06 Hearing RP 18-21. Written findings and an Order for joinder were entered on June 27, 2006. 05-1-02255-1 CP 65-66; 06-1-00326-1 CP 52-53. The court found that the evidence was strong on each count. The court further found that the evidence would be cross admissible, and that even if it was not, joinder would still be appropriate in this matter. The court dictated that the jury must be instructed to consider each count separately. 05-1-02255-1 CP 65-66; 06-1-00326-1 CP 52-53.

A principal objection raised by the defendant to joinder was that the defendant wished to claim self-defense in regard to the charge of second-degree assault, but could be intimidated from testifying about that if faced with cross-examination concerning all of the alleged burglaries in Cause 05-1-02255-1. The court addressed this concern by ordering that if the defendant did choose to testify solely concerning

the charge of second-degree assault, the State's cross-examination would be confined solely to the subject of the defendant's direct testimony. 05-1-02255-1 CP 65; 06-1-00326-1 CP 52.

These cases proceeded to a jury trial during the period of July 10-14, 2006. At the beginning of the trial, the court held a hearing pursuant to CrR 3.5 concerning the admissibility of the defendant's statements to Officer Johnson on November 24, 2005. The defendant stipulated to the admissibility of the statements he made to Officer Arnold on February 20, 2006. Trial RP 4-5.

After hearing testimony and argument, the court ruled that the defendant's 11-24-05 statements were admissible. Trial RP 89-100. Written findings and conclusions pertaining to this hearing were entered on July 27, 2006. 05-1-02255-1 CP 117-119.

The defendant did not choose to testify or present any witnesses. The jury found him guilty of Counts 1 through 4 and of Counts 6 and 7 in

Cause 05-1-02255-1, but not guilty of Count 5 in that cause. He was found guilty of both attempted first-degree burglary and second-degree assault in Cause No. 06-1-00326-1.

A sentencing hearing was held on July 27, 2006. He was ordered to serve concurrent sentences for all counts. For each residential burglary conviction he was ordered to serve 73 months in prison. For the attempted residential burglary in Count 6, he was ordered to serve 71 months. He was ordered to serve a 76-month sentence for attempted first-degree burglary and a 70-month sentence for second-degree assault. Thus, his total period of confinement was ordered to be 76 months. 7-27-06 Hearing RP 10-11.

C. ARGUMENT

1. The trial court did not abuse its discretion in joining the charges against the defendant in Cause 05-1-02255-1 with those in Cause 06-1-00326-1 for trial.

Joinder of offenses charged against a single defendant is governed by CrR 4.3(a) and RCW 10.37.060. CrR 4.3(a) states as follows:

Two or more offenses may be joined in

one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(1) Are of the same or similar character, even if not part of a single scheme or plan; or

(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Similarly, RCW 10.37.060 contains the following language:

When there are several charges against any person, or persons, for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments or informations the whole may be joined in one indictment, or information, in separate counts; and, if two or more indictments are found, or two or more informations filed, in such cases, the court may order such indictments or informations consolidated

RCW 10.37.060. CrR 4.3 does not supersede RCW 10.37.060 and both are to be interpreted consistently. State v. Thompson, 88 Wn.2d 518, 525, 564 P.2d 315 (1977). The two joinder provisions together constitute a liberal joinder rule in this state. Thompson, 88 Wn.2d at 525. Under this rule, the trial court has considerable

discretion to decide when the joinder of offenses is appropriate, and that judgment will not be overruled unless it is found that the trial court abused its discretion. Thompson, 88 Wn.2d at 525.

In this case, the trial court properly found that the joinder of Cause 05-1-02255-1 and Cause 06-1-00326-1 was permitted under Washington law. The charge of attempted first-degree burglary in Cause 06-1-00326-1 was of a similar character and was of the same class of crime as were the residential burglaries and the attempted residential burglary in Cause 05-1-02255-1. While the second-degree assault charge was different, its inclusion in the joinder was permitted as well. When one crime in a single transaction is of a similar character as crimes involved in separate transactions, and therefore properly joined with those other crimes, other offenses that are part of the same transaction as the properly joined crime may also be joined for trial. State v. Smith, 74 Wn.2d 744, 753-754, 446 P.2d 571 (1968), *vacated in part on separate*

grounds in Smith v. Washington, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972).

In Smith, supra, two counts of first-degree murder, four counts of robbery, and one count of assault, involving four separate incidents over the period of 1 and $\frac{1}{2}$ years, and involving separate witnesses, were joined together for trial. The Washington Supreme Court ruled that such joinder was appropriate. There was a robbery involved in each incident, and the other crimes were each part of one of these incidents in which a robbery was alleged. Smith, 74 Wn.2d at 753-754. Similarly, in the present case, the second-degree assault was part of the same incident or transaction in which the attempted first-degree burglary occurred.

Nevertheless, the defendant on appeal contends that the trial court abused its discretion in joining the two causes, arguing that the joinder was too prejudicial.

Before addressing this claim, it should be noted that the defendant did not renew his

objection to the joinder of these causes during the trial either before or at the end of the presentation of evidence. CrR 4.4(a)(2) states as follows:

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.

CrR 4.4(a)(2).

It is correct that technically there was no pretrial motion for severance, but rather an objection to joinder. However, there is no substantive difference between the two, and the defendant on appeal makes the same arguments that would apply to a denial of severance. Thus, it may be that the defendant's failure to renew his objection to joinder at trial would also have the effect of waiving the argument he now seeks to raise on appeal. However, it is not necessary to determine whether this would be so, since the trial court clearly did not abuse its discretion in joining the two causes, and so the defendant's argument on appeal fails on the merits.

To show the trial court abused its discretion in joining the causes against defendant Dontez Johnson for trial, the defendant must show that this joinder resulted in manifest prejudice that outweighed the concerns for judicial economy that support such joinder. State v. Bythrow, 114 Wn.2d 713, 717-718, 720, 722, 790 P.2d 154 (1990). The defendant seeks to minimize the concerns for judicial economy present here by noting that the primary witnesses for the two causes were different. However, this ignores the necessity of two separate trials and two separate juries that would have been necessary absent joinder.

It has been recognized that the joinder of offenses can prejudice a defendant in a number of ways: (1) the defendant may become embarrassed or confounded in presenting separate defenses; (2) the jury may use evidence of one of crimes charged to infer a criminal disposition on the part of the defendant and then use that as a basis for finding guilt on some other, weaker charge; or (3) the jury may cumulate evidence of the various crimes

charged and find guilt where the jury would not do so considering each crime separately. Bythrow, 114 Wn.2d at 718.

However, factors that balance against such potential for prejudice are: (1) the strength of the State's evidence on each count; (2) the jury's ability to compartmentalize the evidence; (3) whether the judge instructed the jury to decide each count separately; and (4) the cross-admissibility of the various counts. State v. Kalokosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

In the present case, there was strong evidence in support of all the counts. With regard to the residential burglaries charged in Counts 1 through 4 of Cause 05-1-02255-1, the defendant had admitted to being an accomplice to each of those burglaries. Ex 16B.

With regard to the attempted residential burglary alleged in Count 6, the defendant admitted he was the one who went to the side of the house, took off the screen, and attempted to

open the window, and those admissions strongly supported the conclusion that he was the individual Renae Gideon observed at her front door. Ex 16B. This was further supported by the fact that Renae had observed the individual get into a blue car, and Tangelette Johnson had testified she had transported the defendant to that area in her blue car. Trial RP 192, 368.

The defendant claimed his purpose in trying to open the window was to see if "E.J." was inside. Ex 16B. However, there was no evidence of this "E.J." being anywhere near that residence at that time. The defendant admitted that he was at that location to assist in the commission of a burglary. Ex 16B. The fact that the defendant knocked and rang the door bell repeatedly before going to the side window indicated his actual concern was whether a resident was at home, and when it appeared that was not the case, he took steps to accomplish a burglary of that residence.

As regards the residential burglary charged in Count 6, concerning the residence of Ingrid

Hall, the defendant's fingerprint was found twice on the window that was used as the point of entry for that burglary. Trial RP 248-250, 443-444.

With regard to Count 5, concerning the burglary at Kasey Soto's residence, the defendant was in possession of stolen property from this burglary. Trial RP 212-213, 288-290, Ex 16B. However, the defendant denied involvement in the burglary itself, and on this count the jury found him not guilty.

With regard to the charge of attempted first-degree burglary on February 20, 2006, in Cause 06-1-02255-1, the defendant admitted he had attempted to break into Morrow's apartment without her permission. Trial RP 410-411. His claim that he did this to retrieve his own property was highly implausible. The property consisted of some t-shirts and a bandanna. That property had been there since at least early February only because Morrow had agreed to hold it for him. He could have picked it up from her at any time. He knew she began work at 8 a.m., but had waited until she

would be at work to go to her residence and then try to break in. Trial RP 339-340.

The same implausibility characterized his claim of self-defense regarding the assault. By his own admission, he was attempting to commit a crime when Katzenberger came upon him. The defendant's attempt to leave at that point was obviously to escape detection, even under his own version. The defendant's claim that he used lawful force because Katzenberger tried to detain him at that point was not a claim likely to sound reasonable to anyone. Trial RP 561-564.

Considering the second factor mitigating any prejudice from the joinder of offenses, this was a case in which the jury would not have difficulty compartmentalizing the evidence, even though there was a similarity in the manner in which each burglary was attempted or committed. The counts referred to discrete incidents separated in place and time. In Kalakosky, supra, Kalakosky was found guilty of four rapes and one attempted rape. Like the present case, the charges arose out of

separate incidents. In considering the appropriateness of joinder, the State Supreme Court found that the jury could easily compartmentalize the evidence in that case.

In the present case, it was not a particularly complicated task to keep the testimony and evidence of the five crimes separate. Each victim described quite a different episode even though there was much in the rapist's methods that was the same.

Kalakosky, 121 Wn.2d at 537.

The defendant contests this conclusion, arguing it was likely the jury did not compartmentalize the evidence, but rather cumulated the evidence from Cause 05-1-02255-1 with that of Cause 06-1-00326-1 to find guilt where it would not have been found otherwise. However, if there was any tendency on the part of the jury to cumulate evidence, surely that would have applied even more so to the counts in Cause 05-1-02255-1. Nevertheless, the jury found the defendant not guilty of Count 5 in that cause, where there was no confession. This outcome supports the conclusion that the jury in this matter appropriately did compartmentalize the

evidence.

With regard to the third mitigating factor, the jury was properly instructed to decide each count separately.

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..

Court's Instruction to the Jury No. 2 in 05-1-02255-1 CP 84-116.

The trial court found that joinder was proper in this case even if the evidence was not cross-admissible. 05-1-02255-1 CP 65. Even though evidence regarding separate counts would not be cross admissible in separate proceedings, joinder can still be appropriate where the other mitigating factors are present. Bythrow, 114 Wn.2d at 720. In Kalakosky, the Washington Supreme Court found that it was not necessary to determine whether the evidence of the separate counts would have been cross admissible in separate trials in order to affirm the joinder of offenses in that case, given the presence of the other three factors.

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, we conclude that the trial court was well within its broad discretion in finding that the potential prejudice did not outweigh the concern for judicial economy.

Kalsakosky, 121 Wn.2d at 539.

However, in fact the evidence of the defendant's residential burglaries and attempted burglary in Cause 05-1-02255-1 would have been admissible in a separate trial of Cause 06-1-0326-1 as evidence of the defendant's intent in removing the window screens at Morrow's apartment and breaking her window. The charge of attempted first-degree burglary required the State to prove that the defendant intended to commit a crime against property therein. RCW 9A.52.020. The defendant denied he had this intent. Trial RP 409-410. It would have been relevant for the jury considering that charge to know that this same defendant had, in previous months, been involved in a series of burglaries or attempted burglaries in which that same method of entry had been used.

In Bythrow, supra, Bythrow had robbed a gas station while another male acted as lookout. He was also accused of having been one of two men who robbed a store shortly thereafter. Bythrow admitted he was at the store at that time, but denied having the intent to commit the crime. In analyzing the appropriateness of joining the two incidents for trial, the State Supreme Court found that evidence of the gas station robbery would have been admissible in a separate trial of the store robbery to show Bythrow's intent. Bythrow, 114 Wn.2d at 715-716, 718-719.

In State v. Eastabrook, 58 Wn. App. 805, 795 P.2d 151 (1990), the defendant was found guilty of first-degree burglary and first-degree rape arising out of one incident. He also was found guilty of second-degree burglary of the apartment of a woman who lived alone in an incident occurring about a month and a half after the first incident. Eastabrook, 58 Wn. App. at 808-809. In joining charges arising out of the two incidents for trial, the trial court had found that evidence

of the first-degree burglary and first-degree rape would be admissible in a separate trial of the second-degree burglary charge to prove intent. In considering the issue of joinder in this case, the Court of Appeals agreed that finding of the trial court. Eastabrook, 58 Wn. App. at 812-813.

In several prior cases, the Court of Appeals has cautioned that prior similar criminal acts are not legally relevant to prove the intent element of a charged offense if the basis for relevance is merely a showing that the defendant had a past propensity to commit such crimes. State v. Wade, 98 Wn. App. 328, 335-336, 989 P.2d 576 (1999); State v. Holmes, 43 Wn. App. 397, 399-400, 717 P.2d 766 (1986). There must, instead, be some similarity between the prior acts and the charged offense, other than the identity of the defendant, from which his intent can be properly inferred. Wade, 98 Wn. App. at 336.

In Holmes, for example, Holmes had removed a window screen to break into a building, and so there was the issue of what his intent would have

been upon entering the building. The trial court allowed evidence of two prior juvenile convictions for second-degree theft to show Holmes' intent. The Court of Appeals reversed since the only connection would be by reasoning "once a thief, always a thief". Holmes, 43 Wn. App. at 399-400.

However, in the present instance, there is a marked similarity between the burglaries and attempted burglary in Cause 05-1-02255-1 and the attempted first-degree burglary in Cause 06-1-00326-1. In each instance of an accomplished burglary in Cause 05-1-02255-1, entry had been made into a residence through a window after removal of the screen. While the defendant claimed he had only acted as the lookout for the burglaries, he admitted he was the one who took off the screen and attempted to open the window at the location which was the residence of Renae Gideon, a place he had targeted for a burglary. Ex 16B. Furthermore, his fingerprints had been found on the window, which was the point of entry, at the residence of Ingrid Hall. Trial RP 248-

250, 443-444. Thus, in this case, the evidence of the crimes in Cause 05-1-02255-1 would have been legally relevant as a basis to argue that the defendant's method of attempting to break into Morrow's apartment was a method he had previously, and recently, used to commit burglaries, and that this similarity indicated the defendant's actual intent.

The defendant contends that his ability to present separate defenses was confounded by the joinder in this matter. The defendant specifically refers in this regard to his self-defense claim. However, the record does not support that contention.

As noted previously, the trial court protected the defendant's ability to testify solely in support of his claim of self-defense by ordering that if the defendant did so, the State could not cross-examine regarding any other charges. 05-1-02255-1 CP 65-66. Despite this order, the defendant chose not to testify.

The defendant's denial as to the burglary and

attempted burglary charges did not contradict his claim of self-defense, and so the defendant was not prejudiced in that manner. The major difficulty the defendant faced in claiming self-defense did not derive from the joinder of Cause 05-1-02255-1, but rather from the sequence of events leading up to the alleged assault, including the attempted unlawful entry into Morrow's apartment, which he acknowledged to police. All of that would still have been in front of the jury even if there had been no joinder in this case.

D. CONCLUSION

Based on the above, the State respectfully requests that this court find that the trial court did not abuse its discretion in joining Causes 05-1-02255-1 and 06-1-00326-1 for trial, and affirm the defendant's convictions in both causes.

DATED this 11th day of April, 2007.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
DONTEZ M. JOHNSON,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

COURT OF APPEALS
 STATE OF WASHINGTON
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 BY James C. Powers DEPUTY
 STATE CLERK

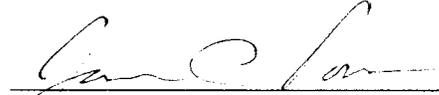
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 11th day of April, 2007, I caused to be mailed to appellant's attorney, THOMAS E. DOYLE, a copy of the Respondent's Brief, addressing said envelope as follows:

Thomas E. Doyle,
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 11th day of April, 2007 at Olympia, WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney