

35492-6-II

No. 35502-7-II

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

STATE OF WASHINGTON

Respondent

vs.

MICHAEL DARREN ODELL

Appellant

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COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Robert Lewis
Superior Court No. 05-1-01731-7

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The trial court erred in failing to grant Mr. Odell's motion for a separate trial.

The state argues that the trial court's ruling denying the several motions for severance should be upheld as an appropriate discretionary ruling. The state argues that the conflict between the defendants in this case were not sufficiently antagonistic to warrant severance. The state relies primarily on *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982), *In re Davis*, 152 Wn. 2d 647, 101 P.3d 1 (2004) and *State v Hoffman*, 116 Wn. 2d 51, 804 P.2d 577 (1991). This argument should be rejected.

In *State v. Canedo-Astorga*, 79 Wn. App. 518, 903 P.2d 500 (1995), the court noted that a defendant can demonstrate specific prejudice flowing from denial of a motion for severance by demonstrating *any* of the following factors:

“ (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a codefendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.”

State v. Canedo-Astorga, 79 Wn. App. 518, 903 P.2d 500 (1995), (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985)) and cited with approval in *State v. Larry*, 108 Wn. App. 894, 34 P.3d 241 (2001).

- a. The defenses of Odell and Johnson were irreconcilable.

As the court in *United States v. Throckmorton*, 87 F. 3d 1069, 1072 (9th Cir. 1996) noted, defenses are antagonistic when “acceptance of

the co-defendant's theory by the jury precludes acquittal of the defendant." In the present case, this was certainly true after Johnson took the stand. Johnson testified that Mr. Odell was aware of and had planned the burglary on the house of Gerald Newman. Johnson's "defense" was that he was only accomplice to a burglary for financial gain, and thus should not be liable for the felony murder that followed. Johnson also admitted liability for the assault on Gerald Newman. Johnson's testimony directly implicated Mr. Odell in the planning and commission of the burglary, and thus for the assault on Newman at least. Mr. Odell's defense was that he did not plan the burglary and had no knowledge that Johnson, Rekdahl, and Balaski were planning a crime or crimes at the house. Reduced to its essentials, Mr. Odell's defense that he was not an accomplice to the other men's activities because he lacked the knowledge element for accomplice liability. His defense was completely irreconcilable with Johnson's "defense", because acceptance by the jury of Johnson's story that Odell knew in advance what would happen at Newman's house precluded Mr. Odell's acquittal.

The Washington cases cited by the prosecutor do not contradict the principle that severance may be required when co-defendants have antagonistic defenses. In each, however, the court held either that the defenses were not conflicting (*Grisby* and *Hoffman*) or that conflict between co-defendants was not sufficient to overturn the trial court's

discretionary ruling (*Davis*). An examination of the details of these cases is instructive.

In re Davis, supra, was a post-conviction attack on Davis' conviction which presented Davis with several procedural hurdles not present in the case at bar. Davis alleged that his lawyer was ineffective for failing to move for severance at all. Davis thus faced the hurdle of proving three things under the standard in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct 2052, 80 L.Ed.2d 674 (1984): That a competent attorney would have moved for severance, that the motion would have been granted if made, and that if granted there was a reasonable probability that he would have been acquitted. The court held that even assuming the first hurdle was met, Davis could not show the motion would have been granted, and if granted, that he would have been acquitted. On the last point, the court noted that the evidence presented at a separate trial would have been the same as was presented at his joint trial, so Davis could not show there was a reasonable probability that the result would have been different even if his case had been severed.

Unlike the present case, where Johnson took the stand and directly implicated Mr. Odell during the course of his "defense", the co-defendant in *Davis* did not testify at all, much less in a way that directly implicated Davis. Wilson, the co-defendant, did not offer any evidence that he was innocent, and that Davis was solely responsible for the crime. Consequently, Davis could not show his defense was irreconcilable with

Wilson's. Davis also could not demonstrate that the evidence would have been significantly different from that presented at the joint trial. Again, this is in striking contrast to Mr. Odell's case. If Odell's trial had been severed from Johnson's, Johnson's damaging testimony would not have been presented to the jury at all.¹ The state would have been left with only circumstantial evidence to support its argument that Mr. Odell was an accomplice to the activities of the other three co-defendants, since there was no physical evidence connecting him with any of the activities of the three co-defendants inside the Newman house.

In *State v. Hoffman, supra*, the court noted that "mutually antagonistic defenses *can be sufficient* to support a motion for severance, but this is a factual question which must be proved by the defendant." *Hoffman* at 76. (emphasis added). Hoffman argued that separate trials were required because his father, the co-defendant, had a reputation for quarreling with tribal officials, and the victim of the killing was a tribal police officer. However, as the court observed, the two defenses presented were consistent, as both Hoffman and his father claimed self-defense during the shoot-out which led to the tribal police officer's death. In contrast, Mr. Johnson's testimony did not support Mr. Odell's lack of knowledge defense but was instead dealt a potentially fatal blow to it if the jury believed Johnson's story. Johnson's testimony filled in the significant

¹ Johnson had not made any statement to the police so there was no possibility of even a redacted statement being admitted to comply with the requirements of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968).

gaps in the state's case regarding accomplice liability. So unlike the defendants in *Hoffman*, Johnson and Odell's defenses were in no way consistent.

In *State v Grisby, supra*, the defendants took the position that severance was required *as a matter of law* when there were antagonistic defenses.² The court observed, as it did later in *Hoffman*, that "mutually antagonistic defenses *may* on occasion be sufficient to support a motion for severance" (emphasis added) but this was a factual question which needed to be proven. *Grisby*, at 508. However, as in *Hoffman*, the defenses of Grisby and Frazier, his co-defendant, were *not* factually antagonistic. Grisby and Frazier both testified that they went armed to the apartment of a man named Walker to settle a quarrel over the quality of drugs that Frazier had purchased there. Shots were fired and five people were killed. Grisby himself was wounded. The court pointed out that the sole dispute between the co-defendants was who fired the fatal shots. There was thus no basis for an argument by Grisby that he was not Frazier's accomplice because he knowingly accompanied Frazier armed to the scene of the murder.

CrR 4.4 (c) provides that severance should be granted whenever "it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." Appellant submits that unlike the defendants in

² In reviewing cases from other states, the *Grisby* court noted that in *State v Myrick*, 228 Kan. 406 616, P.2d 1066 (1980) the Kansas Supreme Court held that antagonistic defenses present the most compelling ground for severance. *State v. Grisby, supra* at 508.

Davis, Grisby and Hoffman, there was an irreconcilable conflict between his defense and that of co-defendant Johnson, a conflict that was painfully obvious when Johnson took the stand in his own “defense.” It would be difficult to conceive of a fact pattern in which the “factual question” alluded to in *Hoffman* could be proven more convincingly. If severance was not required in this case, it will never be required in any case. Severance was required to promote a fair determination of guilt or innocence in this case.

Significantly, the state does not address any of the cases from other jurisdictions cited in appellant’s opening brief in which the defenses of co-defendants *were* deemed to be sufficiently antagonistic to require separate trials, such as *Day v. State*, 196 Md. 384, 76 A.2d 729 (1950) and *State v. Blanchard*, 44 N.J. 195, 207 A.2d 681 (1965).

Unlike a pretrial motion for severance, where the trial judge may be required to speculate as to the extent of conflict between defendants, the trial court here had both an offer of proof from Johnson which demonstrated the Grand Canyon-esque rift between the defenses, and then had the testimony itself. On these facts, Mr. Odell was substantially prejudiced by the trial court’s failure to grant severance of his case from that of Johnson. This court should reverse his conviction and remand for a new trial.

2. The warrantless “detention” of Odell’s vehicle was not justified by reasonable suspicion that it was carrying the perpetrators of the burglary.

The parties do not disagree that Mr. Odell’s Tahoe and its occupants were seized without a warrant. They also do not disagree as to the legal standards necessary to support such a warrantless seizure. The state argues that Deputy Young had a basis for believing that there was a “substantial possibility” both that criminal conduct had occurred *and* that the occupants of the Tahoe were involved in it.

Appellant does not dispute that at the time of the stop, Young had sufficient information to believe a crime had taken place at Gerald Newman’s home on Evergreen Boulevard. There was, however, an insufficient connection between that crime and Mr. Odell’s Tahoe.

Mr. Koenekamp had seen a white Tahoe driving eastbound on Evergreen Boulevard within two minutes of the time that witnesses heard shots fired. Koenekamp had previously seen a white Tahoe parked on Evergreen in the vicinity of the place where the shots were fired. He did not, however, see anyone enter or leave the car. Significantly, Koenekamp admitted he *did not know* if the car was associated with the shots he heard. RP XIII-A 218-19, 221. When Young followed up on the investigation via his computer after finishing his shift at the Clark County fair, he found that it was *unknown* if the Tahoe was involved in the shooting. RP XIII-A292, 309-310.

After first following another Tahoe on his way home, Young followed Mr. Odell's Tahoe for about two miles southbound. During that time, the car did not engage in any evasive maneuvers. RP XIII-A 286, 299. Nor was Young able to make any observations about whether the occupants of the Tahoe corresponded in any way with the perpetrators of the burglary. The spot where he detained the Tahoe was about 7 miles away from the spot where the shots had been fired. It had been about an hour since the report that shots had been fired.

The warrantless seizure was thus not justified at its inception for several reasons. First, it had been an hour since the time of the shooting, thus widely increasing the radius where a suspect vehicle could conceivably be located. Second, the Tahoe was seven miles from the scene of the shooting. Third, the Tahoe had not engaged in any suspicious driving under Young's surveillance. Fourth, Young was not able to obtain further information about the occupants of the vehicle, either as to their number or racial identity. Finally, and most importantly, the government's chief source of information about the Tahoe, Mr. Koenekamp was himself unsure about whether the Tahoe was connected to the burglary or not. Young knew this when he made the stop. The trial court erred in denying the motion to suppress the evidence derived from this warrantless detention. This court should reverse the judgment and remand to the trial court for a new trial without the evidence seized from the occupants of the Tahoe.

3. There was insufficient evidence to convict Michael Odell of an assault on Ms. Harrington as an accomplice or principal.

Mr. Odell challenges the sufficiency of the evidence to convict him for the assault on Laura Harrington. The prosecutor's response does not attempt to differentiate in any meaningful way between the three co-defendants who were on trial, but merely argues that an accomplice need not have specific knowledge of every element of the crime committed by a principal, provided that he has general knowledge of that specific crime. This begs the very question presented here, and also reiterates the problems identified with the accomplice instructions criticized by the court in *State v. Roberts*, 142 Wn. 2d 471, 14 P.3d 713 (2000) and *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). There was absolutely no evidence presented that Mr. Odell entered Mr. Newman's house, or that he participated in any way in the shooting of Mr. Harrington. There is no evidence he knew that Mr. and Ms. Harrington were even at the Newman house that night. Johnson's testimony suggests that the person who shot Mr. Harrington was either Rekdahl or Belaski. The gunshot residue evidence suggested that Balaski had fired a gun recently. There was therefore no basis for the jury to convict Mr. Odell of the assault on Ms. Harrington as a principal.

Similarly, there was no legal basis for his conviction as an accomplice. There was no evidence which suggested that Mr. Odell had solicited, commanded, encouraged or requested either Rekdahl or Belaski to shoot at Mr. Harrington or Ms. Harrington. There was no evidence that

he had aided or agreed to aid either man in either assault, even if Johnson's evidence that he encouraged the burglary of Newman's house is given full credence. He was not present at the scene of the shooting nor ready to assist by his presence. That basis for accomplice liability might attach only to either Rekdahl or Balaski, whoever was not the shooter.

In short, the prosecutor's argument on appeal has the same fallacy that the trial prosecutor's argument had. It expands accomplice liability to all putative accomplices for *any* crime committed by any of their number, whether they had knowledge of the commission of the crime or not. The trial prosecutor argued specifically that if any of the co-defendants agreed to the "plan" to commit a burglary, he was liable for *any* crime committed by the others. RP XXVII 2882-2883. This is exactly the argument rejected by our Supreme Court in *Cronin*:

As we indicated there, [in the Court's recent decision in *State v. Roberts*] the plain language of the complicity statute does not support the State's argument that accomplice liability attaches so long as the defendant knows that he or she is aiding in the commission of any crime. On the contrary, the statutory language requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged. We also noted in *Roberts* that the legislative history of RCW 9A.08.020 supports a conclusion that the legislature "intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge'". . . .

We adhere to our decision in *Roberts* and conclude here, as we did in that case, that the fact that a purported accomplice knows that the principal intends to commit "a crime" does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal.

State v Cronin, supra at 578-579.

There was thus no basis, legal or factual, to support Mr. Odell's conviction as a principal or accomplice for a first degree assault on Ms. Harrington. This court should vacate that conviction and remand for resentencing.

4. The trial court erred in denying the motion to suppress evidence seized from the residence and workplace of Michael Odell.

Police in Oregon sought and obtained a warrant to search Mr. Odell's residence on Winchell Street and his shop on Albina Avenue. The trial court ruled that the state had not presented a sufficient basis to believe that either weapons used in the burglary nor clothing or trace evidence would be found at either location. Conclusion of Law 6, CP 349. The state has not cross–appealed this conclusion of law. However, the trial court did conclude that there was a sufficient nexus to search for three things: the person of Adrian Rekdahl, written documents which might support the existence of a conspiracy, and evidence connecting Mr. Odell to the firearms or ammunition used in the burglary, but not the firearms themselves. The trial court's conclusion was based on the fact that radios were found in the Tahoe when it was stopped, the location of two co-defendants' cars in the neighborhood of the shop, and "written documents found at another location connecting the suspects together." Conclusion of Law 8, CP 349.

To ask for authority to search the house and office for evidence of a conspiracy between Odell and the others, the officer's affidavit cites his

training and experience as the basis for believing that people “in the criminal subculture...will communicate their plans to commit the crime through both verbal and written dialogue” and that such writings would therefore be found at Mr. Odell’s house and shop. Affidavit p.22, located in Appendix to Opening brief. As argued in Appellant’s opening brief, this type of boilerplate supposition about the habits of the “criminal subculture” is no substitute for facts allowing a reasonable inference that a particular item or class of evidence is to be found at the place the police seek to search.

In *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999), our court did an exhaustive survey of state and federal decisions dealing with the nexus issue. The court concluded:

Most courts, however, require that a nexus between the items to be seized and the place to be searched must be established by specific facts; an officer's general conclusions are not enough. 139 Wn. 2d at 145.

As demonstrated above, our precedent requires probable cause be based on more than conclusory predictions. Blanket inferences of this kind substitute generalities for the required showing of reasonably specific “underlying circumstances” that establish evidence of illegal activity will likely be found in the place to be searched in any particular case. We reiterate that “[p]robable cause to believe that a man has committed a crime [in the street]. . . does not necessarily give rise to probable cause to search his home.” *State v. Dalton*, 73 Wn. App. 132, 139, 868 P.2d 873 (1994) (quoting *Commonwealth v. Kline*, 234 Pa. Super. 12, 17, 335 A.2d 361 (1975)) cited with approval in *Thein, supra* at 147-48.

As for the “documents found at another location connecting the suspects together”, the affidavit is decidedly ambiguous. At page 13-14, the affiants stated that they found mail “that showed a relationship

between ...Balaski...Odell, and...Rekdahl.” The affiant never states, however, *what* the documents were or *how* they established a relationship. The only document which arguably showed any kind of connection between Balaski and Odell was a map with directions to Odell’s house on Winchell Street. For the reasons stated by the *Thein* court, there was not a sufficient nexus shown between the documentary evidence sought and Mr. Odell’s house and shop.

The evidence suggesting Rekdahl might be at the house at the time the police sought permission to search was essentially limited to evidence that a phone call had been placed, not from the residence or shop, but from a cell phone belonging to the business. This call was at 10:30 in the morning on Sunday, August 7, the day after the burglary. The police were seeking the warrant on August 9, two days later. Since this call had come from a cell phone, which is not linked to any particular location, and was at least 48 hours old, there was no basis to believe that two days later Rekdahl would still be found either at Odell’s residence or at his shop.

The affidavit suggested that firearms, or evidence relating to them, would be found at Odell’s residence or shop. The “facts” supporting this supposition consisted of two real facts (that the burglary had involved firearms, and they had not been found at other defendants’ homes) and the officer’s boilerplate conclusion that because guns are expensive and hard to replace, they would be hidden in a criminal’s home, or that of his relatives.

A comparison with *Thein* is again instructive in dispelling the idea that this boilerplate was sufficient to constitute probable cause. The *Thein* court rejected the idea that because drugs were not found in one place, they might be found in another place linked to Thein: his home.³ Beyond that, the Oregon officers presenting the affidavit presented no facts, other than the boilerplate speculation found at page 21 of the affidavit, that would raise a reasonable inference that evidence relating to the firearms used in the burglary would be found at Odell's residence or shop. The trial court explicitly rejected the idea that guns themselves could be found in either location, but concluded that evidence relating to them could be. Appellant submits that there was simply not enough of a showing that either category of evidence would be found at Mr. Odell's shop or home. This court should therefore reverse the trial court, and order a remand with directions to suppress the evidence seized from Mr. Odell's house and shop.

5. The trial court erred in not determining that Count I and Count IV constituted the "same criminal conduct" under RCW 9.94A.589 (1)(a).

The trial judge indicated that although he had "discretion to merge a burglary in given circumstances" notwithstanding the anti-merger statute, he declined to do so here since he felt that the burglary was an

³ "We also disagree with the Court of Appeals reasoning that since no grow operation was found at South Brandon, it was likely marijuana 'would be found at the other place Thein controlled — his home.'" *Thein, supra* at 150.

independent violation from the assaults which also occurred. RP XXIX 2943-44.

Appellant did not argue in his opening brief that the burglary count and the felony murder count should “merge.” Instead, he argues that the two counts constitute the “same criminal conduct” for purposes of determining the offender score. The state has cited no cases which exclude burglary from the category of cases subject to the “same criminal conduct” statute and in fact several Washington decisions have held that burglary can be the “same criminal conduct” as other crimes committed during the same transaction. See e.g. *State v. Dunbar*, 59 Wn. App. 447, 798 P.2d 306 (1990); *State v. Lessley*, 118 Wn. 2d 773, 827 P.2d 996 (1996) (trial court has discretion to apply anti-merger statute even when same criminal conduct is found, *Dictum*).

The prosecutor does not argue that the crimes did not take place at the same time, involved different victims or did not have the same criminal intent. He argues merely that the trial court could as a matter of discretion, punish the burglary separately under the burglary “anti-merger” statute, RCW 9A.52.050.

A trial court’s decision about applying the “same criminal conduct” doctrine is reviewed for an abuse of discretion. *State v. Elliot*, 114 Wn. 2d 6, 785 P.2d 440 (1990). A trial court abuses its discretion if its decision is exercised on untenable grounds, or for untenable reasons. *State ex. rel. Carroll v. Junker*, 79 Wn. 2d 12, 482 P.2d 775 (1971). The trial

court abused its discretion in sentencing Mr. Odell without counting the first degree burglary as the “same criminal conduct” as the first degree felony murder.

There was no question here but that the burglary and felony murder charges were intimately related, since the burglary was the predicate felony which raised the felony murder charge to first degree. The prosecutor argued throughout the case that the burglary was part of a plan which included an assault. The assaults, far from being separate from the burglary, were the crime the prosecutor argued was intended by Johnson, Rekdahl and Balaski. It was an abuse of discretion, under the facts of this case to use the first degree burglary to elevate the felony murder charge to first degree, and then also count it separately in the offender score. This court should vacate the sentence imposed and remand for a new sentence with a recalculated offender score.

B. CONCLUSION

It is indeed difficult to imagine a scenario which would demonstrate a greater conflict between defendants than was presented in Mr. Odell’s case. The testimony of co-defendant Daniel Johnson was a gift any prosecutor would be delighted to receive, since it shored up what was otherwise a circumstantial case against Mr. Odell. While severance is a matter addressed to the trial court’s discretion, no case could present a better example of an abuse of discretion than this one.

The trial court also erred in denying the motion to suppress evidence obtained from the warrantless gunpoint stop of Mr. Odell's vehicle. At the time of the stop, the police knew that even the person who made a connection between Mr. Odell's Tahoe and the shooting was not sure if it was involved or not. Given the fact that even Mr. Koenekamp was unsure of whether there was a connection between the shots he heard fired and the Tahoe, a forcible stop here violated the Fourth Amendment and Art. I, Sec. 7 of the Washington Constitution.

The trial court also erred in denying the motion to suppress the evidence gleaned from the search of Mr. Odell's shop and residence. There was no reason to believe Adrian Rekdahl would be at the residence, since a cell phone call made 48 hours earlier was the only hint he might be there. There was no more reason to believe that evidence related to guns were be present than there was that guns themselves would be present. There was no reason to believe that documents linking Mr. Odell with the other co-defendants other than the boilerplate assertions about what the "criminal element" does. The same type of generalized assertions in an affidavit were found to be wanting in *State v. Thein*, and should be found insufficient here. This court should reverse and remand for a new trial with directions to suppress the evidence obtained in the Oregon search.

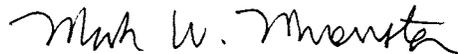
Mr. Odell's conviction for the first degree assault on Ms. Harrington should be reversed. The jury was misled by the prosecutor's

closing argument that they should convict for *any* charged counts if they found Mr. Odell was an accomplice to the burglary. But in light of *Roberts* and *Cronin*, this was not a tenable theory of liability. There was no evidence to support a finding that Mr. Odell had aided or agreed to aid either Balaski or Rekdahl in the assault on Ms. Harrington, even assuming that there was sufficient evidence that she was a target, as opposed to her husband.

Finally, given the close connection between the first degree felony murder charge and the first degree burglary charge, the trial court erred in not applying the “same criminal conduct” rule for arriving at the offender score. The court should vacate the sentence and remand for resentencing.

Dated this 6th day of DECEMBER, 2007

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's reply brief, upon the following attorney of record and the Defendant at the addresses shown, by depositing the same in the mail of the United States at Vancouver, , Washington, on the 6th day of December 2007 with postage fully prepaid, or by hand delivery (prosecutor's copy)

DATED this 6th day of December, 2007



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