

No. 43967-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JONATHAN ALLEN LISCHKA,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court improperly join and consolidate the possession of methamphetamine and harassment charges with the malicious mischief in the third degree charge?
- B. Did Lischka receive effective assistance from his trial counsel?

II. STATEMENT OF THE CASE

Lischka and Sara Henke had known each other for approximately five years and had been in a dating relationship prior to March 2012. RP 103.¹ Ms. Henke and Lischka broke up in the beginning of 2012. RP 103. Lischka was distraught over the break-up and began acting agitated and paranoid. RP 33, 35, 50. Lischka discussed his frustration about the break-up with his friend, Rodney Teitzel. RP 33. Lischka and Mr. Teitzel had been close friends for four to five years. RP 30-31.

Prior to March 8, 2012 Lischka began acting increasingly agitated and hostile towards Mr. Teitzel. RP 33. Mr. Teitzel had known Lischka to be an intelligent, logical person but in the few weeks leading up to March 8, 2012 Lischka was making arguments that were illogical and appeared to be getting progressively worse.

¹ There are numerous report of proceedings for this case. The State will cite the report of proceedings from the jury trial, occurring on 7/31/12 and 8/1/12 as RP. All other report of proceedings will be cited as RP with the date of the proceedings in parentheses after the RP.

RP 35. Lischka accused Mr. Teitzel of being disloyal and having a sexual relationship with Ms. Henke, which Mr. Teitzel denied. RP 38. Lischka told Mr. Teitzel that his friends and people close to Lischka were trying to harm him. RP 35. Lischka talked about righting the wrongs against him, that doing such would lead Lischka back to prison, and only a bullet would stop him. RP 36-37.

On March 8, 2012 Lischka texted Mr. Teitzel. RP 39. The text message stated, "You can come to my house tonight and be honest with me." RP 39. Mr. Teitzel tried to convince Lischka he had been honest with him. RP 40. Lischka began ranting and raving and demanded to know where Mr. Teitzel was at. RP 40. This made Mr. Teitzel worried that Lischka was going to try to find him. RP 40. Later, while at his parent's house in Chehalis, Mr. Teitzel received a phone call from Lischka. RP 40, 44. Lischka was agitated, yelling, and screaming at Mr. Teitzel. RP 40. Lischka asked Mr. Teitzel if Mr. Teitzel was on Lischka's side or against him. RP 41. Lischka then asked Mr. Teitzel if he was "in or out?" RP 41. Mr. Teitzel told Lischka he was out. RP 42. Lischka responded by stating, "It's on" and stated he was coming over to Mr. Teitzel's house right away. RP 42. Mr. Teitzel was scared for his safety, and Lischka's, and called the Sheriff's Office. RP 46.

On March 8, 2012, Sergeant Snaza of the Lewis County Sheriff's Office began an investigation into the threats made by Lischka to Mr. Teitzel. RP 60-61, 64-65. Sgt. Snaza saw Lischka driving a vehicle and initiated a stop on the vehicle. RP 66. Lischka was arrested for harassment and searched incident to his arrest. RP 70. Sgt. Snaza found a baggie of a crystal substance, which turned out to be methamphetamine, in Lischka's watch/coin pocket. RP 71, 96-97. Lischka admitted to Sgt. Snaza that the substance was methamphetamine and he had it for personal use. RP 75. Lischka was upset, agitated, and excited. RP 80. Lischka also explained to Sgt. Snaza that he had broken up with his girlfriend. RP 76. Lischka was very emotionally upset. RP 77.

The State charged Lischka by information on March 9, 2012 with Count I – possession of methamphetamine and Count II – harassment (gross misdemeanor). RP 1-3.

On March 22, 2012, Ms. Henke drove her car over to Lischka's residence in Centralia. RP 104-05; Ex. 4.² Ms. Henke was interested in reconciling with Lischka. RP 104. Lischka threw a large weight into the windshield of Ms. Henke's car, breaking the

² The State will be filing a supplemental Clerk's papers designating exhibits 4, 6, 7, and 8.

windshield. RP 106, Ex. 6-8. Ms. Henke called the police but was not fearful or intimidated during the incident. RP 115, 118.

On March 23, 2012 the State filed an information charging Lischka with Count I – intimidating a witness (domestic violence) and Count II – malicious mischief in the third degree, domestic violence. CP 54-56. The State ultimately dropped the intimidating a witness charge. CP 68-69. The State moved to join the charges and consolidate the two cases for trial. RP (5/10/12) 2-7. Over Lischka’s attorney’s objection the trial court granted the State’s motion to join and consolidate. RP (5/10/12) 5-7. The cases proceeded to trial on July 31, 2012. RP 1. Lischka’s attorney renewed her objection to the joinder and consolidation of the cases. RP 6. The trial court denied severance of the charges and the case proceeded to trial. RP 6, 22. Lischka was found guilty of possession of methamphetamine and malicious mischief in the third degree, domestic violence. CP 39, 72, 73. The jury acquitted Lischka of harassment. CP 40. Lischka was sentenced and timely appeals his convictions. CP 43-53, 74-77.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. LISCHKA WAS NOT UNFAIRLY PREJUDICED BY THE TRIAL COURT'S DECISION TO CONSOLIDATE LISCHKA'S TWO CASES TOGETHER FOR A SINGLE TRIAL.

Lischka argues that he was unfairly prejudiced by the trial court's consolidation of his malicious mischief case with his possession of methamphetamine and harassment case. Brief of Appellant 8-18. Lischka argues he was prejudiced because the weak evidence in his malicious mischief case was bolstered by the propensity evidence of his methamphetamine use, his presentation of separate defenses on each charge confused the jury, that the trial court's instructions to the jury were not adequate to mitigate the prejudice, and the evidence of methamphetamine use was stronger than the State's evidence of harassment and malicious mischief. Brief of Appellant 8-18.

Joinder and consolidation for trial were proper. Lischka was not prejudiced by the consolidation and this Court should affirm the malicious mischief conviction.³

³ Lischka does not argue that this Court should reverse his Possession of Methamphetamine conviction. See Brief of Appellant.

1. Standard Of Review

A trial court's decision to join multiple charges and consolidate for trial is reviewed de novo. *State v. Embry*, 171 Wn. App. 714, 730-31, 287 P.3d 648 (2012) (citations omitted).

2. The Trial Court Properly Joined And Consolidated Lischka's Two Cases For Trial.

Two or more offenses may be joined when the offenses "(1) [a]re of the same or similar character, even if not part of single scheme or plan; or (2) [a]re based on the same conduct or on a series of acts connected together or constituting parts of single scheme or plan." CrR 4.3(a). The joinder rules are to be construed expansively to promote the public policy of conserving prosecution and judicial resources. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998) (citation omitted). Even when joinder is permissible under the rule the trial court should not join the offenses if the defendant would be prejudiced by the prosecution of all the charges in a single trial. *Bryant*, 89 Wn. App. at 865.

A defendant must demonstrate to the court "that a joint trial was so manifestly prejudicial as to outweigh the concern for judicial economy." *Embry*, 171 Wn. App. at 731, citing *State v. Phillips*, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). "Prejudice may result from joinder if the defendant is embarrassed in the presentation of

separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition.” *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994) (citations omitted). To show joinder is manifestly prejudicial the defendant must alert the court to specific prejudice. *Embry*, 171 Wn. App. at 731 (citations omitted). If the trial court consolidates the charges for trial and joinder was not proper the convictions must be reversed except if the error is harmless. *Bryant*, 89 Wn. App. at 864.

a. The malicious mischief in the third degree charge was sufficiently connected with the harassment charge.

Lischka argues that the harassment charge does not fall under the narrow exception for common plan or scheme. Brief of Appellant 16. The trial court’s findings state that “[t]he alleged facts in these cases are based upon the same conduct or a series of acts connected together or constituting parts of a single scheme or plan.” CP 10. The trial court then concluded that joinder was appropriate under CrR 4.3 and the cases should be consolidated for a single trial under CrR 4.3(1). CP 10. Lischka spends considerable time arguing that the harassment and the malicious mischief were not part of a common scheme or plan. Brief of Appellant 15-18.

Lischka did not assign error to the findings of fact or conclusions of law entered by the trial court from the joinder motion. Brief of Appellant 1. “Unchallenged findings of fact are verities on appeal.” *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287, (2011) (citation omitted). Lischka does not argue to this Court in his briefing that the malicious mischief and harassment were not a series of acts connected together. See Brief of Appellant 15-18. Lischka has failed to comply with RAP 10.3(g) and this Court “will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” RAP 10.3(g). An appellate court, in its discretion, will entertain issues and/or findings not assigned “where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so the Court is not greatly inconvenienced and the respondent is not prejudiced...” *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

In the present case Lischka takes issue and argues two of the possible ways a case can be joined under CrR 4.3(a)(2). Brief of Appellant 15-18. The State would agree that this Court can and should entertain Lischka's arguments on same conduct and part of a common plan or scheme regardless of his failure to adhere to

strict compliance of RAP 10.3(g). However, Lischka does not assign error, make an argument, or cite to any legal authority in regards to whether the malicious mischief and the harassment are based on a series of acts connected together. See Brief of Appellant, 1, 15-18. The reviewing court will not consider an alleged error that is presented without reasoned argument or legal authority cited in the briefing. *In re Cassel*, 63 Wn.2d 751, 755, 388 P.2d 952 (1984); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). Therefore, Lischka has abandoned the issue and conceded that the trial court's finding that the alleged facts are based on a series of acts connected together were proper and supported by the record. This Court should find that joinder was appropriate and affirm Lischka's malicious mischief conviction.

i. The malicious mischief and harassment charges are a series of acts connected together.

The State is not conceding that Lischka can raise any issue regarding whether the malicious mischief charge and the harassment charge are a series of acts connected together. If this Court decides to consider the issue, the two charges are based upon a series of acts connected together and joinder is therefore proper. CrR 4.3(a)(2).

In *State v. Robinson*, Mr. Robinson was upset and agitated about his pending divorce, which was initiated by his wife, Mildred. *State v. Robinson*, 38 Wn. App. 871, 873, 691 P.2d 213 (1984). Mr. Robinson called his brother-in-law, Mr. Pruitt, and left a threatening message on Mr. Pruitt's answering machine regarding Mr. Robinson's visitation with his children. *Robinson*, 38 Wn. App. at 873. Two and a half months later, Mr. Pruitt and his son were in their van, approaching their residence, when Mr. Robinson shot the son in the arm. *Id.* Mr. Pruitt contacted Mildred's attorney, Mr. Neville, and informed him of the shooting. *Id.* Five days later Mr. Neville contacted a detective with the Seattle Police Department regarding the assault on Mr. Pruitt's son. *Id.* The detective received a call from Mr. Robinson. *Id.* The detective told Mr. Robinson not to have any contact with the Pruitts and they were under surveillance. *Id.* Later that same day Mr. Robinson shot and killed Mr. Neville. *Id.* at 873-74.

Mr. Robinson argued on appeal that the trial court erred when it denied his motion to sever the assault in the second degree charge from the murder charge. *Id.* at 880. Mr. Robinson argued the two counts could not be regarded as of same or similar character because the two charges require different *mens rea*. *Id.*

at 882. The Court of Appeals held that the two charges “were arguably part of a series of acts related to the dissolution and were sufficiently similar to justify joinder.” *Id.* The Court of Appeals noted that both crimes involved the use of a firearm, violence, and both the victims were associated with Mrs. Robinson. *Id.*

In *State v. Townson*, Mr. Townson was a licensed to operate a foster home for teenage boys. *State v. Townson*, 29 Wn. App. 430, 431, 628 P.2d 857 (1981). Mr. Townson was charged, and found guilty at trial, with three counts of forgery, two counts of burglary in the second degree, theft in the second degree, possession of stolen property in the second degree, rendering criminal assistance in the second degree, and communicating with a minor for immoral purposes. *Id.* at 430-31. All of the charges, with the exception of one, involved one or more of the boys living in Mr. Townson’s home, and all of the crimes occurred in the summer of 1979. *Id.* at 431. The State’s theory was that Mr. Townson used the boys in a continuing course of various criminal activities. *Id.* The forgeries involved Mr. Townson altering high school diplomas and birth certificates to allow some of the boys to be admitted to one of the cosmetology schools where Mr. Townson was an instructor. *Id.* The two burglaries were arranged by Mr. Townson. *Id.* Mr.

Townson had two of the boys break into beauty salons he managed. *Id.* Mr. Townson received the money obtained in the burglaries. *Id.* The theft in the second degree involved Mr. Townson appropriating cash from the two beauty salons and destroying sales receipts to hide the discrepancies. *Id.* The possession of stolen property charged stemmed from Mr. Townson keeping a number of statues in his home he knew one of the boys had stolen. *Id.* Mr. Townson rendered criminal assistance by helping a juvenile escape from a detention facility and concealing the juvenile in his home. *Id.* Finally, the State charged Mr. Townson with communicating with a minor for immoral purposes for threatening to turn one of the foster boys, who had several warrants for arrest, into the authorities unless the boy agreed to have sex with Mr. Townson. *Id.* 431-32.

Mr. Townson assigned error on appeal to the 10 count information, arguing that many of the charges were not factually or legally related. *Id.* at 432. The Court of Appeals agreed with the trial court that the events occurring in the summer of 1979, with foster boys living in Mr. Townson's home, and beauty salons where Mr. Townson lived were sufficiently connected together as a series of events to warrant joinder. *Id.*

Two charges that are based upon a series of acts connected together may be joined. CrR 4.3(a)(2). In this case, Lischka was upset regarding his relationship with Ms. Henke. RP 33-34. Lischka's mental health appeared to be deteriorating during the weeks leading up to the March 8, 2012 incident. RP 34. Lischka was distraught about his break-up with Ms. Henke. RP 33-34. Lischka's demeanor had drastically changed and he had become paranoid. RP 34-35. Lischka believed his friends were trying to harm him and accused one of his close friends, Mr. Teitzel, of having a sexual relationship with Ms. Henke. RP 38. These events led Lischka to allegedly harass Mr. Teitzel, threatening Mr. Teitzel and driving over to Mr. Teitzel's home. RP 36-42. Then, two weeks later, Lischka picks up and throws a large weight into the windshield of Ms. Henke's car. RP 106; Ex. 6-8.

Lischka's acts were a series of acts connected together based upon Lischka's mental and emotional distress from breaking up with Ms. Henke. In *Robinson*, Mr. Robinson threatened his wife's brother, shot his nephew and later killed his estranged wife's divorce attorney. All of Mr. Robinson's acts related back to his emotional distress and anger surrounding his pending divorce and hurting the people he believed were attempting to keep him from

his children. *Robinson*, 38 Wn. App. 872-74. Similar to the facts in *Robinson*, Lischka reacted to the break up by lashing out at the people who were at one time close to him. Lischka allegedly harassed one of his close friends, Mr. Teitzel, because he felt Mr. Teitzel was in a sexual relationship with Ms. Henke and was out to get Lischka. RP 32-42. Then two weeks later Lischka throws a large weight at the windshield of Ms. Henke, his former girlfriend's, car and destroyed the windshield. RP 103-06; Ex. 6-8. There was a sufficient facts for the trial court to conclude that Lischka's actions and the crimes charged were a series of acts connected together and properly joined the charges.

ii. The State concedes that the malicious mischief and harassment charges are not same criminal conduct or part of a single plan or scheme.

A common plan or scheme is not defined by statute but the courts have held, at least in regards to ER 404(b), that a common plan or scheme is a specific prior design or system which included committing the act charged. *State v. Lough*, 70 Wn. App. 302, 315, 853 P.2d 920 (1993). A person commits a crime as part of a common scheme or plan when he devises a plan and uses it repeatedly to commit separate but very similar crimes. *State v.*

Yates, 161 Wn.2d 714, 751, 168 P.3d 359 (2007) (citations omitted). In regards to jury instructions, this Court has repeatedly held, “common scheme or plan’ are words of common understanding requiring no definition.” *State v. Cross*, 156 Wn.2d 580, 617, 132 P.3d 80 (2006) (citations omitted).

There was no evidence presented to the trial court that Lischka devised a plan and put it into use when he committed the malicious mischief and allegedly harassed Mr. Teitzel. The State concedes that joinder under common scheme or plan was not proper.

iii. The malicious mischief and harassment charges are the same or similar character.

Malicious mischief and harassment are of similar character and therefore, even if not part of a common plan or scheme, a trial court may properly join the charges. RCW 9A.46.060(19); *State v. Wilson*, 71 Wn. App. 880, 886, 863 P.2d 116 (1993); CrR 4.3(a)(1). Although the trial court did not find that joinder was proper under the same or similar character prong, a trial court's correct ruling will not be disturbed on appeal merely because it was based on an incorrect or insufficient reason. *State v. Byrd*, 25 Wn. App. 282,

289, 607 P.2d 321 (1980), *citing Pannell v. Thompson*, 91 Wn.2d 591, 589 P.2d 1235 (1979).

In *Wilson* the Court of Appeals held that harassment and assault in the first degree were of same or similar character and therefore, the trial court could join the offenses under CrR 4.3(a)(1). *Wilson*, 71 Wn.2d at 886. In January 1990 Wilson was kicked out of a bar for his bad behavior and as he was leaving told one bar patron not to leave the bar alone and told an employee that she would not leave the bar alive tonight. *Id.* at 882-83. Wilson then went out to his vehicle and fired three or four bullets through the plate glass window in the bar. *Id.* at 883. Wilson was charged with four counts of assault in the first degree. *Id.* The State also charged Wilson with one count of harassment for going to a firehouse where he was once a volunteer firefighter and threatening to kill the firefighters who were there. *Id.* The trial court denied Wilson's motion to sever the harassment charge from the assault charges. *Id.* at 884. The Court of Appeals held the charges were properly joined as they were the same or similar character. *Id.* at 886. The Court of Appeals stated, "[t]he Legislature itself has stated that 'harassment', as used in the chapter declaring harassment a

criminal offense, specifically includes the offense of assault in the first degree, RCW 9A.46.060(4). *Id.* (quotations original).

Contained within the chapter declaring harassment a criminal offense, harassment specifically includes malicious mischief in the third degree. RCW 9A.46.060(19). Therefore, pursuant to *Wilson*, harassment and malicious mischief in the third degree are of the same or similar character and the trial court properly joined the charges.

b. Lischka did not suffer prejudice from the trial court's decision to join the charges and consolidate them for trial.

In the present case joinder was proper. Lischka cannot demonstrate specific prejudice as a result of the joinder because the jury was instructed to determine each count separately and the jury clearly did that as evidenced by its verdicts. *Bryant*, 89 Wn. App. at 868-69; CP 39-40, 72-73. If the jury was swayed by the evidence presented that Lischka was using methamphetamine and was found in possession of methamphetamine on March 8, 2013 it would have been evidenced in the harassment verdict. See RP 35, 61, 70-71, 75-77. The State alleged Lischka harassed Mr. Teitzel on March 8, 2013, the same day he was arrested for possession of methamphetamine. CP 1-2. The jury was not swayed by the

alleged propensity evidence and acquitted Lischka on the harassment charge. CP 40. There is no showing that the evidence admitted regarding Lischka's drug use and possession of methamphetamine manifestly prejudiced Lischka. There is also no showing that the harassment charge manifestly prejudiced Lischka. Therefore, Lishka has not met his burden and this Court should affirm his malicious mischief conviction.

3. Lischka Waived Raising The Issue Regarding The Trial Court's Denial Of His Request For Severance Of The Malicious Mischief Charge.

Lischka's attorney opposed the joinder motion and renewed the objection prior to the trial commencing. RP (5/10/13) 5-8; RP 6. While Lischka's attorney did not use the word severance, that is essentially what she was requesting the trial court to do the morning of trial. RP 6. Lischka's attorney did not renew her motion for a severance at the close of evidence as required by CrR 4.4(a)(2). RP 30-124.

The rule states, "[i]f 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). Therefore,

Lischka cannot raise on appeal the issue of trial court's denial of his motion to sever. *Bryant*, 89 Wn. App. at 864-65.

a. If this Court allows Lischka to raise the issue regarding the trial court's denial of Lischka's motion for severance, the trial court did not abuse its discretion when it denied the motion for severance.

While the State maintains throughout its argument that Lischka waived his right to raise the alleged error that trial court improperly denied his motion for severance, arguendo, the trial court did not abuse its discretion when it denied the motion for severance.

"[A] trial court's refusal to sever charges is reversible only where it constitutes a manifest abuse of discretion [and it is] [t]he defendant [who] bears the burden of demonstrating such abuse. *Russell*, 125 Wn.2d at 63. "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

The reviewing court considers four prejudice mitigating factors:

- (1) the strength of the State's evidence on each count;
- (2) the clarity of the defenses as to each count;

(3) whether the trial court properly instructed the jury to consider the evidence of each crime; and (4) the admissibility of the evidence of the other crimes.

State v. Price, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005)

(citations omitted).

i. While the strength of the State's evidence was strongest for the possession of methamphetamine charge, the State also had strong evidence for the malicious mischief.

Lischka argues that the possession of methamphetamine charge was relatively easy for the State to prove with the available evidence in that case. Brief of Appellant 8. The State agrees with Lischka's analysis regarding the ease of proving Lischka was in possession of methamphetamine given the facts in this case. The State was required to prove that Lischka was in possession of a controlled substance on March 8, 2013 and that substance was methamphetamine. RCW 69.50.4013; RCW 69.50.206(d)(2); CP 1, 24. The evidence available to the State was that Sgt. Snaza initiated a stop on the vehicle Lischka was driving on March 8, 2013. RP 61, 66. Sgt. Snaza arrested Lischka and searched him incident to arrest. RP 70. Sgt. Snaza found a baggie of crystal substance in Lischka's watch/coin pocket. RP 71. Lischka admitted to Sgt. Snaza that the substance was methamphetamine and told

Sgt. Snaza that it was for personal use. RP 75. Sharon Herbalin, a forensic scientist, from the Washington State Patrol Crime Laboratory tested the substance and it was positive for methamphetamine. RP 82, 96-97.

Lischka argues the evidence available for the charges of harassment and malicious mischief in the third degree were much weaker. Brief of Appellant 9. The evidence available for the malicious mischief charge was relatively strong even though Lischka did not admit to committing malicious mischief. See RP 102-118, 123. The State acknowledges the evidence available for the harassment charge was not as strong as the methamphetamine charge or the malicious mischief charges. See RP 30-50. But the question is whether it was an abuse of discretion not to sever the malicious mischief charge from the harassment and possession of methamphetamine charges, not whether to sever all three charges from each other.

To convict Lischka of malicious mischief in the third degree the State was required to prove that on March 22, 2012 Lischka did knowingly and maliciously cause physical damage to the property of another. RCW 9A.48.090(1)(a); CP 34, 55. The property was a vehicle belonging to Ms. Henke. RP 104-05; Ex. 4, CP 68. To prove

Lischka acted with malice the State had to prove that Lishka damaged Ms. Henke's property with an evil intent, wish, or in a manner which was designed to vex, annoy or injure Ms. Henke. WPIC 2.13; CP 31. "Malice may be, but is not required to be, inferred from an act done in willful disregard to the rights of another." WPIC 2.13; CP 31. To prove knowingly the State was required to prove:

A person knows or acts knowingly or with knowledge with respect to a fact when he is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact.

WPIC 10.02; CP 26.

The evidence was unequivocal that on March 22, 2013 Lischka knowingly threw a weight into the windshield of Ms. Henke's car, damaging her property. RP 104-06; Ex. 4, 6-8. The only real issue for the jury to decide was if Lischka acted with malice. Lischka's act of throwing the weight into the window was designed to injure Ms. Henke by damaging her property. WPIC 2.13; RP 106; Ex. 6-8; CP 31. Lischka's actions show he acted with

an evil intent, wish or design. WPIC 2.13; RP 106; Ex. 6-8; CP 31. The jury instruction explained that the jury could infer malice “from an act done in willful disregard of the rights of another.” WPIC 2.13; CP 31. Further, “the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). There is no other explanation for throwing a large weight plate, such as the one used by Lischka, into the windshield of a vehicle except that Lischka had an evil intent, wish, or design to injure Ms. Henke’s car. It is matter of logical probability that Lischka acted maliciously. Also, it can be inferred that Lischka acted with malice because he threw the weight into the window in a willful disregard of Ms. Henke’s property rights. WPIC 2.13; CP 31.

Therefore, although Lischka did not confess to maliciously damaging Ms. Henke’s property as he did to possessing methamphetamine, the strength of the malicious mischief charge was not dissimilar to the strength of the possession of methamphetamine charge. And ultimately there was no prejudice suffered by Lischka as evidenced by the jury acquitting Lischka on the one charge that was weaker than the other two, the harassment

charge. CP 40. Therefore, the trial court did not abuse its discretion by denying the motion to sever. See *Russell*, 125 Wn.2d at 64.

ii. Lischka's defenses were presented to the jury with clarity and the jury was not confused as to Lischka's defenses.

The second prejudice mitigating factor "to consider is whether the clarity of defenses to each count was prejudiced by joinder." *Russell*, 125 Wn.2d at 64. When the defenses to the different charges are identical there is a very small likelihood that it will cause the jury confusion as to the defendant's defenses. *Id.* at 64-65 (citations omitted).

Lischka did not present any defense to the possession of methamphetamine charge. RP 77-80, 123, 166-72. The defense for the harassment and the malicious mischief charges were not identical but similar in each case there was in essence denial and intent of Lischka. RP 167-72.

Lischka did not testify, so the only defense offered was in his attorney's closing argument. RP 123, 166-72. Lischka's attorney argued that Lischka did not act with malice in regards to the malicious mischief charge. RP 171-72. There was no argument that Lischka did not throw the weight into the windshield. RP 171-72.

The only argument presented by Lishcka's attorney was in regards to Lischka's mental state at the time of the incident. RP 171-72.

Similarly, for the harassment charge, Lishcka's attorney argued that the crime of harassment was "a lot about intent and about whether or not the fear was reasonable." RP 167. There was no denial that Lischka made the statements or sent the text messages to Mr. Teitzel. RP 168-70. Later during argument Lischka's attorney stated, "I think that the evidence that has presented here makes it clear that he did not commit that crime [harassment]. There was no intent. There was no reasonable fear." RP 170. While part of the argument dealt with the reasonableness of Mr. Teitzel's fear that Lischka would cause physical harm to Mr. Teitzel, a large part of the argument dealt with intent.⁴ RP 166-70.

The jury did not have difficulty with the clarity of the defenses because the cases were joined. The jury acquitted Lischka of the harassment charge. CP 40. The acquittal is evidence that Lischka's defenses to the crimes charged were clear and the jury understood

⁴ The State would also note that Lischka's trial attorney completely misrepresented Mr. Teitzel's testimony. The attorney stated Mr. Teitzel was 30 miles away when he received Lischka's phone call and that Mr. Teitzel did not contact the police. RP 168. Mr. Teitzel's testimony was clear, he received the phone call while at his parent's house in Chehalis and he called the Sheriff's Office after receiving the phone call. 40-44, 46.

each argument raised by Lischka's attorney independently. The trial court did not abuse its discretion and Lischka was not prejudiced.

iii. The trial court properly instructed the jury.

The reviewing court considers if the trial court properly instructed the jury that it must consider each charge independent of the other charges. *Russell*, 125 Wn.2d at 66. Lischka argues that the trial court did not give a limiting instruction to the jury directing them that evidence of one crime could not be used to decide guilt for a separate crime. Brief of Appellant 12. Lischka also claims that the deputy prosecutor "encouraged the jury to use evidence of one crime as evidence of another by arguing that each crime was part of a single extended crime spree resulting from the defendant's relationship deteriorating with his ex-girlfriend." Brief of Appellant 12. Neither argument is persuasive when viewing the actual arguments made by the deputy prosecutor in the full context of his closing argument and the current case law.

First, the jury was instructed "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." CP 20. This Court has held that the instruction given in Lischka's case, by itself with no limiting instruction, is sufficient to properly

instruct the jury. *State v. McDaniel*, 155 Wn. App. 829, 861, 230 P.3d 245 (2010) (citations omitted). The reviewing court presumes the jury followed the instructions. *McDaniel*, 155 Wn. App. at 861.

The deputy prosecuting attorney argued the State's theory, that Lischka's deteriorating relationship with Ms. Henke is what led Lischka to commit the crimes of harassment and malicious mischief. RP 156. The deputy prosecutor also told the jury during his closing argument:

Now, to be clear, each crime is separately charged and you don't let them control each other's verdicts. If you find him guilty of malicious mischief, you don't just go over and say oh, well, he's guilty of harassment. That's not what we are asking you to do.

RP 161.

The jury instruction given by the trial court has been relied upon by reviewing courts when upholding a trial court's decision denying severance of charges. The deputy prosecutor did not urge the jury to find Lischka guilty on the other charges if they found Lischka guilty on one of the charges. The trial court did not abuse its discretion as no further jury instructions were necessary to avoid Lischka from suffering prejudice due to the joinder of the charges.

iv. The State concedes that the evidence of Lischka's drug use would not have been admissible in a separate trial for only the malicious mischief charge.

Lischka argues, and the State concedes, that evidence of Lischka's possession of methamphetamine would not be admissible in a separate trial for malicious mischief when the allegation is that the malicious mischief occurred two weeks after the possession of methamphetamine. Brief of Appellant 14.

The State relies on its argument above regarding the harassment charge and the malicious mischief charge being a series of acts connected together and both offenses are of the same or similar character. As a series of acts connected together, the State could admit the evidence of the harassment in a separate trial for malicious mischief as the evidence is relevant to explain the state of mind of Lischka, his intent, and absence of mistake or accident, which is allowed under ER 404(b). Evidence of other crimes or misconduct is not admissible to demonstrate a defendant's propensity to commit the crime they are currently charged with. ER 404(b); *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). The evidence is admissible for other purposes if

the probative value of the evidence outweighs the prejudicial effect. ER 404(b); *Powell*, 166 Wn.2d at 81.

In Lischka's case the probative value of Lischka's emotional and mental state regarding his break-up with Ms. Henke outweighs any prejudice that he would have suffered. The testimony of Mr. Teitzel put Lischka's actions, throwing the weight through Ms. Henke's window, in context and explained the intent behind Lischka's actions. Further any prejudice from the harassment was harmless as the jury clearly did not believe Lischka harassed Mr. Teitzel as evidenced by their acquittal of Lischka on that offense. CP 40.

4. If The Trial Court Improperly Joined The Charges Any Error Was Harmless.

If a trial court improperly joins and consolidates charges the convictions must be reversed unless the error was harmless. *Bryant*, 89 Wn. App. at 864. An error is harmless if, "within reasonable probabilities, the outcome of the trial would not have differed in absence of the error." *State v. Gasteazoro-Paniagua*, 173 Wn. App. 751, 760, 294 P.3d 857 (2013).

In this case any error that occurred from the joinder of the charges was harmless. The evidence presented through Ms. Henke regarding Lischka throwing the large weight at her windshield,

coupled with the photographs admitted which showed the size of weight and the damage done to the window, was overwhelming evidence that Lischka committed malicious mischief. See RP 102-107; Ex. 6-8. The outcome of the case would not be different if the malicious mischief charge was tried separately from the harassment and possession of methamphetamine charges. The jury considered each charge independently, as evidenced by their acquittal on the harassment charge. Any error was harmless and this Court should affirm Lischka's malicious mischief in the third degree conviction.

B. LISCHKA RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL ATTORNEY THROUGHOUT HIS CASE.

Lischka's assertion that his attorney was ineffective for failing to renew the motion for severance at the close of evidence is false. Brief of Appellant 18-20. The State concedes that Lischka's attorney's performance was deficient, but Lischka has not shown that he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be

considered. *McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Lischka's Attorney's Performance Was Deficient But Not Ineffective For Failing To Renew Her Motion For Severance At The Close Of Evidence.

To prevail on an ineffective assistance of counsel claim Lischka must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the

defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

To preserve the issue of the trial court’s denial of Lischka’s motion for severance of the charges for appeal, the motion must be renewed at the close of evidence. *Bryant*, 89 Wn, App. at 864-65; CrR 4.4(a)(2). Lischka’s attorney failed to renew her motion for severance at the close of the evidence. RP 119-23. Lischka’s attorney’s performance was deficient for failing to renew the motion for severance. An attorney’s failure to renew a severance “motion does not support an ineffective assistance of counsel claim unless the defendant can show that the motion would properly have been granted.” *Price*, 127 Wn. App. at 203. A severance motion would not have been granted. As argued above, the trial court did not abuse its discretion when it declined to sever the charges. Lischka was not prejudiced by his trial counsel’s alleged deficient performance and his claim of ineffective assistance of counsel fails.

This Court should find that Lischka's counsel was not ineffective and his conviction for malicious mischief in the third degree should be affirmed.

V. CONCLUSION

The trial court properly joined and consolidated the charges against Lischka. Further, Lischka received effective assistance from his attorney and this Court should affirm Lischka's malicious mischief conviction.

RESPECTFULLY submitted this 29th day of July, 2013.

JONATHAN L. MEYER
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by: _____
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LEWIS COUNTY PROSECUTOR

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