

No. 44467-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JUSTIN MICHAEL HUBBARD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 11-1-00827-6
The Honorable Brian Chushcoff, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Justin Hubbard's motion to sever his trial from his co-defendant's trial.
2. The trial court should have granted discretionary severance because the evidence of Justin Hubbard's prior crimes and bad acts, which was only admitted to support and rebut his co-defendant's claim that she lacked knowledge of the crime, was highly prejudicial and would not have been admissible in a separate trial.
3. The trial court erred when it concluded in its written Findings of Fact & Conclusions of Law that evidence that Justin Hubbard and his co-defendant possessed a stolen vehicle in 2008 "directly goes to the heart of the defenses raised by the defendants."

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was Justin Hubbard entitled to a separate trial when both the State and his co-defendant sought to admit evidence of Hubbard's criminal history and prior bad acts that would not have been admissible in a separate trial, where the evidence was highly prejudicial, and where the evidence was used by Hubbard's co-defendant to argue that he was guilty and she

was not? (Assignments of Error 1 & 2)

2. Should the trial court's conclusion in its written Findings of Fact & Conclusions of Law that evidence that Justin Hubbard and his co-defendant possessed a stolen vehicle in 2008 "directly goes to the heart of the defenses raised by the defendants" be disregarded where, in its oral ruling, the court stated that: the testimony was relevant to rebut Hubbard's co-defendant's claim that she lacked knowledge; that the testimony would nevertheless only be admissible if the co-defendant opened the door to the issue; and when the court allowed the State to present the testimony only after finding that the co-defendant did open the door? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Ryan Tawes' Mazda pickup truck was stolen on February 10, 2008. (11/19/12 RP 711-12)¹ A few months later, he saw his truck advertised for sale on Craigslist. (11/19/12 RP 714) He called the person who placed the ad, and arranged to meet. (11/19/12 RP 715)

¹ Citations to the transcripts will be to the date of the proceeding contained therein.

When Tawes arrived at the meeting spot, he saw a man and a woman standing by his truck. (11/19/12 RP 715, 716) He approached and told the man, Justin Hubbard, that the truck was stolen. Hubbard replied that it was not stolen. (11/19/12 RP 716, 717) The woman with Hubbard, Ashley Burmeister, began to cry. (11/19/12 RP 717) Tawes called the police, who arrived a short time later. (11/19/12 RP 717)

Burmeister told the responding officers that she had acquired the truck after seeing it advertised for sale online, and that she was the registered owner. (11/19/12 RP 676, 677) The officers noticed that the vehicle identification number (VIN) appeared to have been tampered with. (11/19/12 RP 679, 692-93, 695)

Jose Chavez's Independence Motorcycle Company motorcycle was stolen on August 15, 2009. (11/14/12 RP 373-74) Chavez had purchased the motorcycle a few months earlier for \$11,995. (11/14/12 RP 374-75)

David Cress owned a red/orange, 18-20 foot long two-axle car trailer, which he used to move machinery for his business. (11/14/12 RP 321, 322, 324) The trailer, which Cress purchased in 2007 for \$4,000.00, was stolen from a Puyallup Safeway parking lot sometime overnight on April 4-5, 2009. (11/14/12 RP 323, 324; 11/15/12 RP

468-69, 470)

On April 23, 2009, Lee Guillot sold a small utility trailer built in 1949, for \$100.00 to a man and a woman who responded to his ad on Craigslist. (11/14/12 RP 340, 341, 343; 11/13/12 RP 268-69)

On December 20, 2010, Pierce County Sheriff's Deputy Jessica Johnson responded to a call reporting the theft of a motorcycle. (11/13/12 RP 192) Ashley Burmeister and Justin Hubbard were at the location when Deputy Johnson arrived. (11/13/12 RP 192) Burmeister described the motorcycle as a custom-built 1988 Harley Davidson, with several after-market parts, and license plate number 8A5727. (11/13/12 RP 193-94) Burmeister told Deputy Johnson that she was the registered owner of the motorcycle. (11/13/12 RP 196, 200) Burmeister also said that a man named Scott Schuh called her that day and told her he had stolen the motorcycle. (11/13/12 RP 194)

Tacoma Police Officer Jeffrey Robillard was on patrol the night of December 28, 2010, when he heard and saw a motorcycle speeding on a South Tacoma street. (11/13/12 RP 208, 210) Officer Robillard initiated a traffic stop. (11/13/12 RP 211) After running the motorcycle's license plate number, 8A5727, Officer Robillard learned that the motorcycle had been reported stolen. (11/13/12 RP 211) So

he detained the driver, Scott Schuh. (11/13/12 RP 213)

Officer Robillard called the phone number of the registered owner, Burmeister, and spoke to Hubbard. (11/13/12 RP 214) Hubbard told the officer that they would come to the scene to identify and pick up the motorcycle. (11/13/12 RP 214)

While he waited, Officer Robillard inspected the motorcycle. He noticed that the registration listed the motorcycle as a 1988 Harley Davidson, but that the major parts of the bike were stamped "Independence Motorcycle Co." (11/13/12 RP 215, 216-18) He also noticed that the identification numbers on the engine and transmission were different. (11/13/12 RP 221) Based on his observations and a discussion with Schuh, Officer Robillard decided to impound the motorcycle and investigate whether it contained stolen parts. (11/13/12 RP 221)

Burmeister and a male companion eventually arrived at the scene on foot. (11/13/12 RP 221-22) Burmeister told Officer Robillard that she parked her truck and trailer in a Safeway parking lot several blocks away, and that Hubbard did not come with her because he was on electronic home monitoring. (11/13/12 RP 223-24) Officer Robillard told Burmeister that he would be keeping the motorcycle, so Burmeister and her friend walked back towards the

Safeway. (11/13/12 RP 225)

A short time later, as he drove Schuh to the police station, Officer Robillard noticed a truck and trailer pulling out of a Safeway parking lot. (11/13/12 RP 226-27) Burmeister was driving the truck, but the man in the passenger seat was not the same person who had earlier accompanied Burmeister. (11/13/12 RP 227) Schuh also saw the truck and trailer, and made a comment to Officer Robillard that prompted Robillard to run a check on the trailer's license plate. (11/13/12 RP 227, 228)

The registration information described the trailer as a red 1949 utility trailer, but the trailer Officer Robillard saw was a black car-hauling trailer that did not look 60 years old. (11/13/12 RP 228, 230) Officer Robillard initiated a traffic stop to investigate whether the trailer was stolen. (11/13/12 RP 230) He contacted Burmeister and learned that Hubbard was the passenger. (11/13/12 RP 230) Burmeister told Officer Robillard that she had lied about Hubbard being at home because they were afraid of Schuh. (11/13/12 RP 231)

Hubbard and Burmeister were fully cooperative with Officer Robillard, and tried unsuccessfully to help him find the trailer's vehicle identification number (VIN). (11/13/12 RP 232, 236) While

he was looking for the VIN, Officer Robillard noticed that the trailer appeared to have once been painted red. (11/13/12 RP 234)

Officer Robillard released Burmeister and Hubbard, but continued to investigate the status of the trailer. (11/13/12 RP 236-37) After locating David Cress' stolen trailer report from 2009, detectives went to Burmeister and Hubbard's home. (11/13/12 RP 237) The trailer was parked in the driveway, and Hubbard willingly allowed the detectives to inspect the trailer. (11/13/12 RP 256, 257)

The detectives saw that the trailer was originally red but had been painted black, and that the VIN number was missing. (11/13/12 RP 260, 262, 265) The trailer was registered to Burmeister and the registration described a 1949, four foot by six foot home built utility trailer, but this trailer was a newer, 18 foot long car trailer. (11/13/12 RP 260, 270, 271) Hubbard and Burmeister told detectives that they purchased the car trailer from a man in Olympia after seeing it advertised on Craigslist. (11/13/12 RP 258, 271)

Detectives also inspected the motorcycle, and found that the VIN number was not in the usual place, and appeared to have been tampered with. (11/13/12 RP 272, 273-74; 11/15/12 RP 477, 480) Detectives were able to find a mirror-image of a VIN number that remained on the frame of the motorcycle after the metal VIN plate

was removed. Although the registration information associated with the license plate number described the motorcycle as a Harley Davidson, the VIN number did not belong to a Harley Davidson model motorcycle. (11/15/12 RP 476) Instead, the VIN belonged to the Independence motorcycle reported stolen by Jose Chavez in 2009. (11/13/12 RP 289-91)

During his interview with the Detectives, Hubbard acknowledged that he was aware that both the motorcycle and car trailer had been stolen. (11/15/12 RP 553; 11/19/12 RP 632-33, 634) Hubbard said that Schuh stole the Independence motorcycle, but that he rebuilt the motorcycle using the Independence frame and parts that he purchased. (11/15/12 RP 532, 533-34; 11/19/12 RP 641) Hubbard denied being present when Schuh stole the car trailer, but when pressed, Hubbard indicated that he was present. (11/15/12 RP 530, 555-37; 11/19/12 RP 632-33, 634)

Burmeister acknowledged that she registered the stolen trailer and the stolen motorcycle under her name, but said that was only because she had a valid driver's license and Hubbard did not. (11/15/12 RP 520, 522-23)

B. PROCEDURAL HISTORY

The State charged Hubbard with one count each of theft in the

first degree (car trailer), possessing stolen property in the second degree (car trailer), and unlawful possession of a stolen vehicle (motorcycle) (under RCW 9A.56.020, .030, 068, .140, and .160). (CP 58-59) The State also charged Burmeister with possessing stolen property and possessing a stolen motor vehicle, and two counts of making false statements or illegal transfers. (CP 93, 96, 97, 98)

The trial court denied the defense motion to suppress, and ruled that statements made by Hubbard and Burmeister were admissible at trial under CrR 3.5. (CP 22-54; 08/21/12 RP 384-90, 404)

Before trial, Burmeister announced that she would argue that Hubbard was responsible for the thefts and for arranging the false registrations, that he deliberately deceived her about the source of the motorcycle and car trailer, and that she unknowingly filed false and incorrect registration information at his request. (08/21/12 RP 328-29, 407-08) Burmeister would claim that she agreed to register the motorcycle and trailer in her name only because Hubbard had a suspended driver's license, not because she was knowingly hiding the fact that the motorcycle and car trailer were stolen. (11/01/12 RP 24-25) To support her defense, she sought to introduce evidence that

Hubbard's license had been suspended numerous times over the past five years. (11/01/12 RP 24-25; 11/19/12 680, 773-74) The trial court ruled that Burmeister could introduce the evidence at trial. (11/01/12 RP 43)

In order to rebut Burmeister's claim that she did not know that the motorcycle and car trailer were stolen, the State sought to introduce evidence of Burmeister and Hubbard's contact with police in 2008 regarding their possession of the stolen Mazda truck. (08/21/12 RP 362-65, 381) The trial court initially found that the evidence would not be admissible in the State's case-in-chief but might be if Burmeister opened the door. Later, after finding that Burmeister opened the door during opening statements and cross-examination of witnesses, the court ruled that the State could introduce that evidence. (08/21/12 RP 395-96, 402-03, 409; 11/13/12 RP 189; 11/14/12 RP 350-51, 370-71; CP 16-19)

Numerous times before and during trial, Hubbard asked that his trial be severed from Burmeister's because her defense required the jury to presuppose his guilt, and because otherwise inadmissible and prejudicial ER 404(b) evidence was being admitted to prosecute and defend Burmeister. (08/21/12 RP 354, 11/01/12 RP 28; 11/14/12 RP 354-56, 364-65; 11/19/12 RP 680, 773-74) Hubbard

also repeatedly moved to exclude the evidence of his electronic home monitoring status, his driving status, and the evidence of the 2008 stolen truck incident. (08/21/12 RP 352; 11/01/12 RP 9, 17, 21, 28, 62, 74-75) The trial court denied Hubbard's requests. (08/21/12 RP 352; 11/01/12 RP 34, 43; CP 16-19)

The jury convicted Hubbard as charged, but found Burmeister not guilty. (CP 64-66; 11/21/12 RP 998-99) The trial court sentenced Hubbard to a total of nine months of confinement. (CP 114; 01/14/13 RP 1040) This appeal timely follows. (CP 121)

IV. ARGUMENT & AUTHORITIES

A defendant has the constitutional right to a fair trial. U.S. Const. Amend. XIV; Wash. Const. art I, § 3. To this end, CrR 4.4 provides for severance of counts and of co-defendants if joinder prevents a fair trial. CrR 4.4(c) provides, in relevant part:

(2) The court, on application of the prosecuting attorney, or on application of the defendant . . . should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

Separate trials are not favored in Washington. State v. Dent, 123

Wn.2d 467, 869 P.2d 392 (1994). However, severance is appropriate when it would prevent undue prejudice. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154(1990).

A trial court's denial of a motion to sever is reviewed for abuse of discretion. State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994); CrR 4.4(c)(2). On appeal from the denial of a motion for severance, the defendant has the burden of demonstrating that a joint trial was so manifestly prejudicial as to outweigh the concern for judicial economy. State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991); Bythrow, 114 Wn.2d at 718. To meet this burden, the defendant must show specific prejudice. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982).

In this case, the trial court allowed both Burmeister and the State to present evidence that was highly prejudicial to Hubbard, but that would not have been admitted if Hubbard were tried alone. First, the trial court allowed Burmeister to elicit testimony regarding Hubbard having a suspended driver's license and his electronic home monitoring status. (11/01/12 RP 25-26, 43, 74-75; 11/13/12 RP 224; CP 56-57) Second, the trial court allowed the State to present several witnesses who testified that both Burmeister and Hubbard were in possession of a stolen Mazda truck in 2008, before

any of the events surrounding the current charges took place. The State was allowed to elicit testimony that the truck was reported stolen, that its VIN number was tampered with, and that Burmeister registered the truck in her name. (11/19/12 RP 675-76, 680, 691, 692-93, 695, 716, 718)

Admission of evidence of other crimes or bad acts must be evaluated under ER 404(b), which reads:

(b) Other Crimes, Wrongs, or Acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

Evidence of other crimes is inadmissible at trial unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

In this case, Burmeister's defense was that it was all Hubbard's fault and she did not have any knowledge that the car trailer and motorcycle were stolen. On the other hand, Hubbard did not argue lack of knowledge. His defense was one of general denial and of holding the State to its burden of proof. Thus, while the other acts evidence may have been admissible and relevant to

Burmeister's prosecution and defense, it was neither relevant nor admissible against Hubbard. This same evidence could not have been presented at a separate trial.

However, the presentation of the evidence, and its use by the State and Burmeister at trial, was highly prejudicial to Hubbard. The factual similarity between the 2008 Mazda truck incident and the charged incidents (stolen vehicle, altered VIN, registered in Burmeister's name) is obvious. Although the State did not connect Hubbard to this incident in closing arguments, the State did specifically elicit testimony from its witnesses regarding Hubbard's presence and statements at the time of the police contact. And Burmeister used that evidence to attack Hubbard in her closing statements, arguing:

Mr. Hubbard is telling her what to do. In other words, he doesn't tell her, guess what? I stole the Mazda. Now I want you to go register it for me.

(11/20/12 RP 960, 965) Burmeister's counsel continues:

Mr. Hubbard is the one that is in control here. Ms. Burmeister is just passively listening to whatever he tells her to do. She is not the one making the decisions. She is not the one who is taking an active participation in this. She is not the one in the know. That is Mr. Hubbard pulling the strings.

(11/20/12 RP 961-62)

In regards to the suspended license evidence, Burmeister argued in closing:

We have got the stipulation that was read to you by the Court. It says, that Mr. Hubbard's license was suspended from December 16, 2007 through March 27, 2008. The stipulation said, it was also suspended from October 28, 2008, through March 1, 2011. That period of time covers this entire range of events.

Furthermore, we have the stipulation that during the period of time between March 10th -- or excuse me, December 8, 2010 and March 10, 2011, that Mr. Hubbard was on electronic home monitoring for a driving while license suspended sentence. That is a different status. It's not only was he suspended, but during this period of time, he was serving a sentence for a conviction of the crime of driving while license suspended. There is no question here that Mr. Hubbard has a lengthy history of driver's license suspensions.

(11/20/12 RP 978-79) And Burmeister's counsel concluded by stating:

What was happening here is, she was doing what she was asked to do without asking questions. My client is not guilty of all four counts. I ask you to find Ashley not guilty.

(11/20/12 RP 981) These arguments clearly worked for Burmeister, as she was acquitted and Hubbard was convicted on all counts. By emphasizing Hubbard's driving history, and by reminding the jury about his connection to the 2008 Mazda truck incident, Burmeister successfully deflected all blame from herself onto Hubbard.

Although Hubbard acknowledged that he knew the car trailer and motorcycle did not legally belong to Schuh, Hubbard initially told the interviewing Detectives that he was not present when Schuh stole the trailer. (11/15/12 RP 530, 555-37; 11/19/12 RP 632-33, 634) In closing, Hubbard argued that the jury should believe that statement. (11/20/12 RP 947) But with all of the other irrelevant, prejudicial and otherwise inadmissible evidence regarding Hubbard, the jury was unlikely to believe that he was not involved. Any juror would have their opinion of Hubbard's involvement improperly influenced by this evidence.

Although the evidence was admitted only to explain Burmeister's behavior and to rebut her claim that she lacked knowledge, this distinction was likely lost on the jury because of the way in which the evidence was presented and used in closing arguments.

Knowing that all of this highly prejudicial evidence would be presented during the trial, and knowing how Burmeister intended to use this evidence to argue that Hubbard was guilty and she was not, the trial court's decision to deny Hubbard a separate trial was an abuse of discretion and denied Hubbard his constitutional right to a fair trial.

Where a trial court erroneously denies a motion to sever, the proper remedy is reversal. State v. Bryant, 98 Wn. App. 857, 864, 950 P.2d 1004 (1998).

V. CONCLUSION

Hubbard was entitled to a separate trial when both the State and his co-defendant sought to admit evidence about Hubbard's criminal history and prior bad acts that would not have been otherwise admissible. The trial court abused its discretion when it denied Hubbard's request to sever his trial from Burmeister's trial, and Hubbard's convictions should be reversed.

DATED: September 27, 2013



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CERTIFICATE OF MAILING

I certify that on 09/27/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Justin M. Hubbard, 10904 Fruitland Ave E, Puyallup, WA 98373.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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