

NO. 45772-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BRUCE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable David Gregerson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to sever the counts for trial.

2. Unmitigated prejudice from joinder of offenses denied appellant a fair trial.

3. Appellant's convictions of both first degree burglary and residential burglary for the same offense violate double jeopardy.

4. The trial court erred in entering judgment and sentence on both the first degree burglary and the residential burglary counts.

Issues pertaining to assignments of error

1. Appellant was charged with four offenses relating to an alleged burglary in June 2013 and with four misdemeanor violations of a domestic violence order committed in September and October 2013. Over defense objection, the court consolidated the charges for trial. Where the State's evidence as to the initial charges was weak, the defenses to the charges differed, the evidence was not cross admissible, and the testimony at trial encouraged the jury to cumulate evidence to find guilt, did unmitigated prejudice from joinder deny appellant a fair trial?

2. Appellant was convicted of first degree burglary and residential burglary based on a single incident involving a single victim.

Where the evidence used to prove first degree burglary was sufficient to establish residential burglary, did conviction of both offenses violate appellant's right to be free from double jeopardy?

B. STATEMENT OF THE CASE

1. Procedural History

On September 10, 2013, the Clark County Prosecuting Attorney charged appellant Michael Bruce with first degree burglary, felony domestic violence court order violation, and third degree theft, based on an incident occurring on June 30, 2013, at the home of Heather Reid. CP 1-2. On December 5, 2013, the State file an amended information, adding four counts of domestic violence court order violation committed in September and October 2013. CP 52-54. The State filed a second amended information on December 9, 2013, adding a charge of residential burglary based on the June 30 incident at Reid's home. CP 56-68.

The case proceeded to jury trial before the Honorable David Gregerson, and the jury returned guilty verdicts on all counts. CP 170-77. The jury entered a special verdict finding the State had not proven Bruce and Reid were family or household members. CP 178. At sentencing the court entered judgment and sentence on all eight counts of the second amended information. CP 192-215. Bruce timely filed a notice of appeal. CP 216.

2. Substantive Facts

a. **The June 30 incident**

On the afternoon of June 30, 2013, Heather Reid called the police to report that during the night Michael Bruce had violated a protection order by entering her apartment, assaulting her, and taking her cell phone. 3RP¹ 32, 43; 4RP 173. Two restraining orders prohibited Bruce from contacting Reid. 3RP 133-38.

At trial Reid testified that she was alone in her apartment on the evening of June 29, 2013, because her children were spending the night with her aunt in Portland. It was a hot night, so she left her windows and back door open when she went to bed. 3RP 13-14. She was awakened when Bruce touched her arm and told her not to be mad. 3RP 15. Reid testified that Bruce held her down as she struggled, covering her mouth so she would not scream. 3RP 16-18. When she calmed down, he let go of her, and she jumped out of bed and continued yelling. 3RP 19. When she would not stop yelling, he hit her in the jaw and left the apartment. 3RP 21. Reid looked for her cell phone, but it was not on her night stand where she had left it, so she went to bed. 3RP 21. The next morning she walked

¹ The Verbatim Report of Proceedings is contained in four volumes, designated as follows: 1RP—10/24/13, 12/3/13, 1/8/14; 2RP—12/16/13 (motion hearing); 3RP—12/16-17/13 (jury trial); 4RP—12/18-19/13.

to a pay phone and called her mother. 3RP 25. Her mother talked her into calling the police and took Reid to buy a new phone. 3RP 32, 102.

Several inconsistencies between Reid's testimony and her prior statements were uncovered at trial. For example, when she spoke to the deputy on June 30, she said that prior to that night she had not seen Bruce in some time, because of the restraining orders. 4RP 179. In her defense interview, Reid said that Bruce had no way of knowing that her children would not be home that night. 3RP 78. When asked if she had had contact with Bruce prior to that night, she said no. 3RP 93. Reid initially estimated that she and Bruce had broken up within the week prior to the incident. Later she said it was more like three months, then one month, and she finally settled on two weeks. 4RP 242-43.

At trial, however, Reid testified that Bruce had been to her apartment the previous night as well. He knocked on her window and asked to come in. When she told him to leave, he said he would make a scene, so she let him inside. He spent the night, and she gave him bus fare in the morning. 3RP 67-69. She also told him her children would not be home the next night, making it more likely he would return. 3RP 68. When asked about the discrepancy between her testimony and what she had told police and the defense investigator, Reid said that she had lied because she wanted to say whatever it took to make sure Bruce could not

contact her again. She also thought she would get in trouble for violating the no contact order. 3RP 94.

Another inconsistency was that Reid had told the deputy that Bruce was left-handed and had struck her on the right side of her face. 4RP 179. Despite telling the deputy that Bruce was left handed, she told the defense investigator that he was right handed. 4RP 243. At trial she said she could not remember if Bruce was right or left handed. 3RP 63.

Reid testified that after Bruce left on June 30, she found several bunches of flowers around her apartment, which she had not put there. 3RP 33-35. Reid testified that Bruce gave her flowers fairly often when they were together. 3RP 66. In the defense interview, however, Reid had said that Bruce had never given her flowers before except on Valentine's Day. 4RP 243.

The State's evidence was inconsistent in other respects as well. For example, Reid testified that she believed Bruce had taken her phone, and she described messages sent from her Facebook account while she was without access to her phone which she said Bruce had sent. 3RP 30, 46, 48-50. But she also testified that before calling the police she had used her mother's phone to text her phone, saying "Whoever has my phone needs to return it," implying that she did not know who had the phone. 3RP 64; 4RP 178.

In another inconsistency, Reid testified that she disconnected service to her missing cell phone on the afternoon of June 30, when she bought the new phone. 3RP 72. But Reid's cousin testified that she received a text message from Reid's phone the following day which she suspected was not sent by Reid. 3RP 111-12. She also testified that Bruce called her from Reid's phone the day after that, two days after Reid said the service to the old phone was disconnected. 3RP 113.

Bruce presented an alibi defense at trial. Douglas and Michelle Schmer testified that Bruce was living with them in June 2013. They remembered the weekend of June 28-30 because they were doing yard work in preparation for their twins' first birthday party the next week. 4RP 198, 218. Bruce helped with the work on June 28 until dark, then they watched movies together before going to bed. Bruce did not leave the house that night. 4RP 200, 219. The next day, Bruce and Douglas Schmer went to a friend's birthday party in Portland and returned home around 9:30 or 10:00. 4RP 201-02, 220. The family spent some time together before everyone went to bed. Bruce stayed home, and one of the twins went to sleep with him. 4RP 203, 209-10, 221-22.

Bruce testified that he moved in with the Schmers in March or April 2013. 4RP 249. He recalled the weekend of June 28-30. On Friday June 28, he helped with yard work all day, getting ready for the twins'

birthday party. He never left the house that day or night. He did not go to Reid's apartment. 4RP 250. On June 29, he and Douglas Schmer went to a friend's party in Portland and then returned home. He did not leave the house again that day. 4RP 251-53. He spent June 30 doing yard work, again not leaving the entire day. 4RP 253.

b. The misdemeanor charges

On September 5, 2013, Bruce went to Reid's apartment while she was at work and spoke briefly to Reid's aunt, who was there watching the children. 3RP 124. He left when she called the police. 3RP 125. Bruce returned later that night when Reid was home. 3RP 52. He knocked on her window and said he needed to talk to her, but Reid told him to leave. Her children heard them talking and got scared. Bruce started ringing the doorbell repeatedly, then he walked around the perimeter of the house, yelling at her to let him in. Finally, Reid hid with her children in a closet and called 911. 3RP 52-54.

Bruce was arrested outside Reid's apartment. 3RP 53, 145. He was charged with two counts of violating a domestic violence court order based on the September 5 contacts. While Bruce was in jail, he mailed several postcards to Reid's address, using his daughter's name as the addressee. 3RP 55-57. He was charged with two more counts of violating a domestic violence court order based on the post cards. Bruce admitted

the contact on September 5 and sending the postcards to Reid's apartment.
4RP 257-58.

C. ARGUMENT

1. UNMITIGATED PREJUDICE ARISING FROM
CONSOLIDATION OF THE CHARGES DENIED
BRUCE A FAIR TRIAL.

The State filed the information on charges relating to the June 30 incident on September 10, 2013. Three months later the State moved to consolidate those charges with the misdemeanor court order violation charges. CP 4-43; 1RP 14. The defense filed a written objection to the motion for consolidation, arguing that severance was required to avoid undue prejudice to the defense. CP 44-50. At a hearing on the State's motion, defense counsel argued that the motion was not timely, that Bruce had an alibi for the June 30 incident but no witnesses for the other incidents, that evidence of the misdemeanor charges could be used to infer a criminal disposition, and that the jury might disregard the serious credibility issues with the State's evidence regarding the June 30 charges due to the inferred criminal disposition and the feeling of hostility engendered by the number of allegations. 1RP 27-29. Counsel further argued that the evidence of the felony charges was not cross admissible with the misdemeanor charges, and judicial economy would not be served by consolidation. 1RP 30. The court found that, although its ruling could

go either way, consolidation was appropriate under the totality of the circumstances. 1RP 34. It granted the State's motion for consolidation, and the case proceeded to trial on all charges. CP 51.

At trial during Reid's redirect examination, when the prosecutor was exploring her new claim that Bruce was at her apartment the night before the charged incident, Reid testified that she let Bruce into the apartment because she wanted to avoid the type of scene that occurred on September 5. 3RP 91. Defense counsel objected to this testimony, and in a sidebar he moved to sever the charges relating to the June incident from the other charges. 3RP 91, 128. Counsel argued that severance was necessary to ensure that the jury did not infer guilt on one set of charges based on evidence of the others. 3RP 128. The court denied the motion, saying that the defense had opened the door for evidence of Reid's state of mind when letting Bruce into her apartment, and the inquiry on redirect was therefore appropriate. 3RP 129.

Washington's criminal rules permit joinder of offenses in a single information when the offenses are of the same or similar character or when the offenses are part of a single scheme or plan. CrR 4.3(a). Generally, offenses properly joined under CrR 4.3 are consolidated for trial. CrR 4.3.1(a). While Washington has a liberal joinder rule, "joinder must not be utilized in such a way as to prejudice a defendant." State v.

Harris, 36 Wn. App. 746, 749-50, 677 P.2d 202 (1984)(citing State v. Smith, 74 Wn.2d 744, 466 P.2d 571 (1958), vacated in part, 408 U.S. 934 (1972)). The court must sever the offenses for trial when necessary to promote a fair determination of the defendant's innocence or guilt on each offense. CrR 4.4(b). In such cases, the court's failure to sever offenses is reversible for a manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

Washington courts have recognized that joinder of offenses is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). Thus, even where joinder is legally permissible, the trial court should not join offenses for prosecution in a single trial where joinder prejudices the accused. State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017 (1999). Prejudice will result if a single trial invites the jury to cumulate evidence to find guilt or to otherwise infer a criminal disposition. State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989) (citing Smith, 74 Wn.2d at 754-55). "A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one." Harris, 36 Wn. App. at 750.

When assessing whether the trial court abused its discretion in denying a motion for severance, the appellate court must balance the

inherent prejudice from joinder against the presence of mitigating factors. These factors include (1) the strength of the State's evidence as to 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 separately; and (4) the admissibility of evidence of the other charges if not joined for trial. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Finally, any "residual prejudice" must be weighed against the need for judicial economy. Id. (citing State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993)). These factors failed to mitigate the prejudice to Bruce in joining the offenses for trial in this case.

Where the State's evidence is not uniformly strong, severance may be necessary to ensure a fair trial. State v. Hernandez, 58 Wn. App. 793, 800, 794 P.2d 1327 (1990), overruled on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 99, 812 P.2d 86 (1991). For example, in Hernandez, the defendant was charged with three robberies of three different businesses on three different dates. Id. at 795. Each charge was based on the testimony of eyewitnesses whose identifications varied as to reliability. Id. at 800. The evidence on one count was quite strong, mitigating any prejudice caused by joinder, where the evidence on the other two counts "was somewhat weak," creating a likelihood of

“significant prejudice.” Id. The court held, “It is apparent to us that where the prosecution tries a weak case or cases, together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case.” Id. at 801.

Similar to Hernandez, the disparate reliability of the State’s evidence on the various counts joined for trial in this case likely influenced the jury’s verdict. Here, the State’s evidence as to the misdemeanor violations was strong. In fact, Bruce admitted that he went to Reid’s apartment twice on September 5, and there was no dispute that he was arrested there that evening. Similarly, Bruce did not deny mailing the postcards to Reid’s address, and those postcards were available to the jury. There were significant reliability issues with the evidence regarding the June 30 incident, however. Numerous inconsistencies between Reid’s earlier statements and her trial testimony demonstrated that she was not a credible witness, and unlike the other charges, Reid was the only witness to the alleged events on June 30. Trying the weak case with the stronger ones created a likelihood of significant prejudice to Bruce.

The next factor to consider is the clarity of defenses as to each count. “The likelihood that joinder will cause a jury to be confused as to the accused’s defenses is very small where the defense is identical on each charge.” Russell, 125 Wn.2d at 64 (quoting Hernandez, 58 Wn. App. at

799); see also State v. Sutherby, 165 Wn.2d 870, 885, 204 P.3d 916 (2009) (defense counsel ineffective for failing to move to sever possession of child pornography charge from child rape and molestation charges, where defense to pornography charge was unwitting possession and defense to rape and molestation charges was mistake or accident). For example, in Russell, the defense to both offenses was a general denial. 125 Wn.2d at 65. Finding this factor supported joinder, the Supreme Court quoted the trial court's observation that "It isn't as though there will be a self-defense argument on one and a different type of defense on another one, or that there will be an admission of one or a denial of another." Russell, 125 Wn.2d at 65.

Here, however, there was an admission of wrong-doing on the September 5 and postcard counts and a denial and alibi defense as to the June 30 charges. As the Russell Court observed, the conflict between the two defenses would likely confuse the jury's deliberations. This factor does not mitigate the prejudice inherent in joinder.

Next, the court instructed the jury to consider each charge separately:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 134 (Instruction No. 3). Bruce acknowledges that this instruction has been approved by appellate courts in the context of severance determinations as generally favoring joinder. Bythrow, 114 Wn.2d at 723. This factor is not dispositive, however. See e.g. Harris, 36 Wn. App. at 750 (“despite an instruction to consider the counts separately, there was extreme danger that the defendants would be prejudiced.”).

The fourth factor to consider is whether the evidence to be presented is cross-admissible. Cross-admissibility considerations involve evaluating whether the evidence of various offenses would be admissible to prove the other charges if each offense was tried separately. Ramirez, 46 Wn. App. at 226. “In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence.” Sutherby, 165 Wn.2d at 887 (internal citations omitted).

Here, details of the September violations would not have been admissible in a separate trial of the June 30 charges. While the fact that Bruce ran when Reid’s aunt said she was calling 911 might have demonstrated Bruce’s knowledge of the protection orders on June 30, as the State suggested, so did the fact that Bruce signed the orders. Thus, it is not clear that the court would have admitted any evidence of the September incident to prove the State’s case on the felony violation charge. But more importantly, there would have been no justification for

admitting evidence that Bruce circled the house, shouting to be let inside, while Reid and her children hid in a closet waiting for police to arrive. Allowing the same jury to hear that evidence as well as decide the June 30 charges was unfairly prejudicial to Bruce.

The primary concern underlying review of a severance decision is whether evidence of one crime taints the jury's consideration of another charge. Bythrow, 114 Wn.2d at 721. Here, actual prejudice from joinder of the counts surfaced at trial. For the first time at trial, Reid claimed that Bruce had been to her apartment the night before the June 30 incident as well. She testified not only that she let Bruce into the apartment, but she encouraged Bruce to return the next night when her children would not be present, explaining that she wanted to avoid a scene like the one that occurred in September. Because of this testimony, there was an extreme danger that the jury would cumulate the evidence and decide the June charges based on evidence of the September offenses, despite the instruction to consider the counts separately. See Harris, 36 Wn. App. at 749-50 (prejudice from joinder of counts where prosecutor remarked that defendant being charged with two rapes within two-and-a-half weeks seemed coincidental).

A trial court's failure to grant severance requires reversal when the danger of prejudice from the evidence of various counts deprives the

accused of a fair trial. Harris, 36 Wn. App. at 752. The State's strong evidence on the misdemeanor violation charges, together with Reid's testimony, bolstered the State's weak case on the June 30 charges, and Bruce did not receive a fair trial. His convictions must be reversed.

2. BRUCE'S CONVICTION OF BOTH FIRST DEGREE BURGLARY AND RESIDENTIAL BURGLARY FOR THE SAME ACT VIOLATES DOUBLE JEOPARDY.

The State charged Bruce with first degree burglary and residential burglary for the same act of unlawfully entering Reid's apartment on June 30, 2013. The jury returned guilty verdicts on both offenses, and the court reduced both to judgment, imposing a sentence of 75 months on the first degree burglary and 43 months on the residential burglary. CP 202-05. It is "unjust and oppressive to multiply punishments for a single offense[.]" State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007) (quoting State v. Johnson, 92 Wn.2d 671, 678, 600 P.2d 1249 (1979)).

Both the Fifth Amendment to the United States Constitution and Article 1, section 9, of the Washington Constitution prohibit double jeopardy. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). One of the purposes of the double jeopardy clause is to prevent multiple punishments for the same offense. Womac, 160 Wn.2d at 650-51; State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Violation of double jeopardy prohibitions is manifest constitutional error which may be raised

for first time on appeal. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

The first question for a court reviewing a claim of double jeopardy is whether the legislature expressly intended multiple punishments. In re Pers. Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004). The burglary statutes do not demonstrate a legislative intent that the defendant be punished separately for very same burglary. See RCW 9A.52.050 (expressly providing for separate punishment of any other crime committed in course of burglary). Nor do the statutes defining the two types of burglary demonstrate such an intent. See RCW 9A.52.020(1)(a); RCW 9A.52.025.

Because the statutes are silent, the court must apply principles of statutory construction. Jackman, 156 Wn.2d at 746. The primary rule followed in Washington is the same evidence test. With this test, if each offense contains an element the other does not, or if each requires proof of a fact the other does not, the offenses are not the same. Orange, 152 Wn.2d at 816-18. The test is not a mere abstract comparison of statutory elements, however. The court must look at the facts used to prove the statutory elements and determine whether each provision requires proof of some fact the other does not. Orange, 152 Wn.2d at 818; see also Freeman, 153 Wn.2d at 777 (court must look at crimes as charged and

proved rather than abstract articulation of elements). Double jeopardy is violated where “the evidence required to support a conviction on one of the charged crimes would have been sufficient to warrant a conviction on the other.” Orange, 152 Wn.2d at 820 (quoting State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)).

In Orange, the Court held that the defendant’s convictions of attempted first degree murder and first degree assault were the same in fact and law, even though the offenses had different statutory elements, because the two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for attempted murder was sufficient to convict of first degree assault. Orange, 152 Wn.2d at 820.

In this case, as in Orange, the two burglary convictions were the same in fact and law because the evidence used to prove first degree burglary would have been sufficient to warrant a conviction on residential burglary. There is no question that both the residential burglary and the first degree burglary convictions were based on the very same burglary. To prove residential burglary, the State had to prove that on or about June 30, 2013, Bruce entered or remained unlawfully in Reid’s apartment with intent to commit a crime therein. CP 162. To prove first degree burglary, the exact same evidence was used, with the additional fact of assault. See

CP 138. Where, as here, the very same evidence establishes the two crimes and there is no legislative intent to allow multiple punishments, allowing both convictions to stand violates double jeopardy.

While the State may bring multiple charges for the same conduct in single proceeding, the court may not enter multiple convictions for the same offense without offending double jeopardy. Womac, 160 Wn.2d at 658. Because Bruce was not charged in the alternative but with separate counts and both counts were reduced to judgment, his right to be free from double jeopardy was violated. The conviction for residential burglary must be reversed and dismissed.

D. CONCLUSION

Unmitigated prejudice from joinder of offenses denied Bruce a fair trial, and his convictions must be reversed. In addition, conviction of both first degree burglary and residential burglary for the same act violates double jeopardy, and the residential burglary conviction must be reversed and dismissed.

DATED July 14, 2014.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

A handwritten signature in black ink, appearing to read "Catherine E. Glinski". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

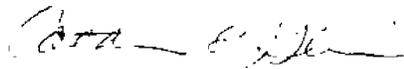
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Certification of Service by Mail

Today I caused to be mailed a copy of the Brief of Appellant in
State v. Michael Bruce, Cause No. 45772-5-II as follows:

Michael Bruce, #371505
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
July 14, 2014

GLINSKI LAW FIRM PLLC

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