

NO. 49538-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

CODY MARTINEZ,

Appellant.

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

The Honorable Christopher Melly, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Cody Martinez's pre-trial motion to sever the bail jumping charge from the underlying violation of a no contact order.

2. Cody Martinez was denied effective assistance of counsel by defense counsel's failure to renew the motion to sever the charges before the close of evidence.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

After Cody Martinez did not appear at a hearing on the pending no contact order violation, defense counsel unsuccessfully objected to the State adding a bail jumping charge to the amended information. The bail jumping charge permitted the jury to improperly conclude Cody Martinez had a propensity to ignore court orders and, consequently, a criminal disposition. Inexplicitly, defense counsel failed to renew the motion to sever the two counts before the close of evidence thereby the objection under CrR 4.4(a)(2). The trial court likely would have granted the renewed severance motion. Was defense counsel ineffective for failing to renew the motion to sever, and did counsel's ineffectiveness prejudice Cody Martinez on both charges?

C. STATEMENT OF THE CASE

1. Charges, motion to sever, and sentencing

The court arraigned Cody Martinez¹ on a single count of Felony Violation of a No Contact Order on April 8, 2016. RPI²; CP 29-30. The court set a June 15 trial date. RP 6. When Cody did not appear in court on June 15 the trial was stricken and a bench warrant was issued. RPI 13-14.

Cody appeared in court on August 5, 2016, when the State filed an amended information adding a charge of Bail Jumping for the missed June 15 court date. RPI 16-17. Defense counsel objected to the joinder of the bail jumping charge arguing the occurrence was two and a half months after the order violation and, as such, should not be joined with the order violation. RPI 17. The court authorized the joinder as it believed there was “some authority for this.” RPI 17.

A jury heard the trial. RPI 31-182. Defense counsel did not renew the motion to sever the no contact order violation from the Bail Jumping. RPI 31-159. The jury found Cody guilty of both crimes. RPI 181-82; CP 25-

¹ Because both Cody Martinez and his father, Jerome Martinez, share the same last name, they are referred to by their first names for clarification. No disrespect is intended.

² This appeal has three volumes of verbatim report of proceedings. RPI and RPII are so designated on the respective volume cover page. RP III refers to the supplemental volume containing just closing argument.

26. The court imposed a Residential Chemical Dependency Treatment-Based Alternative Sentence. RPII 231-32; CP 1-23.

Cody appeals all portions of his judgment and sentence. CP 9.

2. Trial testimony

A no contact order issued June 23, 2013, prohibited Cody Martinez from having contact with his father, Jerome Martinez, or going to Jerome's home at 279 Pierson Road, Sequim. RPI 51-52; Supplemental Designation of Clerk's Papers, Exhibit 1. The Order did not expire until June 23, 2020.

On March 31, 2016, Jerome was home and heard his wife, Cody's mother, screaming. RPI 58, 115. When he went to find out what the screaming was about, he found Cody hanging from a tree via an extension cord wrapped around his neck. RPI 53, 58, 138. Jerome untied the noose and called the police. RPI 54. Clallam County Sheriff's Deputy Paul Federline came to the house, found Cody walking in the trees behind the house, and arrested him. RPI 117.

Court documents admitted into evidence via Clallam County District Court Clerk Keith Wills reflected Cody's two prior convictions for violating the order. RPI 63-69, 71-74, 81; Supp. DCP Exhibits 3A, 4A, 5A.

Cody testified to being distraught and angry with his father. RPI 136-37. He did not go to his father's home to contact his father. Rather, he

intended to commit suicide thereby punishing his father for all the things his father put him through. RPI 136-37.

Cody also acknowledged having been told by the court originally to appear for trial on June 15. RPI 6, 13-14, 91-98, 158. Supporting documentation was admitted through Clallam County Superior Court Clerk Morgan Halencak. RPI 90-106. Cody did not appear in court because he was terrified of going to prison. RPI 158. The court told the jury to disregard Cody's motivation for not appearing. RPI 158.

In closing, Cody argued that in his suicidal condition, he was too distraught to knowingly violate the no contact order. "If you're distraught enough to commit suicide, you're distraught enough not only not to know that you're violating the terms of the no-contact order especially after you have been twice previously convicted of them, you're just not thinking of it and you don't know what's happening." RPIII 15.

At no time did defense counsel again move to sever the two charges. RPI 31-159.

D. ARGUMENT

Defense counsel's failure to renew Cody Martinez's motion to sever charges during trial denied Martinez effective assistance of counsel.

Defense counsel was ineffective for failing to renew the severance motion before or at the close of all the evidence. CrR 4.4(a)(2). A renewed severance motion would likely have been granted, and there is a reasonable probability that the outcome of separate trials would have been different. This Court should, accordingly, reverse both charges and remand for new trials.

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Wash. Const. art. I, § 22. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

An accused asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing *Strickland*, 466 U.S. at 686; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

This Court reviews claims of ineffective assistance of counsel de novo, as they present mixed questions of law and fact. *A.N.J.*, 168 Wn.2d at 109.

With respect to the deficient performance prong, “[t]here is a strong presumption that defense counsel’s conduct is not deficient,” but an accused rebuts that presumption if “no conceivable legitimate tactic explain[s] counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To meet the prejudice prong, an accused must show a reasonable probability “based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” *McFarland*, 127 Wn.2d at 337.

1. Counsel’s failure to renew the severance motion was unreasonable.

CrR 4.4 governs severance of charges in a criminal trial. Counts that are properly joined may be severed “to promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). A defendant’s motion to sever “must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require.” CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed until the close of

all the evidence. CrR 4.4(a)(2). Failing to renew an unsuccessful severance motion constitutes a waiver. *Id.*; *State v. Henderson*, 48 Wn. App. 543, 545, 551, 740 P.2d 329 (1987).

Joinder is “inherently prejudicial.” *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). An accused may be prejudiced by having to present separate defenses, the jury may use evidence of one or more of the charged crimes to infer a criminal disposition, or the jury may cumulate evidence of the charges and find guilt when, if considered separately, it would not. *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

A more subtle prejudicial effect may be present in a “latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” *Id.* (quoting *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964)).

In determining whether to sever charges, therefore, a court must consider (1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) whether the court instructs the jury to consider each count separately; and (4) the admissibility of evidence of the other charges, even if not joined for trial. *State v. Sutherby*, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009). Where counsel’s failure to litigate a motion to sever is the basis of an ineffective assistance claim,

prejudice is demonstrated by evidence the motion should have been granted, and but for counsel's deficient performance, the outcome of the proceeding would have been different. *Id.*

Here, counsel's failure to renew the motion to sever fell below the standard expected for effective representation. As evidenced by the original motion to sever, trial counsel was well aware of the harm that could result from joinder of the bail jumping charge during trial. Failure to renew the motion after the close of the State's case was deficient representation. Nothing happened during trial to mitigate the prejudice counsel anticipated when the motion was initially brought. Both the felony violation of the no contact order and the bail jumping are premised on a jury finding Cody did not abide by court orders. Felony violation of the court order required proof of three instances of violating court orders: twice violating the order to making a third violation a felony. Bail Jumping required notice by the court to appear on a certain date and a knowing failure to appear on that date. Supp. DCP. Court's Instructions to the Jury (Instructions 7 and 11).

Thus, there was no reasonable trial strategy that would lead counsel to abandon the motion to sever. Counsel simply neglected to renew the motion, as required by the rules. *See State v. Kylo*, 166 Wn.2d

856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); *State v. Carter*, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such negligent conduct demonstrates deficient performance. *Sutherby*, 165 Wn.2d at 887. By failing to move to sever, counsel was essentially acquiescing to the admission of improper propensity evidence that Mr. Martinez was a chronic court rule violator. ER 404(b) prohibits use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith.

2. Counsel's failure to act prejudiced Cody Martinez.

The next question is whether counsel's defective representation prejudiced Cody. There are four factors to consider when determining whether joinder causes undue prejudice: "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial." *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

In light of the evidence presented at trial, and after proper application of the four severance factors, the trial court would likely have granted a renewed motion for severance. *Sutherby*, 165 Wn.2d at 884-85

(where ineffective assistance was raised on appeal, finding that had counsel made motion to sever charges, trial court was likely to have granted it).

First, the State's case as to the no contact order violation was strengthened significantly by the bail jumping charges and the asserted defense. "[P]rejudice may result from joinder . . . if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition." *State v. Bryant*, 89 Wn. App. 857, 867, 950 P.2d 1004 (1998) (quoting *State v. Russell*, 125 Wn.2d at 62-63. A single trial allowed the jury to infer that Cody had a criminal disposition and ignored court orders. Without such evidence suggesting Cody had a criminal disposition, it is reasonably likely the jury would have acquitted Cody of the no contact order violation given his mental state when he went to his parents' home and attempted to take his own life.

The joinder of the charges also prejudiced Cody as to the bail jumping charge. The character of the underlying no contact order charge, which suggested disrespect for the rights of others, would likely to have made the jury less sympathetic to Cody regarding his excuse for failing to appear, i.e., fear of incarceration especially as a person with mental health concerns.

The second factor, clarity of defenses, also favored severance. As stated above, prejudice from the bail jumping charge likely bled over to the violation of the no contact order as a commonality of the two offenses is disregard of court orders.

The third factor also supports severance, as the court failed to instruct the jury it must “decide each count separately.” Supp. DCP, Court’s Instructions the Jury. In fact, the jury instructions provided suggest to the contrary by instructing, “During your deliberations, you must consider the instructions as a whole.” Supp. DCP, Court’s Instructions to the Jury (Instruction 1).

The jury’s ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. *State v. Bythrow*, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). In *Bythrow*, the Court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence, different witnesses testified as to the different counts, the jury was properly instructed to consider the counts separately, and the issues and defenses were distinct. *Id.* at 723. On that basis, it was unlikely the jury was influenced by joinder of the crimes. *Id.*

Unlike in *Bythrow*, the jury in this case was unlikely to be capable of compartmentalizing the evidence. Jerome Martinez, Deputy Federline, and Cody Martinez told the story about what happened at 279 Pierson Road on March 31, 2016. But the remaining two witnesses, court personnel Keith Wills and Morgan Halencak, provided the jury with necessary court documents all of which reinforced the theme that Cody fails to follow court orders. *See State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) (“A juror’s natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended”). The third factor likewise supports severance.

The fourth factor also favors severance. The State never argued, and the court never found, the charges were cross-admissible, to show, for example, consciousness of guilt on the underlying charges. Cf. *State v. Cobb*, 22 Wn. App. 221, 224, 589 P.2d 297 (1978) (defendant’s failure to appear at trial admissible as circumstantial evidence of guilt). The only cross-admissibility of evidence would be that Cody had been released by court order on the no contact order charge with a subsequent obligation to return to court. Cody did not dispute that element of bail jump. Supp. DCP, Court’s Instructions to the Jury, Instruction 10.

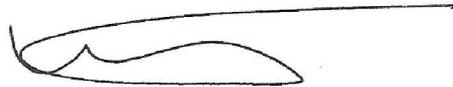
While a trial court's joinder decision is reviewed for abuse of its considerable discretion, precedent does not allow joinder "if prosecution of all charges in a single trial would prejudice the defendant." *State v. Bluford*, __ Wn.2d __, 393 P.3d 1219, 1226 (2017). As argued, joinder of the two offenses prejudiced Cody.

There was no legitimate reason for counsel to fail to renew the severance motion, the failure to move for severance before the conclusion of testimony was prejudicial. Cody's constitutional right to effective assistance of counsel was violated, and a new trial is required on all charges. *Sutherby*, 165 Wn.2d at 888 (reversing on grounds of ineffective assistance all charges for which Sutherby demonstrated prejudice).

E. CONCLUSION

Cody Martinez's convictions should be reversed and remanded.

Respectfully submitted June 20, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for Cody Martinez

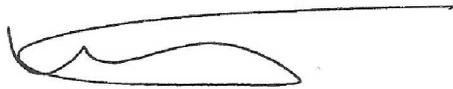
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Clallam County Prosecutor's Office, at jespinoza@co.clallam.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Cody Martinez, 12032 Beverly Park Road, Everett, WA 98204.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed June 20, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
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LAW OFFICE OF LISA E TABBUT

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