

NO. 49538-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

CODY MARTINEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00138-5

BRIEF OF RESPONDENT

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11
Port Angeles, WA 98362-301

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred by denying Martinez's Pretrial Motion to Sever Bail Jumping Charges when Martinez never moved to sever the charges under CrR 4.4(b)?
2. Whether Martinez failed to establish prejudice due to counsel's failure to move to sever charges because Martinez cannot show that the trial court would have granted a severance motion?
3. Whether Martinez failed to establish prejudice due to counsel's failure to move to sever charges because Martinez cannot show a reasonable probability of a different result had there been separate trials?

II. STATEMENT OF THE CASE

On April 5, 2016, the State filed an information charging the appellant, Cody Martinez, with Violation of Protection Order, Domestic Violence, for having contact with his father Jerry Martinez. CP 29–30, 68–69; RP 50–51, State's Ex. 1. On April 8, 2016, the Clallam County Superior Court set a trial date on June 15, 2016. CP 61. On May 26, 2016, the parties appeared in court and agreed to leave the matter on for trial. CP 67. On June 15, 2016, Martinez failed to appear for trial and the court issued a bench warrant. CP 60, 62; RP 13–14.

On August 5, 2016, the State filed a motion to amend the information to add a count of bail jumping for Martinez's failure to appear for trial on June 16, 2016. State's Supp. CP 58, 59. Martinez objected to the State's motion to amend and the court overruled this objection stating that it was aware there was authority for it. RP 17.

At trial, Jerry Martinez (appellant's father) testified that Martinez, the appellant, was restrained by a court order from coming within a certain distance from him. RP 51–52. Jerry also testified that he found his son in his front yard about 10 feet from his house while the order was in effect. RP 53. Then Jerry ran to his son to remove him from the tree he was hanging from and called 911 and Martinez called Jerry a snitch. RP 54–55.

Keith Wills, Clallam District Court Administrator, testified as to the existence of Martinez' prior no-contact order convictions. RP 81–86.

As to the bail jumping charges, Ms. Halecek, a Superior Court Clerk employee, testified that court records established that Martinez was given a trial date, he was present and notified, and yet failed to appear as charged. CP 90–106.

Martinez testified that he was aware of the no-contact order with his father. RP 139. Martinez testified that he went to his father's residence anyway to kill himself in front of his father in order to get back at his father. RP 135–36. Martinez characterized the contact as intent to get back at his

father rather than intent to violate the court order. RP 136–37, 140. The jury instructions required the State to prove that Martinez knowingly violated the no-contact order. CP 45.

Then Martinez testified that he failed to appear in court when required because he was terrified of going to prison if convicted. RP 158. The State objected to the defendant’s testimony and the trial court sustained the objection and instructed the jury to disregard this testimony. RP 158. The jury was instructed to not let their decision be based upon sympathy. CP 39

III. ARGUMENT

A. **THE COURT DID NOT ERR BY DENYING A PRETRIAL MOTION TO SEVER CHARGES BECAUSE MARTINEZ NEVER MOVED TO SEVER CHARGES UNDER CrR 4.4(b).**

The State moved to amend the information by adding a charge of Bail Jumping. State’s Supp. CP 58–59. Martinez objected and the court overruled this objection stating that it was aware there was authority for it. RP 17. The inclusion of multiple charges on a single information falls under the rule of joinder:

- (a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
 - (1) Are of the same or similar character, even if not part of a single scheme or plan; or
 - (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

CrR 4.3(a).

Martinez's improperly characterizes the trial court's overruling his objection to the amended information as a denial of his pretrial motion to sever charges. Appellant's Br. at 1. Martinez never moved to serve the charges under CrR 4.4(b).

This is a critical point because joinder and severance are reviewed by the appellate court under different standards.¹ "We review a trial court's refusal to sever charges for an abuse of discretion." *State v. McDaniel*, 155 Wn. App. 829, 857, 230 P.3d 245 (2010) (citing *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990)).

Severance of Offenses. The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

CrR 4.4(b).

A motion to sever charges falls under CrR 4.4(b) and requires the court to consider whether a "severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). On the other hand, when determining whether joinder is appropriate, the court considers whether both charges are "based on the same conduct or on a series of acts

¹ "The question of whether two offenses are properly joined is a question of law subject to full appellate review." *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998) (citing *State v. Hentz*, 32 Wn. App. 186, 189, 647 P.2d 39 (1982), rev'd in part on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983)).

connected together” CrR 4.3(a)(2).

Here, the trial court never had the opportunity to exercise discretion on a motion to sever under CrR 4.4(b) because Martinez never moved to sever. Because Martinez’ counsel never moved to sever, the issue of severance is waived and is not reviewable on appeal except in the context of ineffective assistance of counsel. *See* CrR 4.4(a)(1); *State v. McDaniel*, 155 Wn. App. 829, 859, 230 P.3d 245 (2010); *see also State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) (appellate review of trial court’s denial of codefendant’s motion to sever waived where defendant did not raise the claim at trial); *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998) (Failure to renew pretrial motion to sever charges of bail jumping and underlying offense of robbery prior to close of trial constituted waiver of issue of severance on appeal); *State v. Harris*, 36 Wn. App. 746, 677 P.2d 202 (1984) (Defendants waived their motion to sever counts where it was brought on morning of trial); *State v. Ben-Neth*, 34 Wn. App. 600, 663 P.2d 156 (1983) (Error was waived where defendant made pretrial motion to sever counts but failed to renew his motion at trial); *State v. Clark*, 34 Wn. App. 173, 659 P.2d 554 (1983) (Error was waived where defendant made no motion to sever bribery and prostitution-related charges).

Here, the issue of severance was waived because trial counsel never moved to sever either before or during trial and thus the trial court never had

the opportunity to exercise any discretion in regard to a motion to sever.

Finally, Martinez does not assign error to the trial court's granting the State's motion to amend the information which effectively joined the Bail Jumping and Violation of Court Order charges. *See* State's Supp. CP 58, 59, 27–28. Nevertheless, Martinez cites *State v. Russell* as authority on determining whether joinder was proper. Appellant Br. at 63 (citing to *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)).

As pointed out above, appellate review of joinder and severance motions fall under differing standards of review. Therefore, it is inappropriate to characterize a motion to sever as a joinder motion. The test cited under *Russell* is a test to determine whether severance is appropriate rather than joinder:

In determining whether the potential for prejudice requires *severance*, a trial court must consider (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. *Smith*, 74 Wash.2d at 755–56, 446 P.2d 571; *State v. York*, 50 Wash.App. 446, 451, 749 P.2d 683 (1987), review denied, 110 Wash.2d 1009 (1988). In addition, any residual prejudice must be weighed against the need for judicial economy. *State v. Kalakosky*, 121 Wash.2d 525, 539, 852 P.2d 1064 (1993); *State v. Bythrow*, 114 Wash.2d 713, 723, 790 P.2d 154 (1990); *State v. Markle*, 118 Wash.2d 424, 439, 823 P.2d 1101 (1992).

On review, a trial court's refusal to sever charges is reversible only where it constitutes a manifest *abuse of discretion*. *Markle*, at 439, 823 P.2d 1101; *York*, 50 Wash.App. at 450, 749 P.2d 683. *The defendant bears the burden of demonstrating such abuse*. *Bythrow*,

114 Wash.2d at 720, 790 P.2d 154; *York*, 50 Wash.App. at 450, 749 P.2d 683.

State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994) (emphasis added).

Here, the test under *Russell* does not apply to determine whether the court erred because severance was waived as trial counsel never moved to sever. Therefore, Martinez's assignment of error that the trial court erred by denying Martinez's pretrial motion to sever the charges lacks merit.

B. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FAILS BECAUSE MARTINEZ CANNOT ESTABLISH THAT THE TRIAL COURT WOULD HAVE GRANTED A MOTION TO SEVER WHICH IS A MATTER OF BROAD DISCRETION AND THERE WAS NO REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Here, the thrust of Martinez's argument seems to be that trial counsel's performance was ineffective because counsel failed to move to sever the counts. This argument assumes that Martinez was prejudiced by counsel's failure to act which in turn assumes the trial court would have granted the motion to sever. This also assumes that had the trial court granted the motion to sever, there was a probability of a different outcome for one of the charges.

A defendant claiming ineffective assistance of counsel must show that counsel's performance was objectively deficient and resulted in prejudice. *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). . . .

To establish prejudice based on an improper joint trial, a defendant must show that a competent attorney would have moved for severance, that the motion likely would have been granted, and that there is a reasonable probability he would have been acquitted at a separate trial. *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 711, 101 P.3d 1 (2004). The failure to show either deficient performance or prejudice defeats a defendant's claim. *McFarland*, 127 Wash.2d at 334–35, 899 P.2d 1251.

State v. Emery, 174 Wn.2d 741, 754–55, 278 P.3d 653 (2012) (holding that Emery waived the severance issue and could not establish ineffective assistance due to failure to move to sever the joint trial of two defendants); *see also Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (“[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.”); *see also State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (“[I]f either part of the test is not satisfied, the inquiry need go no further.”)

1. Martinez cannot show that the trial court would have granted a motion to sever.

Here, in order to establish prejudice from deficient performance (as opposed to trial court error), Martinez must establish that the trial court would have granted the motion to sever and that there was a probability of a different outcome for one of the charges. *See Emery*, 174 Wn.2d at 755.

“A trial court has broad discretion to grant a severance when it is deemed appropriate or necessary ‘to promote a fair determination of the guilt

or innocence of a defendant.’ CrR 4.4(c)(2)(i).” *Emery*, 174 Wn.2d at 752. “Washington law disfavors separate trials.” *McDaniel*, 155 Wn. App. at 860 (citing *State v. Medina*, 112 Wn. App. 40, 52, 48 P.3d 1005 (2002)). “Separate trials are not favored in Washington because of concerns for judicial economy, ‘[f]oremost among these concerns is the conservation of judicial resources and public funds.’” *In re Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004) (citing *State v. Bythrow*, 114 Wn.2d 713, 723, 790 P.2d 154 (1990)). Trial courts properly grant such severance motions only if a defendant demonstrates that a joint trial would be “so manifestly prejudicial as to outweigh the concern for judicial economy.” *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991).

Here, Martinez can only speculate as to whether the trial court likely would have granted a motion to sever at the close of all the evidence. The trial court already granted the State’s motion to amend the information over the defendant’s objection as the court was aware there was authority for the joinder of bail jumping to an underlying charge.

Furthermore, the joinder of the count of bail jumping to the Violation of Court Order is not manifestly prejudicial as to outweigh the concern for judicial economy.

Four factors mitigate prejudice to the accused, none of which is dispositive: “ ‘(1) the strength of the State’s evidence on each count; (2) the clarity of the 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.’ ” *Sutherby*, 165 Wash.2d at 884–85, 204 P.3d 916 (quoting *State v. Russell*, 125 Wash.2d 24, 63, 882 P.2d 747 (1994)); see *State v. Warren*, 55 Wash.App. 645, 655, 779 P.2d 1159 (1989). Regarding this last factor, the trial court need not sever counts just because evidence is not cross admissible. *State v. Markle*, 118 Wash.2d 424, 439, 823 P.2d 1101 (1992).

State v. McDaniel, 155 Wn. App. 829, 860, 230 P.3d 245 (2010).

Here, the strength of the State’s evidence on both counts was equally strong. Jerry Martinez (appellant’s father) testified that Martinez, the appellant, was restrained by a court order from coming within a certain distance from him. RP 51–52. Jerry also testified that he found his son in his front yard about 10 feet from his house while the order was in effect. RP 53. Then Jerry ran to his son to remove him from the tree he was hanging from and called 911 and Martinez called Jerry a snitch. RP 54–55. Keith Wills, Clallam District Court Administrator, testified as to the existence of Martinez’ prior no-contact order convictions. RP 81–86. Martinez himself admitted to having knowledge of the order and going to his father’s residence to hang himself to get back at his father.

As to the bail jumping charges, Ms. Halecek, a Superior Court Clerk employee, testified that court records established that Martinez was given a trial date, he was present and notified, and yet failed to appear as charged. CP 90–106. Martinez himself testified that he failed to appear because he was

terrified.

Therefore, the State's evidence was strong for both cases such that it was not necessary for a jury to infer a criminal disposition from one strong count in order to find guilt in another weaker count. *See State v. Bythrow*, 114 Wn.2d 713, 721–22, 790 P.2d 154 (1990) (citing *State v. Smith*, 74 Wn.2d 744, 755, 446 P.2d 571 (1968)) (“In addition to the jury's ability to compartmentalize the evidence, we look to the strength of the State's evidence to determine whether a prejudicial effect will be produced by joinder. When the State's evidence is strong on each count, there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another.”).

As to the second factor, Martinez testified making the clarity of his defense very clear as to both counts.

As to the third factor, the jury instructions did not include an instruction to consider each count separately, but this would in all likelihood have been corrected had the defendant made a motion to sever giving the court the opportunity to weigh the factors. The court would have considered this factor and made sure to include the instruction which is read to the jury at the close of all evidence.

Furthermore, the jury was instructed on the elements of each offense and that it was the State's burden to prove each element beyond a reasonable

doubt. The separate offenses were distinct enough in time and place and conduct such that they could easily be compartmentalized by a jury.

“Regarding this last factor, the trial court need not sever counts just because evidence is not cross admissible.” *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245 (2010) (citing *State v. Markle*, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992)).

Moreover, even if the charges were severed, the jury would still be presented evidence that the defendant had two prior convictions for violating a court order in order to satisfy the elements of the Court Order Violation. CP 45. Adding a bail jumping charge would not tip the scales to manifestly prejudicial as to outweigh concern for judicial economy.

Martinez cannot establish that the trial court would have granted a motion to sever as the decision is highly discretionary and Washington State’s strong policy against separate trials outweighs the minimal prejudice to the defendant in this case.

2. **Martinez cannot show that there is a reasonable probability of a different outcome had the charges been tried separately because there was overwhelming evidence as to each charge.**

Martinez also fails to establish prejudice from counsel’s failure to move to sever the charges because he cannot establish a reasonable probability of a different outcome had there been separate trials because the

evidence for each charge was overwhelming.

First, in regards to the bail jumping charge, the defendant testified that he failed to appear because he was terrified of going to prison if convicted. RP 158. Such testimony admits to knowledge of the requirement to appear in court and knowingly failing to appear. Additionally, fear of incarceration is no defense to the bail jumping charge. Thus the State objected to the defendant's testimony and the trial court sustained the objection and instructed the jury to disregard this testimony. RP 158. All the jury was left with was the defendant admitting to bail jumping because he was terrified.

Martinez argues he was prejudiced by the joinder because the Court Order Violation suggests disrespect for the rights of others and would make the jury less sympathetic about his excuse for bail jumping, i.e., fear of incarceration. Appellant's Br. at 10.

The jury was rightfully instructed to not let their decision be based upon sympathy (CP 39) and the defendant was not entitled to a jury nullification instruction. *See State v. Brown*, 130 Wn. App. 767, 771, 124 P.3d 663, 665 (2005); *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222, 1228–29 (1998); *State v. Meggyesy*, 90 Wn. App. 693, 700, 958 P.2d 319 (1998).

Thus, the argument that the joinder of the bail jumping charge to the Court Order Violation prevented the jury from feeling *sympathy* regarding his

excuse for bail jumping fails and there was overwhelming evidence supporting a finding of guilt as to bail jumping.

Second, as to the Violation of the Court Order, Martinez's testimony admits to knowingly violating the order. *See* RP 135–39, CP 45. Martinez testified that he had prior knowledge of court order to have no contact with his father, but he essentially disregarded it so that he could get back at his father by attempting suicide. *Id.* Martinez characterized the contact as intended to get back at his father and not an intent to violate the court order. RP 136–37, 140. However, the State was only required to prove that Martinez knowingly violated the order and Martinez testified that he had knowledge of the order. CP 45, RP 139. Therefore, Martinez's testimony admits to the elements of the offense.

Martinez cannot establish that the trial court would have, in its broad discretion, granted a severance motion. Additionally, the evidence was overwhelming as to both the Bail Jumping and Violation of Court Order charges such that there was no reasonable probability of a different results had the charges been tried in separate trials.

Therefore, Martinez cannot establish prejudice and his claim of ineffective assistance fails.

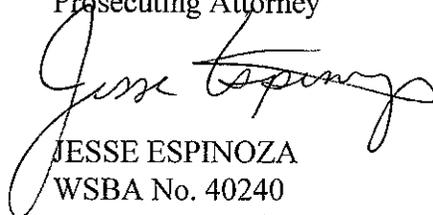
IV. CONCLUSION

The court did not err by denying a pre-trial motion to sever because Martinez never moved to sever, and the issue is waived on appeal. Further, Martinez cannot show the trial court would have granted a motion to sever and, because there was overwhelming evidence supporting each charge, there was no reasonable probability of a different outcome had the charges been tried separately. Therefore, Martinez's ineffective assistance claim fails because he cannot show prejudice from trial counsel's failure to move to sever the charges of Violation of a Court Order and Bail Jumping.

Therefore, this Court should affirm the conviction.

Respectfully submitted this 18th day of August, 2017.

MARK B. NICHOLS
Prosecuting Attorney

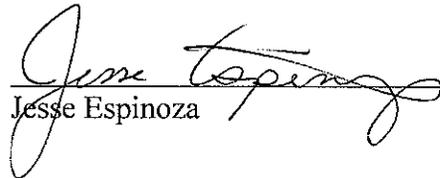


JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lisa E. Tabbut on August 18, 2017.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY PROSECUTING ATTORNEY'S OFFICE

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