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Court of Appeals
Division III
State of Washington

NO. 299031-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

KEVIN NEILD CARAKER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-01045-2

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

In the early morning hours of October 4, 2010, Moon Security Officer Ernest Bass responded to Les Schwab located in the 3400 Block of Clearwater Avenue in Kennewick after an alarm was activated. (II RP at 91-92). When Mr. Bass arrived at the scene, he observed that the bay door to the business was open. (II RP at 92). Kennewick Police Department Officers Noble and Meiners also responded to the Les Schwab store after an audible burglary alarm was activated at approximately 12:30 a.m. (II RP at 68-69, 101, 104). When Officers Noble and Meiners arrived on the scene, they found the garage door to the business open, and it appeared to have fresh damage. (II RP at 69-70, 102). When Officers Noble and Meiners entered the business, they found property including rims, batteries, and other items including cleaning products stacked near the door. (II RP at 80, 103). Officer Meiners also observed a jacket hanging over the

surveillance camera. (II RP at 76). The drawers in the main cashier office were also opened and had been rummaged through. (II RP at 81, 152-53).

Les Schwab employee, Brent Johnson, responded to the store and found that the rims stacked by the door had been removed from a display wall. (II RP at 154, 193). The surveillance videotape was reviewed and showed two men, one wearing a distinct tonal grey sweatshirt, enter the business through the bay door. (II RP at 162, 168-69, 193-94). The two men are then seen crawling through the business on their hands and knees. (II RP at 168-69, 193). The men are seen opening drawers in the office and going through them. (II RP at 162, 170, 193). One of the men then put a coat over the security camera, and the video goes black. (II RP at 168-69, 196).

Officers on the scene were contacted by Tana Perkes and Nathaniel Colvin. (II RP at 127,

140). Ms. Perkes lives at 4019 West Deschutes Avenue in Kennewick, and the back of her home faces the Les Schwab business. (II RP at 112-13, 116). Mr. Perkes and Mr. Colvin were in Mr. Perkes's backyard on her porch swing on October 3rd, and observed a white Jetta vehicle arrive in the alley area of her home at approximately 11:00 p.m. (II RP at 113-14, 135, 137). Ms. Perkes and Mr. Colvin observed two males exit the Jetta, get flashlights out of the vehicle, and walk toward Les Schwab. (II RP at 116-17). The two males returned a short time later and retrieved jackets out of the vehicle, and then walked back toward Les Schwab. (II RP at 117-18, 138).

Ms. Perkes and Mr. Colvin then left her residence to get food, but were able to get a partial license plate number for the Jetta and observed that it had unique white rims. (II RP at 118). Mr. Colvin was also able to identify the Jetta as being a 1997 or 1998 body style, and a vehicle similar to the one Jesse from the movie

the Fast and Furious drove. (II RP at 137, 143-45). When Ms. Perkes and Mr. Colvin returned from dinner approximately one hour later, they observed several police cars outside of Les Schwab and contacted law enforcement to advise them of what they had seen. (II RP at 120-21, 126, 139-40).

A newspaper article was later run regarding the burglary, and listed the description of the suspect vehicle and the partial license plate. (II RP at 228). Officer Scott Peterson received information from the defendant's former boss regarding the article and the fact that he believed the suspect vehicle belonged to the defendant. (II RP at 228-29). Officer Peterson was able to run the partial license plate numbers provided by Ms. Perkes and trace them back to the defendant's vehicle. (II RP at 229-31). The vehicle was then located at the defendant's residence by Officer Peterson. (II RP at 231-33). On October 5, 2010, Detective Runge drove

Ms. Perkes and Mr. Colvin separately by the defendant's place of business and they were able to positively identify the defendant's vehicle as the vehicle they had seen in the alley behind their house on October 3, 2010. (II RP at 119, 140-41, III RP at 310-11).

Detective Runge questioned the defendant regarding his whereabouts during the timeframe in which the Les Schwab burglary was committed. (III RP at 315). During the interview, the defendant stated that he was in Moses Lake during the day, and returned at approximately 8:00 p.m. (III RP at 316). The defendant denied going anywhere else after he returned home. (III RP at 316). When questioned further regarding the possibility of having gone skateboarding, the defendant stated that he did, but not near the Les Schwab store. (III RP at 316). The defendant stated that he skateboards at Lawrence Scott Park, which is not near Clearwater Avenue, nor Les Schwab. (III RP at 316). The defendant

also stated that his roommate, Richard Bohne, was also with him when he went skateboarding. (III RP at 317).

The defendant reported to his federal probation officer, David McCary, as a required condition of his probation on October 5, 2010, after being contacted by law enforcement. (II RP at 216-17). The defendant told Mr. McCary that he had been in the area of Les Schwab on the night the burglary had occurred at approximately 12:15 a.m., skateboarding. (II RP at 216-17).

Detective Runge then applied for and was granted a search warrant for the defendant's residence where he lives with his roommate Richard Bohne. (III RP at 313-14). During the execution, Corporal Ryan Kelly located a tonal grey sweatshirt in a kitchen drawer that had been cut into pieces. (II RP at 237). Corporal Kelly pieced the sweatshirt back together and it matched the sweatshirt of the male in the Les Schwab security surveillance video. (II RP at

237, 242-46). Corporal Kelly also located a newspaper article regarding the Les Schwab burglary on the dining room table and a piece of paper with the words "steal tire in Jetta?" written on it, as well as several car parts listed with prices next to them. (II RP at 239-40).

Also located in the defendant and Mr. Bohne's residence were several laptop computers. (II RP at 221). Detective Chris Littrell obtained consent to search the laptop from the defendant. (II RP at 221-23). Fred Christian, the Pastor at the Kennewick Seventh Day Adventist Church, testified that approximately one and one-half years prior to March 8, 2011, an unknown person(s) had broken into his church and stolen a safe and laptop computer. (II RP at 204-05). Pastor Christian was able to positively identify the computer found in the defendant's room during the execution of the search warrant as the one

that was stolen from his church based upon the serial number. (II RP at 204-06).

The defendant was charged by Information with one count of Burglary in the Second Degree on October 11, 2010. (CP 1-2). A First Amended Information was filed on January 26, 2011, adding two additional counts of Possessing Stolen Property in the Second Degree. (CP 5-7). However, a Motion/Affidavit/Order of Dismissal - Count III was entered on March 7, 2011. (CP 12-13). A Second Amended Information was filed on March 9, 2011, changing the charging timeframe on Count I. (CP 14-16; III RP at 268). The State orally moved to dismiss Count III, as it was erroneously left on the Second Amended Information, and a 2nd Motion/Affidavit/Order of Dismissal - Count III was entered on March 16, 2011. (CP 94-95; III RP at 268). The case proceeded to trial on Counts I and II of the Second Amended Information. (CP 14-16).

The defendant was found guilty of Burglary in the Second Degree, and not guilty of Possessing Stolen Property in the Second Degree after a jury trial. (CP 79-80; III RP at 381-82). The defendant was found to have an offender score of 11 and was sentenced on April 15, 2011, to 65 months in prison on a standard range sentence of 51 to 68 months. (CP 98-107; III RP at 399). The defendant filed a Notice of Appeal on May 11, 2011. (CP 109).

ARGUMENT

- 1. The trial court did abuse its discretion when it properly denied severance of the Burglary in the Second Degree and Possession of Stolen Property in the Second Degree charges due to the cross admissibility of evidence.**

CrR 4.4(a) provides:

(1) A defendant's motion for severance of offenses or defendants 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. Severance is waived if the motion is not made at the appropriate time.

(2) If 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.

A denial of a CrR 4.4(b) motion to sever multiple charges is reviewed for a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990). Washington law disfavors separate trials. *State v. Medina*, 112 Wn. App. 40, 52, 48 P.3d 1005 (2002). A defendant seeking severance has "the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Bythrow*, 114 Wn.2d at 718. Even if separate counts would not be cross-admissible in separate proceedings, this does not as a matter of law state sufficient basis for the requisite showing by the defense that undue prejudice would result from a joint trial. *State v. Bythrow*, at 720. "Severance of charges is important when there is a risk that the jury will use the evidence of one crime to

infer the defendant's guilt for another crime or to infer a general criminal disposition." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

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. *Russell*, 125 Wash.2d at 63, 882 P.2d 747.

State v. Sutherby, 165 Wn.2d at 884-85.

In the instant matter, the evidence with regard to the burglary and possession of stolen property charges would more likely than not have been admissible at each trial if the charges had been severed. The stolen laptop was discovered during a search warrant executed after officers received information regarding the defendant's involvement in the Les Schwab burglary. Once the laptop was discovered, the defendant gave consent

to Kennewick Police Detectives to search the computer and that led to the discovery that the computer was stolen. The same officers that were involved in the burglary investigation would have been called at trial in the possessing stolen property trial. Additionally, the defendant asserted the same "general denial" defense to each count.

Furthermore, the trial court in the instant matter instructed the jury that "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 74). The courts have repeatedly approved and relied on essentially the same instruction in upholding decisions denying severance. *State v. Bythrow*, 114 Wn.2d at 723; *State v. Cotten*, 75 Wn. App. 669, 688, FN14, 879 P.2d 971 (1994). Additionally, it is presumed that jurors follow instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

Severance in the instant matter was not necessary because any possible prejudice was significantly ameliorated. The evidence was easy for a jury to compartmentalize, and the trial court minimized prejudice through its instructions. This is evidenced by the fact that the jury was able to return a not guilty verdict on one count. Thus, the trial court did not manifestly abuse its discretion by denying defense counsel's motion to sever the charges in this matter.

2. **The defendant acknowledged his criminal history at the sentencing hearing and thus no same criminal conduct determination was warranted.**

RCW 9.94A.525(5)(a)(I) states in part:

Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one

offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used.

Additionally, RCW 9.94A.525(22) states in part:

The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. . . . Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

Two crimes constitute the same criminal conduct for sentencing purposes only if they involve each of three elements: (1) the same criminal intent, (2) the same time and place, and (3) the same victim. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). A same criminal conduct finding is precluded if any of these elements are absent; the court construes the statute narrowly to disallow most such claims. *State v. Porter*, 133 Wn.2d 177, 181, 942

P.2d 974 (1997). The court's particular offender score calculation may be deemed an implicit determination that the defendant's current offenses do not constitute the same criminal conduct. *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998). A defendant can affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

Counsel for defendant's brief erroneously sets out the dates of crimes for the defendant's prior criminal history that were included in the defendant's judgment and sentence. (Appellant's brief at 5-6); CP 100). The dates of sentences and dates of crimes for the crimes contained in the defendant criminal history are as following:

| | CRIME | DATE OF SENTENCE | SENTENCING COURT (County & State) | DATE OF CRIME | A OR J Adult, Juv | TYPE OF CRIME |
|---|------------------------------------|-------------------------|--|----------------------|--------------------------|----------------------|
| 1 | Felon in Possession of a Firearm | December 6, 2005 | Federal | December 8, 2004 | A | NV |
| 2 | Malicious Mischief 1 st | July 29, 2003 | Grant County | June 10, 2003 | A | NV |
| 3 | Burglary 2 nd | July 29, 2003 | Grant County | June 10, 2003 | A | NV |
| 4 | Burglary 2 nd | July 29, 2003 | Grant County | March 31, 2003 | A | NV |
| 5 | Burglary 2 nd | July 29, 2003 | Grant County | March 31, 2003 | A | NV |
| 6 | Burglary 2 nd | July 29, 2003 | Grant County | March 29, 2003 | A | NV |

Furthermore, the defendant acknowledged his criminal history on the record at the sentencing hearing. (III RP at 395). Because the defendant acknowledged his history on the record, the State is not required to provide evidence to support the offender score calculation. Moreover, it is now disingenuous to argue that the crimes contained in the criminal history could possibly

have been the same criminal conduct. Trial counsel for the defendant had been provided copies of the police reports and Judgment and Sentences prior to trial showing that they are in fact not the same criminal conduct.

3. Although the defendant's offender score was calculated incorrectly by including one point for being on federal community custody, the defendant's standard range does not change, and thus his 65 month sentence is still within the standard range, rendering resentencing unnecessary.

The State concedes that it erroneously calculated the defendant's offender score by adding a point for the defendant being on federal community custody based upon the court holding in *State v. King*, 162 Wn. App. 234, 253 p.3d 120 (2011). However, since the defendant's offender score was 11, removing the one point for being on federal community custody would leave the offender score at 10, and the standard range of 51 to 68 months would not change. Additionally, the defendant was given a standard range sentence

of 65 months, and that sentence would still be within the standard range sentence of an offender with 10 points. As such, no remedy for the error exists and the case should not be remanded for further sentencing purposes.

CONCLUSION

Based upon the aforementioned rationale, the defendant's appeal with regard to failure to sever the charges in this matter and failure to make a same criminal conduct determination should be denied. Furthermore, although the State erroneously included a point in the defendant's offender score for him being on federal community custody, there is no remedy available to the defendant as it only changes his offender score from 11 to 10, and the standard range of 51 to 68 months in prison remains the same. The defendant was sentenced within the standard range of 51 to 68 months when he was ordered to serve 65 months. Thus, no resentencing hearing is warranted in this matter.

RESPECTFULLY SUBMITTED this 23rd day of
April 2012.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

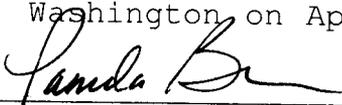
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