

63779-7

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No. 63779-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARCUS ANDERSON,

Appellant.

2010 FEB 15 11 49 AM '10
COURT OF APPEALS
STATE OF WASHINGTON
FILED

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

The Honorable Thomas J. Wynne
The Honorable David A. Kurtz

APPELLANT'S OPENING BRIEF

VANESSA M. LEE
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....	1
B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT	4
THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. ANDERSON'S MOTIONS TO SEVER THE TWO COUNTS AGAINST HIM.....	4
1. Severance is required where it is necessary to promote a fair determination of guilt or innocence.....	4
2. Severance was necessary and appropriate in Mr. Anderson's case.....	6
a. The relative strengths of the cases favored severance	6
b. The "clarity of defenses" weighed in favor of severance.....	9
c. While the court instructed the jury to consider each charge separately, that instruction did not mitigate the prejudice	10
d. The charged conduct with regard to each individual count was not cross-admissible, supporting severance of the counts	11
e. The prejudice engendered by joining Mr. Anderson's charges far exceeded any concerns for judicial economy.....	16
3. Reversal is required.....	18
E. CONCLUSION	19

TABLE OF AUTHORITIES

Washington Supreme Court

<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).	6
<u>State v. Bythrow</u> , 114 Wn.2d 713, 790 P.2d 154 (1990).....	4, 10, 16
<u>State v. Kalakosky</u> , 121 Wn.2d 525, 852 P.2d 1064 (1993)	5, 7
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994)....	5, 9, 15, 16
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982).....	12
<u>State v. Smith</u> , 74 Wn.2d 744, 466 P.2d 571 (1968), <u>vacated in part</u> , 408 U.S. 934 (1972)	4, 5, 13
<u>State v. Sutherby</u> , 165 Wn.2d 870, 204 P.3d 916 (2009) ...	9, 11, 12

Washington Court of Appeals

<u>State v. Bryant</u> , 89 Wn.App. 857, 950 P.2d 1004 (1998).....	4, 17
<u>State v. Cotten</u> , 75 Wn.App. 669, 879 P.2d 971 (1994), <u>rev. denied</u> , 126 Wn.2d 1004 (1995).....	11
<u>State v. Harris</u> , 36 Wn.App. 746, 677 P.2d 202 (1984)..	4, 5, 11, 12, 13, 18
<u>State v. Hernandez</u> , 58 Wn.App. 793, 794 P.2d 1327 (1990)...	6, 7, 8, 9
<u>State v. Ramirez</u> , 46 Wn.App. 223, 730 P.2d 98 (1986)....	4, 11, 12, 13, 15, 18
<u>State v. Watkins</u> , 53 Wn.App. 264, 766 P.2d 484 (1989)	5

Statutes and Rules

CrR 4.3.....	4
CrR 4.4.....	4
ER 404(b).....	13, 14, 15

A. ASSIGNMENT OF ERROR.

The court erred in denying Marcus Anderson's motion to sever the charges.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Mr. Anderson was charged with two independent crimes with little factual nexus. The evidence of each crime would have been inadmissible in a separate trial for the other crime. While Mr. Anderson essentially conceded one charge, he completely denied the other. The joinder of the two charges created substantial prejudice to Mr. Anderson on the felony. Did the trial court err in denying Mr. Anderson's motion to sever?

C. STATEMENT OF THE CASE.

Marcus Anderson and Amanda Jackson were in a dating relationship for a little over a year; Mr. Anderson stayed in Ms. Jackson's apartment for most of that time. 6/8/09RP 61. On November 23, 2008, Ms. Jackson arrived home from work between 11:35 pm and 12 am. 6/8/09RP 63. She testified that Mr. Anderson was in the apartment and they argued. 6/8/09RP 64. She testified he punched and hit her and prevented her from leaving the apartment or reaching the phone. 6/8/09RP 64-68, 71-72. Both eventually went to sleep. 6/8/09RP 69. A court order

prohibiting Mr. Anderson from contacting Ms. Jackson, was in effect at this time. 6/8/09RP 62, 84-85.

Around 10:30 am on November 24, 2008, Ms. Jackson left to go to work. 6/8/09RP 70, 72. A co-worker saw her bruised face and called 911, although Ms. Jackson did not want her to. 6/8/09RP 74-75. The co-worker then took her home, where they met Snohomish County Sheriff's Deputy Troy Koster. 6/8/08RP 76. Deputy Koster testified Ms. Jackson gave him her apartment keys and verbal permission to search, but he found no one inside the apartment. 6/9/09RP 63.

Ms. Jackson testified Mr. Anderson called her that evening and she told him the police had been called. 6/8/09RP 77. When she arrived home around 11:30 pm that night, Mr. Anderson was there. 6/8/09RP 78. Ms. Jackson testified they both "acted normal" and she decided not to call the police. 6/8/09RP 80.

At approximately 3 pm on the next day, November 25, 2009, Deputy Koster and his partner returned to check on Ms. Jackson. 6/9/09RP 76. Deputy Koster saw Ms. Jackson on her way to do laundry and asked if Mr. Anderson was in her apartment. 6/9/09RP 78. She admitted he was and gave Deputy Koster her keys and permission to search. 6/9/09RP 77-79. After additional officers

arrived, they entered the apartment, found Mr. Anderson asleep inside and arrested him without incident. 6/9/09RP 77-82. Deputy Koster testified that as he and his partner were seating Mr. Anderson in the back of the patrol car, he rose up and shouted towards Ms. Jackson, "Nothing would happen if you didn't say anything." 6/9/09RP 82.

Mr. Anderson was charged with Felony Violation of a No Contact Order (by Assault), occurring on November 24, 2008, and Violation of a No Contact Order (a gross misdemeanor), occurring on November 25, 2008. CP 105-06. Mr. Anderson moved to sever the charges before the trial began and again on the morning of trial; both motions were denied. CP 104; 6/4/09RP 28-31; 6/8/09RP 19-28. Following a jury trial, he was convicted as charged. CP 54-55.

D. ARGUMENT.

THE TRIAL COURT ABUSED ITS DISCRETION
WHEN IT DENIED MR. ANDERSON'S MOTIONS TO
SEVER THE TWO COUNTS AGAINST HIM.

1. Severance is required where it is necessary to promote a fair determination of guilt or innocence. CrR 4.3(a) authorizes joinder of multiple counts of the same or similar character. However, "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 (1968), vacated in part, 408 U.S. 934 (1972)).

Offenses properly joined under CrR 4.3(a), however, may be severed if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). The failure of the trial court to sever counts is reversible only upon a showing that the court's decision was a manifest abuse of discretion.

State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990) (footnotes omitted). Washington courts have recognized that joinder of offenses is "inherently prejudicial." State v. Ramirez, 46 Wn.App. 223, 226, 730 P.2d 98 (1986) (citing Smith, supra).

The principle underlying severance is "that the defendant receive a fair trial untainted by undue prejudice." State v. Bryant, 89 Wn.App. 857, 865, 950 P.2d 1004 (1998). Even where joinder

is legally permissible, the trial court should not join offenses for prosecution in a single trial where joinder prejudices the accused. Id. Prejudice will result if a single trial invites the jury to cumulate evidence to find guilt or to otherwise infer 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 undue prejudice results from joining separate offenses, a court must consider several factors: (1) the strength of the prosecution’s evidence with respect to each charge, (2) the clarity of the defenses regarding each count; (3) the court’s instructions to the jury to consider the evidence separately; and (4) the cross-admissibility of the offenses had they not been tried together. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). Finally, any “residual prejudice” must be weighed against the need for judicial economy. Id. at 63 (citing State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993)).

A trial court abuses its discretion when it exercises that discretion on untenable grounds or reasons. State ex rel. Carroll v.

Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here, because of the similar circumstances of the two allegations, it was highly likely the jury cumulated the evidence against Mr. Anderson to convict him of both counts, resulting in undue prejudice. The trial court abused its discretion in denying the motions to sever.

2. Severance was necessary and appropriate in Mr. Anderson's case. Because well-established factors weigh in favor of severance in Mr. Anderson's case, the trial court abused its discretion in denying his motion to sever.

a. The relative strengths of the cases favored severance. Where the 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)). 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, while 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. The Court therefore affirmed the conviction on the stronger count, but reversed on the two weaker counts. Id.

In contrast, the trial court in Kalakosky denied the defendant’s motion to sever five counts of rape. 121 Wn.2d at 529. The Supreme Court found the State’s case strong for each of the five counts, as significant corroborating evidence supported each conviction. Id. at 538-39. The Court concluded,

Given that the crimes were not particularly difficult to “compartmentalize”, that the State’s evidence on each count was strong, and that the trial court instructed the jury to consider the crimes separately, we conclude that the trial court was well within its broad discretion in finding that the potential prejudice did not outweigh the concern for judicial economy.

Id. at 539.

This case is far more similar to Hernandez on this factor. The State’s evidence as to each count was quite different. The misdemeanor violation of no contact order was personally witnessed by several people, including two testifying deputies, and was essentially conceded by the defense. 6/8/09RP 25. The

felony, however, hinged completely on the credibility of Amanda Jackson's testimony. It was obvious that an assault occurred; the question was whether Mr. Anderson was with Ms. Jackson in the early morning hours of November 24 and therefore could have been the assailant. There was no question that the jury would convict on the misdemeanor, but because the charges were joined, it was highly likely that the jury would be influenced by the strength of that evidence with regard to the felony. Once the jury found Mr. Anderson was present at Ms. Jackson's apartment on November 25, they would be much more likely to believe he was there the day before, in violation of the court order, and had committed the assault.

As in Hernandez, joinder created a serious risk that the jury would find the weaker case fortified by the stronger case. The joinder unduly prejudiced Mr. Anderson and encouraged the jury to find he had a propensity to violate the no-contact order by staying at Ms. Jackson's apartment, and had done so on the night of the assault.

b. The “clarity of defenses” weighed in favor of severance. “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 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 both Russell and Hernandez, for example, the defense to both charges was general denial. 125 Wn.2d at 65; 58 Wn.App. at 799. Finding Russell’s defenses to both counts identical, the Supreme Court quoted the trial court’s observation: “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 denial of another.” Russell, 125 Wn.2d at 65.

But here, there was an admission of one and a denial of the other. While arguing the severance motion, defense counsel told the court Mr. Anderson had no defense to the misdemeanor

charge¹ and plainly admitted the offense to the jury in closing argument.² However, the defense to the felony was consistently general denial. As the Russell Court observed, the conflict between the two defenses would likely confuse the jury, especially because Mr. Anderson exercised his Fifth Amendment right not to testify. This factor weighs in favor of severance.

c. While the court instructed the jury to consider each charge separately, that instruction did not mitigate the prejudice. In the instant case, the jury was instructed:

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 64. Mr. Anderson acknowledges this instruction has been approved of by appellate courts in the context of severability determinations. Bythrow, 114 Wn.2d 723; State v. Cotten, 75

¹“With regards to Count II, it’s very clear that he was in violation of the order because he was at her residence, and there really will be no factual dispute as to that... [I]t will prejudice Mr. Anderson for the jury to hear the evidence together because it would be a small step for the jury to conclude that if he was there on the 25th which, essentially, we will be admitting, then he must have been there on the 24th or he would be more likely to have been there on the 24th.” 6/8/09RP 25.

² “[H]e did have contact on the 25th. He was at her apartment on the 25th. 6/10/09RP 136.

Wn.App. 669, 688, 879 P.2d 971 (1994), rev. denied, 126 Wn.2d 1004 (1995).

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”).

d. The charged conduct with regard to each individual count was not cross-admissible, supporting severance of the counts. 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).

In Ramirez, the Court of Appeals considered a trial court’s decision to join two counts of indecent liberties. 46 Wn.App. at 224. The State argued the evidence would be cross-admissible to prove intent and absence of mistake or accident. Id. at 227. The Court was not persuaded, recognizing the defendant denied touching either complainant and such proof would be relevant only

if he admitted touching but denied it was for the purpose of sexual gratification or argued it was a mistake or accident. Id. at 227-28. Cf. Sutherby, 165 Wn.2d at 885-87 (although defendant did argue mistake or accident in defense to child rape and molestation counts, Supreme Court found evidence of possession of child pornography charge would still not be admissible in sexual assault trial; such evidence would not show absence of mistake but only propensity for molesting children and would therefore be inadmissible). The Ramirez Court held that because the evidence would not have been cross-admissible in separate trials, “the jury may well have cumulated the evidence of the crimes charged and found guilt, when if the evidence had been considered separately, it may not have so found.” 46 Wn.App. at 226, 228.

In Harris, the Court rejected the State’s argument that the evidence would be cross-admissible to prove a common scheme or plan, pointing out that “the State has fallen into the common error of equating facts and circumstances which are merely similar in nature with the more narrow common scheme or plan.” 36 Wn.App. at 751, citing State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982). Instead, the Harris Court held the evidence could “[a]t

most... show only only a propensity” prohibited by ER 404(b). 36 Wn.App. at 751.

Here, evidence of the misdemeanor would not have been admissible in a trial on the felony alone. As in Ramirez, Mr. Anderson did not argue a lack of mens rea. He never suggested, for example, that he did not knowingly violate the no contact order on either date. Thus, the misdemeanor could not be used to prove knowledge or absence of mistake or accident. Nor could it be used to prove a common scheme or plan; as in Harris, the “similar nature” of being in the same place twice in two days does not come close to passing the “stringent test of uniqueness” required for a common scheme or plan. Smith, 106 Wn.2d at 778. If the felony was tried alone, there would be no conceivable reason to admit it other than as propensity evidence.

The State argued that if the felony was tried separately, the jury would still hear about the misdemeanor incident on November 25 because the investigation and arrest occurred on November 25. 6/4/09RP 29. However, the deputies could easily have testified that they obtained Ms. Jackson’s consent to search her apartment, conducted the search, and took photographs without testifying that they found and arrested Mr. Anderson there. Similarly, they could

have testified that they arrested Mr. Anderson without mentioning where or when the arrest occurred, or that he was in violation of the same court order when arrested. Unduly prejudicial testimony about the November 25 violation would have easily been excluded, as required by ER 404(b).

Mr. Anderson was particularly prejudiced on the felony count by the admission of his statement “Nothing would happen if you didn’t say anything.” In the joined trial, the jury was invited to, and very likely did, consider this statement in regard to both counts. In fact, the prosecutor began his closing argument with these words, and repeatedly referred to the statement with regard to both counts. 6/10/09RP 121, 126, 131. The statement was highly prejudicial, implying that Mr. Anderson knew he had done something illegal and would have gotten away with it if not for Ms Jackson’s reporting. However, there is no evidence that the statement referred to the felony of November 24.

If the counts were severed, the court would not have admitted the statement in the felony trial. It would be considered too far removed to establish enough probative value to outweigh the prejudice. No reasonable court would find sufficient relevance in such a vague statement, made in the midst of an arrest for an

additional offense, roughly 36 hours later. Moreover, admitting that statement would essentially force the defense to bring in evidence of the misdemeanor charge, in order to explain the statement in an exculpatory way. In other words, Mr. Anderson would be forced to bring in his own 404(b) evidence – to testify against himself, in violation of the Fifth Amendment.

Because the evidence was not cross-admissible, the joint trial of these separate offenses created an improper impression of a “general propensity” toward criminal acts and specifically toward violation of this particular court order, supporting severance of the trials. Ramirez, 46 Wn.App. at 227.

In addition, the court abused its discretion by refusing to consider this factor in the pre-trial ruling on the severance motion, saying, “whether the statements are admissible as to both or only one is a matter to be taken up by the trial judge.” 6/4/09RP 30. This is incorrect. The correct inquiry is whether, if the charges were severed, the evidence would be cross-admissible. Russell, 125 Wn.2d at 63. The court was required to answer that hypothetical question; because it failed to do so its decision was based on untenable grounds, amounting to a manifest abuse of discretion.

e. The prejudice engendered by joining Mr. Anderson's charges far exceeded any concerns for judicial economy. Interests of judicial economy will be balanced against the accused's interest in receiving a fair trial free of improper taint from unrelated charges. Id. at 68. The primary concern underlying review of a severance decision is whether evidence of one crime taints the jury's considerations of another charge. Bythrow, 114 Wn.2d at 721.

Joinder of Mr. Anderson's two counts in one trial did little if anything to conserve judicial resources. In fact, given Mr. Anderson's admission of the misdemeanor charge, if the counts were severed it is very unlikely he would have insisted on a jury trial for that count. Mr. Anderson would have had no reason to take the misdemeanor to trial and probably would have pled guilty or agreed to a bench trial.

The felony, however, would certainly have gone to trial. Mr. Anderson would have mounted the same defense of general denial, and the State would have offered exactly the same evidence and witnesses. There was no testimony or piece of evidence which was relevant only to the misdemeanor; it all went to both counts or to the felony only. Therefore, the trial on the felony

alone would have used no more judicial resources than the joined trial.

Even if Mr. Anderson had made the unlikely choice of taking the misdemeanor case to trial, that trial would obviously have occurred in Municipal Court, and would have been very brief. The State would have needed to establish only the validity of the order (which was uncontested in this trial) and the testimony of any of the several witnesses to Mr. Anderson's presence at the apartment on November 25, including the two deputies who testified here. Ms. Jackson's testimony would not have even been needed, as it would have added nothing to the State's proof. Thus, in any scenario it is extremely unlikely that joinder actually conserved judicial resources.

While interests of judicial economy are important, they cannot trump the accused's right to due process, nor society's interests in seeing the accused receive a fair trial with a just outcome. Bryant, 89 Wn.App. at 865. But here, severance might actually have been the more economical as well as the more just path. This factor cuts in favor of severance.

3. Reversal is required. A trial court's failure to grant severance requires reversal when the danger of prejudice from the evidence of the various counts deprives the accused of a fair trial. Harris, 36 Wn.App. at 752. In Ramirez, even though the jury acquitted on one count, the Court did not find the erroneous joinder harmless, but reversed the remaining conviction and remanded for a new trial. 46 Wn.App. at 228.

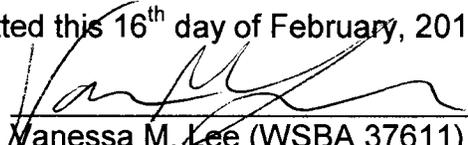
Mr. Anderson requested severance of the charges before the trial began and renewed it on the morning of trial. CP 104; 6/4/09RP 28-30; 6/8/09RP 19-28. As set forth above, the jury was unable to render a fair verdict because the trial was tainted by the admission of substantially similar propensity evidence demonstrating Mr. Anderson violated the same court order twice within two days, and an unfairly prejudicial statement which would have been inadmissible in the felony trial alone.

Under the circumstances of this case, the trial court's denial of Mr. Anderson's severance motion constituted a manifest abuse of discretion. The error was not harmless, requiring reversal and remand for new, separate trials. Id.

E. CONCLUSION.

For the reasons set forth above, Mr. Anderson respectfully requests this Court reverse his felony conviction and remand that case for a new trial.

Respectfully submitted this 16th day of February, 2010.



Vanessa M. Lee (WSBA 37611)
Washington Appellate Project – 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)

Respondent,)

NO. 63779-7-I

MARCUS ANDERSON,)

Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SETH FINE, DPA
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] MARCUS ANDERSON
752360
AIRWAY HEIGHTS CC
PO BOX 2049
AIRWAY HEIGHTS, WA 99001

(X) U.S. MAIL
() HAND DELIVERY
() _____

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SIGNED IN SEATTLE, WASHINGTON, THIS 16TH DAY OF FEBRUARY, 2010.

X _____ *[Signature]*

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎ (206) 587-2711