68421-3

68421-3

NO. 68421-3-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

JORDAN J. PORTCH,

Appellant

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

U.S. CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

COURT RULES

I. ISSUES

1. The defendant raised an alibi defense. In support of that defense the defendant listed his investigator as well as several other witnesses, and provided the State discovery of an auto repair estimate. It was later learned the defendant had caused the estimate to be deleted from the repair shop records.

a. Was any attorney-client privilege waived as to the circumstances surrounding the defense investigation into the alibi defense insofar as the repair record was offered to support that defense?

b. Did the work product doctrine preclude the State from calling the defense investigator as a witness concerning the investigation surrounding the repair estimate?

2. After learning about the circumstances under which the document had been altered the State added one count of tampering with physical evidence and one count of tampering with a witness. The defendant made a motion to sever the counts, which was denied.

a. When the defendant did not renew his motion to sever did the defendant waive that issue for appeal?

b. Has the defendant shown that the prejudice from consolidating those charges at trial was so manifestly prejudicial as to outweigh the concern for judicial economy ?

II. STATEMENT OF THE CASE

Jordan Portch, the defendant, had dated Megan Gates from the fall of 2009 to May 2010. He lived with Ms. Gates and her parents at her parent's home from February 2010 to May 2010 when they broke up. During the course of their relationship they adopted a puppy. Although they agreed Megan would keep the puppy when they broke up, the defendant tried to take the puppy when he was asked to leave the Gates' home. When Lynette Gates, Ms. Gates' mother, confronted the defendant he admitted he had taken the dog. He then returned the dog to the Gates' home. After the defendant left he never again had permission to be in the Gates' home. 1 RP 67-74, 80, 94-96.

On January 14, 2011 shortly after 4:00 p.m. Lynette was at home from work recovering from an extended illness. She was upstairs in her bedroom with her own dog and Megan's dog. Both dogs jumped off the bed and ran downstairs. Lynette heard a noise downstairs which she assumed were the dogs getting into the garbage. She went downstairs to scold them. When she got to the

base of the stairs she encountered the defendant standing in her hallway. 1 RP 81-83.

Lynette asked the defendant what he was doing in her house. He shuffled around, first trying to get around her. He then turned and fled to the back of the house, through the family room, and out a shattered sliding glass door. The defendant was wearing dark clothing at the time. Lynette called the police who arrived within minutes. 1 RP 83-87.

Around the time the defendant fled from the Gates' home Rebecca Tindall was walking in the neighborhood. She saw a car later identified as the defendant's car parked with the engine running and someone sitting in the passenger seat of the car. She then saw a man sprinting from the direction of the Gates' street. The man jumped in the car and sped off. Ms. Tindall's description of the man matched the defendant's physical characteristics. 1 RP 106, 134-36, 139-144; 1 CP 49.

The defendant was charged with one count of Residential Burglary. 1 CP 101-02. The defendant was represented by Mr. Don Wackerman. Mr. Wackerman notified the deputy prosecutor that the defense was alibi. He provided a list of witnesses in support of that defense. In addition the defense provided a portion

of an estimate for repairs to the defendant's car which purported to have been done on December 10, 2010. The mileage was listed as 115,721 and listed some damage to the car. The defense also provided information that the defense investigator, Mr. Joel Martin, inspected the car sometime after charges were filed. Mr. Martin noted at the time he inspected the odometer it read 115,726. The odometer readings were intended to show the defendant's car could not have been the car Ms. Tindall saw in the neighborhood on January 14. 1 CP 68-70, 93-94; Ex. 24.

The defense listed Mr. Scott Hardy as a witness. Mr. Hardy was an estimator for the body shop that prepared the estimate. Mr. Hardy told the deputy prosecutor that he could not absolutely testify to the accuracy of the mileage reading on the estimate because on September 14, 2011, just before the case was set to go to trial, someone had asked the shop owner to delete the estimate. Mr. Hardy stated that he thought the person was someone from the defendant's attorney's office. Further investigation revealed that the defendant had contacted Mr. Shayne Hedahl, the owner of the body shop. The defendant asked Mr. Hedahl to delete the estimate. The request was so unusual that Mr. Hedahl insisted the defendant come in the shop to make the request. The estimate was

deleted on September 15 shortly before a scheduled trial date. The defendant later returned to the shop and asked him to recreate the estimate. Mr. Hedahl initially believed he could not do that. Later he did find a way to import the data from the original estimate into a new format for estimates that the shop adopted after the original estimate was prepared. The recreated document showed the mileage for the defendant's car was 114,979 as of December 10, 2010. 1 RP 20-23, 161-62; 2 RP 190-91, 200-10, 223-235; 1 CP 68, 70, 76.

Trial was set to commence on November 14, 2011. Mr. Wackerman stated that he intended to call Mr. Martin to testify regarding a photo montage that he showed Ms. Tindall. 1 RP 4. The State sought to call Mr. Martin as a witness to testify to the investigation he conducted on behalf of the defendant. The defense objected to the State calling Mr. Martin as a witness. Mr. Wackerman did agree that if the court allowed the State to call Mr. Martin it could inquire into Mr. Martin's observations regarding the defendant's car and photos he took of that car without breaching the attorney client privilege or work product privilege. Mr. Wackerman further stated that if the State were to elicit testimony from Mr. Hardy and Mr. Hedahl that the defendant acted at his

attorney's instruction there would be a conflict and he would be obligated to withdraw as counsel. 1 RP 9-20; 1 CP 64, 77.

After hearing argument the trial court ruled that any statement the defendant made to the body shop employees regarding his attorney's instructions were not covered by either the attorney client or work product privileges. Further the estimate and any information regarding its preparation were not covered by attorney client or work product privilege because it too was voluntarily disclosed to the State. The court further ruled this evidence was relevant. Mr. Wackerman was then permitted to withdraw. 1 RP 26-29.

Mr. Pandher was then appointed to represent the defendant. 1 RP 32-33. Prior to the new trial date the State filed an amended information adding tampering with physical evidence and tampering with a witness. 1 RP 45; 1 CP 48-51[1]. The defense moved to sever the residential burglary charge from the tampering charges. The State opposed the motion, and the court denied the defendant's motion to sever the charges. 1 RP 40-44; 1 CP 59-60. The defense did not renew the motion at the end of the State's case. 2 RP 239-45.

Before Mr. Martin testified the State outlined what it proposed to elicit from him. The deputy prosecutor stated:

> Your Honor, the State would be seeking to elicit the fact that he was assigned to this investigation; that he served defense witnesses, who they are, when that happened, what – Whether he was familiar or had knowledge of the original estimate, his investigation with regard to mileage that he printed out on Googlemap, and taking pictures of the interior of Mr. Portch's vehicle, which was provided to the State as part of the alibi defense, and also that he had contact with witnesses at the auto body shop in regards to the estimate that was presented to us by defense, as well as the recovered estimate.

2 RP 120-21.

Mr. Pandher objected on the basis of relevance, attorney client privilege, and work product privilege. He specifically objected to Mr. Martin testifying regarding his investigation, who and why he contacted certain persons, his communications with Mr. Wackerman on their theory of the case and any communication with the defendant. 1 RP 119, 121, 129. Mr. Jaquette, who was from Mr. Wackerman's office, also objected to any communication between Mr. Wackerman and Mr. Martin, and any communication between Mr. Martin and the defendant on the basis of work product and privilege. 1 RP 124-25.

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[1] The witness tampering charge was dismissed at the end of the State's case. 2 RP 244.

The court denied the motion. The court noted the defendant relied on an alibi defense which required him to provide the State with a list of alibi witnesses pursuant to CrR 4.7(b)(2)(xii). In doing so the court found the defense had waived any attorney client or work product privilege. The court also found Mr. Martin's proposed testimony was not covered by either privilege. 1 RP 129-31.

Thereafter Mr. Martin testified regarding his investigation into the defendant's alibi defense. Specifically he testified regarding his inquiry into the documents and other evidence relating to the mileage on the defendant's car. 1 RP 149-72.

In lieu of recalling Mr. Martin in the defense case, Mr. Pandher questioned Mr. Martin about his investigation as it related to Ms. Tindall. Mr. Martin testified that Ms. Tindall was shown a photo montage, and picked someone other than the defendant as the person she saw on the date of violation. 1 RP 173-79; 2 RP 185. The defendant produced evidence of an alibi through a friend, Ryan Danekas. 2 RP 247-60.

The jury rejected the alibi defense and returned verdicts of guilty for both residential burglary and tampering with physical evidence. It also found that the victim of the crime was in the

building when the crime of residential burglary was committed. 1 CP 23-25.

III. ARGUMENT

A. THERE WAS NO VIOLATION OF THE DEFENDANT'S RIGHT TO ATTORNEY-CLIENT PRIVILGE.

The defendant first argues that his right to counsel was infringed when the court permitted Mr. Martin to testify. Specifically he claims that Mr. Martin's testimony violated his attorney client privilege. Because the privilege was waived no violation occurred.

"An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." RCW 5.60.060(2). The privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery. Dietz v. Doe, 131 Wn.2d 835, 842, 935 P.2d 611 (1997). It applies to communications and advice between an attorney and client and extends to documents that contain privileged communications. State v. Perrow, 156 Wn App. 322, 328, 231 P.3d 853 (2010).

The privilege only applies to communications that are intended to be confidential. Seattle Northwest Securities Corporation v. SDG Holding Co., Inc., 61 Wn. App. 725, 742, 812

P.2d 488 (1991). When a communication is intended to be disclosed to others it is not protected by the attorney client privilege. State v. Sullivan, 60 Wn.2d 214, 217-18, 373 P.2d 474 (1962). When a party offers otherwise privileged communication as evidence the privilege is waived as to the entire communication. State v. Webbe, 122 Wn. App. 683, 691, 94 P.3d 994 (2004). Further, when a client reveals a communication between himself and his attorney to a third person the privilege is waived unless the third person is necessary for the communication. Zink v. City of Mesa, 162 Wn. App. 688, 725, 256 P.3d 384 (2011), review denied, 173 Wn.2d 1010 (2012).

Much of Mr. Martin's testimony was not concerning his communications with the defendant and Mr. Wackerman. Rather it related to what he did and what he observed in his investigation. 1 RP 150-172. To the extent Mr. Martin's testimony did not reveal communications between Mr. Wackerman and the defendant, it was not protected by the attorney client privilege.

Arguably, the State may have made inquiry into a communication between defense counsel and his investigator when Mr. Martin was asked if he knew why Mr. Hardy was being called as a witness. Mr. Martin stated that he did not know the answer to

that question. 1 RP 154. No implied communication was therefore admitted as a result of that question.

Mr. Martin's testimony may have concerned a communication between himself and defense counsel when he was asked if he knew what the defendant's proposed defense was when he was investigating the case. His testimony may also have involved a communication between himself and Mr. Wackerman when asked where the estimate marked as exhibit 24 came from. 1 RP 170-72. The defendant waived any privilege as it related to those communications when he gave notice of his intent to assert an alibi defense, and then provided the State with a copy of the estimate and listed Mr. Martin as a witness in support of that defense. Mr. Martin was listed to testify regarding his investigation which included investigating the odometer readings on the defendant's car to prove it could not have been the car Ms. Tindall saw in the neighborhood on the date of the burglary. 1 CP 69-70, 97. Because he waived any privilege that may have existed as to Mr. Martin's investigation no privilege was violated.

In addition to waiver, under certain circumstances the nature of the defense precludes application of the privilege to a witness's testimony. In Pawlyk the Court held the attorney client privilege did

not extend to communications between the defendant and a psychiatrist who evaluated the defendant in preparation for an insanity defense. State v. Pawlyk, 115 Wn.2d 457, 465, 800 P.2d 338 (1990). Similarly the Court held there was no violation of the privilege when the defendant asserted a diminished capcity defense in State v. Hamlet, 133 Wn.2d 314, 320-21, 944 P.2d 1026 (1997). The Court reasoned that the privilege did not apply because once the defendant puts his mental state at issue the State needed the psychiatric evidence, "which may be the best and most accurate evidence of a defendant's mental state." Id. at 320.

The Court's rationale for finding the privilege did not apply in Pawlyk and Hamlet is equally applicable here. The defendant raised the alibi defense. In doing so he put in issue every fact that bore on the reliability of that defense. How the evidence that supported that defense was obtained did bear on the reliability of that defense.

Finally, the defendant's claim that his Sixth Amendment right to counsel was violated when the State was permitted to call Mr. Martin as a witness should be rejected. The defendant relies on Garza, arguing its logic, if not its facts, is applicable to his confidential relationship with the defense investigator. State v.

Garza, 99 Wn. App. 291, 299, 994 P.2d 868, review denied, 141 Wn.2d 1014, 10 P.3d 1072 (2000).

Although the Court of Appeals in Garza concluded that a prosecutor's intentional intrusion into the attorney client relationship constitutes a direct interference with the Sixth Amendment right to counsel, the Supreme Court has held that the attorney client privilege is not part of that constitutional provision. Pawlyk, 115 Wn.2d at 469, Hamlet, 133 Wn.2d at 325.

In addition, the logic of the court in Garza makes sense only when applied to the specific facts of that case, i.e., an intentional intrusion by jail officers into the defendant's personal papers, including communications between the defendant and his attorney. The Court carefully limited the analysis in that case, stating the rule adopted in that case did not affect the analysis in cases where the state has a legitimate law enforcement purpose for its intrusion. Id. at 300. The case did not concern the circumstances here where the communications at issue were part of the defense which had been disclosed to the State.

B. THE WORK PRODUCT DOCTRINE WAS NOT VIOLATED.

The trial court ruled when the defense disclosed the repair estimate to the State as part of its alibi defense it waived any work

product confidentiality as it related to evidence prepared from that estimate. 1 RP 27. The court clarified that the work product doctrine did not prevent the State from presenting Mr. Martin's testimony regarding his investigation into the repair estimate because the defense was still relying on the alibi defense, albeit through other evidence. 1 RP 130-31. The defendant asserts that because Mr. Martin's testimony was based on interviews and documents created as result of the defense team's opinion, legal theories and conclusions, his testimony violated the work product doctrine.

The discovery rule exempts from disclosure legal research, records, correspondence, reports, or memoranda, "to the extent that they contain the opinions, theories or conclusions of investigation or prosecuting agencies..." CrR 4.7(f)(1). The doctrine does extend to "material prepared by agents for the attorney as well as those prepared by the attorney himself." United States v. Nobles, 422 U.S. 225, 238-39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), Heidebrink v. Moriwaki, 104 Wn.2d 392, 396, 706 P.2d 212 (1985).

The doctrine is not absolute. Whether it applies depends on the type of material sought to be discovered and the adversary's

need for it. Pawlyk, 115 Wn.2d at 476. Materials which do not contain "opinions, theories, or conclusions" are not work product. State v. Strandy, 49 Wn. App. 537, 540, 745 P.2d 43 (1987), review denied, 109 Wn.2d 1027 (1988), State v. Garcia, 45 Wn. App. 132, 138, 724 P.2d 412 (1986). The doctrine also does not apply when the defendant raises a defense which creates a need for the prosecution to have access to materials in order to rebut the defense. Pawlyk, 115 Wn.2d at 478, Nobles, 422 U.S. at 239-40.

Much of the doctrine was not implicated by Mr. Martin's testimony because it did not reveal any strategy or thought process on either Mr. Martin's or Mr. Wackerman's part. Mr. Martin's testimony regarding what he did, as far a serving subpoenas, checking mileage, and obtaining the initial repair estimate and following up to obtain a second, complete repair estimate did not reveal any thought processes.

Mr. Martin's testimony regarding how the nature of the defense related to his work on the case could have been work product. 1 RP 170-71. But by virtue of raising the alibi defense, the defendant waived any privilege to Mr. Martin's investigation as it related to that defense. In order to rebut the defense the State needed to be able to examine the whole investigation as it related

to that defense. If some of the evidence originally proffered in support of the defense turned out to be fraudulent, then it could cast doubt on the credibility of other evidence presented in support of the defense. For that reason the doctrine was not violated when the trial court permitted the State to call Mr. Martin as a witness.

C. WHETHER THE COURT SHOULD HAVE SEVERED THE CHARGES HAS NOT BEEN PRESERVED FOR REVIEW. THE CHARGES WERE PROPERLY JOINED AND THE DEFENDANT WAS NOT PREJUDICED.

1. The Defendant Did Not Preserve The Issue Of Severance For Review.

A defendant whose pretrial motion to sever counts is denied may renew the motion on the same ground at or before the close of evidence. Failure to renew the motion waives review of the trial court's order denying severance. CrR 4.4(a)(2), State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 104 (1998), review denied, 137 Wn.2d 1017 (1999). The defendant did not renew his motion to sever the burglary count from the evidence tampering and witness tampering counts. The issue is therefore waived.

This case is in the same procedural posture as Bryant; the defendant argued on appeal that the court improperly denied his severance and joinder motions but failed to preserve the severance issue for review. This Court considered the joinder issue in light of

the prejudice to the defendant because both rules were based on the principle that the defendant receive a fair trial that was not tainted by undue prejudice. Id. at 865.

This decision is directly contrary to the specific language of the court rules governing joinder and severance. Offenses that are properly joined are consolidated for trial pursuant to CrR 4.3 "unless the court orders severance pursuant to rule 4.4" CrR 4.3.1. A court must grant severance on application of the defendant "whenever ... the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). That subsection is limited by the provisions of CrR 4.4(a) which require the defendant to renew the motion at or before the close of all evidence. If the defendant fails to renew the motion the question of severance is waived. Id. Thus if the defendant waived the issue by failing to renew the motion as required, he has likewise failed to preserve the question of whether the offenses should have been consolidated for trial.

The requirement that the defendant renew the motion to sever at or before the close of evidence recognizes the defendant must choose between competing interests. Once the testimony and exhibits on all counts has been received into evidence the

parties and the court may have a better understating of the potential prejudice resulting from consolidation of counts than they did at the beginning of the trial. At that point the defendant may perceive little or no prejudice and as voluntarily abandoned the motion.

If the defendant moves to sever the counts at the close of evidence he runs the risk of giving up another important right. Court's have repeatedly recognized that the defendant has a right to have his case determined by the jury that has been selected and sworn. State v. Juarez, 115 Wn. App. 881, 889, 64 P.3d 83 (2003), State v. Browning, 38 Wn App. 772, 775, 689 P.2d 1108 (1984). If a mid-trial severance motion is granted, then the court will necessarily have to declare a mistrial as to at least one or more counts which have been severed. As a result the defendant will give up the right to have his case decided by that jury as to some of the charged counts.

The rules regarding joinder, consolidation for trial, and severance are designed to promote a fair determination of the defendant's guilt or innocence as well as judicial economy. CrR 4.4(b), Bryant, 89 Wn App. at 864 (stating the "rule should be construed expansively to promote the public policy of conserving

judicial and prosecution resources.") It does so by giving the defendant a second opportunity to make the motion based on a strategic choice between two competing interest. Where, as here, there is no argument that the offenses were not properly joined under CrR 4.3(a), and the defendant has not renewed the motion as required under CrR 4.4(a), the Court should find the issue regarding any prejudice resulting from consolidation of counts waived.

2. The Defendant Was Not Prejudiced When The Properly Joined Offenses Were Consolidated For Trial.

Even if the Court does consider the defendant's prejudice argument, it should be rejected. The defendant bears the burden to demonstrate that the trial involving both counts was so manifestly prejudicial as to outweigh the concern for judicial economy. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). It is within the discretion of the trial court to determine whether sufficient prejudice has been shown to warrant severance of counts. State v. Weddel, 29 Wn. App. 461, 464, 629 P.2d 912, review denied, 96 Wn.2d 1009 (1981). That decision will be overturned only upon showing a manifest abuse of that discretion. Id. at 465.

A defendant may be prejudiced by joining offenses for trial because the jury "may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find." Bythrow, 114 Wn.2d at 718. Factors that mitigate any prejudice resulting from joinder include consideration of (1) the strength of the State's evidence on each count, (2) the clarity of defenses to each count, (3) whether the court properly instructed the jury to consider the evidence of each crime, and (4) whether the evidence of the other crimes would be cross-admissible if they had been tried separately or if some offenses had not been charged or joined at all. Bryant, 89 Wn. App. at 867-68.

The State presents a strong case when eyewitnesses identify the defendant as the perpetrator of each crime charged. State v. Watkins, 53 Wn App. 264, 269, 766 P.2d 484 (1989). Where the each count is similarly strong the court does not abuse its discretion in finding this factor supports joinder. State v. Russell, 125 Wn.2d 24, 64, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129 (1995). Here Lynette identified the defendant as the perpetrator of the burglary. Mr. Hedhal identified the defendant as the perpetrator of the evidence tampering charge. Thus the State

presented a strong case as to each count. This factor supports the decision to consolidate the counts for trial.

The court also properly instructed the jury to consider each count separately. "Your verdict on one count should not control your verdict on any other count." 1 CP 30. Jurors are presumed to follow all the instructions given by the trial court. State v. Keend, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041, 187 P.3d 270 (2008).

In addition the evidence in support of each charge would have been cross admissible. To prove the tampering with physical evidence charge the State would have to prove the defendant had reason to believe that an official proceeding was pending or about to be instituted and acted with intent to impair or prevent the availability of physical evidence relevant to that proceeding. RCW 9A.72.150(1)(a), ER 402. Evidence the defendant had committed a burglary and was charged with that offense would be relevant to prove that element of the offense.

Evidence of other crimes, wrongs, or acts is admissible to prove knowledge. ER 404(b). Courts have specifically found evidence of the defendant's conduct committed after the charged offense is admissible to establish consciousness of guilt. In Saenz

the Court held the trial court properly admitted evidence of witness intimidation on the issue of guilty knowledge in an assault prosecution. State v. Saenz, 156 Wn. App. 866, 874, 234 P.3d 336 (2010), reversed on other grounds, 175 Wn.2d 167, 283 P.3d 1094 (2012). See also State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997) (evidence the defendant threatened the witness may be admitted to imply guilt), State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). (Evidence the defendant fled is admissible if under the circumstances it creates a reasonable and substantive inference that defendant's departure from the scene is the result of consciousness of guilt or an attempt to avoid arrest or prosecution.) The court may admit evidence pursuant to ER 404(b) based on the State's offer of proof. State v. Kilgore, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002).

Ms. Tindall described a car that was damaged in the area of the Gate's home about the time of the burglary. She testified that photos of the defendant's car "looks like the car that I saw that day." 1 RP 144. The estimate for repairs to the defendant's car prepared shortly before the burglary listed the same type of damage that Ms. Tindall saw and supported the conclusion that the car she saw had been the defendant's. 1 RP 141-44; 2 RP 277; Ex. 27. That

evidence in turn corroborated Lynette's testimony that the defendant broke into her home. The defendant's attempt to destroy evidence that would support the witness' testimony is evidence that he knew he was guilty and was trying to avoid responsibility for his crime.

Finally, the defendant was not prejudiced when the charges were consolidated for trial. Prejudice may result from joinder if the defendant is embarrassed in the presentation of separate defenses or if a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition. Russell, 125 Wn.2d at 62-63. The defense to residential burglary was alibi. 2 RP 280-288. The defense to tampering with physical evidence was insufficiency of the evidence. 2 RP 289-290. These defenses were distinct. He was not put in the position of presenting conflicting defenses and therefore was not prejudiced in that regard.

The defendant argues the prejudice resulted from the possibility that his alibi defense was hampered when jurors were permitted to consider the tampering charges in conjunction with the residential burglary charge. Under the circumstances of this case it is not likely that jurors considered the alibi defense to the burglary

charge any less credible as a result of consolidating the tampering charges along with the burglary charge for trial.

Tampering with a witness was dismissed at the end of the State's case for insufficiency of the evidence. The court specifically found that, taking the evidence in the light most favorable to the State, there was insufficient evidence that the defendant personally attempted to induce a witness to testify falsely or unlawfully withhold testimony. 2 RP 244-45. Any evidence that arguably supported that charge would likely have had little if any effect on the jury's decision.

Nor does the defendant make the necessary showing of prejudice to prove the trial court abused its discretion when it did not sever the tampering with physical evidence charge from the burglary charge. To support his claim that joinder would result in the jury cumulating evidence of each crime the defendant must be able to point to specific prejudice to sustain his burden. Bythrow, 114 Wn.2d at 720. The Court in Bythrow considered the same argument the defendant makes here. There the defendant was charged with a robbery of a donut shop and a robbery of a gas station. While evidence of the gas station robbery was relevant to the defendant's guilty state of mind and rebutted his defense in the

donut shop robbery, the donut shop robbery was not admissible to prove identity in the gas station robbery under ER 404(b). Id at 719-720. Despite that severance was not required where the jury could reasonably be expected to compartmentalize the evidence. Id. That may be done where the issues are relatively simple and the trial fairly short. Id.

Here the evidence was cross admissible for both counts and the jury was properly instructed. The trial lasted two days, and the issues were straightforward. These circumstances support the conclusion that the jury could have easily compartmentalized the evidence for each count. The defendant has not sustained his burden to demonstrate any actual prejudice.

In addition, the defendant actually derived some benefit from trying the charges together. Although he did not ultimately introduce the repair estimate that was the basis for the tampering with physical evidence charge, he did use it to his advantage to support his alibi defense. He compared the odometer reading on the estimate that was printed in the format in use when the estimate was created to the odometer reading Mr. Martin recorded months after the burglary. The difference between those two readings was

less mileage than would have been recorded had the defendant driven to the Gate's home and back. 2 RP 288-289.

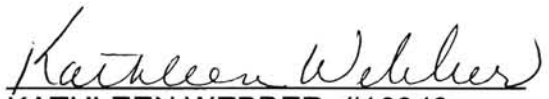
Whether to deny the motion for severance of charges that are otherwise properly joined for trial is reviewed for an abuse of discretion. Weddel, 29 Wn. App. at 464. A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. In re Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). Here the trial court articulated tenable reasons for denying the motion to sever. It properly instructed the jury. The defendant has not shown the requisite prejudice to justify severance under the circumstances of this case. The trial court therefore did not abuse its discretion when it allowed the charges to be tried together.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's convictions.

Respectfully submitted on December 3, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
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