90183-0

NO.69036-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WAYNE DUBOIS 3

PETITIONER

VS.

STATE OF WASHINGTON

RESPONDENT

MOTION FOR DICRETIONARY REVIEW
RAP13.4(a)

-PRV-

E CRF

A. IDENTITY OF THE PETITIONER

WAYNE DUBOIS , asks this court to accept review of the decision or part of the decision designated in part B of thjs motion.

B. DECISION

petitioner seeks review of the decision of the Court of appeals, that stated:

Dubois asserts his attorney provided ineffective assistance of counsel by not renewing a motion to sever at trial...We affirm. toprevail on an ineffective assistance of counsel claim based on counsel's failure to renew a motion to sever,Dubois must show both that the motion would have been granted and that, but for the deficient performance, there is a reasonable probability that the outcomer of trail would have been different. Dubois cannot demonstrate that a motion to sever at trial would have been granted.

Offenses properly joined under CrR 4.3(a) may be severed if 'the court determines that severance will promote a fair determination of the defendants guilt or innocence of each offens e'CrR 4.4(b) **state v bythrow, 114 Wn.2d 713,717,790 P.2d 154 (1990).** The defendant has the'burden of demonstrating thata trail involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy."**bythrow, 114 Wn2d at 7 18. when weighing potentail prejudice from joinder, the court mus t consider whether (1) the States evidence is strong on each coun t,(2) the defenses are clear on each count, (3) the trial court instructs the jury to consider each countseparately, and (4) the evidence of each count is admissible on the other count even if not joined for trial. State v russell, 125 Wn.2d 24,632,882 p.2d 747 (1994).**

The court's stated the States evidence was strong on the charges of assault of Hillis and possession of a firearm in November 2011, and the charge of possession of copaine in June 2011. The defense on both charges were clear not inconsistant or antagonistic.The court propperly instructed the jury and tbhe evidence was cross admissible.

Because iI cannot show the trial court would have granted severance motion at trial, the claim of ineffective assistance of counsel was affirmed.

(2) the court improperly admitted evidence of my prior juvenile adjudication of unlawful possession of a fire arm without engaging in a proper analysis under ER.404(b).This was also ineffective assistance of counsel.The court said the the State was entitled to introduce the prior to prove an element of the crime charged for second degree unlawful possession of a firearm. RCW 9.41.040(2)(a)(i).

(3) I also challenged the trial court's denial of the CrR3.6 motion to suppress the cocaine found in the crown victoria under unreasonable intentional intrusive look into the car which violated my fouth amendment right to privacy. The court held an officer looking into the car from the outside and seeing contraband has not searched the car.

C. ISSUES PRESENTED FOR REVIEW

(1)The trial court erred in denying appellant's motion to sever charges.

(2)Appellant was denied effective assistance of counselwhen his attorney failed to renew the motion to sever.

(3)The court erred in not suppressing evidence of cocaine which violated my fourth amendment right to privacy.

(4)The court erred when it admitted evidence of prior 404(b) bad acts without holding proper analysis under ER.404(b).

D. STATEMENT OF THE CASE

Petitioner is satisfied with the statement of the case presented in exhibit B.(1) and (2) -In brief of appellant presented to THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

!. review should be accepted (a.On direct appeal the lower courts granted one of thge two prongs.But for the deficient performance, there is a reasonable probability that the outcome of the trial would have been different review should be accepted because i can demonstrate the motion to sever at trial would have been granted.

(b.The court did err in denying motion to suppress evidence of cocaine when "unreasonable intentional intrusive look violated my Fourth Amendment right to privacy(Did search not violate my Fourth Amendment right to privacy when trial court agreed it was a search.

(c.The court improperly admitted evidence of prior bad acts (was it an abuse of discretion when trial court failed to hold proper 404(b) anaylsis and allowed prejudicial prior bad acts that the jury heard,.

1.OPENING STATEMENT

The petitioner, Wayne Dubois 3, Humbly asks this most honorab le Court to please not hold me to the same standards as a lawyer, since he is acting Pro Se and has no legal training. Please give these pleadings Liberal interpretations and hold them to less stringent standards than those drafted by Lawyers.
MALENG V. COOK, 490 U.S. 488,493,109 S.Ct. 1923, 1926-27(1989).

The states evidence of first degree assault was not strong at trial the State had to prove(1) that on or about the november 6, 2011, the defendant assaulted Alvin Hillis (2) that the defendant acted with intent ti inflict great bodily harm; (3) that the assa ult (a) was commited with a firearm; or (b) resulted in the infliction of great bodily harm; (4) that this act occurred in th e State of Washington.WPIC 35.08 Assault in the first degree (alternative means.

When a statute sets fourth a single offense that may be comm-itted by alternative means,there must be jury unanimity as to guilt for the single offense charged,However, unanimity is not required as to each of the alternative means by which the crime was committed provided there is substantial evidence presented to support each alternative means.State v. Linehan 147 Wn.2d 638, 56 p.3d 542(2002) cert. denied 538 U.S. 945,123S.Ct. 1633,155 LEd 2d (2003);State v.kitchen 110 Wn.2d 403,756 p.2d 105 (1988); petition of jeffries, 110 Wn.2d 326,752 p.2d 1338(1988).Evidence is constitutionally sufficient to support each alternative means if after viewing the evidence in the light most favorable to the prosecution,any rational trier of fact could find each means of committing the crime proved beyond a reasonable doubt.State v Whitney, 108 Wn2d 506 739 p2d 1150 (1987) State v. Kitchen;supra; petition of jeffries,supra,State v. Franco 96Wn2d 816,639 p2d 132 0(1982)State v. Green, 94 Wn.2d 216,616p2d 628 (1980)

If one of the alternative methods upon which a charge is based fails, the verdict must be set aside unless the court can ascerta in that it was based on remaining grounds for which sufficient evidence was presented (fn7)Green 94, wash.2d at 230,616 p2d628 State v gillespie, 41 wash app. 640,645,705 p2d 808 (1985) review denied, 106 wash 2d 1006(1986). Evidence of great bodily harm occuring was not proved beyond a reasonable doubt.

Great bodily harm means bodily injury that creates a probabili ty of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or orgaN.

Due to Docter Huefoys trial testimony on crossexamination this bodily harm never occured [TOP p.28-33] No probability of death victim had stable vital signs no significant serious permanent disfigurement no significant permanent loss or impairment of function of any bodily part or organ. docter huefoy s testimony stated his pronosis basically is that he is likely to do just as well as he would have without the gunshot to him he stated he should,yes [top p.33 L.20]

At trial my attorney argued insufficient evidence of the inten t to inflict great bodily harm [top May 29 p.71-75] Caselaw states an assault in the first degree is an offense which consist of an act combined with a specific intent, so that intent is as much a element of the offense as is the act of the assault State v.Louther 22wash 2d 497,156 p2d 672 (1945)

The mens rea for first degree assault is the specificintent to inflict great bodily harm.Specific intent is defined as intent to produce a specific, result as opposed to intent to do the physical act that produces the result.

Sprcific intent is an intent to produce a specific result and not simply the act that produces a result.State v. Wilson 125 wash.2d at 218,883p.2d 320(1994). On [top may29 p.74 l.13 the attorney states Whats the intent? Apparently to scare or intimid ate Alvin Hillis.If the intent was to inflict great bodily harm why isnt there any great bodily harm?Clearly if the shooter advanced on Alvin Hillis firing as hes doing so the chances of him inflicting some injury above the very low part of the torso some place in his major torso or head certainly if someone intended to inflict great bodily harm there is a likelyhood that could have happend.

Also see [top May 22 2012 testimony of Alvin Hillis p.45-46 L.3 Hillis stated the shooter was 10 to 15 feet away.Additionally Alvin Hillis states the shooter got out of the carand told him "to break hisself" which ment to him to give him everything I got [top May 22,2012 p.41 L.13-20 This is more evidence that the specific intent to inflict great bodily harm was not strong.

Evidence of constructive possession was also weak lower courts said evidence of constructive possession was strong when police testified that Dubois got out of the drivers seat of the car and told officers to stay away from "my" car.Fingerprintand documenta ry evidence established dominion and control over CrownVictoria andit's contents.This analysis is in conflict with other courts.

In state v spruell, 57 wash app,383,788 p.2d 21 (1990) police observed luther hill stand up from a table which was holding drug s and paraphernalia.The court refused to find constructive posses sion even though Mr.hills fingerprints were on aplate cotaining cocaine residue. Id at388-89,788 p.2d 21.

In Callahan Mr.Callahan did not own the houseboat he was on, but was observerd in close proximity to the drugs and he admitted handling the drugs earlier that day Callahan had been on the houseboat for two or three days and he had with him two books, two gun's and a set of broken scales.Id at 31,459 p,2d 400 the court found insufficient evidence to find Mr.Callahan in constructive possession of illegal drugs.Id

In Enlow officers found Mr.Enlow hiding under a blanket in the canopy of a truck, the officers also found Mr.Enlows Washington State identification card in the canopy portion of the truck, and his inmate identification card in the pocket of a shirt in the truckcab Cp at 17 The truck was not registered to Mr.Enlow. Mr. Enlows fingerprints were found on certain manufacturing items found in the truck bed, a one pint jar with untestedresidue, one quart jar, and a salad dressing jar. other jars and containers containing residue or powder tested positive for methamphetamine The court found evidence insufficient id cp. furthermore no officers seen me driving the Crown Victoria so evidence of fingerprint was weak when fingerprint evidence linking a defendant to a crime and the fingerprint is found on a moveable object, the state must show that the finerprint could been impressed only during the commission of the crime and not erlyier.State v. Todd 101 Wn app. 945, 6 p.3d 86 (2000). The State showed no such evidence in this case.The documentary evidence in the car.The fact of temporary reidence, personal possessions on the premises, or knowlege of the presence of thedrug without more evidence is insufficient to show dominion and control necessary to establish constructive possession.State v. Davis, 16 Wn.app 657,558 p.2d 236 (1977);State v. Hystad, supra.

Furthermore the statement stay away from"my" car. While Sergeant McSwain stated I yelled this to Dep. Broderick (appendix "6" cert for determination of probable cause)p.2 18-19.During trial and the 3.5 hearing Dep.Broderick never testified I yelled this to him nor did MPO Barden.But if you'll look at Appendix 6 cert. for determination of probable cause .You'll see when Sergeant McSwain asked if Ihad been driving the vehicle I said no,Also that I had no car and the Crown Victoria was not my car.More evidence that the Crown Victoria is not my car is shown on (TOP May 23,2012 p.195) crossexamination of Steve Lysaght it states

Q. Where you the one who released that vehicle
A. I helped to arrange for it's release
Q. And when was that
A. I believe that day
Q. And who did you release it to?
A. It would only have had to have been the registered owner
Q. The registered owner, okay.And that registered owner was not Wayne Dubois?
A. No

This is factual evidence the Crown Victoria was not my car.

Lastly no officers saw me in actual possession,no fingerprint s were recovered from the bindle,three other men were seen exitti ng the car, and no evidence proved the car keys found opperrated that car.

Instead, the trial court's denial of the motion to sever allow ed the jury to cumulate the evidence and infer guilt that because the assault incident allegedly stemmed from a dispute over drugs, I must also be guilty of unrelated drug possession five months prior.If considered separetly, the jury would likely have found the cocaine evidence weak and may have acquitted me.

(2). The second factor, clarity of defenses, also favoresd severance.During severance (TOP march 7,2012 p.11) The prosecutor talked about the increased prejudice I would face if defenses wer e similar.Mr.Classen "The problem would be if the--the prejudice would be increased according to caselaw if defenses were similar Mr.Classen) "So you were saying it wasn't me this time, it wasn't me this in terms of an identification in a shooting.This is more evidence that I was prejudices by joinder.

(3).The third factor also supports severance.The jurys ability to compartmentalize evidence of various count's is an important consideration in assessing the prejudice caused by joinder State v. Bythrow 114 Wn.2d 713,721,790 p.2d 154 (1990).In bythrow, the cou rt found joinder was appropriate,noting the trial only lasted two days, the evidence of the two counts was generally presented in sequence,different witness testified as to the different counts, the jury was properly instructed to consider the counts separatle y, and the issues and defenses were distinct.Bythrow,114 Wn.app. at 723.On that basis, the court concluded the jury was not likely influenced by evidence of multiple crimes, and the failurew to sever was not error.Bythrow,114 Wn.app.at 723.

Unlike in Bythrow, here the jj jury was unlikely to properly compartmentalize the evidence of the different counts. First, my trial spanned one week, with four days of testimony. Moreover, testimonty on the differnt counts was bot presented in sequence with testimony of various witnesses jumping from month to month and incident to incident.

Although the jury was instructed to decide each count separ ately, there was no limiting instruction directing the jury that evidence of one crime could not be used to decide guilt for the second crime.See Sutherby,165 Wn2d at 885-86(recognizing the dif ference between an instruction to decide each count separately and one limiting the jury's use of evidence of one crime to decid e guilt for a second crime). Given the length of trail,non-seqen- tial testimony,and repeated references to drug incidents, both charged and uncharged, the jury was ;likely to cumulate the ev- idence and simply find Me guilty on all counts.

Also prior possession of a firearm being heard could have led the jury to infer I have a propensity to carry gun's and uncharge d possession of cocaine could have led the jury to infer I have a propensity to carry drugs or have acted in conformity with the constructive possession charge.The jury was not properly instruct ed on jury instruction No.23 WPIC 50.03 which was missing proimit y alone without proof of dominion and control is insufficient to establish constructive possession.

(4) The fourth factor also supported severance evidence of the cocaine and dark-colored car would not have been admissible in a trial for assault and firearm charges, and the uncharged cocain e possession and my prior bad acts jury instructions No.20,19,7 of prior adjudication of a firearm would'not have been admissible in a trial for constructive possession.Before trial during motion to sever The State noted it was'criticle' to both cases [cocaine possession and assault]That the State prove that I defendant is connected to and may have possed and owned at various times the Crown Victoria] 1RP4: Supp,Cp (sub no.39 States Response to motio n to sever, dated 3/6/12,at3-4) without evidence there is no proo f of factual crossover.

During trial the prosecutor produced pictures of the Crown Vic toria which were shown to the officers for the possession of cocaine case these pictures were never shown to anyone in assault and firearm case.The State presented no evidence that these cars in each incident were in fact the same.No license plates, vehicle identifacation numbers, or other identifying marks proved the cars were same.The car in thge possession case was picked up by the registered owner see.(TOP p.195)There was no evidence produced to show I recieved that car after that.The car in the assault and firearm charge was never found evidence of joinder that was criticle to prove was never proved and prejudicial.

The 9th Cir court acknowleged that ther id a"high risk of undue prejudice whenever...joinder of count's allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible. "UnitedStates v. Lewis, 787 F.2d 1318,1322(9th Cir.1986)(cita-ton omitted)In Lewis,we explained this risk by observing that "it is much more difficult for jurors to compartmentalize damagin g information about one defendant derived from joined counts,then it is to compartmentalize evidence against separate defendants joined for trial" and by recognizing studies establishing "that joinder of counts tends to prejudice jurors perceptions of the defendant and of the strength of the evidence on both sides of the case."Id.at1322.

Lastly Evidence is relevant to identity only if the method employed in the commission of both crimes is so unique that mere proof that the accused committed one of them creates high proba-bility that he also committed the act charged.State v. Watkins,53 Wn.App.264,271,766 p.2d 484(1989). When identity is at issue, the degree of similarity [between the prior bad act and the current offense] must be at the highest level and the commonalities must be unique because the crimes must have been committed in a manner to serve as an identifiable signature." State v. DeVincentis, 150 Wn,2d 11,21,74 p.3d 119 (2003).Here, the only similarity between the incidents is that all allegedly involved drugs and a Crown Victoria/dark-colored car.

The only purpose for which the evidence could have been used w as to show I Dubois was predisposed to commit drug crimes and therefore must have been involved in both the cocaine possession and the assault of Hillis, which stemmed from a dispute over unrelated drugs.This is the "forbidden inference" ER 404(b) is designed tp prevent. State v. Wade, 98 Wn.app.328,336,p.2d 576 (1999). The trial court, therefore, would likely have sustained counsel's objections to the admissibility of the cocaine charge in a separate assault trial.

For these reasons, a renewed mopion should have resulted in a severance of the cocaine cahrge. Counsel's failure to renew the m otion to sever fell below the standard expected for effective representationb As evidence by his original motion to sever,trial counsel was well aware of the significant prejudice inherent in joinder of charges on one trial.This failure to renew the motion to sever was prejudicial. for the reasons discussed above,there is reason that i have demonstrated that a motion to sever at trial would have been granted.

(2. THE COURT DID ERR IN NOT SUPPRESSING EVIDENCE OF COCAINE WHICH VIOLATED MY FOURTH AMENDMENT RIGHT TO PRIVACY.

Before trial my attorney moved to suppress the cocaine evidence.He argued the cocaine was unlawfully seized from the car in violation of article(1) section(7) of theWashington State Constitution when search occured.

(Did search not violate my Fourth Amendment right to privacy Article (1) Section(7) of the Washington State Constitution when court agreed it was a search.)

During 3.6 Hearing the prosecutor stated that police dont need to discount what they see as they're walking by a vehicle and sta te the deputy saw something in openview (TOP p.24 13-16 5/21/2012 The court then stated it wasnt just a question of walking by ther were looking as much as they could look(TOP p.24 17-19 5/21/2012. Followed by the prosecutor saying I think that's certainly fair, but caselaw doesnt say that they cant look as much as they want to look.(TOP p.24 20-23 5/21/2012.

My attorney argued the officers were investigating what they began to investigate earlyer that evening.That officers suspected drug use or dealing behind the bar.(TOP p.25 17-21 5/21/2012.) he argued the windows were heavily tinted and the observations were not in open view that the officers got a closer look(TOP p.27 1-10 5/21/2012.)The prosecutor then said your right the detective s were certainly looking for something but if it's in openview the individuals can search and that there's no intent to say you can only look as much as an average person would look into that area(TOP p.29 22- p.30 1-8 5/21/2012.)

Also prosecutor said Now, I must admit that I would never have seen the cocaine in that Baggie but that's not the point. I am not a police officer and I don't know where people stash drugs and I don't know Crown Victorias.(TOP p.31 11-15 5/21/12.) this is more evidence that officers were intentionally looking for drugs in the Crown Victoria.

Lastly the court said that when somebody know what they're looking for being able to look into a vehicle and see it.It's not sirprising and it is not inconsistent with the openview doctrine.(TOP p.31 24-25, and p.32 1-4 5/21/12.)

Was this not evidence of search even whencourt's admitted search occured. The officers "unreasonable intentional intursive look into the car violated my Fourth Amendment and Art (1) of Section& (7) of the Washington State Const. Right to privacy.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PRIOR BAD ACTS UNDER 404(b).

The court improperly admitted evidence of prior bad acts(was it an abuse of discretion when trial court failed to hold proper 404(b) analysis and allowed prejudicial prior bad acts to be heard by the jury.

An error in admitting evidence under ER.404(b) mandates reversal, only if the error materially affecteds the outcome of the case within a reasonable probability State v. Everybodytalksabout,145 Wash.2d 456,468-69,39 294(2002) In close cases, the balance must be tipped in favor of the defendant.Smith 106 Wn.2d at 776.

A trial court abuses it's discretion by not following the requirements of evidence rule's, relating to admission of defendant's prior misconduct, in admitting of a defendant's prior convictions or past acts ER404(b) Before a trial court admit's evidence of a defendant's past crimes or bad acts, it must'(1) Find by a preponderance of the evidence that the misconduct occrred(2) Identify the purpose for which the evidence is sought to be introduced(3) Determine whether the evidence is relevant to prove an element of the crime charged,and (4) Weigh the probative value against the prejudicial effect.State v. Thang,145 Wash.2d 630,642,41 p.3d 1159(2002). Here, the court the court did not comply with these requirments by failing to ever hold test.

In this case had the court properly analysed the prior bad act under ER404(b) It would have concluded that the probative value of the prior bad act in it's exact name was more prejudicial befor admitting the possession of a firearm prior adjudication in it's exact name the court should weigh necessity for it's admission against prejudice that in may engender in the mind's of the jury which could be infered it was metioned 6 times in closing arguement's also a couple in opening arguement's see (TOP p.47 l.25 p.60 14-16/18-20/24-25 p.611.,8-10.)Also jury instructions No.7, 19 and No.20.

Even with Jury instruction No.7 the evidence is highly prejidicial because the possibility exists that the jury will vote to convict, not because they find the defendant guilty of the chared crime beyond a reasonable doubt, but because they believe that th e defendant deserves to be punished for a series of immoral actio ns."r Lempert & S.Salzburg at 218.Second the jury may place undue weight or overestimate "the probative value of the prioract.R.Lem pert& S.Salzburg, at 219 comment, 61 Wash.l.Rev. at 1216-17. Overestimation problems are especially acute where the prior acts are similar to the charged crime. State v. Anderson 31,Wash. App, 356,352,641 p.2d 728, review denied, 97 wash 2d 1020(1982(of stat e v. Pam,98 Wash.2d 748,761,659 p.2d 454 (1983) .Prejudice arisin g from introduction of prior convictions which are similar to the charged crime is great since the jury is likely to believe if he did it before [48 Wn.App.196] he probaly did so this time. "Final ly introduction of other acts of misconduct inevitably shift the jury's attention to the defendant's general propensity for crimin ality, the forbidden inference; thus the normal "presumption of innocence" is stripped away.(Fn2) R.lempert & S.Saltzburg, at 219 comment, 61 Wash.L.Rev. at 1216.

Altough the trial court cautioned the jury with respect to pri or bad act's evidence, that instruction has little efficancy wher e the evidence is erronously introduced in the first place. See State v. Miles,73 Wash.2d 67,71,436 p.2d 198 (1968).

Even though the prior bad act was relevant to the element of firearm possession it was'nt Stated or weighed on the record. the trial court did not follow criteria under Washington Evidence Rul e 404(b) and even when the States proposed evidence of the poss ession was relevant, a trial must evaluate evidence under rule of evidence requiring the trial court to exercise it's discretion in excluding relevant evidence if it's undue prejudice substantiall y outweighs it's probative value.ER404(b).

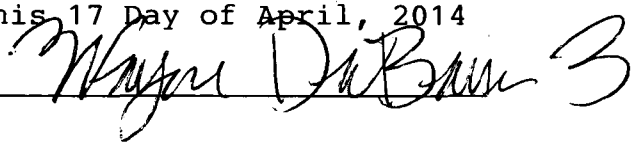
Thus the court should have held analysis under ER404(B) on record stating the prior bad act in it's exact name prejudice me Even if court held analysis and found prior possession of a fire arm to be probative there would have been an alternative means o other then saying exactly what that prior was.

F. Conclusion

for theses reasons set fourth I, Mr.Dubois respectfully requests that this court grant this Petition For Review and for issues (1),(2), and (4). I ask the court to reverse the convictions and remand for new trial. For issue (3) I ask the court to vacate the conviction.

Sincerely Submitted,

This 17 Day of April, 2014

x 

ATTACHMENT "B"

CAUSE NO.

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That S.A. Lysaght is a(n) Detective with the King County Sheriff's Office and has reviewed the investigation conducted in the King County Sheriff's case number(s) 11-138032;

There is probable cause to believe that Wayne R. Dubois committed the crime(s) of Violation of the Uniform Controlled Substance Act, RCW 69.50.401, Minor Frequenting Off-Limits Area, RCW 66.44.310, and Illegal Consumption of Alcohol by a Minor, RCW 66.44.270.2.A.
This belief is predicated on the following facts and circumstances:

John McSwain is a Sergeant commissioned and employed by the King County Sheriff's Office. He was working in this capacity when he witnessed, investigated and reported the following:

"I was on foot patrol in the downtown White Center area. This area has had many problems with drug and alcohol use as well as gang activity.

Specifically of attention to Police has been Papa's Pub located at 9835 16 Ave SW. In the past few months there have been numerous incidents of disturbances in the bar as well as fights in the street in front of the pub and a near fatal shooting within the past week. In conversations I have had in the past few weeks with patrons I learned that illicit drug usage has been occurring in the alley behind Papa's Pub. I was told that patrons of the Pub will go out a back door to the Pub and smoke marijuana or crack cocaine on the steps behind the establishment.

Myself, Dep. Broderick and MPO Barden were on foot patrol and we walked down the alley behind Papa's Pub. As we approached the back of the Pub I noted a youthful looking black male with dreadlocks, wearing a Grey leather coat and sagging jeans with red shorts underneath, standing at the bottom of the stairway. I could see there was another male on the steps partially in the hallway. It did not appear the male appeared to be 21 years of age.

As we approached the male he looked briefly in our direction then ran up the stairs and back into Papa's Pub. We checked the stairs and noted the rear entrance to Papa's Pub was locked and both subjects had entered the bar, an area that serves alcohol and is off limits to patrons under the age of 21.

MPO Barden and I went through an adjacent bar and out onto the sidewalk in time to see the two males had gotten into a dark green or black Crown Victoria. As we approached, the Crown Victoria sped off S/B on 16th Ave SW and we could not see who was driving the vehicle.

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We spoke with the two bouncers on duty at Papa's Pub, Camacho and Atkinson, and both stated they didn't see anyone run out of the bar but there were over 30 people in the bar and they didn't notice who was coming and going. Neither were very cooperative with providing information.

We left the area and continued our foot patrols.

At approx. 0138 hrs MPO Barden, Dep. Broderick and myself were standing near the intersection of SW Roxbury and 16th Ave SW. MPO Barden spotted the same dark green or black Crown Victoria we had seen earlier travelling N/B on 16th SW crossing SW Roxbury. I got into my car and traveled N/B in an attempt to catch up to the vehicle when I saw it had parked on the east shoulder of the roadway in front of 9430 16 SW. I noted the same black male wearing a Grey coat I had seen in the alley was standing directly in front of the vehicle as if he had walked from the driver's side area. I noted the male was with three other males and they were walking S/B on the east sidewalk.

I exited my vehicle and stopped the group to identify the youthful male I had seen run into the bar.

Dep. Broderick and MPO Barden joined me and I identified the male I had seen at the bar as Wayne R. Dubois DOB 04/15/1991. I noted Dubois is only 20 years old and not authorized to be in a bar. I also noted Dubois was clearly under the influence of alcohol, specifically noting his face was flushed and his eyes were bloodshot and watery. Dubois was very animated, yelling that I had no right to stop him, that I had no right to detain him and we were all "mother fuckers" and "punk ass bitches". As Dubois was yelling at me I noted a strong odor of intoxicants on his breath. I identified Warren while MPO Barden identified the other two. All three remaining subjects were very cooperative in providing information. Warren even went so far as to attempt to calm down Dubois, telling him to shut up on several occasions and to calm down.

At one point during my conversation with Dubois and his friends I noted that Dep. Broderick was walking in the direction of the Crown Victoria and Dubois yelled, "hey, stay away from my fucking car". I asked Dubois if he had been driving the vehicle and he said no, that he had no car and that the crown Victoria was not his car.

I placed Dubois in custody for violations of RCW 66.44 and searched him incident to arrest. In Dubois pants pocket I located a Washington State ID Card that I handed to Dep. Broderick. In Dubois right coat pocket I located a set of keys that contained a Ford key.

I was advised by Dep. Broderick that he had looked in the vehicle and had noticed some narcotics in the drivers door handle. I walked over to the Crown Victoria and looked into the drivers door area and noted a plastic baggie that contained white color rocks. Based on my training and more than

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20 years of police experience including 5 years of direct drug investigations I recognized the item to be crack cocaine.

I advised Dubois of his constitutional rights via my department issued rights card. Dubois said he understood his rights. I asked Dubois why he had cocaine in his vehicle and he said he didn't know what I was talking about. Dubois said the car wasn't his and he was innocent. Dubois started yelling that his attorney would get him out and get him off on any charge and continued to call me, Dep. Broderick and MPO Barden racial slurs as well as "punk ass bitches".

While we were on scene members of the Seattle Police Gang Unit arrived and asked who we had detained. I provided the name of Dubois and Warren to the Officer. The Officer was not familiar with Dubois but stated Warren was a "high up" member of the Valley Hood Piru Blood gang.

Dep. Broderick processed the exterior of the Crown Victoria for latent prints and MPO Barden sealed the vehicle in anticipation of an application for a search warrant. The vehicle was subsequently towed to the SW Precinct.

I released Dubois at the scene and advised him this case was being sent to Detectives for further investigation and possible charges. Dubois yelled that he was going to beat "any punk ass charges" and that all cops were "mother fuckers" as he walked away from the scene."

I, Det. Lysaght, am also commissioned and employed by the King County Sheriff's Office. I was working in this capacity when this case was assigned to me for follow-up.

I reviewed the circumstances of the investigation and requested Detective Koby Hamill and his Narcotics Detection Dog assist me. I was present when Hamill and his K9, Jade, approached the vehicle. I watched as Jade, as interpreted to me by Detective Hamill, gave positive alerts on the driver's door and handle, as well as on the passenger door. Further, I too was able to look through the driver's window and see a baggie that contained several white rocks consistent in appearance with crack cocaine. As such, I applied for and was granted a search warrant for the vehicle by the Honorable Judge DeLaurente. The warrant authorized the service for a period of two days. The warrant was executed on the vehicle. I examined the contents of the driver's door handle and learned the baggie we had seen was actually two. The first contained an amount of suspected crack cocaine chunks while the other contained small bindles consistent with $20 amounts of suspected powder cocaine. The glove box contained a check belonging to Wayne Dubois with the payee written as Wal-Mart. Furthermore, additional checks bearing the name of Wayne Dubois as the account holder were found in the trunk. I fingerprinted the vehicle's interior and located latent prints on the rear view mirror, the driver's seat belt clasp and the underside of the detachable face of the car stereo. These prints were recovered and submitted to the

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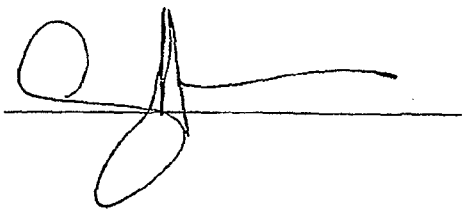
latent lab for processing. I processed the evidence at the Burien Precinct. Both the powder cocaine and rock cocaine field-tested positive using Narcotest Kit #13. I and trained to use these department issued drug test kits. I later received lab results from the King County AFIS Unit regarding prints submitted by both Deputy Broderick and myself. I spoke with Latent Print Examiner Heather Vandegrift regarding the results. She informed me that a series of latent prints belonging to Dubois had been recovered from the vehicle. More specifically, Deputy Broderick had recovered two of Dubois' prints from the exterior of the driver's side front window and one print from the driver's side rear window. Further, three fingerprints I had lifted from the interior driver's rear view mirror had returned to Dubois.

Case closed, cleared by arrest.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated By me this 17th day of November, 2011, at King County, Washington.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WAYNE RICHARD DUBOIS, Appellant.	)	No. 69036-1-I DIVISION ONE UNPUBLISHED OPINION FILED: January 13, 2014

SCHINDLER, J. — Wayne Richard Dubois seeks reversal of his jury conviction of first degree assault, second degree unlawful possession of a firearm, and possession of cocaine. Dubois asserts his attorney provided ineffective assistance of counsel by not renewing a motion to sever at trial. We affirm.

FACTS

Shortly after 10:00 p.m. on June 25, 2011, three police officers observed a young man who appeared to be underage standing outside the open back door of a bar in White Center. When the man saw the officers, he ran into the bar. The officers reached the sidewalk in time to see the young man get into a dark green Ford Crown Victoria that quickly pulled away.

A few hours later, the officers watched as the same dark green Crown Victoria parked near a Walgreens store in the same neighborhood. After parking the car, the

same young man got out of the driver's door. Three passengers got out of the car and joined the man on the sidewalk. When the officers approached the group, the driver, later identified as Wayne Richard Dubois, was belligerent. The other men were quiet and cooperative. While one officer spoke with Dubois, the other officers used flashlights to look through the window of the car and saw what they believed to be a "substantial amount of crack cocaine." When Dubois saw the officers looking into the car, he yelled, "[H]ey, stay away from my fucking car."

The officers obtained the car keys from Dubois, impounded the car, and then released Dubois. In a later search of the car, officers found two bags of cocaine in the compartment next to the driver's door. In the glove box, the police found checks signed by Wayne Dubois, mail addressed to Wayne Dubois, and a direct deposit form listing a Chase Bank account and the name of Wayne Dubois.

On November 6, 2011, Dubois shot Alvin Hillis. About a week before the shooting, Hillis found a rock of cocaine on the floor of his former girlfriend's house. Over the next few days, Dubois asked other people to find out if Hillis took the cocaine. Hillis denied taking the cocaine.

On November 6, Hillis was standing near Parnell's Mini Mart at the corner of 23rd Avenue South and South Dearborn Street when he saw a dark green Crown Victoria driving toward him. The car stopped and Dubois got out of the driver's seat and approached Hillis. Dubois accused Hillis of stealing from him and said, "[Y]ou took something from me, I need it back." Dubois then got into the passenger side of the car and left. Hillis walked toward Martin Luther King Jr. Way South. When Hillis reached the corner, the dark green Crown Victoria pulled into the intersection. Dubois got out of

the passenger seat, approached Hillis, pulled out a gun and shot at him repeatedly. One bullet hit Hillis in the abdomen, causing serious injury. Hillis told the police Dubois shot him.

When the police arrested Dubois several days later, he agreed to a recorded interview. Dubois admitted driving the Crown Victoria to Parnell's on 23rd Avenue and Dearborn Street and confronting Hillis about taking "money" from him. But Dubois denied owning the Crown Victoria and shooting Hillis, or being in the car at the time of the shooting.

The State charged Dubois with first degree assault and second degree unlawful possession of a firearm on November 6, 2011, and one count of possession of cocaine on or about June 25 or 26. Dubois filed a motion to sever the possession of cocaine count from the two other counts for first degree assault and second degree unlawful possession of a firearm. Dubois argued that evidence connecting him to the Crown Victoria in June had little probative value because he admitted driving the Crown Victoria on the day of the shooting in November. Dubois also argued that he would be prejudiced by the joinder because the jury would improperly consider the evidence of the two separate crimes. The State argued that evidence collected during the investigation of the possession of cocaine in June was highly probative of whether Dubois owned the Crown Victoria. The State argued that this evidence was relevant to rebut Dubois' claim that he did not own the car and did not know who was driving the Crown Victoria at the time of the shooting.

The court denied the motion to sever. The court ruled, "The facts supporting the [cocaine possession] charge tie the defendant to the vehicle which makes it more likely

the defendant was in the vehicle at the time of the shooting." Citing State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990), the court also ruled the evidence was cross admissible and "[a]ny prejudice does not outweigh the concern for judicial economy."

Dubois did not renew the motion to sever at trial. The jury found Dubois guilty as charged. The trial court imposed a standard-range sentence.

ANALYSIS

Dubois claims he received ineffective assistance of counsel because his attorney did not renew the motion to sever the charge of possession of cocaine from the charges of first degree assault and second degree unlawful possession of a firearm. CrR 4.4(a) requires a defendant to make a pretrial motion to sever and if overruled, to renew the motion before the close of the evidence. State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329 (1987).

To establish a claim of ineffective assistance of counsel, Dubois has the burden to show that (1) counsel's performance fell below a minimum objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. State v. West, 139 Wn.2d 37, 41-42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Dubois must establish both prongs to prevail on an ineffective assistance of counsel claim. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

To prevail on an ineffective assistance of counsel claim based on counsel's failure to renew a motion to sever, Dubois must show both that the motion would have been granted and that, but for the deficient performance, there is a reasonable

probability that the outcome of the trial would have been different. State v. Standifer, 48 Wn. App. 121, 125-26, 737 P.2d 1308 (1987). Dubois cannot demonstrate that a motion to sever at trial would have been granted.

Offenses properly joined under CrR 4.3(a) 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); State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). The defendant has the "burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718. When weighing potential prejudice from joinder, the court must consider whether (1) the State's evidence is strong on each count, (2) the defenses are clear on each count, (3) the trial court instructs the jury to consider each count separately, and (4) the evidence of each count is admissible on the other count even if not joined for trial. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Here, the State's evidence was strong on the charges of first degree assault of Hillis and possession of a firearm in November 2011, and the charge of possession of cocaine in June 2011. Dubois concedes that the State presented evidence supporting the assault and firearm charges. Hillis identified Dubois to police and testified at trial that Dubois shot him. Two witnesses to the shooting testified at trial to descriptions of the shooter and the car matching Dubois and the Crown Victoria.

But Dubois asserts that the State's evidence on possession of cocaine was less strong because no witness testified to seeing him "in actual possession of the cocaine" or driving the Crown Victoria. We disagree. The cocaine charge was based on strong

evidence of constructive possession. Police testified that Dubois got out of the driver's seat of the car and told officers to stay away from "my" car. Fingerprint and documentary evidence established Dubois had dominion and control over the Crown Victoria and its contents.

The defense on the cocaine possession charge and the assault and firearm charges were clear rather than inherently inconsistent or antagonistic. As to the assault and possession of a firearm, Dubois argued the State did not prove that he shot Hillis or that he intended to inflict great bodily harm. As to the possession of cocaine, Dubois argued the State did not prove the cocaine was his. Further, the trial court properly instructed the jury to consider each count separately.[1] We presume the jury followed the court's proper instruction. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987).

Nonetheless, Dubois claims the jury could improperly infer guilt as to the unrelated cocaine charge because the assault allegedly stemmed from a dispute over drugs. Dubois relies on State v. Sutherby, 165 Wn.2d 870, 885-86, 204 P.3d 916 (2009), to argue the jury could have improperly considered evidence of the cocaine possession to determine guilt in the shooting because the trial court did not provide a limiting instruction telling the jury that evidence of one crime could not be used to decide guilt for a separate crime. Sutherby is distinguishable. In Sutherby, unlike here, the prosecutor repeatedly argued the jury should consider evidence supporting one charge

[1] The court instructed the jury: "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." See 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 3.01, at 80 (3d ed. 2008).

to determine the defendant's guilt on a separate charge of an unrelated crime. Sutherby, 165 Wn.2d at 885-86.

Finally, as the court ruled pretrial, even if not joined for trial, the evidence was cross admissible. The evidence connecting Dubois to the car for the cocaine charge would be admissible to show his connection to the car involved in the shooting. Evidence of Dubois's dominion and control over the Crown Victoria in June was relevant to rebut his claim to police in November that he did not own the car and did not know who was driving the car at the time of the shooting.

Because Dubois cannot show the trial court would have granted the motion to sever if counsel renewed the motion at trial, his claim of ineffective assistance of counsel fails.

In a statement of additional grounds for review, Dubois contends that the trial court improperly admitted evidence of his prior felony juvenile adjudication of unlawful possession of a firearm without engaging in a proper analysis under ER 404(b). Dubois also claims that his attorney provided ineffective assistance by failing to object to the admission of his prior juvenile adjudication. But the State was entitled to introduce the prior juvenile adjudication for unlawful possession of a firearm in order to prove an element of the charged crime of second degree unlawful possession of a firearm. RCW 9.41.040(2)(a)(i).

Dubois also challenges the trial court's denial of his CrR 3.6 motion to suppress the cocaine found in the Crown Victoria. He claims the "unreasonable intentional intrusive look into the car" violated his right to privacy. In its oral ruling on the CrR 3.6 motion, the trial court found that the officers were standing outside the car and looking

through the windshield when they observed the suspected crack cocaine in the driver's door compartment. Under the well established open view doctrine, an officer looking into a car from the outside and seeing contraband has not searched the car. See State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986) ("open view" involves an observation from a nonconstitutionally protected area).

We affirm.

Schindler, J.

WE CONCUR:

Spearman, A.C.J.

Cox, J.