71564-0

71564-0

NO. 71564-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID HAILEY, JR.,

Appellant.

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

The Honorable Michael T. Downes, Judge
The Honorable David A. Kurtz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in denying appellant's motion to sever the charges.

Issue Pertaining to Assignment of Error

Appellant was tried jointly on two counts of attempting to elude a pursuing police vehicle. The first charge stemmed from a daytime incident in early January 2014. The second charge arose from a separate night time incident about two weeks later involving a different car, different circumstances, and included an allegation that appellant's actions threatened physical injury or harm. Before trial, defense counsel moved to sever the two charges. The trial court denied the motion. Counsel renewed the motion to sever before the start of trial. Where the two charges allowed the jury to unfairly cumulate the evidence against appellant and improperly inferred a criminal disposition, did the trial court err in denying appellant's motion to sever?

B. STATEMENT OF THE CASE

1. Trial Testimony

On January 2, 2013, Snohomish County Sheriff Deputy Ryan Phillips was driving his unmarked police car south on Interstate 5 (I-5) when he recognized a blue Ford Mustang car a few car lengths head of

him. 3RP[1] 50, 55, 57-58. Phillips had prior contacts with appellant David Hailey, Jr. (Hailey) and believed he was driving the Mustang. 3RP 58-59. Phillips knew Hailey did not have a driver's license. 3RP 62. The Mustang was not registered to Hailey. 3RP 121-22.

Phillips drove his car parallel to the Mustang and looked through the car's driver side window. 3RP 59-61. Phillips recognized Hailey. 3RP 61-62. Hailey looked at Philips for "a brief moment," before slightly slumping down in the driver seat and turning his baseball hat to partially block his face. 3RP 61-62.

Phillips contacted Snohomish County Sheriff Deputy, Lucas Robinson, who was also driving an unmarked police car south on I-5. 3RP 62-63, 122, 126-30. Robinson did not see the Mustang driving erratically before Phillips contacted him. 3RP 138-39. Robinson also looked through the Mustang window and recognized Hailey. 3RP 132.

Phillips and Robinson devised a plan to stop the Mustang by boxing it against the interstate guardrail. 3RP 63-64, 132. Phillips tried to pull in front of the Mustang but the Mustang changed lanes. 3RP 63-64. At that point, Robinson pulled behind the Mustang and turned on his

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP – October 3, 2013; 2RP – November 22 & 26, 2013; 3RP – January 21, 22, & 23, 2014; 4RP – February 26, 2014.

emergency lights as Phillips tried to push the Mustang toward the guardrail from the front. 3RP 64-65, 132-34. The Mustang slowed to 20 miles-per-hour before accelerating between the front of Phillips' car and the guardrail. 3RP 65, 133-34. The Mustang drove on the I-5 shoulder before continuing southbound on Highway 529. 3RP 65-66.

Phillips turned on his emergency lights and siren and accelerated after the Mustang. Philips stopped the chase after 30 seconds because he could not keep up with the Mustang. 3RP 65-67, 135-37. Phillips estimated the Mustang was traveling between 110 and 115 miles-per-hour. 3RP 69.

A short time later, Phillips drove to a home in North Everett where he believed Hailey had acquaintances. Phillips did not have his emergency lights and siren turned on. 3RP 72-73. Phillips drove down an alley one block north of the house. Phillips saw Hailey walk into the alley about 100 yards in front of his car. Hailey ran after looking at Phillips. 3RP 73-74. Police were not able to locate Hailey. 3RP 75.

Police later found a Mustang parked about three blocks from the alley where Phillips saw Hailey. 3RP 75-76, 124. Four documents with Hailey's name on them were found inside the Mustang. 3RP 76, 125. No DNA or fingerprints were found inside the Mustang. 3RP 125.

On the evening of January 15, 2014, Phillips and Snohomish County Sheriff Deputy, Marcus Dill, went to a house where they believed Hailey was staying. 3RP 76-77, 81, 146-49. They intended to arrest Hailey for the alleged January 2 incident. 3RP 77. At the house, Phillips saw a purple Nissan Altima back out of the driveway. 3RP 81, 150. The Altima matched the description of a car Phillips believed Hailey was driving. 3RP 82. The Altima was not registered to Hailey. 3RP 122.

Phillips followed the Altima and turned on his headlights to see if Hailey was the driver. Phillips could not initially identify the driver. 3RP 82-83. When the Altima turned, Phillips recognized Hailey as the driver based on his "very square head and a very pronounced jaw[.]" 3RP 83. Phillips saw a front seat passenger in the Altima but did not recognize the passenger and could not determine the person's gender. 3RP 84

Phillips followed the Altima without turning on his emergency lights or siren. 3RP 84. At some point, the Altima accelerated and all of its exterior lights were turned off. 3RP 85-86, 88. Phillips turned on his emergency lights and siren and followed the Altima. 3RP 87. He estimated the Altima was traveling between 50 and 60 miles-per-hour. 3RP 88.

Dill turned on his emergency lights and siren and followed Phillips in chasing the Altima. 3RP 151, 154. Dill did not see who was driving

the Altima and could not tell whether there were any passengers inside the car. 3RP 153-54, 157. Phillips stopped following the Altima after about six blocks because he could not keep up with the car. 3RP 87, 90-91, 103-04, 157. Everett police found the Altima abandoned the next day. 3RP 91, 103.

On January 16 Phillips and Dill went to a house in Granite Falls intending to arrest Hailey for both alleged incidents. 3RP 104-05, 158-59. Hailey and a woman were leaving the house as police arrived. Hailey went back inside the house when he saw police. 3RP 106-07, 159-60.

Police went inside the house after waiting for about 25 minutes for Hailey to come outside. 3RP 107-08, 160. Police used infrared heat sensing to determine Hailey was inside the attic. 3RP 116. Hailey did not respond to police announcements. 3RP 117. A police dog was sent inside the attic and bit Hailey who was lying on his back and partially covered by insulation. 3RP 117-20, 160-61. Hailey told Phillips he was sleeping. 3RP 120.

Police arrested Hailey. 3RP 162. Dill told Hailey he was being arrested for the pursuits. Hailey responded, "what pursuits?" 3RP 162-64. When Dill explained the pursuits involved the Mustang and Altima, Hailey responded, "I've just been being stupid again." 3RP 164. Dill told Hailey he was going to hurt himself or someone else if he did not stop.

Hailey responded, "I know. I just don't know why I keep fucking up." 3RP 164-65.

Based on this evidence, the Snohomish County prosecutor charged Hailey with one count each of attempting to elude a pursuing police vehicle for the January 2 and 15 incidents. The prosecutor also alleged the Altima passenger was threatened with physical injury or harm by Hailey's actions of attempting to elude police on January 15. CP 45-46; 3RP 5-6.

After hearing the above, a Snohomish county jury found Hailey guilty as charged. CP 19-20. The jury also returned a special verdict, finding Hailey's actions on January 15 threatened the passenger with physical injury or harm. CP 21; 3RP 223-27. The trial court sentenced Hailey to consecutive prison sentences of 29 months for each attempting to elude conviction. The court also imposed a consecutive 12 month and one day enhancement for the special verdict finding. CP 3-14; 4RP 245-47. Hailey timely appeals. CP 1-2.

2. Motion to Sever

Before trial Hailey's attorney moved to sever the attempting to elude a pursuing police vehicle charges from one another. Defense counsel argued the similarity of the charges improperly invited the jury to cumulative evidence and infer that Hailey had a criminal disposition. CP 50-54.

The State maintained joinder of the crimes was appropriate because of the similar defenses of identity, the cross-admissibility of police officer testimony, and the minimal risk of prejudice to Hailey if the jury was properly instructed that each charge must be decided separately. Supp. CP __ (sub no. 29, State's Response to Defense Motion to Sever, dated 11/22/13, at 1-6).

In arguing the motion to sever, defense counsel reiterated the similarity of the charges invited the jury to cumulative evidence and infer criminal disposition. 2RP 4-5. Defense counsel also argued the strength of the state's evidence identifying Hailey as the driver differed for each count. 2RP 3. Counsel pointed out that whether evidence of each incident was cross-admissible was subject to the trial court's discretion. 2RP 4-5. Defense counsel further noted that if the charges were severed, the risk of unfair prejudice at separate trials could be reduced by sanitizing evidence of why police had probable cause to arrest Hailey for the separate attempting to elude charges. 2RP 4.

The prosecutor responded that the strength of the evidence as to each count was sufficiently strong to allow a jury to convict on both counts, especially when considering Hailey's statements to police. 2RP 5-6. The prosecutor acknowledged however, that it was at the discretion of the trial court to determine whether the evidence was cross-admissible.

2RP 7. The prosecutor noted judicial economy favored joint trials and any risk of prejudice to Hailey given the similarity of the charges could be cured by proper jury instructions. 2RP 5-8.

The trial court denied the motion to sever, reasoning Washington state favored joinder, the defenses to each charge were not inconsistent, and the evidence supporting each charge was "of equal strength." 2RP 9-13; CP 47. The trial court concluded some evidence was cross-admissible because the second count allegedly occurred while police were looking to arrest Hailey for the first charged incident. 2RP 11-12. The court reasoned the evidence was therefore cross-admissible to establish Hailey's identity, explaining:

> "Some of the circumstances under which they were looking for him [Hailey] included getting a glimpse of him driving a motor vehicle. So it may be that the means of identification that they had of the defendant being similar in the first case to the second case has some particular relevance."

2RP 12.

Finally, the court concluded any risk of prejudice to Hailey given the similarity of the charges could be cured by instructions informing the jury to consider each count separately. 2RP 12-13.

Hailey's attorney withdrew before trial. 2RP 19-26; Supp. CP __ (sub no. 34, Notice of Withdrawal and Substitution of Counsel, dated

11/26/13). Hailey's newly substituted attorney renewed the motion to sever the first day of trial. Defense counsel argued trying two similar cases with two different dates together was "highly prejudicial." 3RP 11. The State maintained joinder was proper. 3RP 11-12.

The trial court upheld its prior ruling denying the motion to sever. The court concluded evidence from the January 15 charge would be cross-admissible in a separate trial on the January 2 incident as evidence of flight. The court also concluded evidence of the January 2 incident would be cross-admissible to explain why the police were looking for Hailey at the time of the January 15 incident. 3RP 12-14. The court noted it would instruct the jury to consider each count separately. 3RP 13-14.

C. ARGUMENT

THE TRIAL COURT ERRED IN DENYING HAILEY'S MOTION TO SEVER THE ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE COUNTS.

When "severance will promote a fair determination of the defendant's guilt or innocence of each offense," the court must sever offenses. CrR 4.4(b).[2] This is true even if offenses are properly joined in

[2] CrR 4.4(b) provides: "The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense."

one charging document. Id.; CrR 4.3(a)(1);[3] State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). A defendant's motion to sever "must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require." CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed up until the close of all the evidence. CrR 4.4(a)(2).

Joinder is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). A defendant may be prejudiced by having to present separate defenses, the jury may use evidence of one or more of the charged crimes to infer a criminal disposition, or the jury may cumulate evidence of the charges and find guilt when, if considered separately, it would not. State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984). A more subtle prejudicial effect may be present in a '"latent feeling of hostility engendered by the charging of several crimes as distinct from only one.'" Harris, 36 Wn. App. at 750 (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)).

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[3] CrR 4.3(a) provides two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(1) Are of the same or similar character, even if not part of a single scheme or plan; or

(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

In determining whether to sever charges, the trial court considers (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) whether the court instructs the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. State v. Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009). Where an accused demonstrates that the manifest prejudice of joinder outweighs concerns for judicial economy, severance should be granted. State v. MacDonald, 122 Wn. App. 804, 814-15, 95 P.3d 1248 (2004) (citing State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990), rev. denied, 153 Wn.2d 1006 (2005)). Denial of a motion to sever offenses when such severance should be granted is an abuse of discretion. Harris, 36 Wn. App. at 749-50.

In this case, there is great danger the jury may have used evidence of one of the attempting to elude charges to infer a criminal disposition to find Hailey guilty of the other attempting to elude charge. There is also great danger that the jury may have cumulated the evidence of the crimes to find guilt. At the very least, trying similar charges together necessarily engendered a latent feeling of hostility toward Hailey. Those factors that may mitigate the prejudicial effect are not sufficient in this case.

First, the strength of the State's evidence as to each attempting to elude charge was not equal. The January 2 incident happened during

daylight and both Phillips and Robinson easily recognized Hailey. When the car involved was found abandoned a short time later, paperwork in Hailey's name was found inside. Phillips' recognition of Hailey near the abandoned car provided additional support for the charge.

No such corroborating evidence existed to support the January 15 charge. It was dark outside at the time of the alleged incident and a different make and model of car was involved. The car was not registered in Hailey's name. Dill was not able to identify the driver or passenger of the car. Phillips could not initially identify Hailey as the driver and he was never able to even positively identify the gender of the passenger. Although police later found the car abandoned, no fingerprints, DNA, or paperwork tied Hailey to the car.

Instead, the trial court's denial of the motion to sever allowed the jury to cumulate the evidence and infer that because Hailey was involved in one alleged attempt to elude incident, he must also be involved in a different attempt to elude two weeks later. If considered separately, the jury may have found the January 15 attempting to elude evidence weak and may have acquitted Hailey.

The second factor, clarity of defenses, also favored severance. General denial was a defense to all the counts. However, Hailey's defense to the January 15 attempt to elude also provided that there was insufficient

evidence of the alleged aggravating factor that his actions threatened physical injury or harm.

The third factor also supports severance despite the instruction to "decide each count separately." The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. Bythrow, 114 Wn.2d at 721. In Bythrow, the court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence, different witnesses testified as to the different counts, the jury was properly instructed to consider the counts separately, 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 failure to sever was not error. Bythrow, 114 Wn. App. at 723.

Unlike in Bythrow, here the jury was unlikely to properly compartmentalize the evidence of the different counts. The same witness, Phillips, presented direct testimony of both counts. The remaining testimony on the different counts was not presented in sequence, with testimony of different police officers jumping from incident to incident.

Although the jury was instructed to decide each count separately, there was no limiting instruction directing the jury that evidence of one

crime could not be used to decide guilt for a second crime. See Sutherby, 165 Wn.2d at 885-86 (recognizing the difference between an instruction to decide each count separately and one limiting the jury's use of evidence of one crime to decide guilt for a second crime). Given the similarity of the charges and non-sequential testimony, the jury was likely to cumulate the evidence and simply find Hailey guilty on all counts.

The fourth factor also favored severance. In denying the motion to sever, the court opined that each attempt to elude was cross-admissible as to the other as evidence of res gestae, flight, and as a means of identification because Hailey was seen driving a car in each incident. 2RP 12-13; 3RP 12-14.

First, 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 probability 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 Hailey was allegedly seen driving a car. The alleged incidents occurred at different times and locations. The cars used in each incident were not the same, and one incident alleged the presence of a passenger, while the other did not. Moreover, neither car connected to the charges was registered to Hailey. Thus, the fact that Hailey was seen driving one car could not have been used for the purpose of proving his identity in driving a different car, at a different time and place, on a different day.

The only purpose for which the evidence could have been used was to show Hailey was predisposed to attempting to elude police officers and therefore must have been involved in both incidents in question. See State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) ("A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended."), rev. denied, 116 Wn.2d 1020 (1991). This is the "forbidden inference" ER 404(b)[4] is designed to prevent. State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

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[4] The rule provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Even assuming evidence of the separate attempts to elude would be admissible as evidence of res gesta or flight, this fact alone is not dispositive. Bythrow, 114 Wn.2d at 722. Moreover, even if relevant, prior acts evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. ER 403; State v. Hanson, 46 Wn. App. 656, 661, 731 P.2d 1140 (1987), rev. denied, 108 Wn.2d 1003 (1987). The risk of unfair prejudice at separate trials could have been reduced by sanitizing evidence of the other attempting to elude charge by removing mention of the specific charge itself. In other words, officers could have testified they were looking for Hailey without detailing the specifics as to why.

For all the reasons discussed above, there is great danger the jury used evidence of both attempting to elude charges to infer a criminal disposition. Likewise, the jury may have cumulated the evidence of the crimes to find guilt. At the very least, trying the charges together necessarily engendered a latent feeling of hostility toward Hailey. Cross admissibility of evidence and a proper jury instruction was not sufficient to mitigate the prejudice inherent in trying these counts together. Therefore, the attempting to elude counts should have been severed to guarantee Hailey a fair trial.

D. CONCLUSION

For the reasons discussed above, Hailey's convictions should be reversed and the case remanded.

DATED this 17th day of October, 2014

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON	)	
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Respondent,	)	
	)	
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	)	
DAVID HAILEY,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF OCTOBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF OCTOBER 2014.

X Patrick Mayovsky