98795-5
No. 79335-7-I

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

SAMUEL DAVID OBERT SLATER, Petitioner

v.

STATE OF WASHINGTON, Respondent

PETITION FOR REVIEW

MAZZONE LAW FIRM, PLLC
James Herr, WSBA 49811
Peter Mazzone, WSBA 25262
Attorneys for Petitioner
3002 Colby Avenue, Suite 302
(425) 259-4989 -phone
(425) 259-5994 - fax

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A. Identity of the Petitioner

The Petitioner is Samuel Slater.

B. Decision Below

On June 15, 2020, the Court of Appeals, Division One affirmed Samuel Slater's jury convictions for violation of a court order (domestic violence) and bail jumping in an unpublished opinion, No. 79335-7-I (herein after referred to as "the opinion below"). The opinion is included in Appendix 1.

Appellant submits this timely petition for review to the honorable Supreme Court of the State of Washington.

C. Issues Presented for Review

1. Should missing a court hearing be automatically admissible against a defendant as evidence of flight and consciousness of guilt?

2. Do repeated statements of the defendant's guilt and improper propensity comments constitute prosecutorial misconduct?

D. Statement of the Case

On April 27, 2017, the Snohomish County Prosecutor's Office charged Samuel Slater with one felony count of Violation of a Court Order (Domestic Violence). Clerk's Papers ("CP") at 119. After a series of court hearings, the State alleged Mr. Slater missed his trial call hearing on September 8, 2017, and added one count of bail jumping. CP at 104. As noted by the State, Mr. Slater appeared in court a little over a month later

to quash his warrant. CP at 102. The case proceeded to trial in November of 2018.

Prior to trial, Mr. Slater's attorney moved the court to sever the bail jumping count from the violation of a court order count. CP 105-110. Mr. Slater's attorney raised the issue of prejudice: namely, that there was a high likelihood that the jury would convict based on both charges having, as an element, the violation of a court order, not upon the individual evidence for each charge. CP at 107-09.

The State argued against severance, arguing that prior caselaw had held that a bail jumping charge is cross admissible against the underlying charge to show evidence of flight. 11/08/2018 Verbatim Report of Proceedings ("VROP") at 05-06. The court highlighted the fact that the issue of admissibility was the primary factor in its analysis: "I assume the both of you know the cross admissibility can be a deal breaker, okay? Essentially it's an extremely important factor. If it's cross admissible, it's coming in any way, so the rest of the prejudice analysis becomes almost irrelevant." *Id*. at 6.

The following day, the court denied Mr. Slater's motion to sever. The court ruled that, under the caselaw provided by the State, that the bail jumping charge would be "admissible, cross admissible as to evidence of guilt" to the underlying charge. 11/09/2018 VROP at 12. The court also

found that the bail jumping charge is the "stronger" of the two charges. *Id.* at 11. The court also agreed that the prejudice here "would be greater than in some other cases because of both cases being violating court orders." *Id.* at 12. The judge made clear that the cross-admissibility of the charges compelled her decision:

> At any rate, it's not that I don't agree that there is higher prejudice here. However, because of the cross admissibility I'm finding that the prejudice is going to exist essentially whether it's severed or not and that we're not decreasing the prejudice significantly by severing the cases.

Id. at 13.

The parties proceeded to trial the following week. During motions in limine, Mr. Slater's attorney renewed his motion to sever, 11/14/2018 VROP at 26, and the trial judge did not "find any reason to disturb Judge Farris's ruling." *Id.* at 30. Defense counsel also moved to court to exclude evidence of prior bad acts, such as prior convictions—which the court granted. *Id.* at 32-33. And the judge denied the defense motion in limine to exclude argument that Mr. Slater's missed trial date was evidence of flight. *Id.* at 35.

In the State's closing argument, the prosecutor made repeated comments on Mr. Slater's missed trial call, and the implication that this missed court date showed his guilt of the underlying charge. *See*, 11/15/2019 VROP at 215-16 ("If he didn't do it, why didn't he show up

for trial call a year ago?"); *Id*. at 219 ("He didn't show because he got cold feet. He didn't show because he didn't want to be there. He didn't show to court, because he didn't want to go to trial."); *Id.* at 220 ("If he didn't do it, why didn't he show? … He just didn't show on the day that mattered, because he's guilty.").

The prosecutor continued with this line of argument in his rebuttal argument. *Id.* at 231 ("Man, if my case was that weak, I think I'd show up for trial call. I think I'd be there if there were all these contradictions. I think I'd get this thing out of the way and move on with my life. I'd show up. He didn't. He didn't show because he didn't want to face the facts."); *Id*. at 235 ("If this case was as weak as defense counsel says it is, I would have showed up on September 8th"); *Id*. at 236 ("He didn't show because he didn't want to face the music. He didn't show because he was there on August 6th and that's why he's guilty."); *Id*. at 238 ("There's no way if he didn't do it he wouldn't show up for his trial call if this case was as weak as possible"). The jury returned a guilty verdict on both counts. *Id.* at 242.

E. ARGUMENT

The Sixth Amendment right to a Fair Trial (incorporated to the States under the Fourteenth Amendment) has long protected criminal defendants from convictions based upon passion, not evidence. *See, e.g.*, *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) ("The right to a

fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the Washington State Constitution"). Our rules of evidence are designed with that goal in mind: for example, ER 404(b) states that "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."

The trial court in Mr. Slater's case abdicated its duty to ensure a fair trial to Mr. Slater. The trial court relied upon two Court of Appeals cases[1] from the 1970s to find that Mr. Slater's bail jumping charge is automatically cross-admissible to the Violation of a Court Order charge as "evidence of flight" and "consciousness of guilt." 11/09/2018 VROP at 12-13. The Court was clear regarding its position that the cross-admissibility of the charge overcame any concerns for prejudice: "It's not that I don't agree that there is higher prejudice here. However, because of the cross admissibility I'm finding that the prejudice is going to exist essentially whether it's severed or no." *Id*. at 13.

The Court's statement highlights one key fact—the court determined cross-admissibility before examining the prejudice to Mr. Slater, not the other way around. In doing so, the Court ignored the four-part test regarding admissibility under ER 404(b) outlined in *State v. Fisher*, 165 Wn.2d 727, 745, 292 P.3d 937 (2009), and instead found the bail jumping charge "cross admissible" based solely on two older cases. By

[1] *State v. Cobb*, 22 Wn. App. 221, 589 P.2d 297 (1978); *State v. Jefferson*, 11 Wn. App. 566, 524 P.2d 248 (1974).

upholding this procedure, the opinion below is in conflict with the Supreme Court's caselaw regarding admissibility under ER 404(b), as outlined in *Fisher*. Additionally, this issue is one of substantial public interest: the trial court relied upon two Court of Appeals decisions (that are over thirty years old) for the notion that a missed court date is admissible as evidence of flight and consciousness of guilt. Recent legislative developments, which were driven by practical considerations, demonstrate the absurdity of the these old cases. As the Supreme Court has never affirmed or upheld the Court of Appeals' reasoning in *Cobb* and *Jefferson*, now is the time for the Supreme Court to step in and address these cases.

By determining that the bail jumping charge is automatically cross-admissible as evidence of flight and consciousness of guilt, the trial court gave the State free reign to argue propensity character attacks throughout closing, as well as to repeatedly offer its assurance to the jury of Mr. Slater's guilt. The opinion below whitewashed the State's repeated insistence that Mr. Slater was guilty by reading nuance into what was otherwise an un-nuanced and ham-fisted closing argument: "This man is guilty of both crimes. He's banking on the fact that nobody else saw it and he's banking on the fact you're not going to take into consideration he didn't show for the second time. Don't give it to him." 11/15/2018 VROP at 222. The prosecutor also used the "evidence of flight" to argue an impermissible "propensity" argument: "Ladies and gentlemen, you don't sign documents if you're not going to adhere to them. And if you do, you do so at your own peril whether it be a no-contact order, an omnibus order or your conditions

of release." *Id.* These comments were so flagrant and ill intentioned that they prejudiced Mr. Slater's right to a fair trial, such that no jury instruction could cure them; by declining to find misconduct and reversing the conviction, the opinion below is at odds with *Glasmann*. The Supreme Court should grant review of this case because the opinion below is at odds with the Court's precedent in *Glasmann* and because the State's actions violated Mr. Slater's right to a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution and article 1, section 22 of the Washington State Constitution.

1. The Court Should Grant the Petition for Review to Clearly Establish That Courts Must Engage in an ER 404(b) Analysis Before Determining a Charge is Cross Admissible.

The Washington Supreme Court has outlined a four-part test that a trial court must engage in before admitting evidence of prior bad acts under ER 404(b). Under *Fisher*, the Court must:

> (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence.

State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). This test is fact-specific, and thus must be applied to every case—no prior case can foreclose engaging in this analysis. We know that the trial court did not engage in this analysis for two reasons: first, the Court's discussion of prejudice to Mr. Slater was limited by its belief that "because of the cross admissibility I'm

finding that the prejudice is going to exist essentially whether it's severed or not." 11/09/2018 VROP at 13. The fact that the Court's analysis of prejudice is modified by the cross-admissibility of the charge shows that the Court only engaged in a probative vs. prejudice analysis *after* determining cross-admissibility. *Fisher* mandates that the Court engage in a probative vs. prejudicial analysis *to determine* admissibility. *Fisher*, 165 Wn.2d at 745.

Second, the trial court never analyzed the relevance of the evidence (a missed court date) to proving an element of the charge. The trial court relied on the holdings of *Cobb* and *Jefferson* without comparing them to the facts of Mr. Slater's case. Numerous cases highlight the dubious probative value of evidence of flight. *See, e.g.*, *Wong Sun v. United States*, 371 U.S. 471, 483 n.10, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963) ("[W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime"); *State v. Freeburg*, 105 Wn. App. 492, 498, 20 P.3d 984 (2001) ("When evidence of flight is admissible it tends to be only marginally probative as to the ultimate issue of guilt or innocence"). The Washington Supreme Court has noted that "the circumstance or inference of flight must be substantial and real. It may not be speculative, conjecture, or fanciful." *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965).

In *Jefferson*, the defendant missed the first day of his trial, and later testified "he was 'nervous and was afraid and decided to leave' and that he went to California 'to find a house, find work, because I had no intention of

showing up for this court." *Jefferson*, 11 Wn. App. 566 at 568. In *Cobb*, the court noted that the defendant "was not apprehended until nearly a year later" after missing his trial date, and that the record "failed to reveal any testimony by the defendant even attempting to explain his failure to appear on the date originally scheduled, or to account for his long absence thereafter." *Cobb*, 22 Wn. App. at 224-25. Unlike both of those cases, Mr. Slater voluntarily appeared in court 38 days after his missed court hearing, and the Court determined his explanation regarding the missed court date sufficient to quash the warrant. The trial court never engaged in the actual facts of the missed appearance or compared them to the facts of the two cases the Court relied upon. The Court never articulated a reasoning for how the specific facts of Mr. Slater's missed court hearing created an inference of flight that was not merely "speculative, conjecture, or fanciful." The Court ultimately did not engage in any sort of test—much less the four-part test required by law.

The opinion below applies a three-part test (instead of the four-part test required by *Fisher*), and misses the point: the trial court engaged in a prejudice-analysis with respect to the motion to sever, *but not as part of the underlying analysis of cross-admissibility*. Instead of examining cross-admissibility under the four-part test required by *Fisher*, the trial court determined the bail jumping charge was automatically admissible against the Court Order Violation charge; after determining the charge was cross-admissible, the Court found the prejudice to Mr. Slater was diminished due to the cross-admissibility. However, the Court never balanced the probative

value of the bail jumping charge against the prejudicial effect its admission would have against Mr. Slater, in contradiction of the requirements of *Fisher*. The Court was explicit: "because of the cross admissibility I'm finding that the prejudice is going to exist essentially whether it's severed or not." 11/09/2018 VROP at 13. By failing to acknowledge this aspect of the trial court's analysis, the opinion below incorrectly asserts that the trial court applied the correct test.

From a practical perspective, the trial court's approach raises significant concerns. Criminal defendants are often from marginalized populations, and struggle with regular court attendance as a result. Defendants may have trouble with arranging transportation to court hearings or child care; many criminal defendants are homeless and struggle to maintain paperwork with court dates; many criminal defendants suffer from mental health issues that create additional difficulties in keeping track of court dates;[2] and many criminal defendants do not have smart phones or other electronic organization devices to keep track of court dates.

The legislature recently recognized this issue and made significant modifications to the bail jumping statute. Laws of 2020, ch. 19, § 2231 (Engrossed Substitute House Bill 2231, Concerning Bail Jumping). The new statute significantly limits the instances in which bail jumping may be charged, adds additional requirements for the State to prove (such as requiring proof the defendant received written notice of the court date), and

[2] The trial court granted Mr. Slater an exceptional downward departure on his sentence due to his diagnosis of Fetal Alcohol Syndrome. VROP 12/12/2018 at 293.

creates an additional element for the State to prove: that the defendant did not file a motion to quash the warrant within 30 days, or failed to attend the quash hearing. Where the legislature has intentionally weakened the bail jumping statute and created additional protections for defendants against bail jumping charges, the courts should not move in the opposite direction of allowing defendants to be guilty (or allow the prosecutor to repeatedly state the defendant is guilty) of the underlying charge because they missed a court date.

The ultimate effect of the trial court's decision was to make the trial not about the elements of the underlying charge, but about whether Mr. Slater could explain his missed court date. Mr. Slater was forced to choose between his right not to testify, or testifying not to address the elements or a defense, but only to explain his missed court date—a detail irrelevant to his underlying guilt. This ensured Mr. Slater did not receive a fair trial, both from the arguments regarding consciousness of guilt and because this improper analysis was part of the reasoning for the Court's denial of Mr. Slater's motion to sever the charges.

2. The Court Should Grant the Petition for Review to Affirm that Repeated Statements of the Defendant's Guilt and Propensity Comments Constitute Reversible Prosecutorial Misconduct.

While the Court allowed the prosecutor to argue that Mr. Slater's missed court date was evidence of flight and consciousness of guilt, the Court did not allow the State to comment directly on Mr. Slater's guilt, nor to make propensity arguments that Mr. Slater is the type of person to sign

court orders and not follow them. By repeatedly offering his opinion of Mr. Slater's guilt and by making propensity comments, the prosecutor engaged in repeated misconduct, making it so pervasive that no jury instruction could have cured their prejudicial effect.

Mr. Slater has the right to a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article 1, Section 22 of the Washington Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). A " '[f]air trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office…and the expression of his own belief of guilt into the scales against the accused." *Monday*, 171 Wn.2d at 677 (alteration in original) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)). The attorney representing the government must "seek convictions based only on probative evidence and sound reason," *State v. Casteneda-Perez*, 61 Wn. App. 354, 363 810 P.3d 74 (1991).

It is also improper for the prosecutor to express a personal opinion on the guilt of the defendant. *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). This should be well-known to prosecutors, as "many cases warn of the need for a prosecutor to avoid expressing a personal opinion of guilt." *In re Glassman*, 175 Wn.2d 696, 706-07, 286 P.3d 673 (2012)(collecting cases). When the prosecutor repeats the misconduct, it can become so pervasive that no instruction can cure the prosecutor's

tainting of the trial. *Glassman*, 175 Wn.2d at 707 ("The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect") (quoting *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)). Improper comments made during rebuttal have an increased prejudicial effect, as the defendant has no opportunity to respond to them. *Lindsay*, 180 Wn.2d at 443.

The misconduct here was generally interwoven with the court's errors in admitting Mr. Slater's missed court date as evidence of consciousness of guilt and denial of Mr. Slater's severance motion: the combination of these two errors gave the prosecutor ample room to careen about in his closing argument and rebuttal, without any guardrails to constrain him from jumping from the "consciousness of guilt" argument into a number of impermissible areas. In closing argument, the prosecutor stated, "If he didn't do it, why didn't he show? Why did he take a month and a half? … He just didn't show on the day that mattered, because he's guilty." 11/15/2018 VROP at 220. The prosecutor gave a repeat performance to the jury a few minutes later:

> And then when it came time to find out guilt or innocence the first go-around, he didn't show. Ladies and gentlemen, you don't sign documents if you're not going to adhere to them. And if you do, you do so at your own peril whether it

> be a no-contact order, an omnibus order or your conditions of release.
> This man is guilty of both crimes. He's banking on the fact nobody else saw it and he's banking on the fact you're not going to take into consideration he didn't show for the second time. Don't give it to him.

11/15/2018 VROP at 222. Notably, the opinion below does not address the blatant propensity argument the prosecutor put forth here: that Mr. Slater is the type of person to sign documents and not adhere to them. In fact, the prosecutor was specific in outlining the propensity by listing the types of orders Mr. Slater allegedly signs and does not follow.

Mr. Slater's attorney objected to one of the prosecutor's initial comments, only for the court to casually waive away any objections by stating, "I'll just note it's argument." VROP 11/15/2018 at 215-16. After the Court expressed its disinclination to actually rule on Mr. Slater's objection, his attorney did not continue to press demonstrably-futile objections. The prosecutor's continued repetition of his opinion of Mr. Slater's guilt (which the judge condoned as just 'argument') prejudiced Mr. Slater, and the repeated nature of the misconduct—including in rebuttal, where the defendant cannot address it—prevented any objection or curative instruction from effectively curing the prejudice. The opinion below ignores *Glasmann* in arriving at the conclusion that "Slater does not establish the prosecutor's comments were so flagrant and ill intentioned

that they evince an enduring and resulting prejudice that could not have been neutralized with a jury instruction." The Supreme Court should accept review in order to instruct the lower courts on the correct standard for prosecutorial misconduct.

F. CONCLUSION

Mr. Slater was denied his right to a fair trial under the Sixth and Fourteenth Amendments of the U.S. Constitution and article 1, section 22 of the Washington Constitution. The trial court failed to conduct the proper analysis to determine if his bail jumping charge would be admissible in his court order violation charge. As a result, the Court incorrectly allowed the State to argue Mr. Slater's missed court date was consciousness of guilt, turning his trial into one about his missed court date, and not about the underlying evidence. The prosecutor exacerbated this error by going beyond arguing consciousness of guilt into repeatedly opining on Mr. Slater's guilt, and arguing for Mr. Slater's propensity to sign court documents and not follow them. In the opinion below, the Court of Appeals' found no issue with the conduct at the trial court. That determination is at odds with cases of the Supreme Court. In addition, Mr. Slater's case presents an issue of public interest that necessitates clearer guidance from this Court to address the ability of the prosecutors to use any missed court hearing as consciousness of guilt, as such farcical trials do nothing to achieve the public's aim of fair, just trials. For these reasons, Mr. Slater requests this Court grant review of these issues.

Respectfully submitted this 15th day of July, 2020.

MAZZONE LAW FIRM, PLLC

s/JAMES HERR
By James Herr, WSBA #49811
Attorney for Petitioner

CERTIFICATE OF SERVICE/PROOF OF FILING

I, Tammy Weisser, hereby certify that the following information is true and correct: That the original pleading of the foregoing document entitled "Petition for Review" was filed Electronically, with the Court of Appeals, Division I, One Union Square, 600 University Street, Seattle, WA 98101-4170 on This 15th Day of July, 2020. And further, that a true and correct copy of the foregoing pleading was served by U.S. Mail, correct postage paid, on the following parties on this 15th Day of July, 2020.

(Electronically)
J. Scott Halloran
Snohomish County Prosecuting Attorney-Criminal
3000 Rockefeller Ave. # MS504
Everett, WA 98201-4046

(VIA USPS)
Samuel David Obert Slater
1422 211th Place SW
Lynnwood, WA 98036

Dated: This 15th Day of July, 2020

s/Tammy Weisser
Tammy Weisser, Legal Secretary

APPENDIX 1

UNPUBLISHED OPINION. NO 79335-7-I

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

STATE OF WASHINGTON, Respondent, v. SAMUEL DAVID OBERT SLATER, Appellant.	)	No. 79335-7-I UNPUBLISHED OPINION

VERELLEN, J. — Samuel Slater appeals his convictions for violation of a court order (domestic violence) and bail jumping. He contends the trial court abused its discretion when it denied his motion to sever the two counts because it did not adequately engage in ER 404(b) analysis when determining the evidence of bail jumping was cross admissible. But the court adequately engaged in ER 404(b) analysis when it recognized an unexplained failure to appear for the trial call is a form of flight, material as consciousness of guilt of violation of the court order. And the court balanced the probative value against any unfair prejudice.

Slater also contends the prosecutor committed misconduct during closing argument. Slater objected to the prosecutor's suggestion that Slater did not appear for trial because he had cold feet and did not want to be there.

Slater does not establish that this comment was improper. For the first time, on appeal, Slater challenges several other comments but does not establish they were so flagrant and ill intentioned that any prejudice could not be cured with an instruction.

We affirm.

FACTS

In April, 2017, the State charged Slater with one count of violation of a court order (domestic violence). On September 8, 2017, Slater did not appear at his trial call hearing. The State amended the information to charge Slater with one count of bail jumping.

Prior to trial in November 2018, Slater moved to sever the two counts. The court denied the motion. During motions in limine, Slater renewed his motion to sever, and the court again denied the motion. The court also denied Slater's motion to exclude argument that his failure to appear on September 8, 2017 was evidence of flight.

Following trial, the jury convicted Slater on both counts. The court sentenced Slater to an exceptional downward sentence of 25 months' incarceration.

Slater appeals.

ANALYSIS

I. Motion to Sever

Slater argues the trial court abused its discretion when it denied his motion to sever.

We review a trial court's denial of a motion to sever for abuse of discretion.[1] "The law does not favor separate trials."[2] To determine whether severance is warranted, trial courts consider

> (1) the strength of the State's evidence on each count; (2) the clarity of the defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.[3]

"A defendant seeking severance has the burden of demonstrating that a trial involving all counts would be so manifestly prejudicial as to outweigh the concern for judicial economy."[4] Slater challenges only the fourth factor.

Slater argues the court abused its discretion when it determined the evidence of bail jumping was cross admissible as to the count of violation of a court order without engaging in an adequate ER 404(b) analysis. We disagree.

> Admissibility of evidence under ER 404(b) requires a three-part analysis. The court must identify the purpose for which the evidence will be admitted; the evidence must be materially relevant to that purpose; and the court must balance the probative

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[1] State v. Huynh, 175 Wn. App. 896, 908, 307 P.3d 788 (2013).

[2] Id.

[3] State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

[4] Huynh, 175 Wn. App. at 908.

> value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.[5]

Here, prior to trial, Slater moved to sever the two counts. As to the cross admissibility, the court stated:

> [T]he case law indicates that this is sort of a factor that can be extremely important. It's the cross admissibility of each charge on to the other charge. Because if they're cross admissible, the prejudice is going to exist whether you sever the case or not. . . . I did look at least at one of the cases cited by the State which specifically held bail jumping is admissible, cross admissible as to evidence of guilt. . . . I'm finding it's likely that there would be cross admissibility. . . .
>
> I do agree with [defense counsel] that this case is somewhat unusual in that the prejudice would be greater than in some other cases because of both cases being violating court orders. . . . However, there is some differences in the court orders. I think there's a different nature to not coming for a trial as opposed to violating a protection order.
>
> At any rate, it's not that I don't agree that there is higher prejudice here. However, because of the cross admissibility, I'm finding that the prejudice is going to exist essentially whether it's severed or not and that we're not decreasing the prejudice significantly by severing the cases. Therefore, I'm holding because of judicial economy, the State is permitted to join the cases.[6]

Several days later during motions in limine, Slater renewed his motion to sever. The trial court, which had not presided over the initial motion to sever, denied the renewed motion. The court indicated, "I am not sure I agree" that

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[5] State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).

[6] Report of Proceedings (RP) (Nov. 9, 2018) at 11-13.

"there's more prejudice" because both cases involved violating a court order.[7] Slater argued, "[T]his is essentially 404(b) evidence that wouldn't come in otherwise but for the joinder of these two charges, violations of court orders. . . . If the court's going to agree that previous convictions . . . should not come in under 404(b), then neither should the bail jump itself."[8] In response, the court stated, "I think the test is not prejudice. It's unfair prejudice. And in balancing this, I do not believe that the danger of unfair prejudice outweighs the probative value."[9]

Also during motions in limine, the court denied Slater's motion to exclude argument that his failure to appear on September 8, 2017 was evidence of flight. The following exchange occurred:

> COURT: The prosecution's position is that you, I assume, wish to be arguing that missing trial is evidence of guilt?
>
> STATE: That's correct.
>
> COURT: And there does seem to be case law supporting that. I think that certainly defense can argue that he did make, you know, 13 other court dates. I think there's support for that in the record. It will just be an argument that's made. I assume we're talking about closing? . . .
>
> DEFENSE: Correct.[10]

[7] RP (Nov. 14, 2018) at 27.

[8] Id. at 29.

[9] Id. at 29-30.

[10] Id. at 35-36.

Although the trial court did not use the specific labels, it is clear the court applied the three-part ER 404(b) analysis. The court identified (1) the purpose for which the bail jumping evidence would be admitted, (2) the evidence was materially relevant for that purpose, and (3) the probative value outweighed any unfair prejudice.[11] It is noteworthy that the court expressly mentioned the ER 404(b) "arena" when announcing its denial of the pretrial motion to sever.[12] And as discussed, when the trial court denied the renewed motion to sever on the first day of trial, it was immediately after Slater's reference to ER 404(b) that the court indicated it was balancing the probative value against any unfair prejudice. The court clearly addressed the third part of the analysis. The court weighed the probative value with any unfair prejudice. Slater does not challenge the court's conclusion concerning prejudice; he merely argues the court failed to conduct the appropriate analysis.

And a careful reading of the record reveals the court adequately applied the first and second parts of the ER 404(b) analysis. When addressing Slater's motion in limine to exclude argument that Slater missing the trial call hearing evidenced consciousness of guilt, the court noted that case law supports such an argument.

[11] See Freeburg, 105 Wn. App. at 497.

[12] RP (Nov. 9, 2018) at 12.

The court appeared to be referencing State v. Jefferson[13] and State v. Cobb.[14] In both cases, the State charged the defendants with an underlying crime and, after failing to appear at trial, the State argued the failure to appear was evidence of consciousness of guilt as to the underlying crime. Both cases cite the principle: "The rationale which justifies the admission of evidence of 'flight' is that, when unexplained, it is a circumstance which indicates a reaction to a consciousness of guilt."[15]

After Cobb and Jefferson, Washington courts have further delineated the probative value of evidence of flight. Evidence of flight is admissible when it creates "'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.'"[16] But even if a reasonable inference exists, evidence of flight "tends to be only marginally probative as to the ultimate issue of guilt or innocence."[17] Consequently, "the circumstance or inference of flight must be substantial and real. It may not be speculative, conjectural, or fanciful."[18] An unexplained failure to appear for trial

[13] 11 Wn. App. 566, 524 P.2d 248 (1974).

[14] 22 Wn. App. 221, 589 P.2d 297 (1978).

[15] Jefferson, 11 Wn. App. at 570; Cobb, 22 Wn. App. at 225.

[16] Freeburg, 105 Wn. App. at 497 (quoting State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)).

[17] Id. at 498.

[18] State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965).

is an evasion of prosecution and thus is a form of flight.[19] Although the trial court did not explicitly outline the case law, the court adequately addressed the first and second part of the test when it determined case law allowed arguing that missing trial is evidence of guilt.

The trial court adequately applied the three-part analysis under ER 404(b). The trial court did not abuse its discretion by determining evidence of bail jumping was cross admissible as to Slater's consciousness of guilt of violating a court order. Because Slater has the burden to demonstrate that a trial involving all counts would be so manifestly prejudicial as to outweigh the concern for judicial economy and because his argument is limited to cross admissibility, we conclude the trial court did not abuse its discretion when it denied Slater's motion to sever.

II. Prosecutorial Misconduct

Slater contends the prosecutor committed prejudicial misconduct during closing argument.

[19] See Freeburg, 105 Wn. App. at 497-98 (Flight includes the inference of "a deliberate effort to evade arrest and prosecution. Actual flight is not the only evidence in this category."); Cobb, 22 Wn. App. at 224; Jefferson, 11 Wn. App. at 570.

We review prosecutorial misconduct claims for abuse of discretion.[20] To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of establishing that the conduct was both improper and prejudicial.[21]

> Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. Prejudice on the part of the prosecutor is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict."[22]

Additionally, "[t]he failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."[23] On the other hand, "[i]f the defendant objected to the misconduct, we determine whether the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict."[24]

Here, during closing argument, after discussing the evidence that established Slater violated a court order, the prosecutor stated:

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[20] State v. Brett, 126 Wn.2d 136, 174, 892 P.2d 29 (1995).

[21] State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

[22] State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

[23] State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

[24] State v. Sakellis, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011).

> And here's the last piece. If he didn't do it, why didn't he show up for trial call a year ago? Why didn't he show? Motions are done. Omnibus, pretrials, arraignments, all that pretrial stuff that people have to show up [for] and nothing really every happens, that's done. The day that we find out whether this case is going out or not, he's gone. If he didn't do it, why didn't he show?[25]

Slater did not object to this statement. His only objection came during the following exchange:

> STATE: He didn't show because he got cold feet. He didn't show—
>
> SLATER: Objection.
>
> STATE: —because he didn't want to be there.
>
> COURT: I'll just note it's argument.
>
> STATE: He didn't show to court because he didn't want to go to trial.[26]

Also during closing, the prosecutor made the following statements:

> If he didn't do it, why didn't he show? What did he take a month and a half? There's no evidence that he mistook his date. There's no evidence that the court was notified he wasn't going to be able to make it. He just didn't show on that day that mattered because he's guilty.[27]
>
> And then when it came time to find out guilt or innocence the first go-around, he didn't show. Ladies and gentlemen, you don't sign documents if you're not going to adhere to them. . . .

[25] RP (Nov. 15, 2018) at 215-16.

[26] Id. at 219.

[27] Id. at 220.

> This man is guilty of both crimes. He's banking on the fact nobody else saw it, and he's banking on the fact you're not going to take into consideration he didn't show for the second time. Don't give it to him.[28]

Slater did not object to these statements.

At the start of rebuttal, the prosecutor argued:

> Man, if my case was that weak, I think I'd show up for trial call. I think I'd be there if there were all those contradictions. I think I'd get this thing out of the way and move on with my life. I'd show up. He didn't. He didn't show because he didn't want to face the facts.[29]

Slater did not object to this statement. Also during rebuttal, the prosecutor stated, "If this case was as weak as defense counsel says it is, I would have showed up on September 8."[30] "He didn't show up because he didn't want to face the music. He didn't show because he was there on August 6, and that's why he's guilty."[31] At the end of rebuttal, the prosecutor also argued, "There's no way if he didn't do it he wouldn't show up for his trial call if this case was as weak as possible."[32] Slater did not object to these statements.

In part, Slater argues the prosecutor improperly "argu[ed] an impermissible inference from the evidence, and . . . appeal[ed to] the jury's

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[28] Id. at 222.

[29] Id. at 231.

[30] Id. at 235.

[31] Id. at 236.

[32] Id. at 238.

passion."[33] As to the single comment challenged at trial and several other statements challenged for the first time on appeal, Slater fails to establish that the prosecutor acted improperly. Many of the comments touched on whether Slater had an explanation for his failure to appear. As discussed above, "[t]he rationale which justifies the admission of evidence of 'flight' is that, when unexplained, it is a circumstance which indicates a reaction to a consciousness of guilt."[34] The prosecutor properly argued Slater did not offer an explanation for his failure to appear. Slater fails to show such comments were improper.

As to the comments regarding guilt, Slater cites In the Matter of the Personal Restraint of Glasmann,[35] to argue the prosecutor improperly "instruct[ed] the jury that Mr. Slater was guilty."[36] In Glasmann, during closing argument, the prosecutor presented several slides with pictures of Glasmann and the word "GUILTY" superimposed across his face.[37] Although defense counsel did not object, our Supreme Court determined "the misconduct here was so pervasive that it could not have been cured by an instruction."[38]

Here, unlike Glasmann, the comments did not amount to the prosecutor pervasively offering an improper opinion on Slater's guilt. They were offered in

[33] Appellant's Br. at 18.

[34] Cobb, 22 Wn. App. at 225.

[35] 175 Wn.2d 696, 286 P.3d 673 (2012).

[36] Appellant's Br. at 18.

[37] Glasmann, 175 Wn.2d at 701-02.

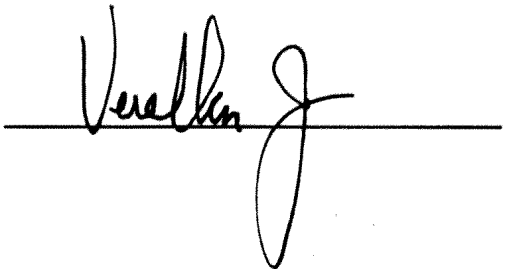
[38] Id. at 707.

the context of the prosecutor's discussion of flight and consciousness of guilt. Although the distinction may be difficult for the jury, a timely objection would have allowed for an instruction that would have cured any prejudice. Slater does not establish the prosecutor's comments were so flagrant and ill intentioned that they evince an enduring and resulting prejudice that could not have been neutralized with a jury instruction.

IV. Cumulative Error

Finally, Slater argues the cumulative error requires reversal. "The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal."[39] For lack of a combination of trial errors, we conclude Slater is not entitled to a new trial based on cumulative error.

Therefore, we affirm.



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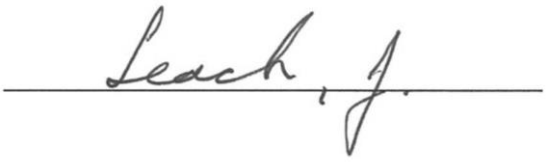

[39] In re Det. of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012).

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