

NO. 65358-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JAMES PAULEY,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL FOX AND JEFFREY RAMSDELL

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**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. Automatic standing allows a defendant to challenge the search of another person's property when the defendant is charged with a crime that includes possession as an essential element of the crime, and the defendant is in possession of the property at the time of the search. The State charged Pauley with first-degree robbery, which does not include possession as an essential element of the crime. Did the trial court properly deny Pauley's motion to suppress based on his lack of automatic standing?

2. A jury does not have to be unanimous to acquit a defendant on a deadly weapon special verdict. The trial court instructed the jury that they all had to agree to return a verdict on a deadly weapon enhancement. Pauley did not object to the court's instruction at trial. Did Pauley waive his right to challenge the court's instruction? If not, was the instructional error harmless?

3. Properly joined offenses may be severed if the potential prejudice to the defendant outweighs the need for judicial economy. A defendant must move to sever the charges against him prior to trial, and renew the motion at trial. Pauley moved twice prior to trial to sever the charges against him, but did not renew his

motion at trial. Did Pauley waive his right to challenge the denial of his motion to sever by failing to renew the motion at trial? If not, has Pauley failed to demonstrate the manifest prejudice required for severance?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged James Pauley with Robbery in the First Degree, Assault in the Second Degree, Attempting to Elude a Pursuing Police Vehicle, and Vehicular Assault. CP 23-25. The State alleged deadly weapon enhancements on the robbery and assault charges. CP 23-25. The jury convicted Pauley as charged and the trial court imposed a standard range sentence, totaling 207 months. CP 133-39, 146-54; 13RP 167.<sup>1</sup>

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<sup>1</sup> The Verbatim Report of Proceedings consists of thirteen volumes, with the State adopting the following reference system: 1RP (7/10/09), 2RP (10/9/09), 3RP (10/29/09, 11/10/09, 12/2/09, and 12/30/09), 4RP (1/28/10), 5RP (3/1/10), 6RP (3/2/10), 7RP (3/3/10 and 3/4/10), 8RP (3/8/10), 9RP (3/9/10), 10RP (3/10/10), 11RP (3/11/10), 12RP (3/15/10), and 13RP (3/16/10, 3/17/10, 3/18/10, and 4/9/10).

## **2. SUBSTANTIVE FACTS**

On February 13, 2009 around 6:00 p.m., John Donahue stopped at QFC on the way home from work to get some dinner. 8RP 11. As Donahue opened the door to get back into his BMW, Pauley walked up to him, pulling out a four-inch knife and lunging at Donahue. 8RP 11, 15-16. With one swipe of the knife, Pauley punctured Donahue's coat and nicked him in the stomach. 8RP 15-16, 24. Donahue ran away and yelled for help. 8RP 17. Both Donahue and an eyewitness, Brian Olmstead, described Pauley as a white male, 5'10" tall, with brown hair, a slender build, and wearing a blue, hooded sweatshirt. 9RP 76-78. Although police failed to locate Pauley that night, Donahue identified Pauley as his attacker a few days later in a photo montage and also at trial. 8RP 36-38.

The next day around noon, William Stollar pulled into the Kingsgate Park and Ride, a quarter mile away from the QFC where Donahue was assaulted. 8RP 76-77; 9RP 9-10. While sitting in his Jaguar with his car door open, Stollar looked up and saw Pauley standing next to the car with a knife in his hand. 9RP 16, 28-29. Pauley demanded that Stollar "get out of the car" and Stollar complied. 9RP 16. Pauley got in the car, started it, and drove off.

9RP 16. Stollar called 911 and responding officers broadcast a description of the car and suspect within minutes. Ex. 8; 9RP 98-100. Stollar described his attacker as a white male, 5'10" tall, with light-colored hair, a small build, and wearing a blue sweatshirt. Ex. 8.

Officer Mike Girias heard the broadcast of the call and located the Jaguar within 10 minutes on S.R. 520. 9RP 109. Girias confirmed that the Jaguar matched the description of the car reported stolen and that the driver matched the suspect's description. 9RP 109-10. Girias pulled in behind the Jaguar and followed it while he waited for other back-up units to arrive. 9RP 110-11. Once they arrived, Girias activated the lights and sirens on his marked patrol car, attempting to stop the Jaguar. 9RP 111-13.

Pauley looked at Girias through his rearview mirror and then took off speeding down the highway at an estimated speed of 80 mph, as other vehicles moved slowly along at 10 mph. 9RP 113; 10RP 14, 61; 11RP 45. Although multiple police cars pursued him, Pauley did not come to a stop until he drove over "stop sticks" with needles inside that deflated his tires. 10RP 65-66; 11RP 27. Pauley hit a concrete barrier and collided with three different vehicles, including one driven by Jennifer Marlin,

who suffered serious injuries as a result of the crash causing her to walk with a cane and depriving her of the ability to run. 10RP 14-15; 12RP 48, 90-92, 100.

Police officers pulled Pauley out from the driver's seat of the Jaguar, and found a knife with a six-inch blade on the passenger side floorboard. 11RP 31-32. Stollar identified the recovered knife as the one Pauley used to rob him of the Jaguar, while Donahue stated that he thought it looked like the knife Pauley used to assault him the night before. 8RP 43; 9RP 29-30; 10RP 125. Stollar picked Pauley out of a photo montage a few days after the incident and identified him in court as the person who robbed him at knifepoint. 9RP 28, 50-51.

Prior to trial, Pauley moved to suppress the knife. CP 71-77. The court denied the motion based on Pauley's lack of automatic standing to challenge the search of Stollar's vehicle. CP 162-67; 7RP 80-81. The court also denied Pauley's motions twice prior to trial to sever the charges against him. CP 42-43; 3RP 30; 7RP 87-88. The jury convicted Pauley on all of the counts charged and found that Pauley was armed with a deadly weapon at the time of the robbery and assault. CP 133-39; 13RP 102-04. Pauley timely appealed. CP 173.

C. **ARGUMENT**

1. **PAULEY LACKED AUTOMATIC STANDING TO SUPPRESS THE SEARCH OF STOLLAR'S CAR AND POLICE HAD REASON TO BELIEVE THAT THE CAR CONTAINED EVIDENCE OF THE CRIME OF ARREST.**

Pauley never argued to the trial court that he had automatic standing to challenge the search of Stollar's car. Pauley now contends that the trial court erred by concluding that he lacked automatic standing, arguing that possession is an essential element of first-degree robbery. Pauley's claim fails in light of case law holding to the contrary. Even if Pauley had standing to challenge the search, his claim would fail because the police had reason to believe that there was evidence of the robbery inside Stollar's car.

Under the Fourth Amendment, a person must have a legitimate expectation of privacy in property in order to challenge the search of such property. Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). Automatic standing is an exception to this rule under the Washington Constitution that allows a person to challenge the search of another's property. E.g.,

State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); State v. Zake, 119 Wn.2d 563, 570-71, 834 P.2d 1046 (1992).

To assert automatic standing, the defendant must (1) be charged with a crime that involves possession as an essential element of the crime, and (2) be in possession of the subject matter at the time of the search. Jones, 146 Wn.2d at 332. Courts have recognized that unlawful possession of a firearm, possession of stolen property, and possession of a controlled substance are all crimes that include possession as an essential element. Id. at 332-33 (unlawful possession of a firearm); State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980) (possession of stolen property); State v. Carter, 127 Wn.2d 836, 838, 849, 904 P.2d 290 (1995) (possession of cocaine).

This Court has held that “first degree robbery . . . does not have possession as an essential element.” State v. Hayden, 28 Wn. App. 935, 939, 627 P.2d 973 (1983); but see State v. White, 40 Wn. App. 490, 699 P.2d 239 (1985) (suggesting that whether first-degree robbery includes possession “may be subject to some

argument"). The trial court properly denied Pauley's motion to suppress based on this Court's precedent.<sup>2</sup>

Nonetheless, even if Pauley had automatic standing to challenge the search of Stollar's vehicle, the court still would properly have denied Pauley's motion to suppress because police had reason to believe that the vehicle contained evidence of the robbery. Under the Fourth Amendment, police can lawfully search a vehicle incident to arrest if they have reason to believe that evidence of the crime of arrest might be found in the vehicle.

Arizona v. Gant, \_\_ U.S. \_\_, 129 S. Ct. 1710, 1714, 173 L. Ed. 2d 485 (2009). Additionally, under the Washington constitution, police can search a vehicle if they have probable cause to arrest the defendant, and there is a nexus between the defendant, the crime

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<sup>2</sup> Without acknowledging this Court's precedent in Hayden, Pauley argues that "common sense" requires that possession be required to prove robbery because "the perpetrator must be in 'possession' of the item once he or she has taken it from the victim." *Appellant's Br.* at 8-9. The law, however, has traditionally only recognized a narrow class of offenses that qualify as possessory crimes for purposes of automatic standing, *supra*. Under Pauley's argument, any crime could be transformed into a possessory crime if it includes a deadly weapon prong or if the State alleges a deadly weapon enhancement, leading to absurd results. See State v. Recuenco, 163 Wn.2d 428, 434-35, 180 P.3d 1276 (2008) (holding sentencing enhancements, such as a deadly weapon allegation, that increase the maximum sentence are the equivalent of an element and must be included in the information). For example, under Pauley's theory, Murder in the First Degree would be a possessory crime when charged with the deadly weapon enhancement and there can be no argument that possession is an essential element of murder. See RCW 9A.32.030 (first-degree murder statute).

of arrest, and the search of the vehicle. State v. Wright, 155 Wn. App. 537, 541, 230 P.3d 1063, review granted, 149 Wn.2d 1026 (2010).

Unlike defendants in recent cases where courts have invalidated vehicle searches based on the defendant's arrest for driving with a suspended license or for having an outstanding warrant, Pauley was arrested for first-degree robbery. E.g., Gant, 129 S. Ct. at 1714 (suspended license); State v. Patton, 167 Wn.2d 379, 383, 219 P.3d 651 (2009) (outstanding warrant). Officers' search of Stollar's car for evidence of the robbery satisfied both the Fourth Amendment and the Washington Constitution.

Given the circumstances and the timing of events, officers had strong reason to believe that evidence of the robbery would be inside Stollar's vehicle. Stollar called 911 to report being robbed of his Jaguar at knifepoint shortly before noon on February 14, 2009. 9RP 10, 15-16. Police responded to Stollar's location within one to two minutes and broadcast an initial description of Stollar's stolen car and the suspect. 9RP 98-100. Officer Girias heard the call around noon and located the Jaguar 10 minutes later in slow-moving traffic on S.R. 520. 9RP 108-09. Girias confirmed that the Jaguar matched the description of the car reported stolen and that

the driver essentially matched the suspect's description. 9RP 110. Girias and multiple other officers pursued the Jaguar until it crashed and police arrested Pauley behind the wheel. 9RP 110-23; 10RP 97-98, 101-03; 11RP 25-28, 30-31.

Officers had reason to believe that the knife used in the robbery would be inside Stollar's car based on his account of being robbed at knifepoint, Girias's location of the car minutes later, and the ensuing police chase that ended in Pauley's arrest. Officers also had probable cause to arrest Pauley and search the car under the Washington Constitution, given the clear nexus between Pauley, the robbery, and the search of the stolen car. Even if Pauley had automatic standing to challenge the search of Stollar's car, the trial court would properly have denied Pauley's motion to suppress based on the officers' lawful search of the vehicle incident to Pauley's arrest for robbery.

**2. PAULEY'S BELATED CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION SHOULD BE REJECTED.**

Relying on the Washington Supreme Court's recent decision in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Pauley argues that the trial court's special verdict instruction on the deadly

weapon enhancement misstated the law on jury unanimity. Pauley, however, waived this issue by failing to object to the instruction below and by failing to show on appeal that it is a manifest constitutional error. Alternatively, any error is harmless because this Court can conclude beyond a reasonable doubt that the verdict would have been the same without the error. To convict Pauley of first-degree robbery and second-degree assault, the jury necessarily and unanimously found that Pauley was armed with a deadly weapon.

Both the robbery and assault charges required the jury to find that Pauley was armed with a deadly weapon at the time of the offense. CP 112, 121. The court instructed the jury that a deadly weapon is any weapon that "is readily capable of causing death or substantial bodily harm" under the circumstances in which it is used. CP 111, 120. Consistent with this definition, the court further instructed the jury for purposes of the special verdict that:

[A] person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant . . . [and] a connection between the weapon and the crime.

A knife having a blade longer than three inches is a deadly weapon. A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death . . .

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision.

CP 130. This instruction is substantially similar to the definition of a deadly weapon for purposes of a special verdict in WPIC 2.07.01 and the general concluding instruction in WPIC 151.00.<sup>3</sup> Pauley did not object or take exception to this instruction. 13RP 19-20, 26-27.

Pauley waived the right to challenge the special verdict instruction by failing to object at trial. To claim error on appeal, an appellant challenging a jury instruction must first show that he took exception to that instruction in the trial court. State v. Salas, 127 Wn.2d 173, 181, 89 P.2d 1246 (1995). The purpose of requiring objections or exceptions is "to afford the trial court an opportunity to know and clearly understand the nature of the objection" so that "the

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<sup>3</sup> Rather than rely on the pattern jury instruction for the special verdict on the deadly weapon enhancement contained in WPIC 160.00, the court "blend[ed] . . . the special verdict form with the concluding instruction that we normally use." 13RP 19.

trial court may have the opportunity to correct any error." City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976). The objecting party must indicate the instruction objected to and the reasons for the objection. CrR 6.15(c). By failing to object to the special verdict instruction at trial, Pauley deprived the trial court of the opportunity to correct any alleged error and waived his right to challenge the instruction on appeal.

An instructional error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on "knowledge" was not manifest error). To obtain review, the defendant must show that the claimed error is of constitutional magnitude and that it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). Actual prejudice requires the defendant to make a plausible showing that the alleged error had "practical and identifiable consequences in the trial of the case." Id.

Instructional errors are not automatically deemed manifest constitutional errors. Id. at 103. Division Three of the Court of Appeals recently held that a trial court's erroneous, pre-Bashaw instruction that a jury must be unanimous to acquit on a special

verdict, was neither a constitutional error, nor was it manifest. State v. Nunez, No.28259-7-III, 2011 WL 536431 at \*4-6 (Feb. 15, 2011). Similar to the defendant in Nunez, Pauley has failed to identify a constitutional provision that the special verdict instruction violated beyond the general provision in the state constitution protecting a criminal defendant's right to a unanimous jury verdict for purposes of conviction. Id. at \*4.

Pauley rests his claim on Bashaw, despite its lack of constitutional underpinnings. In Bashaw, the court held that the trial court erroneously instructed the jury that it had to be unanimous to acquit on a special verdict based on common law and policy considerations.<sup>4</sup> 169 Wn.2d at 145-47. The Bashaw court explicitly stated that its holding was "not compelled by constitutional protections against double jeopardy . . . but rather by the common law precedent of this court." Id. at 146 n.7. The court further noted that "several important policies" justified the common law rule, including judicial economy and finality. Id. at 146-47. Pauley cannot rely on Bashaw to demonstrate an error of constitutional magnitude,

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<sup>4</sup> The special verdict instruction in Bashaw closely resembled the challenged jury instruction in this case: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139; CP 130.

given that the decision is grounded in common law and policy concerns.

Pauley does not even attempt to show that the claimed error resulted in actual prejudice, the second element required to obtain review under RAP 2.5(a)(3).<sup>5</sup> The special verdict instruction conformed substantially to the pattern instruction on the definition of a deadly weapon and the general concluding instruction. Unlike other instructions deemed to have resulted in manifest constitutional error, this instruction did not direct the verdict, shift the burden of proof, fail to require jury unanimity to convict, or omit an element of the crime charged. O'Hara, 167 Wn.2d 103. "The jury was able to make all of the findings required, applying the proper burden of proof, under the instructions given." Nunez, at \*7. Pauley waived his challenge to the special verdict instruction by failing to object to it below and by failing on appeal to make an affirmative showing that the alleged error was of constitutional magnitude and resulted in actual prejudice.

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<sup>5</sup> The fact that the court in Bashaw, and the earlier decision on which it relied, State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), considered the jury unanimity issue for the first time on appeal, does not absolve Pauley of his duty to make the required showing in this case under RAP 2.5(a)(3). Neither Bashaw nor Goldberg discussed RAP 2.5(a)(3), and it is unclear whether the issue was ever raised in these cases.

Alternatively, if Pauley has not waived his challenge, then any error in the special verdict instruction was harmless. An instructional error is harmless if the court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Bashaw, 169 Wn.2d at 147. In Bashaw, the instructional error was not harmless because it resulted in a "flawed deliberative process" based on the court's erroneous instruction to the jury that it had to be unanimous to acquit on the special verdict. Id. at 147. The special verdict in Bashaw required the jury to determine whether the defendant delivered a controlled substance within 1,000 feet of a school bus stop. Id. at 137. The defendant objected to the State's measurements and there was conflicting evidence about the distance involved in one of the drug transactions. Id. at 138, 144.

In contrast, this jury unanimously found that Pauley used a deadly weapon as an element of the crimes charged *before* it ever deliberated on the special verdict. To convict Pauley, the jury had to find beyond a reasonable doubt that Pauley was armed with, displayed, or used a deadly weapon. CP 112, 121.

Although Pauley generally denied committing the crimes, he never disputed that a deadly weapon was used to commit them.

Indeed, the puncture mark on Donahue's jacket and the knife's recovery in Stollar's stolen Jaguar confirmed the victims' accounts that a knife was used to rob and assault them. 8RP 24; 11RP 31-32. Unlike the jury in Bashaw, which had to resolve a contested factual issue for the first time during special verdict deliberations, this jury had already determined unanimously that Pauley had used a deadly weapon to commit the crimes.<sup>6</sup>

Pauley's attempts to distinguish the definitions of a deadly weapon as contained in the general instruction and the special verdict instruction are unpersuasive. The definitions are substantially similar, with the only significant difference being the statement as a matter of law, in the special verdict instruction, that a knife having a blade longer than three inches is a deadly weapon. This statement, however, results in little consequence, given that the only weapon discussed at trial was a knife and that the special verdict instruction, consistent with the general instruction, still

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<sup>6</sup> Pauley's reliance on State v. Williams-Walker for the proposition that "guilty verdicts cannot authorize sentence enhancement" is misplaced, given that Williams-Walker considered a different scenario where the court imposed a firearm enhancement, although the special verdict instruction only referenced the deadly weapon enhancement. 167 Wn.2d 889, 895, 225 P.3d 913 (2010); *Appellant's Br.* at 16.

required the jury to determine the way in which the knife was used and its capacity to inflict death.

In the general instruction, the court defined a deadly weapon as "any weapon, device, instrument . . . which under the circumstances in which it is used . . . is readily capable of causing death or substantial bodily harm," while in the special verdict instruction, the court defined a deadly weapon as "an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death." CP 111, 120, 130. Both instructions required the jury to find that Pauley used a weapon in a manner capable of causing death. The similarity in the two definitions confirms that the jury had already determined unanimously that Pauley had used a deadly weapon to rob and assault the victims, as an element of the crimes charged, prior to considering the special verdict.

While the Bashaw court speculated that the instructional error might have impacted the jury's special verdict, this Court can conclude beyond a reasonable doubt, in light of these circumstances, that the error did not impact the jury's special verdict. The Court should find that any error in the special verdict instruction was harmless.

**3. PAULEY WAIVED HIS RIGHT TO CHALLENGE THE COURT'S DENIAL OF HIS MOTION TO SEVER AND HAS FAILED TO DEMONSTRATE THE MANIFEST PREJUDICE REQUIRED TO WARRANT SEVERANCE.**

Pauley contends that the trial court's failure to grant his motion to sever violated his right to a fair trial. Pauley, however, waived his right to challenge this issue on appeal by failing to renew his motion to sever at trial. If Pauley has not waived the issue, then this Court should find that judicial economy outweighed any potential prejudice caused by joinder. Pauley failed to demonstrate below, and now on appeal, the manifest prejudice required to warrant severance. Alternatively, if the Court finds that the trial court erred in denying severance, then the error was harmless.

CrR 4.3(a) permits joining two or more offenses of the same or similar character, even if the offenses are not part of a single scheme or plan. Properly joined offenses may be severed if the defendant is prejudiced in presenting separate defenses, or if a single trial would encourage the jury to cumulate evidence or infer a criminal disposition. State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989). The defendant must make a motion to sever offenses before trial, unless the interests of justice require

otherwise. CrR 4.4(a)(1). If the defendant's motion is denied, then the defendant must renew the motion to sever "before or at the close of all the evidence," or the issue is waived on appeal.

CrR 4.4(a)(2); State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998).

Pauley initially moved to sever the offenses against him prior to trial before the Honorable Michael Fox. CP 58-65; 3RP 21. Judge Fox denied Pauley's motion based on the cross-admissibility of the evidence and Pauley's "pattern of behavior." 3RP 30. Following the denial, Pauley successfully moved to continue the trial date and the Honorable Jeffrey Ramsdell received the case for trial. 3RP 39; 5RP 1.

On the third day of pretrial motions, Pauley renewed his motion to sever and Judge Ramsdell denied the motion, finding that there was "no new evidence" and "no new reason" to revisit the earlier ruling. 7RP 86, 88. Judge Ramsdell noted that Pauley claimed general denial on all counts, and that Pauley's argument essentially boiled down to being concerned that the jury would convict him of assault based on the strength of the State's evidence on the other charges. 7RP 86. While acknowledging Pauley's concern, Judge Ramsdell indicated that he would instruct the jury to

consider the charges separately and that in his experience, juries follow instructions. 7RP 88. Following the denial, the parties immediately proceeded to pick a jury and Pauley never raised the issue of severance again.

Pauley waived his right to challenge Judge Fox's and Judge Ramsdell's denial of his motion to sever by failing to renew the motion *at trial*, as required by the rule and case law. CrR 4.4(a)(2) requires the defendant to renew the motion "before or at the close of all the evidence." Courts have interpreted this phrase to require defendants to renew a motion to sever at or before the close of trial. E.g., State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329 (1987) ("Henderson moved to sever the bail jumping count before trial, but failed to renew his motion at or before the close of trial. He therefore waived the issue."); State v. Ben-Neth, 34 Wn. App. 600, 606, 663 P.2d 156 (1983) (same). Given that Pauley failed to renew his motion to sever at trial, this Court should reject his belated attempt to raise the issue again on appeal.

Even if Pauley has not waived the issue, he has failed to demonstrate the required prejudice to warrant severance. The defendant bears the burden of showing that trial on two or more counts "would be so *manifestly prejudicial* as to outweigh the

concern for judicial economy." State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990) (emphasis added). When weighing the potential for prejudice, the trial court must consider "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) the court's 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." State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

None of these factors is dispositive, and the final factor does not automatically result in severance where evidence of one count is inadmissible to prove another count. Watkins, 53 Wn. App. at 272-73 n.3; Bythrow, 114 Wn.2d at 720-22; State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992). Any potential prejudice to the defendant must be weighed against concerns of judicial economy. Bythrow, 114 Wn.2d at 723 (concluding that conserving judicial resources and public funds are the cornerstones of judicial economy and noting the significant savings resulting from having one courtroom, one judge, and one jury to empanel).

On appeal, the trial court's decision will be upheld unless it constitutes a manifest abuse of discretion. Bythrow, 114 Wn.2d

at 717. A court abuses its discretion only when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The defendant must point to specific prejudice to demonstrate an abuse of discretion. Bythrow, 114 Wn.2d at 720.

Here, two trial court judges considered Pauley's motion to sever prior to trial and denied it each time. 3RP 21-30; 7RP 81-88. Judge Fox found "a lot of the evidence admissible in both cases" and noted an "ongoing pattern of conduct" that supported joinder. 3RP 30; CP 42. Judge Ramsdell acknowledged Pauley's concern that the State's evidence was arguably stronger on the "second day's events," but ultimately concluded that the jury would be instructed to consider the charges separately and that "in my own personal experience, [juries] do." 7RP 87-88 ("I've had many joint trials where the jury has come back with guilty on one count and acquitted on the other even though there was the very same risk."). Further, Judge Ramsdell found "nothing inconsistent" about Pauley's defenses, given that he claimed general denial on every count. 7RP 86.

On appeal, Pauley does not dispute that he offered the same defense on all counts or that the court properly instructed the jury to consider the charges separately. Rather, Pauley's primary contention is that the jury convicted him of second-degree assault based on the strength of the State's evidence on the other charges, and the prosecutor's efforts "to use the evidence from one incident as proof of another." *Appellant's Br.* at 23.

Although the State had strong evidence to support the charges stemming from the robbery based on the police's near-immediate pursuit of Stollar's car and Pauley's arrest at the wheel, the State also had strong evidence to support the assault charge. Both Donahue and Olmstead described the attacker as being a white male, 5'10" tall, with brown hair, a slender build, and wearing a blue, hooded sweatshirt. 9RP 76-78. Pauley matched the physical description provided and was seen wearing a blue, hooded sweatshirt the next day. 8RP 40-41; 11RP 30. Police also found a knife in Pauley's possession the next day similar to the one Donahue described being used in the attack. 8RP 42-43. Moreover, Donahue identified Pauley as his attacker in a montage after the incident with 50% certainty, and later at trial without hesitation. 8RP 16, 36-38.

The major disputed issue at trial was whether it was *Pauley* who assaulted Donahue. The State argued that Pauley assaulted Donahue in a failed attempt to steal Donahue's BMW based on the State's theory that Pauley stole luxury cars from victims in parking lots at knifepoint as they entered or sat in their cars. CP 31; 3RP 25-29; 13RP 48. By the State's theory, Pauley waited to attack Donahue until he returned to his BMW and attempted to open the door. 8RP 11-15; 13RP 48.

While Donahue managed to thwart Pauley's efforts, Stollar did not and Pauley successfully stole Stollar's Jaguar at knifepoint. 8RP 16-17; 9RP 16-19, 50-51. Stollar's description of the attacker - a white male, 5'10" tall, with light-colored hair, a small build, and wearing a blue sweatshirt - matched Donahue and Olmstead's description from the night before. Ex. 8; 9RP 76-78. The incidents happened within 18 hours of each other a quarter mile apart. 8RP 76-77; 9RP 10. The day after his arrest, Pauley asked, "How many cars do you think I'll take before I die?" and then admitted to wanting to next steal a Dodge Viper. 11RP 44-47. Pauley said that he knew of two Dodge Vipers in Bellevue and that he intended to steal two more cars upon his release. 11RP 47.

Evidence of the Stollar incident was cross-admissible to prove identity and motive under ER 404(b) on the Donahue incident. See State v. Thang, 145 Wn.2d 630, 643-44, 41 P.3d 1159 (2002) (recognizing courts consider geographical proximity, the amount of time between crimes, similarity of clothing, and unusual or distinct similarities between the crimes when admitting ER 404(b) evidence to prove identity based on *modus operandi*); State v. Matthews, 75 Wn. App. 278, 284-85, 877 P.2d 252 (1994) (admitting evidence of the defendant's financial distress to prove State's theory that defendant murdered the victim, a relative stranger, in a failed robbery attempt).

Even if the evidence was not cross-admissible, the lack of cross-admissibility does not automatically result in severance. Bythrow, 114 Wn.2d at 720-22; Markle, 118 Wn.2d at 439. Pauley still must show that a joint trial was "so *manifestly prejudicial* as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718 (emphasis added).

Pauley argues that the jury convicted him of second-degree assault based on the prosecutor's argument in closing that the incidents were not a coincidence, and that the similarities between the attacks proved that Pauley assaulted Donahue. While Pauley

challenges the prosecutor's arguments on appeal, he did not object to them at trial. Given Judge Fox's ruling that "a lot of the evidence" was admissible in both cases, the prosecutor's argument was neither flagrant nor ill-intentioned. 3RP 30. Following the argument, Pauley did not renew his motion to sever or move for a mistrial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991) ("The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial.").

Pauley's trial lasted five days and involved the relatively simple and distinct issues of whether Pauley (1) assaulted Donahue, and (2) robbed Stollar of his car at knifepoint and then eluded police, crashing into Marlin and others. The evidence relating to each count was neither complicated nor difficult to compartmentalize, particularly since almost every witness testified in chronological order, beginning with Donahue and the officers who assisted him, followed by Stollar and the officers who assisted him, the officers who pursued Pauley, and finally the victims of the crash. 8RP-12RP. Pauley cannot show that the potential prejudice

that might have resulted from admitting the challenged evidence trumped the need to conserve judicial resources and public funds.

Pauley's argument that the court's jury instructions failed to cure the alleged prejudice is meritless. The trial court properly instructed the jury, with language mirroring WPIC 3.01, to consider each count separately. CP 107 ("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."). The court gave the jury separate to-convict instructions and verdict forms for each count establishing the different elements to be found and reaffirming the requirement to consider the counts separately. CP 112-13, 116-17, 121, 126, 133-36. Further, Pauley's counsel reminded the jury multiple times in closing argument about their obligation to consider the charges separately. 13RP 81-82.

Pauley cannot show based on this record that the trial court committed a "manifest abuse of discretion" by denying his motion to sever. See State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993) (judicial economy outweighed potential prejudice resulting from joining five rape counts with separate victims based on the strength of the State's evidence, ability to compartmentalize evidence, and court's instruction to consider the crimes separately);

cf. State v. Sutherby, 165 Wn.2d 870, 883-86, 204 P.2d 916 (2009) (prejudice outweighed judicial economy where the strength of the State's evidence differed on each count, the defendant offered separate defenses, and the State argued that evidence of one count could be used to convict on another count even though the evidence was not cross-admissible).

Nonetheless, if the Court determines that the trial court erred by denying the motion to sever, any error was harmless. Pauley cannot show that he would have been acquitted of assault but for the joinder of the charges. See Bythrow, 114 Wn.2d at 722 n.4 (recognizing reversal is warranted only when "the outcome of the trial would have been different had the errors not occurred").

Pauley matched Donahue and Olmstead's description of the attacker and was found the next day wearing a blue, hooded sweatshirt and in possession of a similar-looking knife. 8RP 40-43; 11RP 30. Donahue identified Pauley as his attacker in a montage following the incident, and later at trial without hesitation. 8RP 15-16, 36-38. Given this evidence, Pauley cannot show that the jury would have acquitted him of the assault but for the evidence relating to the other charges against him. The Court should find that the trial court properly denied Pauley's motion to sever.

D. CONCLUSION

For the reasons stated above, the Court should affirm Pauley's convictions and the court's imposition of the deadly weapon enhancement.

DATED this 2nd day of March, 2011.

Respectfully submitted,

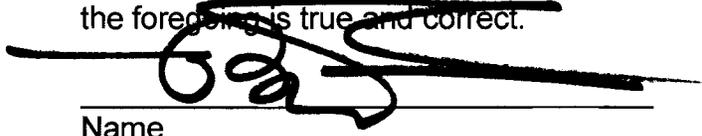
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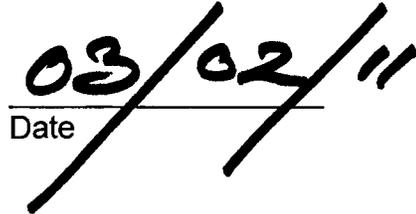
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JAMES PAULEY, Cause No. 65358-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington



Date