

No. 67555-9-I

IN THE
WASHINGTON STATE COURT OF APPEALS
DIVISION I

STATE OF WASHINGTON,

Respondent,

VS.

CHRISTOPHER BINGHAM,

Appellant.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

CHRISTOPHER BINGHAM
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STATE OF WASHINGTON

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ASSIGNMENTS OF ERROR

1. The Trial Court Erred In Failing To Sever Counts I, & II From Counts III & IV.
2. Appellant's Sentence Is Disproportionate When Compared to What His Co-Defendant's Received.
3. Appellant's Sentence Amounts To Cruel And Unusual Punishment Under Constitutional Art. 1 § 14; U.S.C.A VIII.
4. Appellant's Multiple Sentences Violates Double Jeopardy Where The Burglary And Robbery Amounts To the Same Criminal Conduct.
5. The Accomplice Liability Instructions Relieved The State Of Proving All Elements Of The Crimes Charged And Mislead The Jury.
6. The Trial Court's Failure To Declare A Mistrial Violated Appellant's Right To A Fair And Impartial Jury.
7. The Evidence Was Insufficient To Convict Appellant Of Robbery.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a Criminal Defendant Deprived of His Right to a Fundamentally Fair Trial When Several Unrelated Charges Are Tried Jointly?
2. Is A Criminal Defendant's Sentence Disproportionate When he Receives A Sentence Twice and Six Times More then His Co-Defendant's?
3. Is A Defendant's Sentence Cruel and Unusual Where He Receives Hundreds Of Months In Prison For A Property Offense?
4. Does Multiple Sentences For The Same Criminal Conduct Implicate The Prohibition Against Double Punishment?

5. Does Accomplice Liability Instructions Relieve The State of Its Burden of Proving All Elements of The Offenses Charged Where The Jury Was Confused As To How Accomplice Liability Attached To All Offenses?
6. Does A Juror's Exposure To Out-side Influences, And A Failure To Come Forward With That Information Show A Presumption Of Prejudice?
7. Is Evidence Sufficient To Sustain A Robbery Conviction Where All Elements Were Not Proven?

I.

Statement of the Case

CHRISTOPHER BINGHAM [hereinafter Appellant] is currently serving a sentence of 258-months in prison after having been convicted in a jury trial.

Appellant incorporates by reference the remainder of the statement of the case from the Opening Brief of Appellant and invites the Court to refer to the same.

II.

Argument

- A. THE CONVICTIONS SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRED IN FAILING TO SEVER COUNTS ONE AND TWO FROM COUNTS THREE AND FOUR.

CrR 4.4(b) directs the trial court to sever offenses "whenever . . . the court determines that severance will promote a fair determination of the

defendant's guilt or innocence of each offense." A trial court's refusal to sever offenses should be reversed if the court abused its discretion and the resulting prejudice outweighs concerns for judicial economy. State v. Markle, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992).

Joinder is inherently prejudicial. State v. Ramirez, 46 Wn.App. 223, 226, 730 P.2d 98 (1986).

A defendant may be prejudiced because:

(1) He may become embarrassed or confounded in presenting separate defenses;

(2) The jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or

(3) The jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990)(citations omitted); State v. Sanders, 66 Wn.App. 878, 885, 833 P.2d 452 (1992), review denied, 120 Wn.2d 1027 (1993).

In determining the prejudice to the defendant, the trial court should consider as mitigating factors:

(1) the strength of the State's evidence on each count; (2) the clarity of the defenses to the respective counts; (3) the probable effect of the cautionary instruction to consider the evidence of each crime separately; and (4) whether, in separate trials, the evidence of the other charged crimes would be admissible. Bythrow, 114 Wn.2d at 721; Sanders, 66 Wn.App. at 885.

In this case, the facts supported severance of the counts.¹ First, the strength of the State's evidence on counts three and four were obviously weak, where the jury acquitted on those counts. Second, appellant's defense strategy on counts three and four were that they never occurred, and the defense on counts one and two were alibi, although the defense never put on a defense. Third, the cautionary instruction here, was clearly rendered meaningless in a trial where other bad acts evidence was placed before the jury. See Opening Brief of appellant at 9, 12. Also see United States v. Nguyen, 88 F.3d 812, 815 (9th Cir. 1996). Fourth, the evidence of

¹ The trial court denied severance in this case finding no prejudice and judicial economy. RP 159-60

counts three and four would not have been admissible at the trial on counts one and two, thus, failure to sever the counts was prejudicial and requires reversal. See State v. Ramirez, 46 Wn.App. 223, 226 (1986). Also See United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir. 1986) as amended by 798 F.2d 1250 (9th Cir. 1986), cert. denied, ___ U.S. 1032, 109 S.Ct. 1169, 103 L.Ed.2d 227 (1989); United States v. Jones, 16 F.3d 487, 493 (2nd Cir. 1994); U.S. v. Shellef, 507 F.3d 82, 102 (2nd Cir. 2007); U.S. v. Johnson, 820 F.2d 1065, 1070 (9th Cir. 1987); U.S. v. Holloway, 1 F.3d 307, 311-12 (5th Cir. 1993).

For these reasons, failure to sever Counts One & Two from counts Three & Four was prejudicial error.

B. THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT TO 258-MONTHS IN PRISON.

(a) The Standard Range Sentence Is Clearly Excessive When Ran Consecutively.

A sentence is clearly excessive under RCW 9.94A.120(2), when it is "clearly unreasonable, . . . or an action that no reasonable person would have taken." State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986). The trial court must use factors that are sufficiently substantial and compelling to

distinguish the offense from other crimes in the same category. State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995).

According to RCW 9.94A.3390(1)(g), one of the specific statutory mitigating circumstances is:

The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

Among the purposes of the Sentencing Reform Act, as stated in RCW 9.94A.010 are:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses; . . .

Proportionality is a factor that may properly be considered, if there are substantial and compelling reasons in the record. Alexander, 125 Wn.2d at 728, 730. First, the trial court must identify the valid mitigating factors in the record; then, it may rely on the purposes section of RCW 9.94A.010. Alexander,

125 Wn.2d at 730.

In this situation, the standard range sentence's appellant received, and ran consecutively, is so much more severe than the sentences received by his co-defendant's, that there is no proportionality between appellant and "others committing similar offenses". The co-defendants actively participated in each burglary and crimes inside the house, and received literally 200-months less than appellant for one co-defendant, and 87-months less for the other co-defendants.

The facts of this case justify a departure below the standard range, in order to promote respect for the law by imposing just and proportionate sentences. The multiple offense policy of RCW 9.94A.400 results in a clearly excessive sentence in this case, and under Alexander, supra, this court has substantial and compelling reasons to impose a sentence below the standard range.

In United States v. Daas, 198 F.3d 1167, 1180-82 (9th Cir. 1999), the court found that a downward departure from the standard range sentence was appropriate where one defendant received a severe sentence that was disparate from the lower sentences

imposed on co-defendants, the court remanded to the trial court for a determination of whether the disparity was such that a reduced sentence should be given. Also see Solem v. Helm, 483 U.S. 277 (1983).

The trial court essentially abdicated its responsibility in simply sentencing appellant to a standard range sentence without even engaging in any analysis which would ensure that his sentence was proportionate to those received by his co-defendants. As such, the court should, at a minimum, reverse the sentence imposed in this case with directions to depart due to the clearly excessive nature of this sentence in relation to the sentences received by the co-defendants.

C. THE COURT SHOULD REVERSE THE SENTENCE BECAUSE SUCH AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT UNDER BOTH THE U.S. AND WASHINGTON CONSTITUTION'S. U.S.C.A. VIII; WASH. CONST. ART. 1, § 14.

Washington State Constitutional Article 1, § 14 provides:

Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Article 1, § 14 protects against grossly disproportionate sentences. State v. Gimorelli, 105

Wn.App. 370, 3380, 20 P.3d 430 (2001)(citing State v. Morin, 100 Wn.App. 25, 29, 995 P.2d 113, review denied, 142 Wn.2d 1010, 16 P.3d 1264 (2000)). Also see Braverman v. U.S., 317 U.S. 49 (1942). Consistent with this constitutional provision, the SRA gives discretion to the trial court to impose a sentence below the guidelines if the sentencing range is clearly excessive. See RCW 9.94A.390(1)(g); see also State v. Fitch, 78 Wn.App. 516, 897 P.2d 424 (1995); State v. Sanchez, 69 Wn.App. 255, 848 P.2d 208, review denied 122 Wn.2d 1007, 859 P.2d 604 (1993).

The factors to be considered in determining whether a sentence is disproportionate under art. 1, § 14 include:

1. The nature of the crime;
2. The legislative purpose behind the sentence;
3. The sentence the defendant would receive in other jurisdictions; and
4. The sentence the defendant would receive for other similar crimes in Washington.

State v. Faith, 94 Wn.2d 287, 397, 617 P.2d ___ (1980).

Here, appellant received in essence what is

a life sentence, See In Re Breedlove, 138 Wn.2d 298, 305 n.2, 979 P.2d 417 (1999)('[t]he maximum sentence for a class A felony is 20 years. RCW 9.A.20.021(1)(a)); State v. Collins, 50 Wn.2d 740, 756 (1957)("A mandatory sentence of Life imprisonment is not a mandate of imprisonment for life").

D. THE COMBINATION OF THE FIRST DEGREE BURGLARY, AND ROBBERY SENTENCES VIOLATE DOUBLE JEOPARDY.

(a) The State Obtained a Conviction and Sentence's For First Degree Burglary; & First Degree Robbery Even Though the Crimes Constituted the Same Criminal Conduct.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington State Constitution prohibit the imposition of multiple punishments for the same offense. Ball v. U.S., 470 U.S. 856, 862 (1985); Whalen v. United States, 445 U.S. 684, 688, 63 L.Ed.2d 715, 100 S.Ct. 1452 (1980); Albernaz v. United States, 450 U.S. 333, 344, 67 L.Ed.2d 275, 101 S.Ct. 1137 (1981); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1990)(citing State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995); State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995)).

The Double Jeopardy Clause protects accused

individuals from three distinct types of abuse by government: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; (3) multiple punishments for the same offense. North Carolina v. Pearce, 295 U.S. 711, 717, 99 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The United States Supreme Court has explained the rationale behind the Double Jeopardy Clause:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense.

...

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Washington State follows the "same evidence" rule. State v. Calle, 125 Wn.2d 763, 776, 777, 888 P.2d 922 (1995)("[T]he defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and law."). The "same evidence" rule is sometimes referred to as the "same elements test." United States v. Dixon,

509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1983). "Washington's "same evidence" test is very similar to the rule set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 100, 76 L.Ed.2d 306 (1932); Calle, 125 Wn.2d at 777.

The same evidence rule controls "unless there is a clear indication that the legislature did not intend to impose multiple punishment."

[O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other". Calle, 125 Wn.2d 777-78.

In this case, the State convicted and sentenced appellant on one count of first degree burglary, and one count of first degree robbery and imposed multiple sentences 171-months and 87 months.

The basic rule applicable to this issue is that it is impermissible to convict a defendant of both a greater and lesser crime occurring at the same time and place. Whalen, Id., at 693-94; Ball, Id., at 862; Rutledge v. U.S., 517 U.S. 292, 304 (1996). Also See State v. Jones, 117 Wn.App. 721, 725-27, 72 P.3d 1110

(2003), review denied, 151 Wn.2d 1006 (2004)(charging conduct occurring at same time and location as both attempted possession of cocaine and possession of cocaine violates double jeopardy protections).

As the Washington Supreme Court explained in State v. Pelky, 109 Wn.2d 484, 488, 745 P.2d 354 (1987):

"A lesser included offense exists when all of the elements of the lesser offense are necessary elements of the greater offense. Put another way, if it is possible to commit the greater offense without having committed the lesser offense, the later is not an included crime". (citations omitted).

In this case, appellant, as noted, was convicted and sentenced on one count of first degree burglary; one count of robbery in the first degree; both of these crimes happened at the same time, place and involved the same victim and criminal intent, thus, the multiple sentences and convictions implicate double jeopardy and the lower degree crime and sentence should be vacated.

E. THE INSTRUCTION ON ACCOMPLICE LIABILITY RELIEVED THE STATE OF ITS BURDEN OF PROVING ALL ESSENTIAL ELEMENTS OF ALL OFFENSES.

(a) The Jury Instructions on Accomplice Liability Confused the Jury in Relation to All Offenses.

The Sixth Amendment provides that "[i]n all

criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The fourteenth Amendment states that no person shall be deprived of liberty without "due process of law." Taken together, these provisions of the constitution "requires criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." See United States v. Gaudin, 515 U.S. 506, 509-510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Also see Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

Here, the jury was confused about how the accomplice liability instruction applied to the various crimes. RP 1052-63(June 7, 2011); RP 3-7 (June 8, 2011) The trial court instructed the jury to follow your instructions. RP 7-8 (June 8, 2011). The defense told the court it would file a motion for a new trial based on the accomplice instructions, and juror issue. RP 1070-73.

Appellant did not receive the clerk's papers

(CP) "counsel's briefing" related to jury instruction, and the trial transcripts of the new trial motion do not contain the legal arguments presented by counsel and co-counsel's, (see RP 1-7 July 22, (2011), thus appellant cannot adequately present all the issues related to the accomplice instruction, however, for all of the reasons stated in the superior court on the new trial motion briefing, appellant believes, for those reasons, that the accomplice instructions denied him due process, and relieved the State of its burden to prove all the elements of the crimes beyond a reasonable doubt.

F. THE TRIAL COURTS FAILURE TO DECLARE A MISTRIAL VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY.

A defendant in a criminal proceeding is entitled to a trial by an impartial jury. U.S. Const. Amend. VI; Wash. Const. Art. 1, §22. A defendant's Sixth Amendment rights are violated even if only one juror was unduly biased or improperly influenced. See United States v. Keating, 147 F.3d 895, 903 (9th Cir. 1998)(citing Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988).

The United States Supreme Court has declared:

In a criminal case, an private communication, contact or tampering, directly or indirectly, with a juror during a trial about a matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial ... The presumption is not conclusive,

but the burden rests heavily upon the government to establish ... that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed 654 (1954).

The remedy for allegations of jury bias is a hearing, in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial. Remmer, 347 U.S. at 229-30; Smith v. Phillips, 455 U.S. 209, 216, 102 S.Ct. 940, 945, 71 L.Ed.2d 78 (1982).

The appellate court than reviews for an abuse of discretion from the trial courts denial of a mistrial. United States v. Randall, 163 F.3d 557, 559 (9th Cir. 1998). Accordingly, this court should determine whether the comments overheard by juror 1 "so affected the jurors ability to consider the totality of the evidence fairly that it tainted the verdict." United States v. Smith, 962 F.2d 923, 9335 (9th Cir. 1992).

When there is a reasonable basis to believe that the defendant was prejudiced by the jury's consideration of extraneous evidence, the trial court

must grant a new trial. State v. Cummings, 31 Wn.App. 427, 430, 642 P.2d 415 (1982). And as in the federal cases, the trial court's decision will not be overturned absent abuse of discretion. State v. Balisok, 12 Wn.2d 114, 117, 866 P.2d 631 (1994).

In determining the effect of an irregularity, an appellate court should examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Each case of alleged juror misconduct is reviewed on its own facts. Cummings, 31 Wn.App. at 429, and any reasonable doubt must be resolved against the verdict. State v. Briggs, 55 Wn.App. 44, 55-56, 776 P.2d 1347 (1989).

In this case, appellants counsel approached the trial court and moved to withdraw. RP 1065 The basis of the motion was that juror 1 had overheard counsel discussing a possible sentence that one of his clients might expect. RP 1066-71 The trial court, and co-counsel's questioned the juror. Id. Co-defendant Miller's counsel [Cruz] brought to the courts attention that the juror did not approach the

bailiff or the court about the incident. RP 1071-72 The incident happened during deliberations. RP 1066.

Here, the incident was clearly serious, as it revealed speculative evidence of the possible punishment in the case, possibly swaying the jurors deliberations. Moreover, the information was not cumulative. Finally, the trial court did not interview any other jurors to determine whether this evidence was shared with other jurors, and failed to provide any necessary curative instructions.

Moreover, the fact that the juror did not come forward and share this information with the court when it was overheard [during deliberations] and was therefore not questioned until after the verdict shows a presumption of bias and prejudice. Id.

Because any reasonable doubts regarding prejudice must be resolved against the verdict, appellants conviction must be reversed and he must be allowed a new trial with an untainted jury. Id.

G. THE EVIDENCE USED TO OBTAIN APPELLANT'S CONVICTION IS INSUFFICIENT BEYOND A REASONABLE DOUBT TO PROVE ROBBERY.

"Constitutional test for the sufficiency of the evidence" is "whether after viewing the evidence

in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt".

Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 1781 (1979). The due process clause requires the government to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. In Re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 3668, 90 S.Ct. 1068 (1979).

The Winship reasonable doubt standard protects three fundamental interests. First, it protects the defendant's interest in being free from unjustified loss of liberty. Second, it protects the defendant from the stigmatization resulting from convictions. Third, it engenders community confidence in the criminal law by giving "concrete substance" to the presumption of innocence. Id., at 363-364.

A conviction based on evidence that fails to meet the Winship standard "is an independent constitutional violation". See Herrero v. Collins, 506 U.S. 390, 402 (1993); Bunkley v. Florida, 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1048 (2003).

In the present case, the entirety of the substantive evidence relied upon by the State is the statements of

Mr. Anway, however, those statements are insufficient to prove the elements of First Degree Robbery where Anway declined medical attention at the time of the crime. RP 464 Absent the element that Anway was "inflicted a bodily injury" (RCW 9A.56.190; RCW 9A56.200(1)(a)(iii), [evidence], there simply is no direct evidence sufficient to establish appellants guilt beyond a reasonable doubt. See Juan v. Allen, 408 F.3d 1262, 1279 (9th Cir. 2005); Jackson, 443 U.S. at 319, 99 S.Ct. 1781; Winship, 397 U.S. at 365-68; Bates v. McCarthy, 904 F.2d 99, 102 (7th Cir. 1991), cert. denied, 124 S.Ct. 202, 540 U.S. 873, 151 L.Ed.2d 133 (2003). Also see Bland, 71 Wn.App. 355-56; Eastmond, 129 Wn.2d 497; State v. Crediford, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996).

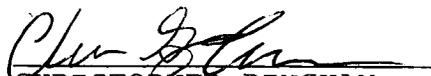
H. Conclusion

For the reasons stated, this Honorable Court should reverse Bingham's conviction on the Burglary, dismiss the Robbery, and remand for a new trial, and resentencing, based on individual reversible error, or if the court finds none by itself to be prejudicial, than on the accumulation of error that denied appellant a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); U.S.

v. Necocheha, 986 F.2d 1273, 1281 (9th Cir. 1993).

DATED this 12 day of March, 2012.

Respectfully submitted,

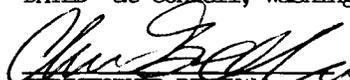

CHRISTOPHER BINGHAM
Appellant

D e c l a r a t i o n

I, CHRISTOPHER BINGHAM, declare that, on March 12, 2012, I deposited the foregoing STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW, or a copy thereof, in the internal mail system of the Coyote Ridge Corrections Center, and made arrangements for postage, addressed to: DANIEL T. SATTERBERG County Prosecutor, 401 Fourth Avenue North, Kent WA 98032-4429

I declare under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

DATED at Connell, Washington on March 12, 2012.


CHRISTOPHER BINGHAM
Appellant

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