

NO. 71215-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON HANSEN,

Appellant.

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

The Honorable LeRoy McCullough, Judge

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BRIEF OF APPELLANT

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE  
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to sever charges of assault and felony violation of a no contact order.

2. Appellant was denied effective assistance of counsel when his attorney failed to renew the motion to sever.

Issue Pertaining to Assignments of Error

Appellant was tried jointly on one count of second degree assault and seven counts of felony violation of a no contact order. The assault charge stemmed from an incident between appellant and his girlfriend and included an allegation that the offense was part of an ongoing pattern of domestic violence. The no contact order charges arose from telephone calls allegedly made by appellant to his girlfriend from jail. Before trial, defense counsel moved to sever the assault and no contact order violation charges. The trial court denied the motion. Counsel did not renew the motion to sever. Where the two distinct types of charges allowed the jury to unfairly cumulate the evidence against appellant and to improperly infer a criminal disposition, was defense counsel ineffective for failing to renew the motion to sever?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Brandon Hansen with one count of second degree assault for an incident involving his then-girlfriend Lindsey Hartley on March 25, 2012. CP 1-6, 42-47. By amended information, the prosecutor also charged Hansen with seven counts of felony violation of a no contact for telephone calls Hansen allegedly made to Hartley from jail between April and June of 2012. CP 42-47. A jury found Hansen guilty as charged. 4RP<sup>1</sup> 950-54. Hansen pled guilty to a charged aggravator alleging the assault was part of an ongoing pattern of psychological, physical or sexual abuse manifested by multiple incidents over a prolonged period of time. 5RP 3, 20-22, 30-31; CP 92-105.

The trial court sentenced Hansen to concurrent standard range sentences of 84 months for the assault and 60 months on each no contact order violation conviction. 1RP 130; CP 107-15. Hansen timely appeals. CP 117-29.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – May 2, June 28, July 8, August 30, October 4, 24, December 13, 2013 and January 9, 2014; 2RP – May 7, 2013 (Morning Session); 3RP – May 7, 2013 (Afternoon Session), May 8, 9 and 15, 2013; 4RP – May 16, 20, 21, 22, 23, and 24, 2013; 5RP – May 28, 2013.

2. Trial Testimony

On March 25, 2012 a 911 call was made to the Enumclaw police department. The caller did not speak directly with dispatchers. 4RP 144-45. Enumclaw police officer Nona Zilbauer recognized Hartley's voice on the call. 4RP 146. When police returned the 911 call it went to Hartley's voicemail. 4RP 145, 148.

Police found Hartley sitting on a curb across the street from her apartment. 4RP 150-53, 549-50, 701. Hartley was crying and holding her head. 4RP 152, 552-53, 607, 697, 757-58, 767, 814. She was bleeding from her nose, eyes, and lip. 4RP 157, 759-60, 816, 818-19, 822. Her lip was swollen and there were red marks around her neck. 4RP 157, 559-60. Hartley complained of face and neck pain and said she felt pressure between her ears. 4RP 154, 157, 757-58. Zilbauer smelled alcohol on Hartley's breath. 4RP 698, 736.

Hartley told Zilbauer, "my boyfriend Brandon beat the shit out of me." 4RP 152, 608, 698-700. When Zilbauer asked whether she meant Hansen, Hartley responded, "yes." 4RP 153. Hartley said she got into an argument with Hansen at a bar earlier in the evening. Hansen pushed Hartley off a barstool. 4RP 551, 737. The argument continued when Hartley and Hansen got home. Hansen hit Hartley in the face with a closed fist and squeezed her neck until she passed out. When she awoke,

Hartley ran outside. Outside, Hansen shoved Hartley's head into the sidewalk and squeezed Hartley's neck until she passed out again. 4RP 551-52.

Hartley was fearful that Hansen was hiding in the bushes and would kill her. 4RP 159, 553, 557. Police searched the area but found no one hiding and saw no one running away. 4RP 553, 556, 704. Police also searched Hartley's apartment. 4RP 554-55, 704. Jeffery Tanner was asleep in the apartment basement. 4RP 555, 609-10, 705-06. Tanner said he heard an argument but declined to provide more information. 4RP 555, 615. There was no blood or signs of a struggle inside the apartment. 4RP 730-31, 746-47.

Hartley declined domestic violence resource assistance, explaining she and Hansen had a mortgage together. 4RP 763, 778-80. Hartley declined to give a written statement to Zilbauer because she feared Hansen would kill her. 4RP 558.

Hartley was taken to the hospital. At the hospital, firefighter Maryn Otto overheard Hartley say her boyfriend had caused her injuries. 4RP 562, 765. Hartley asked that Hansen not be admitted to her room at the hospital. 4RP 557. Testing showed fractures to Hartley's eye socket and nasal bones. 4RP 526, 528-31.

Hansen was arrested when he contacted police the next day. 4RP 564, 708. The court entered a no contact order between Hansen and Hartley on April 10, 2012. 3RP 99; 4RP 581-82. Multiple telephone calls were made from the king county jail between April 14 and June 2, 2012 using Hansen's personal identification number (PIN). 4RP 121, 125-28, 135, 579-80. Jail officer Caty Hicks acknowledged inmates routinely traded and sold PINs. 4RP 132, 134, 137.

Zilbauer identified the voices on the telephone calls as Hansen and Hartley's. 4RP 580, 583-84, 586, 588-92, 626-30, 664-69, 671-78. In multiple calls, the female speaker identified herself as Hansen's sister. Some of the calls included sexual references. 3RP 56, 145-46, 157-58. Hansen's half-sister, Whitney Hartman, denied having a sexual relationship with Hansen or discussing sexual matters over the telephone. 4RP 792, 796-97. Police lost track of Hartley about two weeks after the alleged incident. Hartley did not testify at trial. 4RP 566-67, 579, 711, 726-27.

Hansen's cousin, Kelsey Spencer, denied Hansen and Hartley were in a relationship or lived together. 4RP 834, 836. Spencer saw Hansen and Hartley together at a bar the night of the incident. Hartley appeared drunk, spoke loudly and stumbled around. 4RP 837-38, 844, 847. Hansen and Hartley did not argue and Spencer did not notice Hartley was injured.

4RP 838, 844. Spencer gave Hansen a ride home. 4RP 839-40, 848. Hartley was still at the bar when Spencer and Hansen left. 4RP 854.

3. Motion to Sever

Before trial, Hansen's attorney objected to the State's amended information charging Hansen with seven counts of felony violation of a no contact order. Defense counsel argued the amended information, filed on the third day of pretrial proceedings, was untimely and therefore violated Hansen's due process rights. 3RP 106-08, 119-21. The trial court permitted the amended information to be filed under CrR 2.1(d).<sup>2</sup> 3RP 118.

Defense counsel then moved to sever the assault and no contact order violation charges for trial. 3RP 109-12, 124; CP 38-41. Counsel argued information regarding the alleged assault would be inadmissible as to the no contact order violations, and vice versa. Counsel noted the only common evidence between the crimes would be provided by Zilbauer, who responded to the 911 call and authenticated the voices on the jail telephone calls. Counsel maintained Zilbauer's testimony was insufficient to warrant a single trial. 3RP 119; CP 38-41. Moreover, evidence of the

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<sup>2</sup> CrR 2.1(d) provides: "The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced."

alleged assault was relatively weak because Hartley did not intend to testify. 3RP 362. Counsel also argued the defenses as to each crime were inconsistent because whereas the assault involved “potential defenses of self-defense, identity, [and] general denial,” the defense for the no contact order violation charges was “of a different nature.” 3RP 361.

Defense counsel also argued that because all of the charges involved Hartley, and the State claimed the assault was part of an ongoing pattern of domestic violence, joinder of the charges improperly invited the jury to cumulate evidence and infer that Hansen had a criminal disposition. 3RP 366-67. A limiting instruction could not cure that prejudice. 3RP 362. Defense counsel explained that Hansen desired to testify only regarding the assault charge. 4RP 80-81, 88.

The State maintained joinder of the crimes was appropriate and that both categories of charges involved evidence of similar strength. 3RP 363-65. The prosecutor argued the jail call evidence would be cross-admissible in a separate assault trial to help explain why Hartley did not testify. 3RP 366. Moreover, judicial economy favored joint trials. 3RP 365, 368.

The trial court denied the motion to sever, reasoning judicial efficiency favored joinder, evidence supporting each charge was “sufficient,” and the defenses to each charge were “not antagonistic.” 3RP

368-70. The court acknowledged the factor involving cross-admissibility was “not as strong as the other three [factors], but on balance, certainly, the case should not be severed.” 3RP 370-71. The court did not find any evidence was cross-admissible for a specific purpose, instead concluding, “there is some cross-admissibility, but it is not entirely clear.” 3RP 370. Finally, the court concluded any risk of prejudice to Hansen by a joint trial could be mitigated by instructions informing the jury to consider each count separately. 3RP 370.

Hansen’s attorney did not renew the motion to sever during trial. Defense counsel requested, and received, a jury instruction which read as follows:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of telephone calls from the King County Jail. These calls may be considered by you only for the purpose of deciding whether the State has proved the charges of violation of no contact order as contained in Counts II through VIII. You may not consider it for any other purpose, and you may not consider it as to Count I. Any discussion of the evidence during deliberations must be consistent with this limitation.

4RP 865-66, 878-80, 894; CP 78 (instruction 25).

Defense counsel withdrew before sentencing after informing the trial court she believed she made a mistake at trial that could constitute ineffective assistance. 1RP 67. New defense counsel was appointed for sentencing. 1RP 79, 84.

C. ARGUMENT

HANSEN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO RENEW THE MOTION TO SEVER THE CHARGES DURING TRIAL.

Defense counsel was ineffective for failing to renew the severance motion during trial. A renewed severance motion would likely have been granted, and there is a reasonable probability that the outcomes of separate trials on assault and violation of no contact order would have been different.

The federal and Washington constitutions guarantee the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. A defendant is denied the right and is entitled to reversal of his convictions when his attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney's conduct. State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2d 155 (1996) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694.

CrR 4.4 governs severance of counts in a criminal trial. Counts that are properly joined may be severed “to promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). A defendant’s motion to sever “must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require.” CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed up until the close of all the evidence. CrR 4.4(a)(2). Failing to renew an unsuccessful severance motion constitutes a waiver. State v. Henderson, 48 Wn. App. 543, 545, 551, 740 P.2d 329 (1987).

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

In determining whether to sever charges, the trial court considers (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) whether the court instructs the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. State v. Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009).

Where counsel's failure to litigate a motion to sever is the basis of defendant's claim, prejudice is demonstrated by evidence the motion should have been granted and but for counsel's deficient performance the outcome of the proceeding would have been different. Id.

Here, counsel's failure to renew the motion to sever fell below the standard expected for effective representation. As evidenced by the original motion to sever, request for a limiting instruction, and explanation that Hansen desired to testify only regarding the assault charge, trial counsel was well aware of the significant prejudice inherent in the joinder of the charges in one trial.

Hansen was prejudiced by the joinder of the charges. In light of the evidence presented at trial, and after proper application of the four severance factors, the trial court would likely have granted a renewed motion for severance.

First, the strength of the State's evidence as to assault and no contact order violation charges was not equal. Medical records and testimony, photographs, and Hartley's statements to medical and emergency providers supported the assault charge.

The corroborating evidence supporting the alleged no contact order violations was much weaker. No one saw Hansen call Hartley. The person speaking with Hansen did not identify herself as Hartley. Only Zilbauer identified the voices as being those of Hansen and Hartley. Although the calls were placed using Hansen's PIN, jail counselor Hicks acknowledged inmates routinely traded PINs.

The trial court's denial of the motion to sever allowed the jury to infer that Hansen had a criminal disposition. At the very least, trying the assault and no contact order violation charges together necessarily engendered a latent feeling of hostility toward Hansen. See State v. Hernandez, 58 Wn. App. 793, 801, 794 P.2d1327 (1990) ("where the prosecution tries a weak case or cases, together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case[.]"), review denied, 117 Wn.2d 1011 (1991), disapproved on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 99, 812 P.2d 86 (1991). If considered separately, it is reasonably likely that the jury would have acquitted Hansen of

violation of a no contact order based on the relative weakness of the evidence.

The second factor, clarity of defenses, also favored severance. General denial was a defense to all the counts. However, Hansen's defense to the assault also provided there was insufficient evidence that he was the person responsible for causing Hartley's injuries. No one saw Hansen assault Hartley. Hansen was not even in the area when police spoke with Hartley. Hartley, the only direct witness to the alleged assault, did not testify. Moreover, as defense counsel noted during closing argument, the person found asleep downstairs in Hartley's house was never investigated as a suspect in the alleged assault. 4RP 928.

The third factor also supports severance despite instructions informing the jury it must "decide each count separately," and refrain from using the telephone calls as to the assault charge. The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. Bythrow, 114 Wn.2d at 721. In Bythrow, the court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence, different witnesses testified as to the different counts, the jury was properly instructed to consider the counts separately, and the issues and defenses were distinct. Bythrow, 114 Wn.

App. at 723. On that basis, the reviewing court concluded the jury was likely not influenced by evidence of multiple crimes that refusal to sever was not error. Bythrow, 114 Wn. App. at 723.

Unlike in Bythrow, the jury in this case was unlikely to properly compartmentalize the evidence of the different counts. First, Hansen's trial spanned six days, with four days of testimony. Moreover, testimony on the different counts was not presented in sequence, with testimony of various witnesses jumping from incident to incident. Given the length of trial, non-sequential testimony, and multiple charged counts, the jury was likely to infer Hansen had a criminal disposition despite the limiting instruction. See State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) ("A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended."), review denied, 116 Wn.2d 1020 (1991).

The fourth factor also favored severance. The trial court acknowledged cross-admissibility of evidence was the weakest of the four factors and concluded that whether evidence of each crime was cross-admissible was "not entirely clear." 3RP 370. Nonetheless, citing State v. Watkins, 53 Wn. App. 264, 766 P.2d 484 (1989), the trial court denied the motion to sever. 3RP 368-71. Watkins is, however, distinguishable, and the evidence in this case was not cross-admissible.

Watkins was charged with four convenience store robbery counts and one car robbery count. Watkins testified that she committed the four convenience store robberies under duress. Watkins, 53 Wn. App. at 266-67. The trial court denied Watkins motion to sever the car count from the convenience store counts. Watkins, 53 Wn. App. at 268. The trial court determined evidence of each crime was cross-admissible because evidence of the car robbery was relevant to proving lack of mistake in the convenience store robberies, and evidence of the convenience store robberies was relevant to prove identity in the car robbery. Watkins, 53 Wn. App. at 270-71.

The Court of Appeals agreed evidence of the car robbery was relevant to Watkins' intent or the lack of accident in the commission of the convenience store robberies. The Court noted, however, that Watkins' participation in the convenience store robberies was not relevant to determining the identity of the car robber because there was no similarity in the methods of commission of the robberies. Watkins, 53 Wn. App. at 271.

The Court of Appeals concluded the trial court erroneously analyzed whether the evidence was cross-admissible, and in doing so, reached its decision on untenable grounds. Because three eyewitnesses identified Watkins as the robber, however, the Court concluded the error

in failing to sever the counts was harmless. Watkins, 53 Wn. App. at 272-73.

Unlike Watkins, no eyewitness testified Hansen was responsible for causing Hartley's injuries. Moreover, unlike Watkins, the trial court did not find that evidence of either alleged crime was cross-admissible for any specific purpose. 3RP 370. But even assuming evidence of each crime was cross-admissible, this fact alone is not dispositive. Bythrow, 114 Wn.2d at 722

For all the reasons discussed above, trying the charges together necessarily engendered a latent feeling of hostility toward Hansen. And the limiting instruction was insufficient to mitigate the prejudice inherent in trying these counts together. The assault and no contact order violation charges should have been severed to guarantee Hansen a fair trial.

Nothing happened during trial to mitigate the prejudice counsel anticipated when bringing the motion in the first place. Thus, there was no reasonable trial strategy that would lead counsel to abandon the motion to sever offenses. Counsel simply neglected to renew the motion as required by the rules. State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. Sutherby, 165 Wn.2d at 887.

For the reasons discussed above, defense counsel's failure to renew the motion to sever was prejudicial. Hansen's constitutional right to effective assistance counsel was violated.

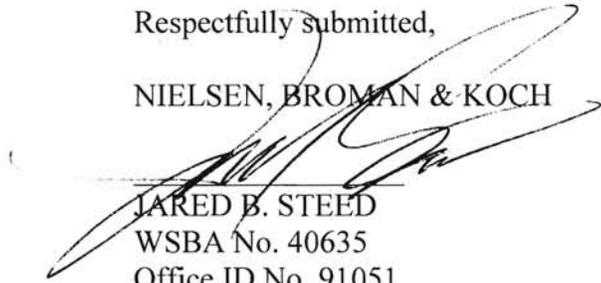
D. CONCLUSION

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

DATED this 13<sup>th</sup> day of November, 2014

Respectfully submitted,

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

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STATE OF WASHINGTON/DSHS	)	
	)	
Respondent,	)	
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v.	)	COA NO. 71215-2-1
	)	
BRANDON HANSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 13<sup>TH</sup> DAY OF NOVEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRANDON HANSON  
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LARCH CORRECTIONS CENTER  
15314 NE DOLE VALLEY ROAD  
YACOLT, WA 98675

**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2014.

X Patrick Mayovsky