

NO. 33999-4-II

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

STATE OF WASHINGTON, Respondent, v. JOSEPH ALBERT FULLER, Appellant.
FROM THE SUPERIOR COURT FOR CLARK COUNTY THE HONORABLE DIANE M. WOOLARD CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-00837-7
BRIEF OF RESPONDENT

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I. **STATEMENT OF FACTS**

The State accepts the Statement of Facts as set forth by the defendant in his appellant's brief. Where additional information is necessary, it will be supplied in the argument section of this response.

II. **RESPONSE TO ASSIGNMENT OF ERROR NO. 1**

The first assignment of error raised by the defendant is a claim that Counts 1 and 2 of the Information should have been severed for purposes of trial. Count 1 dealt with a meeting with the police officers on or about October 27, 2004. Count 2 dealt with the arrest and search of the defendant's vehicle which occurred on or about April 4, 2005. The defendant was convicted at trial of both counts and concerning Count 2 which was the crime of Possession with Intent to Deliver, there was a special finding that it was done within 1,000 feet of a school.

A trial court may join offenses under CrR 4.3(a)(2) where the offenses are based on a series of acts connected together or

constituting parts of a single scheme or plan. State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747 (1994). This rule is construed expansively to promote the public policy of conserving judicial and prosecutorial resources.. State v. Hentz, 32 Wn.App. 186, 189, 647 P.2d 39 (1982). The underlying principle behind this rule insures that the defendant receives a fair trial untainted by undue prejudice. State v. Bryant, 89 Wn.App. 857, 865, 950 P.2d 1004 (1998). In deciding whether joinder was proper as a matter of law, the appellate court must determine whether the defendant suffered actual prejudice. The defendant seeking severance has the burden of demonstrating that a trial involving both 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).

The normal rule is that the appellate court reviews a trial court's refusal to sever charges for an abuse of discretion. Bythrow, 114 Wn.2d at 717. In making this determination, the appellate court considers the following "prejudice – mitigating factors":

1. The strength of the State's evidence on each count.

2. The clarity of the defenses as to each count;
3. Whether the trial court properly instructed the jury to consider the evidence of each crime; and
4. The admissibility of evidence of the other crimes.

State v. Hernandez, 58 Wn.App. 793, 798, 794 P.2d 1327 (1990); State v. Watkins, 53 Wn.App. 264, 269, 766 P.2d 484 (1989).

In our situation, the appellant has framed this issue in terms of “unfair prejudice”. (App. Brief, p. 22). It is difficult to see how he gets to unfair prejudice when we examine the nature of the defense being offered at the time of the trial.

Concerning the first count, which was a delivery to two undercover police officers, the defendant maintained at trial that on that date he was in Yakima with his son playing baseball. (RP 883-884; 904). He consistently maintained to the jury that it was not him and that it was impossible for him to have conducted any type of sale or attempted sale to the undercover officers.

Concerning Count 2, which involved the search of his vehicle at the time of arrest, the defendant acknowledged ownership of some of the methamphetamine found in the visor on

the driver's side (RP 887), but denied that any of the other items were his, other than a large amount of cash that had been secreted elsewhere in the vehicle. He maintained that he was not a drug dealer, and that he was not intending to sell methamphetamine or deal other drugs. (RP 890; 902). He indicated that the cell phone in the car was not his, but had belonged to a former female friend of his (RP 891). He maintained that the scales that were found in his car were not his (RP 893).

Given the nature of the defense, the State submits that it clearly opens up ER 404(b) type information for the jury. The defendant is making a claim of accident, mistake or impossibility. State v. Jeffries, 105 Wn.2d 398, 412, 717 P.2d 722 (1986); State v. Ramirez, 46 Wn.App. 223, 228, 730 P.2d 98 (1986). When we factor in this long standing rule to the factors that we look out for joinder of offenses, we come out with the following conclusions:

1. The strength of the State's evidence on each of the counts is extremely high. The first count is a hand-to-hand delivery of drugs to two undercover police officers. Count 2 is a vehicle seized in his possession that contains contraband and clear evidence of drug being sold. We couple that with the bragging that the defendant did to the undercover officers that he was dealing about \$35,000.00 in methamphetamine a week and that he could provide more drugs for the officers in the future. (RP 284-305; 380-382).

2. The clarity of the defenses on each of the counts is established not only by the testimony of the officers, but by the defendant, himself. Concerning Count 1, he maintains that it is impossible for him to have been there because he was in Yakima and concerning Count 2 he makes claim of some of the drugs found in the car, but the bulk of the materials in the car he denies any ownership or knowledge of.
3. The trial court's instructions to the jury regarding the consideration of each count separately is not really addressed in this briefing but we would anticipate that the standard instructions would have been provided to the jury concerning looking at each of the counts separately.
4. The admissibility of evidence of the other crime deals with the discussion of ER 404(b) if these counts were severed. The State submits that it would clearly be allowable to use the information from each of the counts to demonstrate the lack of mistake, accident or impossibility being raised by the defendant.

The State submits that the defendant has not demonstrated that the joinder of offenses has manifestly prejudiced him and outweighed the concerns for judicial economy that plays so heavily in the case law concerning these matters. There has been no showing that the trial court abused its discretion.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the trial court erred in allowing the police officer,

testifying as an expert, to render an opinion that based on his training and experience the possession of a number of items (large amounts of cash, cell phone, scales, methamphetamine) would demonstrate a possession with intent to deliver.

A trial court's decision to admit opinion testimony is reviewed for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). A police officer's explanation of the significance of drugs evidence is admissible at the trial court's discretion. A police officer may testify as to an expert as to the significance of drug paraphernalia based on his or her training, experience, and observations at the scene. State v. Sanders, 66 Wn.App. 380, 386, 832 P.2d 1326 (1992). Federal cases are in accord with this position. United States v. Dunn, 269 U.S. App. D.C., 373. 846 F.2d. 2d 761, 763 (D.C. Circuit 1988); United States v. Nersesian, 824 F.2d 1294, 1307-1308 (2d Circuit, 1987). In State v. McPherson, 111 Wn.App. 747, 762, 46 P.3d 284 (2002). The Court of Appeals affirmed the conviction holding that a police witness' background and experience goes to the weight of the evidence, not to its admissibility. In Sanders, the police witness had "extensive experience and training in drug enforcement." Sanders, 66 Wn.App. at 386.

Certainly, a witness may not offer a personal opinion as to the defendant's guilt. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). To do so invades the province of the jury as the fact finder. But expert opinion testimony, addressing an ultimate factual issue is admissible if the opinion is relevant and based on inferences from the physical evidence and the expert's experience. ER 704; State v. Baird, 83 Wn.App. 477, 485, 922 P.2d 157 (1996). That an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony improper. "It is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." State v. Wilber, 55 Wn.App. 294, 298, n. 1, 777 P.2d 36 (1989).

Given the police officer's extensive training and experience and the nature and framing of the question by the deputy prosecutor, the State submits that this is not an improper opinion. State v. Strandy, 49 Wn.App. 537, 745 P.2d 43 (1987); City of Seattle v. Heatley, 70 Wn.App. 573, 854 P.2d 658 (1993); State v. Jones, 59 Wn.App. 744, 801 P.2d 263 (1990); State v. Mercer-Drummer, 128 Wn.App. 625, 116 P.3d 454 (2005) .

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant deals with the sentencing of the defendant and provisions of the Judgment and Sentence as they relate to maximum penalties and standard ranges.

The State agrees with the defendant that there should be clarification of the Judgment and Sentence entered by the trial court in this matter. The State does not agree with the defense concerning the other issues raised in the appeal, but does agree that the questions of incarceration and community custody time should be re-examined by the trial court.

V. CONCLUSION

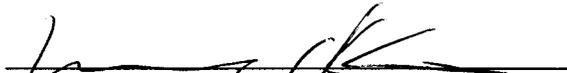
The State submits that there has been an inadequate showing of any improprieties under the first two assignments of error raised by the defendant. The State agrees with the defense that this matter should be remanded to the trial court level for

purposes of sentencing and clarification as to some of the provisions of the Judgment and Sentence.

DATED this 11 day of July, 2006.

Respectfully submitted:

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STATE OF WASHINGTON,
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Clark Co. Cause No. 05-1-00837-7

JOSEPH ALBERT FULLER,
Appellant.

DECLARATION OF TRANSMISSION
BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On July 13, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

DATED this 13th day of July, 2006.

Joseph Albert Fuller DOC #727823 c/o Washington Corrections Center Intensive Management Unit - IMU PO Box 900 Shelton, WA 98584	John A. Hays Attorney at Law 1402 Broadway, Suite 103 Longview, WA 98632
TO: David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	

DOCUMENTS: BRIEF OF RESPONDENT

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

Charles J. Appford

Date: July 13, 2006.

Place: Vancouver, Washington.