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NO. 35145-5-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DONTEZ M. JOHNSON,

Appellant,

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY [Signature]

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Richard A. Strophy, Judge  
Cause Nos. 05-1-02255-1 & 06-1-00326-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in joining the offenses charged under the different cause numbers.
02. In ordering the joinder of offenses charged under different cause numbers, the trial court erred in entering its findings and conclusions 1-4 as fully set forth herein at pages 2-3.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court erred in joining the offenses charged under the different cause numbers where Johnson was prejudiced by the single trial on the joined offenses? [Assignments of Error Nos. 1 and 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Dontez M. Johnson (Johnson) was charged by second amended information filed in Thurston County Superior Court on March 28, 2006, under cause number 05-1-02255-1, with six counts of residential burglary, counts I-V and VII, and one count of attempted residential burglary, count VI, contrary to RCWs 9A.28.020 and

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9A.52.025. [CP 13-14].<sup>1</sup> Johnson was also charged by information filed in Thurston County Superior Court on February 22, 2006, with attempted burglary in the first degree, count I, and assault in the second degree, count II, under cause number 06-1-00326-1, contrary to RCWs 9A.28.020, 9A.36.021(1)(a) or (e), and 9A.52.020. [CP 6 filed under Thurston County cause number 06-1-00326-1].

The trial court ordered the above cause numbers consolidated and joined for trial:

This matter came before the undersigned Judge on June 19, 2006, upon the motion of the Plaintiff, who was represented by David H. Bruneau, Senior Deputy Prosecuting Attorney for Thurston County. The defendant was present and represented by his counsel, Mr. Larry Jefferson. The court having considered the records and pleadings, and cognizant of the factors set forth in State v. Eastabrook,<sup>2</sup> found:

- (1) The State's evidence may be described as strong on each count: there is no "bootstrapping" of a weak count upon other, stronger counts;
- (2) The defenses are clear. If the defendant elects to testify as to the assault count (in cause #06-1-00326-1), and assert self-defense, the prosecutor's cross-examination will be confined to the scope of direct examination;

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<sup>1</sup> All clerk's papers referenced herein refer to those filed under Thurston County cause number 05-1-02255-1 unless otherwise indicated.

<sup>2</sup> 58 Wash. App. 805, 811-812, 795 P.2d 151 (1990).

- (3) The jury will be properly instructed;
- (4) Evidence apparently is cross admissible. Even if it were not, this is not sufficient basis for severance.

For the foregoing reasons, it is hereby

ORDERED that the matter of State v. Dontez Johnson, cause #05-1-02255-1 and 06-1-00326-1 be consolidated for trial and all the counts charged thereunder (sic) be joined for trial.

[CP 65-66].

The court also denied Johnson's motion to suppress evidence under CrR 3.5:

#### I. FINDINGS OF FACT

1. On November 24, 2005, Lacey Police Officer Corey Johnson was detailed to follow-up on a telephone call from one Marcus Johnson, who had inquired of the police if there was a warrant outstanding for his brother, the defendant herein.

2. Johnson telephoned Marcus, and suggested to him that Dontez himself call, which the defendant did. Dontez Johnson agreed to meet the police officer at the parking lot of the Target Store in Lacey. Apparently, the defendant was calling from Tacoma, and said that he "...wanted to clear his name."

3. The defendant arrived at the appointed time and place. He was driven

there by a friend. Officer Johnson asked if the defendant would agree to follow him to the police station and make a tape-recorded statement. The defendant agreed to do so, and he followed the officer to the police department.

4. At this time, the defendant's state of mind appeared to be that he would give a brief statement and he would return home. Officer Johnson believed that the defendant may have information about a burglary that occurred in Lacey on November 21, but was unaware of whether he was merely a witness or a suspect.

5. The defendant entered the police department and the interview took place in a conference room – at a long table with several chairs. The defendant was not handcuffed nor was he advised of his rights.

6. During the initial informal discussion the defendant was asked if he participated in a burglary on November 21<sup>st</sup>, which he denied. Lt. Mack, procured for Johnson the “burglary book” – a compilation of police reports of unsolved burglaries in Lacey – and the officer and the defendant went through various burglaries to determine which, if any, the defendant had information about.

7. Officer Johnson formulated an opinion that the defendant may be involved in or have information about six burglaries that were unresolved. The defendant gave names of various perpetrators and consigned himself the role of “lookout and getaway car driver” in these events.

8. Officer Johnson was not intending to arrest the defendant. In fact, the officer's intentions were to allow the defendant to go his own way and assist in locating other suspects.

9. After the initial interview, at 12:20 p.m. a tape recorded interview was begun (and lasted 38 minutes). The defendant was advised of his Miranda rights and waived them on tape (exhibit 1 at hearing). Thereafter, the defendant discussed his participation in various burglaries and an attempted burglary.

10. At the conclusion of this interview – when Officer Johnson discussed with Lt. Mack the option of having the defendant assist the police in locating other suspects – Lt. Mack decided to have the defendant taken into custody. The defendant was placed under arrest.

## II. THE DISPUTED FACTS

Whether the defendant was “in-custody” – triggering the necessity of Miranda warnings – when he accompanied (followed) Officer Corey Johnson to the police station and was interviewed there.

## III. CONCLUSIONS AS TO DISPUTED FACTS AND REASONS FOR ADMISSIBILITY

1. The contact between the defendant and the police on November 24, 2005, was initiated by the defendant. He voluntarily met with Officer Johnson and voluntarily followed him to the police station.

2. No promises were made by the police in order to gain statements from the defendant. The circumstances of the interview were in all respects informal, and the police simply were gaining information about the bases of the defendant's knowledge.

3. At no time did the defendant ask to end the interview, nor did he ever ask for an attorney during any contacts with the police on November 24<sup>th</sup>.

4. Given the circumstances surrounding the interview, would a reasonable person feel that he or she was not at liberty to end the interview and leave?  
No.

5. The totality of the circumstances of this interrogation lead to the conclusion that this defendant believed he was free to leave and/or end the interview. The defendant believed he would be leaving (after the interview) and it was reasonable that he would think so.

6. The statements made by the defendant at the police station were not "custodial", and did not require the giving of Miranda warnings. Given the totality of the circumstances, there was no reason for Officer Johnson to give Miranda warning before the interview.

For all the foregoing reasons, the statements made by the defendant prior to – and after the giving of Miranda warnings – are admissible at the trial.

Based upon the foregoing, it  
is hereby:

ORDERED that the motion  
to suppress statements is denied.

[CP 117-119].

Trial to a jury commenced on July 10, 2006, the Honorable  
Richard A. Strophy presiding.

The jury returned verdicts of guilty as charged on all counts except  
count V, Johnson was sentenced within his standard range and timely  
notice of this appeal followed. [CP 75-82, 125-135].

02. Substantive Facts: CrR 3.5 Hearing

On November 24, 2005, Officer Cory Johnson was  
assigned “to handle a follow-up phone detail(,)” in which he returned a  
telephone call to Marcus Johnson, who had called the police asking if his  
brother, Dontez Johnson, was wanted or was a suspect for a burglary in  
the City of Lacy. [RP 07/10/06 7-8]. Officer Johnson told Marcus to have  
Dontez call him. [RP 07/10/06 11]. Minutes later, Dontez called Officer  
Johnson and said that he wanted to clear his name. [RP 07/10/06 12]. The  
two agreed to meet in the parking lot of a local retail store within the hour.  
[RP 07/10/06 13, 16].

Dontez arrived at the designated location in a vehicle driven by  
another person. [RP 07/10/06 19-20, 39]. Officer Johnson asked him if

he'd be willing to follow him "to the police department and do a taped statement rather than a written one." [RP 07/10/06 21]. Dontez agreed and followed the officer to the police department in the vehicle in which he had arrived at the parking lot. [RP 07/10/06 23].

At the police department, Officer Johnson, along with Lieutenant Mack, interviewed Dontez in the chief's conference room. [RP 07/10/06 28]. Officer Johnson explained to Dontez that there had been an attempted burglary in Lacey on November 21<sup>st</sup> and that his girlfriend had told the police he was involved. [RP 07/10/06 29]. Dontez admitted his involvement in the attempted burglary and several other burglaries while viewing the officer's "burglary book" of unsolved offenses. [RP 07/10/06 30-34]. After Dontez gave a recorded statement, the decision was made to arrest him. [RP 07/10/06 35, 53].

Dontez testified that the police told him that if he made a taped statement and was cooperative he would be able to go home. [RP 07/10/06 70]. During cross-examination, he admitted that during the entire time of his contact with the police he believed he was going to go home because of the way he was treated by the police. [RP 07/10/06 76]. No threats were ever made. [RP 07/10/06 77]. And because of his prior contacts with the police, he was aware that anything he said could be used

against him, that he had the right to remain silent and that he could stop answering questions at any time. [RP 07/10/06 77-79].

In rebuttal, Officer Johnson and Mack each denied ever telling Dontez that he would be allowed to go home if he gave a taped statement. [RP 07/10/06 80-81].

03. Substantive Facts: Trial<sup>3</sup>

03.1 Count I: Residential Burglary/September 20, 2005, residence of Hattie England

Hattie England came home after work on September 20, 2005, to discover that her residence had been burglarized. [RP 07/10/06 109-114; RP 07/11/06 138-39].

03.2 Count II: Residential Burglary/September 27, 2005, residence of Jonathan Hart

Jonathan Hart came home on September 27, 2005, to discover that his residence had been burglarized. [RP 07/10/06 118-124; RP 07/11/06 143-44].

03.3 Count III: Residential Burglary/October 18, 2005, residence of James Thompson

James Thompson came home after work on October 18, 2005, to discover that his residence had been burglarized. [RP 07/11/06 151-56; RP 07/11/06 171-75].

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<sup>3</sup> The facts do not address count V, for which Johnson was found not guilty. [CP 79].

03.4 Count IV: Residential Burglary/November 14, 2005, residence of Leslie Louise Weight

Leslie Louise Weight came home after work on October November 14, 2005, to discover that her residence had been burglarized. [RP 07/11/06 177-183]; RP 07/12/06 258-261].

03.5 Count VI: Attempted Residential Burglary/November 21, 2005, residence of Renae Gideon

On November 21, 2005, Renae Gideon was asleep in her residence when she heard the doorbell ringing around 8:00 in the morning. [RP 07/11/06 186-87]. She went to the door and looked through the peep hole and saw a young man she did not recognize. [RP 07/11/06 189-190]. She never opened the door and the man soon left in a car driven by another person. [RP 07/11/06 192-93]. “(A) minute to two minutes later” the man returned and “the doorbell and knocking began again.” [RP 07/11/06 195]. The man then went to the side of the house and Gideon began to panic when she heard him remove a window screen. [RP 07/11/06 196]. She also heard the man “feel if the window could open....” [RP 07/11/06 197]. After she called the police, “he was gone so (she) didn’t actually see him leave.” [RP 07/11/06 198]. A screen had been removed from “one of the side windows to the house.” [RP 07/11/06 203].

On the same day, Tangelette Johnson, Dontez's ex-girlfriend, dropped off Dontez in a neighborhood knowing he was "casing a house." [RP 07/12/06 367-371]. She eventually left and was stopped by the police and interviewed by Detective Sharon Barnes. [RP 07/12/06 371-72]. Tangelette told Barnes that she knew Dontez was going to the neighborhood to commit a burglary. [RP 07/12/06 373].

Tangelette acknowledged that she was given immunity from prosecution in exchange for her testimony. [RP 07/12/06 385].

03.6 Count VII: Residential Burglary/October 15, 2005, residence of Ingrid Hall

Ingrid Hall came home on October 15, 2005 to discover that her residence had been burglarized. [RP 07/11/06 158-165; RP 07/12/06 243-252]. The window that was the point of entry was still open. [RP 07/12/06 243]. Latent fingerprints lifted from the edge of the window frame were identified as Dontez's fingerprints. [RP 07/12/06 248-49; RP 07/13/06 443-44, 451].

03.7 Count VIII: Attempted Burglary in the First Degree/February 20, 2006

On February 20, 2006, Sharon Morrow discovered that someone had attempted to burglarize her apartment. [RP 07/12/06 334-35]. The screen on her son's window had been removed and the window behind her couch was broken and there was glass everywhere.

[RP 07/12/06 335-36, 393-399]. Morrow stated that Tangelette Johnson and Dontez had previously lived near her but had moved before the prior Thanksgiving. [RP 07/12/06 336-37]. Dontez had left some personal items at Morrow's apartment when he was there last but had failed to come back to pick them up. [RP 07/12/06 339-40].

When interviewed by the police, Dontez admitted to going to Morrow's apartment, explaining that he had done so in an effort to recover some clothes he had left there. [RP 07/12/06 410]. He also admitted to removing the window screen and to breaking the window with a screwdriver. [RP 07/12/06 411].

03.8 Count IX: Assault in the Second Degree/  
February 20, 2006

On February 20, 2006, Marguerite Thompson, the manager of a local apartment complex, received a complaint about a disturbance in one of the units and sent Jack Katzenberger, her maintenance supervisor, to check out the complaint. [RP 07/12/06 326-327, 345]. When he returned approximately 10 minutes later, he was hunched over and told her to call 911. [RP 07/12/06 328].

When Katzenberger arrived at the unit, he saw a person putting what he thought was a screwdriver "between the windows and prying on the window." [RP 07/12/06 346]. When he confronted the person, he

“was hit very hard on the right side of the face.” [RP 07/12/06 348].

“(H)e hit me.” [RP 07/12/06 348]. “The next thing I recall is waking up on my back on the ground.” [RP 07/12/06 348]. Katzenberger identified Dontez as his assailant. [RP 07/12/06 350, 356].

According to Dontez, when Katzenberger yelled at him, he attempted to walk away when Katzenberger grabbed him before he shoved him to the ground and left the scene. [RP 07/12/06 412].

03.9 Officer Corey Johnson’s Testimony re Counts I-IV and VI

Officer Corey Johnson testified consistent with his CrR 3.5 testimony [RP 07/13 455-462], specifically noting that Dontez implicated himself as the “get-away driver” in counts I-IV and as the person at the scene in count VI. [RP 07/13/06 469-75]. The tape of the officer’s interview with Dontez on November 24, 2005, was played to the jury. [RP 07/13/06 482; State’s Exhibits 16A and 16B].

Johnson rested without presenting evidence. [RP 07/13/06 504].

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D. ARGUMENT

THE TRIAL COURT ERRED IN JOINING  
THE OFFENSES CHARGED UNDER THE  
DIFFERENT CAUSE NUMBERS  
BECAUSE JOHNSON WAS PREJUDICED  
BY THE SINGLE TRIAL ON THE JOINED  
OFFENSES.

Joinder of offenses that are of the same or similar character is permissible under CrR 4.3(a). Although joinder is authorized under this rule, joinder may not be used to prejudice the defendant. State v. Harris, 36 Wn. App. 746, 749, 677 P.2d 202 (1984). The joinder of two or more offenses under CrR 4.3(a) for prosecution in a single trial is reviewed to determine if the defendant was actually prejudiced by a single trial on the joined offenses. State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004, petition for review denied, 137 Wn.2d 1017 (1998). As explained by our Supreme Court, “[p]rejudice may result from joinder ... if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition.” State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

When determining whether a defendant has been prejudiced by the joinder of two or more offenses for trial, the following factors are considered: (1) the strength of the State’s evidence on each count, (2) the clarity of the defenses (whether the defenses to each charge are the same),

(3) the court's instructions to the jury as to the limited purpose for which it may consider the evidence of each count, and (4) the admissibility of evidence of the other crimes if each charge were tried separately (the cross-admissibility of the evidence). State v. York, 50 Wn. App. 446, 451, 749 P.2d 683, review denied, 110 Wn.2d 1009 (1988).

Johnson was prejudiced by joinder in various ways, including the embarrassment or confusion resulting from the various joined charges, the jury using evidence of one of the joined charges to infer a criminal disposition, the risk the jury cumulated evidence to find guilt where it would not if the joined offenses were charged separately, and the hostility generated against Johnson by charging several crimes rather than one. See State v. Harris, 36 Wn. App. at 750.

The jury may have used evidence of the burglary offenses under Thurston County cause number 05-1-02255-1 to find guilt on the attempted burglary and assault offenses under Thurston County cause number 06-1-00326-1, as the risk of cumulating evidence on multiple counts is greater when the case is weaker. Under the 05 cause number, Johnson was charged with six counts of burglary and one count of attempted burglary, but the jury returned a verdict of not guilty on one of the counts of burglary. By permitting the joinder of the attempted burglary and assault charges under the 06 cause number, the invitation to

the jury to cumulate evidence is clear, with the result that the jury's verdict demonstrates that it inferred guilt on the latter charges, where there was no confession, from the joined counts under the 05 cause number, or perhaps vice versa. Given that Johnson's defense to charges under the 05 cause number amounted to a general denial, as contrasted to his self-defense relating to the assault charge under the 06 cause number, the joinder resulted in forcing Johnson to present separate defenses to the same jury. Clearly, the evidence of Johnson's involvement in the numerous burglary offenses under the 05 cause number caused the jury to infer criminal disposition on the part of Johnson and thus more likely to reject his self-defense claim relating to the joined assault charge. And judicial economy was not served because the primary witnesses in the two cause numbers had nothing in common.

In this context, the prejudice relating to the joined 06 charges accruing from the number of burglary offenses under the 05 cause number could not have been ameliorated by the instruction to the jury that it was to consider each count separately [CP 88]. And it is on this point that the prejudice to Johnson cuts the deepest. The joining of the charges carried a greater potential for prejudice, thereby causing interference with the jury's duty to make relevant credibility determinations, and, in the process, precluding it from making a fair determination of Johnson's guilt or

innocence. In the end, as in many cases, this case essentially turned on the answer to whom the jury was to believe, and the likelihood that the effect of the joinder of the offenses having a practical and identifiable consequence on the jury's determination of this issue is substantial, particularly since the charges under the joined cause numbers were factually independent: evidence that Johnson allegedly assaulted another under the 06 cause number was of no consequence to the proof of any of the essential elements of the burglaries under the 05 cause number.

The prejudice resulting from the joinder of the offenses under the two cause numbers denied Johnson his right to a fair and impartial jury trial, with a result that his convictions should be reversed and dismissed

E. CONCLUSION

Based on the above, Johnson respectfully requests this court to reverse and dismiss his convictions consistent with the arguments presented herein.

Dated this 25<sup>th</sup> day of January 2007.

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CERTIFICATE

We certify that we mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 25<sup>th</sup> day of January 2007.

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