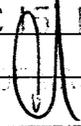


NO. 37411-1

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN L. PARHAM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 07-1-01513-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly admit defendant's prior crimes of dishonesty where there is no issue that the convictions were for crimes of dishonesty, the defendant testified, and the court gave a proper limiting instruction?
2. Did the trial court properly deny defendant's request to instruct the jury pursuant to WPIC 6.31 (Defendant's Failure to Testify) where defendant testified at trial?
3. Did the trial court properly exercise its discretion in denying defendant's motion to sever the bail jumping charges from the burglary and theft charges where the bail jumping charges arose from this incident?

B. STATEMENT OF THE CASE.

1. Procedure

JUSTIN LEVI PARHAM, hereinafter referred to as defendant, was charged by Information in Pierce County Superior Court, cause number 97-1-01513-4 with one count of Residential Burglary. CP 1.

On October 25, 2007, the State filed an amended information charging defendant with Residential Burglary, First Degree Theft, and two

counts of Bail Jumping, contrary to RCW 9A.52.025, 9A.56.020(1)(a)/030(1)(a), and RCW 9A.76.170(1). CP 3-4.

On January 16, 2008, the matter came before the Honorable Lisa Worswick for jury trial. RP 3.

A 3.5 hearing was held and the court ruled defendant's statements were admissible. RP 104, CP 112-114.

Defendant moved to sever the burglary and theft charges from the bail jumping charges. RP 36. Defendant reasoned that because he had to take the stand to explain his absence that gave rise to the bail jumping charge and that whether "we place the defendant on the stand for the purposes of the other counts is still a tactical decision that's evolving based on what the rest of the testimony is." RP 36-37. The defense was worried that by defendant taking the stand, he would open up the use of ER 609 convictions – possession of stolen property and fictitious or altered driver's license. RP 37. The defense also feared that the jury would use the bail jump charges against him on the other counts. RP 38. Defense noted, "with all candor, we may be putting him on the stand for the other part of the case, for the first part, . . . for the Residential Burglary . . .but that is going to depend on how the evidence unfolds." RP 38. The court denied the motion for severance. RP 39.

Defense renewed the motion to sever counts I and II from counts III and IV, arguing that the defendant would choose not to take the stand as to Counts I and II, but would with respect to Counts III and IV. RP 327.

The parties agreed that possession of stolen property in the second degree is a crime of dishonesty and the court, over defense objection, found that possession of a fictitious or altered driver's license was also a crime of dishonesty admissible under ER 609. RP 326-27.

The court denied the motion to sever, but ruled that cross-examination would be limited to the topics covered in direct examination. RP 327-29.

Defendant took the stand in his own defense. RP 331. In direct examination defense counsel elicited testimony from his client regarding his prior ER 609 convictions. RP 333.

The jury convicted on all counts. CP 108-111.

On February 28, 2008, the matter came before the court for sentencing. Defendant was sentenced as follows: 60 months on Count I – Residential Burglary, 29 months on Count II – First Degree Theft, 43 months on Counts III and IV – Bail Jumping; each sentence concurrent to the other. CP 118-129.

A timely notice of appeal was filed. CP 178-190.

2. Facts

Jennifer Pererson came home on January 23, 2007, with her son and was preparing to celebrate his 13th birthday. RP 181-82. When they arrived home they found things in disarray. RP 182. She noticed that there was a rack where they stored electronic equipment and a lot of electronics were missing, including an X-Box, and wires were hanging out. The slider door was open. RP 182, 188. Later, Peterson discovered that approximately \$500-700 worth of Sony Play Station (PSP) games were gone, as well as the PSP. RP 196, 201. The wires to her computer were unplugged, and it appeared that they were trying to steal it, but the trip was cut short. RP 197. A \$400 digital camera that was on top of the computer was taken and a \$1,300 plasma television. RP 197-98, 214. Peterson noticed that the brand-new 42-inch plasma screen in her bedroom was gone. RP 183. A bottle of vodka that was in the pantry was on the great room floor. RP 187. Peterson immediately called 911 and sat at her kitchen table, scared, waiting for the police to arrive and crying because her son's birthday was ruined. RP 183, 184.

Deputy Simmelink-Lovel responded to the burglary call at 12627 116th Court East, Puyallup. RP 121 When Deputy Simmelink-Lovel entered the home she observed that electronic equipment had been pulled out of the living room and found the upstairs to be in disarray, as if

someone had rifled through it. RP 124-25. There was a large gouge in the wall where it appeared someone had run a large screen TV that was one of the items missing. RP 125.

Ms. Peterson believed the point of entry was a ground floor window located at the back of the fenced in home. RP 185, Pl. 20-22. She noticed the screen of the window was removed and the window was open, as well as a sliding kitchen door was left open. RP 185.

Forensic investigator Loree Barnett documented the crime scene. RP 135. Barnett was able to lift a usable partial palm and fingerprint from the outside/exterior window to the victim's home where the victim believed the suspect had entered. RP 146, 185. The print appeared to be made in an upward motion because there were streak going up and then stopping at the end, indicating that the window was pushed up. RP 147, Pl. Ex. 20. Barnett compared the print of defendant to the print taken and an analysis confirmed that the lifted print was a match to defendant's print. RP 151, 316.

Pierce County Sheriff's Detective Lindt contacted defendant on January 26, 2007, several days after the burglary. RP 231, 232. The detective had gone to defendant's residence and left a business card with defendant's older brother, asking defendant to call her. RP 231. Defendant called her later and left a message saying that he would try to

call her again. RP 231. Eventually the two spoke on the phone and she advised defendant that she was investigating a case and she needed to speak with him. RP 231. Defendant agreed to come to the precinct and speak with her. RP 231.

Detective Lindt explained to defendant that he was possibly a suspect in a burglary case and advised him of his Miranda warnings. RP 232. Defendant revealed that he was currently unemployed, and resided with his brothers. RP 233. Detective Lindt asked him about his activities on the previous Tuesday, the day of the burglary. RP 59. Defendant said he was home all day and that his brothers were all home, off and on that day. RP 232-33. Detective Lindt asked him if he was familiar with the location of 128th and Meridian (where the burglary occurred) and defendant said he was familiar with the Rite Aid in that area, but that he did not have any friends who lived in the area. RP 233-34. This store is near the residence. RP 234.

Detective Lindt confronted defendant with the fact that his fingerprints were found at the scene of the crime and defendant did not have an explanation for why they were there. RP 237. Detective asked defendant about his residence, and defendant said there were things there that he did not want the detective to find. RP 237.

As a result of the investigation, criminal charges were filed in this matter. RP 265, Pl. Ex. 2. Defendant was summonsed to court and on March 21, 2007, conditions of release were set. RP 266-67, Pl. Ex. 3.

The documents bear the defendant's signature. RP 267. A scheduling order was entered, which also bore defendant's signature, with the dates of May 2, 2007, for an omnibus hearing and June 18, 2007, for a trial date. RP 271. Defendant failed to appear for the May 2, 2007, hearing, and a bench warrant was issued. RP 275, ex. 7. Defendant signed for a motion to quash the bench warrant on May 2, 2007. RP 298, D Ex. 50.

The bench warrant was revoked on May 10, 2007. RP 292. A scheduling order was entered for an omnibus hearing on July 25, 2007, and defendant failed to appear on that day as well, and as a result a bench warrant was issued. RP 277-79 (Pl. Ex. 9).

C. ARGUMENT.

1. ER 609 REQUIRES ADMISSION OF A PRIOR CONVICTION FOR CRIMES OF DISHONESTY AND THE TRIAL COURT DID NOT ERROR IN ADMITTING DEFENDANT'S CRIMES OF DISHONESTY WHEN HE TESTIFIED. THE TRIAL COURT ALSO GAVE THE PROPER LIMITING INSTRUCTION.

Under Evidence Rule (ER) 609(a)(2), prior convictions for crimes involving dishonesty are admissible to impeach witness credibility.¹ The

¹ The rule provides: "For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime ... involved dishonesty or false statement, regardless of the punishment." ER 609(a).

trial court's ER 609 rulings are reviewed for abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996).

Defendant does not waive an ER 609 challenge by eliciting the damaging evidence on direct review. *State v. Thang*, 145 Wn.2d 630, 646, 41 P.3d 1159 (2002) (declining to adopt the opposite holding as announced in *Ohler v. United States*, 529 U.S. 753, 120 S.Ct. 1851 (2000)).

“Crimes that are normally considered crimes of dishonesty or false statement include theft, robbery and attempted robbery, possession of stolen property, unlawful issuance of a check, forgery, insurance fraud, intimidation of a witness, and the like.” 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice sec. 609.4 (5th ed. 2007), *citations omitted*.

Defendant does not argue that the trial court erred in ruling that the crimes were crimes of dishonesty. Instead, defendant argues that the trial court erred in admitting the crimes because the nature of the prior crimes and the similarity to the charges he was facing increased the potential for prejudice. *See* Opening Brief of Appellant at 13-14. However, once the prior crimes are determined to be crimes of dishonesty under ER 609, the crimes are per se admissible and there is no balancing of the probative value versus the prejudice. “When a conviction is admissible as a crime of dishonesty or false statement, no discretion is involved and the court may not exclude the conviction under Rule 403.” 5A Karl B. Tegland,

Washington Practice: Evidence Law and Practice sec. 609.4 (5th ed. 2007), *citing, State v. Jones*, 101 Wn.2d 124, 761 P.2d 588 (1988)).

What defendant's actual complaint seems to be is that a limiting instruction was not given advising the jury that it could only consider these convictions for purposes of analyzing his testimony on the bail jumping counts, and not to infer guilt to the remainder of the charges. *See* Opening Brief of Defendant at 14 (complaining that the "fact that the jury was provided the standard ER 609 limiting instruction does not save the convictions for residential burglary and first degree theft").

However, an examination of the language in the standard limiting instruction given in this case shows that the instruction accomplished exactly what defendant argues for on appeal, because it narrowed the scope of this evidence to impeachment only:

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant *and for no other purpose*.

CP 80-97, Instruction No. 6, *emphasis added*. It is presumed that a jury will follow a court's instruction. *See, e.g., State v. Willis*, 67 Wn.2d 681, 686, 409 P.2d 669 (1966); *State v. Cunningham*, 51 Wn.2d 502, 505, 319 P.2d 847 (1958).

Defendant also may not claim an instructional error where defendant failed to propose the version of the instruction he alleges should

have been given on appeal. See *State v. Hoffman*, 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991) (A trial court's failure to give a particular instruction is not error where, as here, the defendant made no request for such an instruction below).

Due to the nondiscretionary nature of ER 609, the court had no choice but to admit the evidence of defendant's prior convictions. Once the evidence was admitted the court properly issued the standard limiting instruction thereby limiting the jury's use of the evidence.

Even if there was any error, this error was harmless. An erroneous evidentiary ruling is not grounds to reverse unless, within reasonable probabilities, it changed the outcome of the trial. *State v. Christopher*, 114 Wn. App. 858, 863, 60 P.3d 677, review denied, 149 Wn.2d 1034 (2003). The defendant's fingerprints were found on the window, which was the point of entry to the home. RP 146-47, 151, 316. The defendant denied that he had any friends in the area, thus there was no non-criminal explanation for his fingerprints being located on the window. The defendant also told detectives there were things in his home that he did not want the detectives to find. RP 237. Given the overwhelming physical evidence in this case, any evidentiary error was harmless.

2. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE PROPOSED INSTRUCTION WPIC 6.31 WHERE DEFENDANT TESTIFIED AT TRIAL.

“Instructions are intended to enable jurors to apply rules of law to the facts of the case.” *City of Seattle v. Richard Bockman Land Corp.*, 8 Wn. App. 214, 217, 505 P.2d 168 (1973). Instructions to the jury are sufficient to satisfy the requirement of a fair trial when, taken as whole, they are readily understood, not misleading to the ordinary mind, and properly inform the jury of the applicable law. *State v. Rehak*, 67 Wn. App. 157, 165, 834 P.2d 651 (1992). The wording of jury instructions is a matter within the trial court’s discretion. *City of Yakima v. Irwin*, 70 Wn. App. 1, 10, 851 P.2d 724 (1993).

The proposed defense instruction read:

The defendant is not compelled to testify, ***and the fact that the defendant has not testified*** cannot be used to infer guilty and should not prejudice him in any way.

CP 67 (Defendant’s Proposed Instruction No. 2; WPIC 6.31) *emphasis added*.

The problem with this instruction is that the defendant *did* testify. This instruction, as drafted, is misleading, not easily understood, and is unhelpful to the trier of fact.

Arguably, the defense could have drafted a more specific instruction, which cautioned that the defendant had no duty to testify, and that the jury could not infer guilt from his failure to testify as to certain subjects in the case. However, the defendant did not propose such an instruction, and the defendant may not claim error. *See State v. Hoffman*, 116 Wn.2d at 111-12, (A trial court's failure to give a particular instruction is not error where, as here, the defendant made no request for such an instruction below). The trial court has no duty to rewrite incorrect or inaccurate statements of the law contained in proposed jury instructions. *State v. Robinson*, 92 Wn.2d 357, 361, 597 P.2d 892 (1979).

There is very little law in Washington discussing this instruction.² *But see People v. Mize*, 100 Cal. App.2d 584, 588, 224 P.2d 452 (1950) (holding there was no error in the court's refusal to give defendant's requested instructions pertaining to defendant's failure to testify where the defendant did testify in his own behalf). Washington has likely never addressed this precise issue because the plain language of the WPIC only pertains to cases where the defendant did not testify. It is stretching the language and logic behind the instruction to proffer the instruction in a

² The State in its research could find only four citing references in Washington courts and none pertain to the issue defendant presents to this court. *State v. Barnes*, 54 Wn. App. 536, 774 P.2d 547 (1989); *State v. Redd*, 51 Wn. App. 597, 754 P.2d 1041 (1988); *State v. King*, 24 Wn. App. 495, 601 P.2d 982 (1979).

case where defendant took the stand and chose to testify as to certain matters, but not others.

Because the proffered instruction would have been misleading to the jury, the trial court properly exercised its discretion in declining to give the instruction. Assuming *arguendo*, there was any error, such error was harmless. See Argument *supra* at 13.

3. THE TRIAL COURT PROPERLY DENIED THE MOTION TO SEVER THE BAIL JUMPING COUNT FROM THE BURGLARY AND THEFT CHARGES.

Washington law disfavors separate trials. *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). A reviewing court reviews a trial court's ruling on a motion to sever for an abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

CrR 4.3(a) allows the State to join offenses in one charging document if the offenses: “(1) Are of the same or similar character, even if not part of a single scheme or plan; or (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.” CrR 4.4(b) allows the trial court to sever joined offenses if doing so “will promote a fair determination of the defendant's guilt or innocence of each offense.” A defendant seeking severance has the

burden to show that joinder is so manifestly prejudicial that it outweighs the interest in judicial economy. *Bythrow*, 114 Wn.2d at 718.

Considerations in whether to grant or deny a severance motion are “the jury's ability to compartmentalize the evidence, the strength of the State's evidence on each count, the issue of cross admissibility of the various counts, [and] whether the judge instructed the jury to decide each count separately”. *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). A court presumes jurors follow the court's limiting instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

In *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998), the court examined for the first time the question of whether bail jumping and an underlying charge (drug conviction) were properly joined.³ The court looked to federal analysis in this area, which found:

It is well established that a charge of bail jumping or escape may be deemed sufficiently “connected” with a substantive offense to permit a single trial, at least where the charges are related in time, the motive for flight was avoidance of prosecution, and appellant's custody stemmed directly from the substantive charges.

³ The issue of severance was waived by failing to raise it at the close of the case. A consideration of proper joinder is different than a consideration of whether the trial court abused its discretion in a severance motion. See, *State v. Bryant*, 89 Wn. App. 857, 865 (noting that the distinction between review of joinder and severance issues may have become blurred). However, the joinder analysis is still helpful for this court's consideration of severance.

Bryant, 89 Wn. App. at 867 (quoting, *United States v. Ritch*, 583 F.2d 1179, 1181 (1st Cir.1978) (construing Fed. R. Crim.P.8, the federal equivalent to CrR 4.3(a)(2)).

The Washington court concluded that “slavish adherence” to the federal test was not appropriate given “Washington’s strong policy in favor of conserving judicial and prosecution resources,” and that joinder was still permissible even where the motive for flight was not avoidance of prosecution. 89 Wn. App. at 867. *See also, State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002) (citing *State v. Bryant*, 89 Wn. App. 857, 866-67, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017, 978 P.2d 1100 (1999)) (“For joinder purposes, a charge of bail jumping is sufficiently connected to the underlying charge if the two offenses are related in time and the bail jumping charge stems directly from the underlying charge.”).

Here, the trial court properly denied the severance motion where the bail jumping charges in this case stemmed directly from the underlying burglary charge, and the bail jumping charges (5/2/07 and 7/25/07) were related in time to the burglary and theft charges (1/23/07). The court also properly instructed the jury that “[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.” CP 87, Court’s Instructions No. 5.

Defendant seems to argue that the approach or defenses for the bail jumping charges were different, and therefore severance was required. See Opening Brief of Appellant at 20 (arguing the “trial court’s failure to sever the counts prejudiced Mr. Parham’s attempts to clearly defend both “sets” of cases, that is, the burglary and theft counts, and the bail jumping counts.”).

Generally, courts consider the possibility of antagonistic defenses when weighing severance motions in the context of co-defendant cases, but even then a court “rarely overturn[s] a trial court’s denial of a motion to sever on the basis of mutually exclusive defenses.” *State v. Johnson*, - Wn. App., - 194 P. P.3d 1009 (2008).

Here, the fact that defendant had a defense as to one charge (5/2/07 – bail jump), but not with respect to the others, does not demand severance of the counts. “A defendant’s desire to testify only as to some, but not all, of the counts is an insufficient reason to require severance.” *State v. Watkins*, 53 Wn. App. 264, 270, 766 P.2d 484 (1989) (citing, *State v. Weddel*, 29 Wn. App. 461, 467, 629 P.2d 912, rev. denied, 96 Wn.2d 1009 (1981)). Severance is warranted only if defendant makes a “convincing showing that [h]e has important testimony to give concerning one count, and a strong need to refrain from testifying about another.” *Id.* See also, *Desire of Accused to Testify on Just One of Multiple Charges as Basis for Severance of Trials*, 32 A.L.R. 6th 385, sec. 2 (2008)(“Severance is not required whenever a defendant wishes to testify about one charge

while remaining silent on the other charge(s) and informs the trial court of these wishes in a timely manner.)”

The court honored defendant’s request to limit cross-examination to only those matters he testified to on direct. RP 327-29. Thus, defendant was not placed in a position of having to testify as to all counts, in order to testify as to one count. Defendant cannot articulate prejudice with respect to the denial of the severance motion. Contrary to defendant’s argument, the jury was not permitted to infer guilt to the remaining charges based on the admission of his ER 609 crime. *See Argument Supra* at 9.

Assuming *arguendo*, there was any error, such error was harmless. *See Argument supra* at 13. The jury was instructed to consider the counts separately, and the evidence was overwhelming. CP 87.

D. CONCLUSION.

In the interest of judicial economy, the trial court properly denied the motion to sever the bail jumping charges from the underlying offenses in this matter. Under ER 609, the trial court was required to admit prior crimes of dishonesty. Furthermore, the trial court did not err in declining

to instruct on any inferences from defendant's failure to testify where defendant did in fact testify at trial. For these reasons, the State asks this court to affirm the convictions and sentence.

DATED: December 12, 2008.

GERALD A. HORNE
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Prosecuting Attorney



MICHELLE LUNA-GREEN
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/15/08 
Date Signature

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STATE OF WASHINGTON
BY _____
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COURT OF APPEALS
DIVISION II