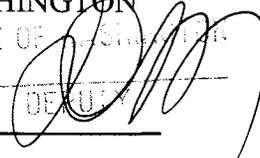


NO. 38179-6-11

COURT OF APPEALS
DIVISION II

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

09 JUN 30 PM 4:15
STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

WESLEY LONG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-00232-2

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED June 30, 2009, Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether any potential error in the trial below was harmless when the evidence regarding the two counts of violation of a court order was overwhelming and uncontested, and when defense counsel at trial even acknowledged this fact in closing when he conceded that the jury should convict long of the two violation of a court order counts?

2. Whether the trial court abused its discretion in allowing Long's wife to testify at trial when Long's wife was the victim of the violation of a court order counts?

3. Whether the trial court abused its discretion in admitting evidence of Long's prior threats when the evidence was admissible under ER 404(b) to show motive and to assist the jury in evaluating the victim's credibility?

4. Whether Long waived any claims regarding the trial court's denial of his motion to sever when he failed to renew the motion at trial as required by CrR 4.4?

5. Whether the trial court erred in imposing consecutive sentences on the gross misdemeanor counts when a court has broad discretion to order that a sentence for a misdemeanor conviction be run consecutively to a felony sentence?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Wesley Long was charged by an information filed in Kitsap County Superior Court with burglary in the first degree, two counts of unlawful possession of a firearm in the second degree, two counts of residential burglary, theft in the third degree, and two gross misdemeanor counts of violation of a court order. CP 280. Prior to trial, the court dismissed one of the unlawful possession of a firearm counts. CP 299. At trial, the jury found Long guilty of the two violation of a court order counts, acquitted Long of the remaining unlawful possession of a firearm count and acquitted him of one of the residential burglary counts. CP 317-22. The jury was unable to reach a unanimous decision on the charges of burglary in the first degree, theft in the third degree, and the other residential burglary charge. CP 317-22. Rather than retrying these remaining charges, the parties entered into a plea agreement and Long plead guilty to a charge of possession of stolen property in the second degree. CP 415, 423. The other charges (other than the two violation of a court order charges) were abandoned.¹ At sentencing, the trial court imposed a standard range sentence of 18 months on the possession of

¹ The other charges were dismissed when the State filed a ninth amended information alleging only the possession of stolen property charge and the two counts of violation of a court order. See CP 411-14.

stolen property in the second degree. CP 449. The court also imposed 365 days on each of the gross misdemeanor charges of violation of a court order, and the court ordered that these two counts be run concurrently with each other but consecutively to the felony PSP count. CP 449. Thus, the court imposed a total of 30 months of confinement (18 months of which came from the felony PSP charge and 12 months of which came from the two gross misdemeanor violation of a court order charges). CP 449. This appeal followed.

B. FACTS

Although Long was charged and tried for multiple felony charges, the only charges that resulted in guilty verdicts below were the two gross misdemeanor counts of violation of a court order.

The uncontested evidence regarding these counts was that a court order was entered prohibiting Long from contacting Christina Long, and a copy of the order was admitted without objection as Exhibit 82. RP 331-32, Exhibit 82. Thurston County Sheriff's Deputy Thomas Cole served Long with a copy of the no contact order on December 26, 2006. RP 330-31.

On January 30th, Long violated the order by calling Christina Long while she was at work, and Ms. Long told Long not to call her. RP 996-97. Long, however, continued calling Ms. Long and placed numerous calls to her work number, her cell phone, and her home number. RP 998-99. Long also

left multiple messages on her home phone and her cell phone. RP 999-1002. Phone records corroborating Ms. Long's testimony were also admitted at trial. See Exhibits, 77 and 78, RP 998-99. In addition, an employee from QWEST communications testified that the records regarding Mr. Long's cell phone indicated that nineteen calls were made from Long's cell phone to Ms. Long's work, home or cell phone on January 30, 2007. RP 1122-23, Ex 78.

With respect to the second count of violation of a court order, the evidence at trial was that in February, Ms. Long received several letters from Mr. Long in violation of the no contact order. RP 1022-24. Ex 88, 94. These letters had been sent to Ms. Long's home address. RP 1026. Ms. Long explained that she was familiar with her husband's handwriting, as she had received many letters from Long over the course of their marriage. RP 1022. Ms. Long recognized the handwriting in the February letters as the handwriting of Long. RP 1022-24.

The testimony and the exhibits regarding the violations was not contradicted by Long, nor was there any cross examination of Ms. Long challenging her testimony regarding the phone calls or letters. Furthermore, in closing argument Long's counsel stated,

Count 6 is Violation of a Court Order on January 30, 2007. You've heard testimony that Mr. Long made repeated calls to his wife on the day that she -- that he got out of jail, and you've heard no testimony to the contrary. You should find him guilty of that charge.

RP 1466. Later, with respect to Count VIII, Long's counsel stated,

Then Count 8 is Violation of a Court Order. These are two letters that Mr. Long wrote to his wife from Utah. You've got partial copies of those. That evidence is not contradicted, and you should find Mr. Long guilty of Count 8.

RP 1469.

III. ARGUMENT

- A. ANY POTENTIAL ERROR IN THE TRIAL BELOW WAS HARMLESS BECAUSE THE EVIDENCE REGARDING THE TWO COUNTS OF VIOLATION OF A COURT ORDER WAS OVERWHELMING AND UNCONTESTED, AND DEFENSE COUNSEL AT TRIAL EVEN ACKNOWLEDGED THIS FACT IN CLOSING WHEN HE CONCEDED THAT THE JURY SHOULD CONVICT LONG OF THE TWO VIOLATION OF A COURT ORDER COUNTS.**

Long argues that he is entitled to a new trial because the trial court erred in admitting certain evidence and in denying Long's motion to sever certain counts. These claims, however, are without merit because even if this court were to assume that the trial court erred, any error would have been harmless since the evidence regarding the two counts of violation of a court order was overwhelming and uncontested. Any potential error, therefore, was harmless.

As mentioned above, Long entered a guilty plea to the charge of possession of stolen property in the second degree. Long, therefore, does not challenge the conviction on appeal. The only counts that Long was found guilty of at trial were the two counts of violation of a court order.

With respect to standards for harmless error, non-constitutional error is harmless unless there is a reasonable probability, in light of the entire record, that the error materially affected the outcome of the trial. *State v. Webb*, 64 Wn. App. 480, 488, 824 P.2d 1257, *review denied*, 119 Wn.2d 1015 (1992). A “reasonable probability” is a probability sufficient to undermine the confidence in the outcome. *State v. Chavez*, 76 Wn. App. 293, 298, 884 P.2d 624 (1994), *review denied*, 126 Wn.2d 1012 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 106 S. Ct. 3375, 87 L. Ed. 2d 401 (1985)).

Constitutional error is harmless when the court is satisfied that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). An appellate court determines whether constitutional error is harmless by employing the “overwhelming untainted evidence.” *Guloy*, 104 Wn.2d at 425-26. Under the “overwhelming untainted evidence” test, a court looks only to the untainted evidence to determine whether the untainted evidence is

so overwhelming that it “necessarily leads to a finding of guilt.” *Guloy*, 104 Wn.2d at 426; *State v. Folkerts*, 43 Wn. App. 67, 73, 715 P.2d 157, review denied, 105 Wn.2d 1020 (1986). Stated another way, when evidence is improperly admitted, the trial court's error is harmless if it is minor in reference to the overall, overwhelming evidence as a whole. *State v. Yates*, 161 Wn.2d 714, 764, 168 P.3d 359 (2007); *State v. Palomo*, 113 Wn.2d 789, 799, 783 P.2d 575 (1989)(If the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, there is no error).

In the present case, Long was charged and convicted in Count VI of violating the no contact order on January 30, 2007. CP 280. In Count VIII, Long was charged and convicted of violating the no contact order on or between February 17th and February 28th, 2007. CP 280.

The uncontested evidence regarding these counts was that Long violated the no contact order on January 30th by placing by numerous calls to Christina Long at her work number, her cell phone number, and her home number. RP 331-32, 996-1002, Ex 82. The physical phone records as well as the testimony of a phone company employee confirmed that the records regarding Mr. Long's cell phone indicated that nineteen calls were made from Long's cell phone to Ms. Longs' work, home or cell phone on January 30, 2007. RP 1122-23, Ex 78.

Similarly, with respect to the second count of violation of a court order, the evidence at trial was that in February, Ms. Long received several letters from Mr. Long in violation of the no contact order. RP 1022-24. Ex 88, 94. Ms. Long was familiar with her husband's handwriting (as she had received many letters from Long over the course of their marriage), and she recognized the handwriting in the February letters as the handwriting of Long. RP 1022-24.

The testimony and the exhibits regarding the violations was not contradicted by Long, nor was there any cross examination of Ms. Long challenging her testimony regarding the phone calls or letters. In the defense closing, Long's counsel addressed the two violation of a court order counts and noted that the evidence on each was uncontradicted and that the jury should find Long guilty. Specifically, Long's counsel stated,

Count 6 is Violation of a Court Order on January 30, 2007. You've heard testimony that Mr. Long made repeated calls to his wife on the day that she -- that he got out of jail, and you've heard no testimony to the contrary. You should find him guilty of that charge.

RP 1466. Later, with respect to Count VIII, Long's counsel stated,

Then Count 8 is Violation of a Court Order. These are two letters that Mr. Long wrote to his wife from Utah. You've got partial copies of those. That evidence is not contradicted, and you should find Mr. Long guilty of Count 8.

RP 1469.

Given the uncontested evidence regarding the violations, Long has failed to show how any of the alleged errors could have affected the finding of guilt in the present case. Rather, the overwhelming evidence clearly proved that Long was guilty of the two counts of violation of a court order. A fact that Long's counsel even conceded at trial. As Long has not challenged the admissibility of the testimony or exhibits regarding the charged violations themselves,² any error that might have otherwise occurred was harmless.³

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING LONG'S WIFE TO TESTIFY AT TRIAL BECAUSE LONG'S WIFE WAS THE VICTIM OF THE VIOLATION OF A COURT ORDER COUNTS.

Long first claims that the trial court erred in allowing testimony regarding prior threats made by Long to his wife. App.'s Br. at 12. Long's argument appears to be that the Long's wife should not have been allowed to testify because of spousal privilege or spousal incompetence, and that the

² At trial, Long's counsel specifically stated,

“There's no objection to any communications or attempt to communicate by Mr. Long with his wife on January 30 as charged, nor is there any objection to the letters that form the basis of his -- of the Prosecutor's allegation that Mr. Long violated the protection order in February of 2007.”

RP 26.

³ The conclusion that any potential errors were harmless is, of course, further reinforced by the fact that the jury ultimately acquitted or was unable to reach a verdict on all of the felony charges in the present case, thus demonstrating that the admission of the evidence that Long now challenges on appeal obviously did not prevent the jury from evaluating the individual charges and reaching a verdict in Long's favor.

prior threats should have been excluded because they were irrelevant to the burglary counts. These claims are without merit because Long's wife was properly allowed to testify since she was the victim of the two charges before this court (violation of a court order) and because the prior threats were relevant to the charged crimes for which he was convicted.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

RCW 5.60.060(1) states that a spouse shall not be examined for or against his or her spouse without the consent of the spouse nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage. The statute, however, expressly states that this exception shall not apply "to a criminal action or proceeding for a crime committed by one against the other." RCW 5.60.060(1). Washington courts, therefore, have held that the statute did not bar estranged wife from testifying against husband in prosecution for burglary. *State v. Thornton*, 119 Wash. 2d 578, 835 P.2d 216 (1992). Similarly, a wife was allowed to testify against husband in prosecution for arson where wife was in burning house and husband had

previously threatened to kill her. *State v. Moxley*, 6 Wash. App. 153, 491 P.2d 1326 (1971).

In the present case, the only convictions that are at issue are the two violation of a court order convictions where Ms. Long was the victim. Under the plain language of the statute, Ms. Long was properly allowed to testify since those charges involved “a crime committed by one [spouse] against the other.” RCW 5.60.060(1). Long’s claim of error, therefore, is without merit.

While the analysis of whether Ms. Long could properly testify regarding a crime against a different victim might be different (such as the burglary of the home of Ms. Long’s parents), that issue is not before the Court in this case. Long’s argument on appeal appears to be that the threats were unrelated to the burglary charges, yet Long seemingly concedes that the threats “have a connection to the charges of violation of a court order.” App.’s Br. at 19. Since the only convictions before this Court are the two violation of a court order convictions, Long’s argument that the prior threats had no connection to the burglary counts is irrelevant to the present appeal. For all of these reasons, Long’s arguments are without merit.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF LONG'S PRIOR THREATS BECAUSE THE EVIDENCE WAS ADMISSIBLE UNDER ER 404(B) TO SHOW MOTIVE AND TO ASSIST THE JURY IN EVALUATING THE VICTIM'S CREDIBILITY.

Long next claims that the prior threats should not have been admitted pursuant to ER 404(b). App.'s Br. at 19. This claim is without merit because the trial court properly admitted the evidence of the prior threats for two purposes: to show motive and to assist the jury in evaluating the victim's credibility.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

ER 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. To justify the admission of prior acts under ER 404(b) there must be a showing that the evidence (1) serves a

legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) the probative value outweighs its prejudicial effect. *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003) (citing *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)).

In the present case the trial court admitted the evidence of prior threats for two purposes: to show motive and to assist the jury in evaluating the victim's credibility. *See*, RP 36-37, 55, 909. Both of these reasons are authorized under Washington law. Motive, for instance, is specifically listed in ER 404(b). In addition, admitting evidence to assist the jury in its evaluation of the victim has been authorized as well. *See, e.g., State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008)(Holding that prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a victim because the jury was entitled to evaluate victim's credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim).

The credibility of the victim in the present case was an issue because the victim testified and because the jury had heard that, despite the no contact order, there were occasions when the victim had contact with Long and that on one of these occasions she became pregnant with Long's child. *See*, RP 1026, 1049, 1065-67. Thus, evidence that Long had previously threatened

Ms. Long was relevant to enable the jury to assess the credibility of Ms. Long (and to explain her actions) and to demonstrate Mr. Long's motive in violating the no contact order.⁴ Given these facts, the trial court did not abuse its discretion.

In addition, even if there had been error, any error would be harmless given the uncontested evidence regarding the two counts of violation of a court order, as outlined above.

D. LONG WAIVED ANY CLAIMS REGARDING THE TRIAL COURT'S DENIAL OF HIS MOTION TO SEVER WHEN HE FAILED TO RENEW THE MOTION AT TRIAL AS REQUIRED BY CRR 4.4.

Long next claims that the trial court erred in denying Long's motion to sever some of the counts. App.'s Br at 25. This claim is without merit because Long waived any argument regarding severance by failing to renew the motion to sever at trial as required by CrR 4.4.

"Separate trials are not favored in this State." *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994); *State v. Campbell*, 78 Wn. App. 813, 819, 901 P.2d 1050 (1995). Severance of trials is also discretionary with the trial court. A trial court's decision on a motion for severance under CrR

⁴ The trial court also gave a limiting instruction that instructed the jury that Ms. Long's testimony regarding the threats was offered solely to explain her actions and the Defendant's motives. RP 909.

4.4(c)(2) is reviewed for a manifest abuse of discretion. *State v. Wood*, 94 Wn. App. 636, 641, 972 P.2d 552 (1999).

CrR 4.4(a) requires the defendant to make a pretrial motion to sever and, if overruled, to renew the motion before or at the close of all the evidence. The rule specifically states that “Severance is waived by failure to renew the motion.” CrR 4.4(a). Washington courts, therefore, have held that if a defendant fails to renew the motion, then the issue of severance is waived by the clear language of the rule. *See, State v. Bryant*, 89 Wn. App. 857, 864-65, 950 P.2d 1004 (1998)(holding that although trial court denied defendant’s pre-trial motion to sever the offenses, the defendant waived the issue of severance and cannot raise it on appeal because he failed to renew the motion to sever before the close of trial); *State v. Hartnell*, 15 Wn. App. 410, 413-14, 550 P.2d 63 (1976)(holding that motion to sever must be deemed waived by virtue of CrR 4.4 when defendant did not renew the motion at the close of all the evidence); *State v. Ben-Neth*, 34 Wn. App. 600, 606, 663 P.2d 156 (1983); *State v. Henderson*, 48 Wn. App. 543, 551, 740 P.2d 329 (1987).

In the present case Long filed a motion to sever certain counts several months before trial,⁵ but Long has not cited any portion of the record indicating that the motion to sever was ever renewed. The State is unaware

⁵ *See*, CP 45, RP (6/16/07) 24-31.

of any evidence that the motion to sever was ever renewed, and the record shows no such motion at either the close of the State's case or at the close of the defense case. Long, therefore, waived the severance issue by failing to renew the motion to sever.

Furthermore, even if he had renewed to motion to sever, Long would be unable to show that the denial of the severance motion would have prejudiced him. As the jury either acquitted or was unable to reach a unanimous decision on the other charges, Long cannot demonstrate how a unitary trial prejudiced him with respect to the violation of a court order charges. In addition, as outlined above, even if Long could demonstrate error, any error was harmless given the uncontested and overwhelming evidence regarding the charges of violation of a court order.

E. THE TRIAL COURT DID NOT ERR IN IMPOSING CONSECUTIVE SENTENCES ON THE GROSS MISDEMEANOR COUNTS BECAUSE A COURT HAS BROAD DISCRETION TO ORDER THAT A SENTENCE FOR A MISDEMEANOR CONVICTION BE RUN CONSECUTIVELY TO A FELONY SENTENCE.

Long next contends that the trial court erred in running his 12 month sentence on the two gross misdemeanor violation of court order convictions consecutive to the 18 month sentence for the felony possession of stolen property conviction. This argument is without merit because a sentencing

court has broad discretion to run misdemeanors consecutive to felony sentences. *State v. Langford*, 67 Wn. App. 572, 587, 837 P.2d 1037 (1992). The trial court in the present case, therefore, did not abuse its discretion in imposing the misdemeanor counts consecutively.

The Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, governs felony sentencing and states:

Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

RCW 9.94A.589(1)(a). The SRA, however, does not apply to misdemeanor sentencing. *State v. Snedden*, 149 Wn.2d 914, 922, 73 P.3d 995 (2003) (SRA applies only to felonies); RCW 9.94A.010; *State v. Langford*, 67 Wn. App. 572, 587-88, 837 P.2d 1037 (1992). Rather, a trial court has discretion to impose concurrent or consecutive sentences for misdemeanors. *See*, RCW 9.92.080(2) & (3) (allowing discretion to sentence concurrently or consecutively). In addition, the statute specifically gives the trial court the discretion to run misdemeanor sentences consecutively even if the offenses arise from a single act or omission. *See* RCW 9.92.080(2). The statute, therefore, is unambiguous and gives the trial court discretion to impose concurrent or consecutive sentences for misdemeanors.

Given these statutory provisions, Washington courts have specifically held that a trial court has the discretion to run a sentence for a gross misdemeanor consecutive to a felony commitment. *See, State v. Whitney*, 78 Wn. App. 506, 517, 897 P.2d 374 (1995)(trial court had discretion to run sentence on misdemeanor charge of driving while license suspended consecutively to felony sentence for failure to remain at the scene); *State v. Langford*, 67 Wn. App. 572, 587-88, 837 P.2d 1037 (1992)(holding that SRA does not limit the discretion of the judge in ordering that a sentence for a misdemeanor conviction be run consecutively to a felony sentence).

In the present case the court, consistent with RCW 9.92.080(2) and (3), expressly ordered that the sentences for the gross misdemeanor violation of a court order counts be run consecutively to the sentence imposed for the felony count. CP 451. As the trial court was not required to state its reasons for ordering the gross misdemeanor sentences to be run consecutively, any reasons given by the court were superfluous. The trial court, therefore, did not err in exercising consecutive sentencing discretion.

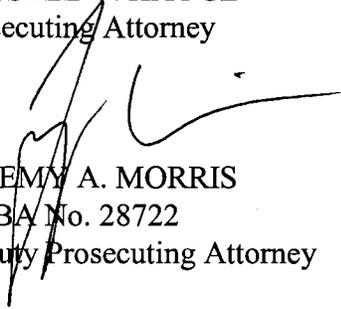
IV. CONCLUSION

For the foregoing reasons, Long's conviction and sentence should be affirmed.

DATED June 30, 2009.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



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DOCUMENT1