

NO. 42376-6-II
Cowlitz Co. Cause NO. 11-1-00433-1

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

STATE OF WASHINGTON,

Respondent,

v.

**DONALD D. MCKNIGHT
AKA: DONALD D. ABDICH,**

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
ERIC H. BENTSON/WSBA #38471
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not err in refusing to sever the charges, McKnight did not suffer ineffective assistance of counsel, and there was sufficient evidence to support McKnight's conviction for making or having burglar tools.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

- A. Did the trial court err in refusing to sever the burglary charges?**
- B. Did McKnight suffer ineffective assistance of counsel?**
- C. Was there sufficient evidence for the jury to find McKnight guilty of making or having burglar tools?**

III. STATEMENT OF THE CASE

On December 30, 2010, at around 7:00 a.m., Jennifer Herrman was awakened in her residence, at 541 21st Avenue in Longview, by the sound of her dog barking. RP at 33-34. Herrman was sleeping in her bed with her three-year-old son. RP at 34. Just prior to this, her boyfriend had left for work in his truck. RP at 95. Herrman got out of bed and saw Donald McKnight in her kitchen going through a drawer. RP at 40, 47. McKnight was wearing a dark heavy jacket, his clothes were bulky, and Herrman estimated his height as being around 5'5" or 5'6". RP at 41-42, 97. Because it was dark and the coat and height were similar to that of

Herrman's boyfriend, she called out her boyfriend's name. RP at 42. McKnight then turned toward Herrman; when he did, Herrman observed that McKnight had a small LED flashlight and was wearing a dark hood and a backpack. RP at 42-43. Herrman then realized that McKnight was not her boyfriend. RP at 43.

Herrman asked McKnight what he was doing in her house. RP at 44. McKnight returned to going through the drawer. RP at 45. Herrman again asked McKnight what he was doing in her house. RP at 45. McKnight then ran yelling at Herrman with a yellow club over his head as if he was going to hit her.¹ RP at 45-46. As McKnight came to where Herrman could see him she recognized his face and said, "I know who you are." RP at 47. McKnight then turned and went back to the drawer. Herrman noticed that McKnight was wearing gloves. RP at 48. Herrman observed that McKnight was white, had a slight growth of facial hair, and looked to be in his early to mid-twenties. RP at 48-49.

Having recognized McKnight, Herrman began asking, "What are you doing in my house?" RP at 50. She also repeated that she knew who he was. RP at 50. McKnight then headed toward a side door with a screen but had trouble opening it. RP at 51. Herrman pursued McKnight and grabbed the handle of his backpack, which she could then tell was full

¹ The yellow club was a device used to keep a steering wheel from moving. RP at 93.

of items. RP at 52. Herrman asked, "What did you take?" RP at 53. McKnight responded by saying, "Nothing." RP at 53. The sound of his voice was consistent of that with a young man's voice. RP at 53. Herrman began ripping at McKnight's backpack, trying to prevent him from stealing from her. RP at 54. McKnight then hit Herrman in the side of her face, knocking her to the ground. RP at 54.

As Herrman came to, she could hear her son crying and screaming. RP at 55. She opened her eyes and saw her son standing by a dog kennel. RP at 55. She also saw that the yellow club was lying on the ground beside her. RP at 55. Herrman grabbed the club, jumped to her feet, and began to hit McKnight with it. RP at 56. McKnight ran past Herrmann's son, knocking him into the wall, ran down the hallway, and out the backdoor. RP at 56. The backdoor to the house was in the laundry room. RP at 57. Once McKnight was outside, he ran through a gate and down an alley. RP at 58. Herrman discontinued the pursuit and went back inside the house to check on her son. RP at 59. A window to the laundry room was open with a lawn chair outside sitting underneath it. RP at 59-60. This window had been closed when Herrman went to bed the night before, and the lawn chair had not been under the window. RP at 60. Officer Ken Hardy of the Longview Police Department responded and

unsuccessfully attempted to retrieve fingerprints from a box in Herrman's drawer, the club, and the window. RP at 101, 105, 107, 115.

Although Herrman recognized McKnight as a person she knew, she could not initially remember his name. RP at 61. She remembered him as a person she would see near duplexes on Cypress Street in the Highlands area of Longview. RP at 61, 67. Approximately five years earlier, Herrman had regularly hung out in this area. RP at 61. Shortly after the burglary, in an attempt to discern McKnight's name, Herrman and her boyfriend drove to the Highlands area to try and find McKnight. RP at 68. As they were driving, Herrman was saying names out loud to trigger her memory. RP at 68. Eventually she remembered that McKnight's first name was "Donny." RP at 69. Her boyfriend asked her if she meant Donny Abdich, and Herrman then remembered McKnight's full name. RP at 69. McKnight goes by the last name "Abdich" as well as "McKnight." RP at 69. Herrman contacted Officer Hardy and told him that McKnight was the person who had broken into her home. RP at 70. She also picked McKnight out of a lineup. RP at 70.

More than two months later, Herrman was at the Cadillac Ranch with her friend and she observed McKnight there as well. RP at 71. McKnight approached Herrman and said, "Jennifer, Jennifer, you know me. I didn't break into your house." RP at 72. Herrman told McKnight

that if he was innocent he should go turn himself in to the police. RP at 74. However, this conversation did not change Herrman's belief that McKnight was the person who had burglarized her house.² RP at 74. At trial, Herrman identified McKnight as the person who burglarized her house and answered unequivocally that he had been that person in her house. RP at 47, 84.

Brad Lowe worked at the Industrial Way Chevron with Ashley Rae. RP at 200. On April 12, 2011, between 9:00 and 10:00 p.m., Rae was working at Chevron. RP at 200. Because she had left a personal item at home, Lowe and his friend, Benjamin Campbell, went to her house to retrieve the item for her. RP at 200. Rae's house was located at 370 15th Avenue in Longview. RP at 201. Rae's house is roughly seven blocks from Herrman's house. RP at 148. McKnight's mother's house was located at 1537 Nichols Boulevard, approximately two or three blocks from Rae's house. RP at 178. McKnight's aunt's house was located at 361½ Oregon Way, just across the alley, two houses down from Rae's house. RP at 185.

When Lowe attempted to unlock the door to Rae's house, it would not open. RP at 202. Lowe struggled with the door for 25-30 seconds.

² McKnight maintains in his brief that Herrman told his investigator that she might have misidentified McKnight, however during cross examination, the defense investigator said that Herrman had told him she was "almost positive" McKnight had been the burglar and simply wanted to confirm her belief with additional evidence. RP at 308-09.

RP at 202. After shoving the door, Lowe was able to open it. RP at 202. When he did, a steak knife that had been lodged in the door jamb fell to the floor. RP at 202. After Lowe entered the house, he observed McKnight in the hallway. RP at 203, 209. Lowe followed McKnight to the back of the house where he saw him exit through an open window. RP at 203. Lowe observed that McKnight had short hair, appeared to be between 19-25 years old, and was between 5'8" and 5'10" tall. RP at 204. Lowe, who is 6'2" himself, said McKnight was shorter than him by quite a bit. RP at 204. Lowe observed that McKnight had a small build and really baggy clothing. RP at 205. McKnight was wearing a large dark jacket with a hood. RP at 205. As McKnight ran, he lost a shoe. RP at 205.

Officer Mike Watts of the Longview Police Department responded to Rae's house. RP at 147-49. Officer Watts was unable to obtain fingerprints from Rae's house. RP at 166. When the police arrived, Lowe did not believe he would be able to identify the burglar. RP at 211. However, after the incident Lowe observed McKnight with some friends. RP at 210. At this point, Lowe recognized McKnight as the man he had seen burglarizing Rae's house. RP at 210. At trial, Lowe identified McKnight as the burglar. RP at 209.

Inside the house, items were loaded in bags. RP at 205. Another steak knife was jammed into the side door to the house, in the same manner as the one that Lowe had encountered in the front door. RP at 208. The steak knives from both doors belonged to Rae. RP at 227. By the refrigerator was a single Nike tennis shoe. RP at 154, 208. The frame to the window that McKnight exited was lying on a bed in the room. RP at 159. Officer Watts was unable to obtain fingerprints from Rae's window.³ RP at 166. Outside the house, a knife was located on the ground, and this knife did not belong to Rae. RP at 160-61, 223. Two backpacks were in the living room—one on the floor and one on the couch. RP at 206.

The backpack on the floor contained gloves, screwdrivers, a file, pliers, scissors, a mini flashlight, wire, phones, lighters, a lock, an eight-ball, a black leather pouch, a magnifying glass, sharp items, a pair of Levi's jeans, a red baseball hat that said "The Players," socks, a black bandana, batteries, a headlamp, a scale, and several documents. RP at 163, 186-87, 206. These documents included an official GED transcript for Donald D. McKnight, a Certificate of Educational Competence for Donald D. McKnight, and a certificate of completion for Donald

³ Officer Watts was surprised that he was only to locate a few smeared fingerprints on the window, because it would have taken considerable effort to remove the frame. RP at 166.

McKnight for stress and anger management. RP at 170-71. Also located in the backpack was a spiral notebook with “Donny McKnight, 9/29/2010, Math 079” written in the right hand corner. RP at 172.

Officer Watts took the backpack, shoe, and knife with him and contacted McKnight’s mother, Dorthea McKnight. RP at 182. Officer Watts showed each of these items to Dorthea and asked her if she knew who they belonged to. RP at 182-84. Dorthea identified each of these items as belonging to her son, Donald McKnight. RP at 253-54. At trial, Dorthea testified that she thought the backpack Officer Watts showed her was McKnight’s. RP at 239. Dorthea testified that she told Officer Watts she did not know to whom the shoe belonged. RP at 239. Dorthea testified that she was never shown a knife. RP at 239.

On April 28, 2011, at 10:47 a.m., Dorthea called the police to have Donald McKnight removed from her house because he was in the back room blocking the door, and she did not want him in her house. RP at 244, 245. McKnight was not permitted in her house at that time. RP at 240. Officer Emilio Villagrana of the Longview Police Department responded, and Dorthea told him that McKnight had crawled into her house through a window. RP at 246. Officer Villigrana arrested McKnight and searched him incident to arrest. RP at 246. Officer Villagrana located several small tools on McKnight including a

screwdriver, a wrench, a large file, a rod, and a Craftsman's tool with a knife on it. RP at 247-48. These tools were useful for unhinging doors, breaking locks, cutting window screens, prying doors, and unlocking windows. RP at 248.

McKnight was charged with Burglary in the First Degree with a Deadly Weapon Enhancement, Residential Burglary, and Making or Having Burglar Tools. Prior to trial, his attorney moved to sever the Burglary in the First Degree charge from the Residential Burglary charge. The court denied McKnight's motion to sever. After a three-day trial, the jury found McKnight guilty as charged.

IV. ARGUMENT

A. The trial court did not abuse its discretion when it refused to sever the burglary charges.

Because McKnight failed to demonstrate that a trial involving both burglary counts would be so manifestly prejudicial as to outweigh the concern for judicial economy, the trial court did not abuse its discretion when it refused to sever the charges. "Defendants seeking severance must not only establish that prejudicial effects of joinder have been produced, but they must also demonstrate that a joint trial would be so prejudicial as to outweigh concern for judicial economy." *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). McKnight's charges were properly joined.

After McKnight filed a motion to sever, the trial court considered the evidence in light of the factors offsetting prejudice from joinder and determined that severance was not warranted. Because McKnight failed to demonstrate that a trial on both counts was so prejudicial as to outweigh the concern for judicial economy, the trial court did not abuse its discretion in denying his motion.

CrR 4.3(a) permits the joinder of offenses of the “same or similar character.” CrR 4.3(a)(1). Washington has “strong policy in favor of conserving judicial and prosecution resources,” and therefore favors liberal joinder of offenses. *State v. Bryant*, 89 Wn.App. 857, 867, 950 P.2d 1004 (1998). Further, crimes of the same character or nature may be joined even though they were not committed at or near the same time. *See State v. Townson*, 29 Wn.App. 430, 628 P.2d 857 (1981). Offenses properly joined under CrR 4.3(a), however, may be severed if “the court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). When a defendant brings a motion to sever offenses he or she has “the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.” *Bythrow*, 114 Wn.2d at 718. The failure of the trial court to sever counts is reversible only upon showing that the court’s decision was a manifest

abuse of discretion.” *Id.* at 717. Joinder will be upheld unless prosecution of all the crimes in a single trial will embarrass or confound the defendant in presenting separate defenses, or unless the defendant will be erroneously prejudiced by cumulative evidence. *State v. Pleasant*, 21 Wn.App. 177, 181-82, 583 P.2d 680 (1978), *cert. denied* 441 U.S. 935, 99 S.Ct. 2058, 60 L.Ed.2d 664 (1979).

Where evidence of one crime would be admissible to prove an element of the second, joinder of the two offenses for trial is not unduly prejudicial to the accused. *Pleasant*, 21 Wn.App. at 181-82. And, even when evidence in one crime charged would not be admissible in another crime charged, severance is not required. For example, in *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993), the court found that severance was not appropriate where the defendant was charged with raping five different women in five separate and dissimilar incidents. In *Brythrow*,⁴ the court found severance was not required where the defendant was charged with two different robberies, not part of a common *modus operandi*, over the course of a month. 114 Wn.2d at 717-723. In *State v. Easterbrook*, 58 Wn.App. 805, 810-15, 795 P.2d 151 (1990), the court found severance was not appropriate where the defendant was charged with burglary and rape of one victim and another separate burglary with

⁴ Greater discussion of the *Bythrow* case follows below.

sexual connotations that occurred a month later and involved a different victim.

In determining whether severance is required, there are four factors that courts recognize which may offset prejudice from joinder:

- (1) the strength of the State's evidence on each count,
- (2) the clarity of 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. Warren, 55 Wn.App. 645, 655, 779 P.2d 1159 (1989). The lack of one of these factors alone does not require severance; however, courts look to these four factors when determining whether severance is required. *See, e.g., id.* at 654-55 (despite the fact that evidence of one count would have been inadmissible in a separate trial on the other count, the presence of the other three factors was sufficient to override any prejudice to the defendant).

The State's evidence is sufficiently strong if it would allow a rational jury to find the defendant guilty of each charge independently. *See Bryant*, 89 Wn.App. at 868. In *Bryant*, the four-factor test was applied to a question of joinder when the charges were separated in time by four

months.⁵ *Id.* 867-68. Bryant was charged with second degree robbery and subsequently, after a missed court appearance, the State amended the information to add a bail jumping charge. *Id.* at 863. The court permitted the charges to be joined for trial over Bryant's objection. *Id.* The jury found Bryant guilty of the bail jump and a lesser included charge of theft in the third degree on the robbery charge. *Id.* In analyzing the four factors, the court found that the State's evidence had been sufficiently strong on each charge despite the fact that the jury had declined to convict Bryant of robbery in the second degree. *Id.* at 868. The court reasoned that the evidence was sufficiently strong because a rational jury could have found Bryant guilty of the robbery. *Id.*

The clarity of the defenses is adequate when charges joined in a single trial will not embarrass or confound the defendant in presenting separate defenses. *See Pleasant*, 21 Wn.App. at 181-82. In *State v. Weddell*, 29 Wn.App. 461, 466, 629 P.2d 912 (1981), Weddell argued that joinder of two burglary counts forced him to choose between testifying as to both counts or not at all, and therefore joinder of these counts denied him the right to testify in his own defense. *Id.* The Court of Appeals examined federal cases as to this issue and explained: "Severance is required only if the defendant makes a convincing showing to the trial

⁵ The Court noted that the distinction between joinder and severance has become blurred in Washington. *Id.* at 864-65.

court that he has both important testimony to give concerning one count and a strong need to refrain from testifying about the other.” *Id.* at 468 (citations omitted). To accomplish this, a defendant must present enough information regarding the nature of the testimony he or she wishes to give on one count and his reasons for not wishing to testify on the other to satisfy the court that the claim of prejudice is genuine. *Id.* (quoting *United States v. Baker*, 401 F.2d 958, 977 (D.C.Cir. 1968), *cert. denied*, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970)). If a defendant makes such a showing, then the court can weigh the judicial economy against the defendant’s interest in testifying. *Id.* Because Weddell failed to make such a showing and he had alibi witnesses to support his defense, the Court concluded that the reason Weddell chose not to testify was not for fear of incriminating himself but to avoid the State using his prior burglary conviction for impeachment. *Id.* Thus, without the fear of self-incrimination, Weddell was not prejudiced by having the charges joined.

A jury is properly instructed on separate counts joined for trial when it is instructed to consider each count separately. *See State v. Bradford*, 60 Wn.App. 857, 861, 808 P.2d 174 (1991). Bradford was charged by two-count information with possessing cocaine on October 24, 1988, and possessing cocaine with intent to manufacture or deliver on

September 3, 1988. *Id.* at 858. Prior to trial, Bradford’s motion to sever was denied. *Id.* at 860. The trial court instructed the jury:

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.⁶

Id. During deliberations the jurors asked if it was permissible to consider knowledge gained from one count when deliberating on the other count.

Id. Over Bradford’s objection, the court responded to this inquiry by telling the jury it was “free to determine the use to which it will put evidence presented during trial.” *Id.* Bradford appealed, arguing the court’s response to this inquiry contradicted the instruction given. *Id.* at 861. The Court of Appeals explained that the jury instruction given was a “correct statement of the law.” *Id.* And, because evidence of dominion and control was admissible on both counts, the trial court’s response did not contradict this instruction. *Id.*

Even when evidence is not cross-admissible, an instruction like the one given in *Bradford* has been found adequate. *See Bythrow*, 114 Wn.2d at 723. Bythrow was convicted of two separate robberies occurring on October 31, 1987, and November 2, 1987. *Id.* at 715. Bythrow appealed the denial of his motion to sever. *Id.* at 717. The Supreme Court found that, although evidence of the first robbery would have been admissible

⁶ This is the instruction provided by WPIC 3.01.

under ER 404(b) in a separate trial for the second robbery, evidence of the second robbery would not have been admissible in a separate trial for the first robbery. *Id.* at 719-20. However, the Supreme Court explained that evidence of one charge that would not be admissible in a trial for the other may still be admissible if it is not likely to confuse the jury as to which count particular evidence was introduced to establish. *Id.* at 721. A court must consider the jury's ability to isolate evidence; it does not create reversible error when a jury is instructed not to consider evidence against one defendant, even though it may do so against his or her codefendant. *Id.* The Court examined the jury instruction that had been given by the trial court, which was identical to the one given in *Bradford*. *Id.* at 723. Because the trial was relatively short, the issues were simple, a proper instruction was given to the jury, the State's evidence was strong, and it did not appear the jury was influenced as to determining guilt on one count by the other, the Court held that the denial of the motion to sever had been proper. *Id.*

Where evidence of one crime would be admissible to prove an element of the second, joinder of the two offenses for trial is not unduly prejudicial to the accused. *Pleasant*, 21 Wn.App. at 181-82. *Pleasant* was convicted of first-degree murder and manslaughter charges; he appealed the trial court's denial of his motion to sever the two killings that

had occurred in November and December of 1975. *Id.* at 178-80. The Court of Appeals explained that joinder was not prejudicial if evidence of one crime was admissible to prove an element of the second. *Id.* at 182. The court explained that the test for cross-admissibility was “whether the evidence tends to establish motive, intent, absence of accident or mistake, common scheme or plan, or identity or presence.” *Id.* (quoting *State v. Kinsey*, 7 Wn.App. 773, 778, 502 P.2d 470, 473 (1972)). The court then held that because evidence of both slayings would have been admissible in separate trials for either, there was no error in joinder. *Id.* at 182.

Moreover, when evidence is not cross-admissible the presence of the other factors may offset any prejudice. *Warren*, 55 Wn.App. 654-55. Warren appealed his convictions of attempted first-degree rape and attempted second-degree rape by arguing that joinder was “inherently prejudicial” because evidence from one count of rape would not have been admissible in a separate trial on the other count. *Id.* at 646, 649, 654. The court explained that even when evidence of multiple counts would not have been admissible had separate trials been held, “automatic reversal” was not required for failure to sever. *See id.* (citing as examples *State v. Watkins*, 53 Wn.App. 264, 766 P.2d 484 (1989); *State v. Standifer*, 48 Wn.App. 121, 737 P.2d 1308, *review denied*, 108 Wn.2d 1035 (1987); *State v. Gatalski*, 40 Wn.App. 601, 699 P.2d 804, *review denied*, 104

Wn.2d 1019 (1985)). Applying the four-factor test, the court determined that despite the fact that the evidence would not have been cross-admissible in separate trials, the strength of the State's case, clarity of the defenses, and instruction of the court outweighed any prejudice that Warren would have suffered. *See id.* at 654-55.

Here, the trial court did not abuse its discretion when it denied McKnight's motion to sever. As a threshold matter, because the evidence from each burglary would have been admissible in a separate trial for the other to prove McKnight's identification, the evidence was cross-admissible and joinder did not cause him to suffer any prejudice. In its ruling, the trial court noted that the primary issue in the case was identification. RP at 24. Because during the second burglary the description of the burglar was similar to the first, McKnight was identified by Brad Lowe, and McKnight left identifying paperwork behind in his backpack, this evidence was admissible to prove McKnight's identity as to the first burglary. Likewise, because during the first burglary the description of the burglar was similar to the second and McKnight was identified by Jennifer Herrman, this evidence was admissible to prove McKnight's identity as to the second burglary. Further, the evidence of the first burglary was admissible to rebut McKnight's proposed defense that someone else brought his backpack to the second burglary. RP at 23.

In addition to direct identification evidence, both burglaries demonstrated a common *modus operandi*. In both burglaries McKnight was identified by an eyewitness, entered through a window, was described as a shorter male with a smaller build in his early to mid-20's, was wearing a dark oversized jacket and a hood, had a dark full backpack with a handle, had a small flashlight, carried a weapon, entered the home after a person had left for work, was committing the burglary alone, ran away when he was detected, was either going through a drawer where steak knives could be kept or had placed them in the doors, had family that lived nearby, and both were committed in the same general area (on the north side of Lake Sacajawea). Thus, as in *Pleasant*, because the evidence was cross-admissible to prove McKnight's identification as the burglar in each of the crimes, joinder of the burglaries was not unduly prejudicial.

Even if the evidence had not been cross-admissible, the trial court properly analyzed the four-factor test offsetting any prejudice from joinder. First, the evidence in each case was independently strong. As demonstrated in *Bryant*, a case is sufficiently strong when a rational jury could find a defendant guilty of the charge; it is unnecessary for the court to attempt to assess whether or not a jury would find the defendant guilty. *See Bryant*, 89 Wn.App. at 868. In the first burglary, Jennifer Herrman identified McKnight as the man she observed burglarizing her house. RP

at 47. In the second, Brad Lowe identified McKnight as the man he saw burglarizing Ashley Rae's house. RP at 209. Additionally, during the second burglary, the burglar left behind a backpack that contained paperwork belonging to McKnight. Thus, because a rational jury could have found McKnight guilty of each burglary independently, the evidence was sufficiently strong.

Second, the defense to each burglary was sufficiently clear. In both cases, McKnight maintained that he was not the one who had committed the burglaries. His argument that he would have testified as to the first burglary but could not because he did not want to testify as to the second burglary is unpersuasive. At his motion to sever, McKnight's attorney stated that the reason McKnight did not want to testify was because he had "a litany of prior convictions that make it something less than desirable from the defense standpoint." RP at 2. As explained in *Weddell*, when a defendant's reason for not testifying is to avoid impeaching himself rather than to avoid self-incrimination, then that defendant suffers no prejudice from joinder. Because McKnight's reason for not testifying was to avoid being impeached with his prior convictions and not to avoid self-incrimination, he failed to demonstrate that joinder would cause him to be confused in the presentation of his defenses. Therefore, McKnight suffered no prejudice.

Third, the court properly instructed the jury regarding the evidence. The instruction given to the jury was:

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.

This instruction was taken from WPIC 3.01 and it is identical to the instruction given in both *Bradford* and *Bythrow*. As in *Bradford*, the evidence from each burglary was cross-admissible, so there was no limitation on what the jury could consider in deciding on each of the burglary charges. Further, as explained by the Court of Appeals, this instruction was a correct statement of the law. Because the jury was properly instructed to decide each count separately, the court did not err in giving this standard jury instruction.

Finally, as previously explained, the evidence of each burglary charge was cross-admissible with the other to establish McKnight's identification. Because of the common criminal signature involved and the identification evidence arising from each burglary, the evidence was cross-admissible. Thus, the admissibility of the evidence is readily apparent. However, even if the evidence had not been cross-admissible because the evidence was sufficiently strong as to each count, McKnight was not prejudiced in the clarity of his defenses, and the jury was properly instructed, the interest in judicial economy outweighed any potential

prejudice to McKnight. As in *Bythrow*, the presumption in favor of joinder is so strong that a defendant seeking severance must make an even stronger showing of prejudicial effect than would be required in determining whether to admit other-crimes evidence in a severed trial. *See* 114 Wn.2d at 721. In a criminal justice system that is overburdened with numerous cases, judicial economy is a real concern. McKnight has failed to show that the prejudicial effect was stronger than would be required for admissibility. Thus, he has not met his burden for severance. For these reasons, the trial court did not abuse its discretion when it denied McKnight's motion to sever.

B. McKnight did not suffer ineffective assistance of counsel.

McKnight did not suffer ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate

strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 335. McKnight argues that he failed to receive effective assistance of counsel because his attorney did not object to Officer Watts’ testimony that Dorteia told him McKnight was not at her house and that she had told him the backpack, shoe, and knife belonged to McKnight. This argument fails. First, McKnight has failed to establish that there were no legitimate tactical reasons for his attorney’s decisions. Second, McKnight cannot show that he suffered any prejudice as a result of this alleged failure.

Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to

exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

“If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *State v. McNeal*, 145 Wn.App. 352, 362, 37 P.3d 280 (2002). Trial counsel has “wide latitude in making tactical decisions.” *State v. Sardinia*, 42 Wn.App. 533, 542, 713 P.2d 122 (1986). “Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel.” *Id.* (citing *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)).

Here, when McKnight’s attorney chose not to object to Officer Watts’ testimony that Dorthea told him that McKnight was not at her house, it served an obvious tactical purpose. Dorthea’s house was only two to three blocks away from Ashley Rae’s house. RP at 178. It was favorable to McKnight’s defense to have evidence presented that he was

not in a location near the burglary that had recently occurred. Accordingly, McKnight's attorney wisely permitted Officer Watts to testify that Dorthea told him McKnight was not in her house.

When McKnight's attorney chose not to object to Officer Watts' testimony that Dorthea told him the backpack was McKnight's, he was merely repeating what Dorthea had already testified to when she was called as a witness.⁷ Dorthea testified that she thought the backpack Officer Watts showed her belonged to McKnight. RP at 239. Thus, there was nothing to be gained by objecting to Officer Watts testifying to what Dorthea had already testified to. Further, because Dorthea suggested that the backpack shown in court was different than the one Watts had showed her that night, it provided another possible reason for the jury to question the State's evidence.

When Dorthea testified, she claimed that she did not remember what she told Officer Watts regarding the shoe, and that she had never seen the knife. The State attempted to rebut these claims by having

⁷ Dorthea's testimony that she told Officer Watts that the backpack he showed her was McKnight's highlights the failure of McKnight's claim that the State merely called Dorthea to impeach her. She had told the police that the shoe, backpack, and knife all were McKnight's; the State did not have knowledge that she would change her testimony on the stand. The State's argument regarding Dorthea's changing statements regarding the backpack, shoe, and knife were simply an attack on her credibility, rather than an argument for substantive use. RP at 367. Additionally, her testimony was also necessary to proving the burglar tools charge. She testified that McKnight had entered her house without permission, and McKnight was located in the house with tools that can be used to enter a building unlawfully.

Officer Watts testify to what Dorthea told him that night—that the shoe and knife were McKnight’s. According to ER 607, “[t]he credibility of a witness may be attacked by any party, including the party calling the witness.” A witness may be examined regarding a prior statement. ER 613(a). Under ER 613(b), a party may introduce extrinsic evidence of a prior inconsistent statement if the witness is first afforded an opportunity to explain or deny the statement and the opposing party has the opportunity to interrogate the witness regarding the statement. The degree of inconsistency is not specified. If two statements are inconsistent in their final effect, then they are sufficiently inconsistent. *See Sterling v. Radford*, 126 Wn. 372, 375, 218 P. 205 (1923) (“[I]nconsistency is to be determined, not by individual words and phrases alone, but by the whole impression or effect of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?”).

In *State v. Johnson*, 90 Wn.App. 54, 60, 950 P.2d 981 (1998), the defense sought to impeach the victim’s testimony by bringing out the fact that the victim would receive money from the victim’s compensation fund if the defendant were convicted. After the victim denied any interest in receiving money as a result of his wounds, the trial court erred by not permitting the defense to recall a witness to a conversation where the

victim boasted about collecting money if the defendant were convicted. *Id.* at 60, 67-71. The Court of Appeals ruled that under ER 613, the defendant was not required to call the victim's attention to the conversation with the witness before presenting the testimony of that witness. *Id.* at 70. All that ER 613 required was that the victim be given an opportunity to explain or deny his own statements either before or after the other witness testified. *Id.* at 70.

Here, in their final effect, Dortehea's statements to Officer Watts were inconsistent with her testimony. When asked about being shown the shoe and the knife, she said she did not remember the shoe and denied being shown the knife. However, when Officer Watts showed her these items she identified both as belonging to McKnight. As in *Johnson*, the State was not required to question Dortehea about her specific conversation with Officer Watts, so long as she was questioned about the subject matter of her prior statements and given the opportunity to explain or deny them. Thus, her statements that she did not remember the shoe and was never shown the knife were sufficiently equivalent to a denial of her prior statements. Because the impeachment evidence was admissible, McKnight's attorney did not fail by choosing not to object.

Moreover, McKnight's attorney likely did not desire highlight this evidence to the jury by raising an objection. This is supported by the fact

that when McKnight's attorney called Dorthea as a witness he chose not to question her about her conversation with Officer Watts. And, after Officer Watts testified to Dorthea's inconsistent statements, McKnight's attorney asked several questions about the backpack but only asked Officer Watts to repeat Dorthea's testimony that she did not remember the shoe or the knife. RP at 255-56. It is important to remember that an eyewitness had identified McKnight as the burglar in Rae's house, that documents identifying McKnight had been found in the backpack left behind, and that the similarity with the burglary of Herrman's house already provided compelling evidence identifying McKnight as the burglar of Rae's house. For these reasons, McKnight's decision not to object was a legitimate trial tactic.

In addition to overcoming the strong presumption of effective assistance, McKnight must also show that he was prejudiced. "Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (citing *State v. Reichenbach*, 153 Wn.2d , 126, 130, 101 P.3d 80 (2004)). Here, McKnight has not made such a showing. First, the testimony regarding McKnight not being in the house can only be construed as helpful to McKnight. Perhaps for this reason, McKnight

does not even make an argument for how this statement caused him to suffer any prejudice. Second, the documents in the backpack made it obvious that the backpack belonged to him. Thus, after he had been identified by an eyewitness to the burglary of Ashley Rae's house, there was simply not a reasonable probability that had his connection to the shoe and knife not been admitted the outcome of the trial would have been different. Because there was no prejudice, McKnight did not suffer ineffective assistance of counsel.

C. There was sufficient evidence for the jury to find McKnight guilty of making or having burglar tools.

There was sufficient evidence for the jury to find McKnight guilty of making or having burglar tools. The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63

Wn.App. 703, 708, 821 P.2d 543, review denied, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *Jones*, 63 Wn.App. at 707-08. All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

Here, McKnight entered Dorthea's house without her permission through a window. He was located on the inside of a room blocking the door so it could not be opened. After he was arrested he was found to be in possession of several small tools that were useful for committing burglaries in a building that he had unlawfully entered. Additionally, his backpack that had been left behind at the scene of his burglary of Ashley Rae's house contained several similar items. This provided evidence of his intent in possessing such tools. Drawing all reasonable inferences in the State's favor and most strongly against McKnight, there was sufficient evidence for the jury to find that McKnight possessed these items while evincing an intent to use them in the commission of a burglary.

V. CONCLUSION

For the above stated reasons, Donald D. McKnight a/k/a Donald D. Abdich's convictions should be affirmed.

Respectfully submitted this 10TH day of JULY 2012.

SUSAN I. BAUR
Prosecuting Attorney

By:



ERIC H. BENTSON
WSBA # 38471
Deputy Prosecuting Attorney
Representing Respondent

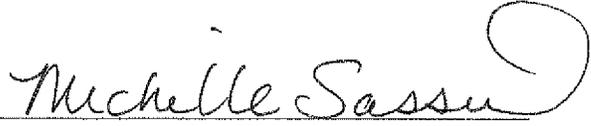
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
jahayslaw@comcast.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 10th, 2012.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

July 10, 2012 - 3:00 PM

Transmittal Letter

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