

No. 43967-1

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

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STATE OF WASHINGTON,

Respondent,

v.

JONATHAN ALLEN LISCHKA,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR LEWIS COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

**The trial court abused its discretion in refusing to sever the offenses for trial**

The issue in this case is whether the trial court abused its discretion in refusing to sever the charges for separate trials. The relevant rule is CrR 4.4, which requires separate trials where necessary to “promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). The trial court’s refusal to sever the charges, thereby permitting the jury to hear evidence of each charge in a single proceeding, unfairly prejudiced Mr. Lischka’s ability to receive a fair trial.

The standards invoked by the State throughout its brief, and by the trial court in denying the motion to sever, see 7/31/12RP 6, CP 9-10, apply to the question of whether the charges should have been “joined” together in a single charging document. They do not apply in determining whether the charges should have been tried together in a single proceeding. CrR 4.3(a) provides that two or more offenses may be “joined in one charging document” if the offenses “[a]re of the same or similar character,” or “[a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.” But even if charges are joined together in a single charging

document, they should not be tried together in a single proceeding if “severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). Determining whether charges should be severed for purposes of trial does not depend upon whether the charges are “of the same or similar character” or “based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.” Instead, the ultimate determination is the effect that trying the charges together in a single proceeding will have on the defendant’s ability to receive a fair trial. CrR 4.4(b).

In drafting the court rules, the drafters made plain their intent that the standards for determining the appropriateness of “joining” multiple charges in a single charging document are not the same as the standards for determining the appropriateness of trying separate charges together in a single proceeding.<sup>1</sup> The term “joinder” in CrR 4.3 refers “only to joinder of offenses and/or defendants in a single charging document. The term should not be confused with *consolidation*, which refers to the consolidation of offenses and/or defendants for purposes of trial, and which is governed by CrR 4.3.1.”

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<sup>1</sup> Court rules are interpreted in the same manner as statutes. Jafar v. Webb, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013). The Court’s primary aim is to give effect to the drafter’s intent. Id. If the rule’s

Karl B. Tegland, 4A Washington Practice: Rules Practice CrR 4.3 (7th ed. 2013). In 1995, the drafters' committee created a separate rule on consolidation of offenses or defendants *at trial*, to avoid confusion with the term "joinder." Id. The new rule, CrR 4.3.1, provides that offenses joined under rule 4.3 "shall be consolidated for trial *unless the court orders severance pursuant to rule 4.4.*" CrR 4.3.1(a) (emphasis added). The purpose of the new rule was to make plain that "[c]onsolidation of offenses or defendants at the trial stage should be covered by a separate rule," i.e., CrR 4.4. Tegland, 4A Washington Practice: Rules Practice CrR 4.3 (drafters' comment). Thus, the standards set forth in CrR 4.4—not in CrR 4.3—apply in determining whether the trial court abused its discretion in consolidating the separate charges for trial in a single proceeding in this case.

To determine whether to sever charges to avoid prejudice to a defendant, a court considers the four factors which are set forth in the opening brief: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of

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meaning is plain on its face, the Court gives effect to that meaning as an expression of the drafter's intent. Id.

evidence of the other charges even if not joined for trial. State v. Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009).

The principal consideration in determining whether severance is necessary to ensure a defendant's right to a fair trial is whether the jury is likely to use evidence of one charge to infer guilt for another. "Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." Id. at 883. Thus, the court must consider whether evidence of one charge would be admissible in a separate trial on the other offenses. "A defendant must be tried for the offenses charged, and evidence of unrelated conduct should not be admitted unless it goes to the material issues of motive, intent, absence of accident or mistake, common scheme or plan, or identity." Id. at 887.

The State concedes that evidence of Mr. Lischka's drug use would not have been admissible in a separate trial on the malicious mischief charge. SRB at 28. That consideration alone justified severing the charge of possession of methamphetamine. As set forth in the opening brief, courts widely recognize that evidence of a

defendant's drug use, when erroneously admitted, is unfairly prejudicial.

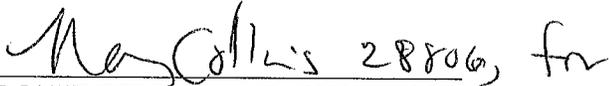
The State contends that evidence supporting the harassment charge would have been admissible at a separate trial on the malicious mischief charge, SRB at 28-29, as evidence of intent or absence of mistake or accident. But that is not correct. Evidence that Mr. Lischka made vague menacing statements to his friend two weeks earlier was not relevant to show whether he intentionally damaged his girlfriend's property. Instead, the evidence merely portrayed Mr. Lischka as an unstable, scary character—a "loose cannon." As such, it was impermissible character evidence and would not have been admissible at a separate trial. ER 404(b).

Because admission of the evidence of Mr. Lischka's drug use and his earlier vague threatening statements directed toward Mr. Teitzel unfairly prejudiced Mr. Lischka, the conviction for malicious mischief must be reversed.

B. CONCLUSION

For the reasons given above and in the opening brief, Mr. Lischka's conviction for malicious mischief must be reversed.

Respectfully submitted this 11th day of September, 2013.

  
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STATE OF WASHINGTON,	)	
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Respondent,	)	
	)	NO. 43967-1-II
v.	)	
	)	
JONATHAN LISCHKA,	)	
	)	
Appellant.	)	

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**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2013.

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# WASHINGTON APPELLATE PROJECT

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