

NO. 44580-8-II

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

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STATE OF WASHINGTON, Respondent

v.

SOKHA SUONG, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01473-6

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BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

Sokha Suong (hereafter 'Suong') was originally charged with Kidnapping in the First Degree, Burglary in the First Degree, Assault in the Second Degree and Felony Harassment, committed on August 14, 2012. CP 1-3. In December 2012, the State filed an Amended Information which added 10 counts of Violation of a Domestic Violence No Contact Order, which alleged Suong had contacted the victim from the Clark County Jail on 10 separate occasions between August 23, 2012 and October 11, 2012. CP 25-29.

The charges arose from allegations that Suong went to his ex-girlfriend, Jasmine Bogle's place of employment a few weeks after she broke up with him. 2 RP at 122-26, 148-52. Ms. Bogle told Suong to leave, but he began crying and asked her to kiss and hug him. 2 RP at 148-52. Ms. Bogle gave Suong a hug and told him to leave and not to return. 2 RP at 148-52. Suong left and Ms. Bogle called her mother and described what had just happened. 2 RP at 155. Later, Ms. Bogle went outside and saw Suong in the driveway. 2 RP at 155-59. She asked Suong why he was still there after she'd told him to leave. 2 RP at 155-59. She again told him to leave and again called her mother after Suong left. 2 RP at 159. Suong returned for the third time and knocked on the front door. 2 RP at 160-62. Ms. Bogle opened the door to tell him to leave, but Suong forced his way

into the house. Suong grabbed Ms. Bogle around the neck, cutting off her ability to breathe. 2 RP at 160-62.

Suong dragged Ms. Bogle to the kitchen from the front door and searched for something in the kitchen, settling upon a pair of scissors. 2 RP at 160-67. Suong held the scissors up to Ms. Bogle's throat and told her, "Bitch, if you don't do exactly what I fucking tell you to do, I'm going to fucking stab you." 2 RP at 167. Ms. Bogle attempted to get Suong to calm down, and promised to meet him at her parents' house when she was done at work. 2 RP at 176-79. Suong left. Ms. Bogle again called her parents who indicated Ms. Bogle was hysterical during this conversation. 3A RP at 312-14; 3B RP at 553-57. Ms. Bogle's father called the police and then he and his wife drove to Ms. Bogle's place of employment. 3B RP at 558-60. Ms. Bogle did not suffer any injuries and nothing in the place seemed out of place except the carpet inside the front door. 2RP at 118-19, 162.

Later that night, Ms. Bogle's parents saw Suong attempting to return once again, and Ms. Bogle's father physically restrained him while her mother called the police. 3B RP at 560-66. The police arrived and arrested Suong.

The day after his arrest, Suong appeared in court where the judge issued a pretrial no contact order prohibiting him from having any contact

with Ms. Bogle. 3A RP at 397-401; Ex. 5. Suong signed the order and was personally served with a copy by the prosecutor in court. *Id.* The victim also obtained a protection order admitted at trial as Ex. 4. Suong called Ms. Bogle and sent her letters on ten different occasions between August 23, 2012 and October 11, 2012. 2 RP at 211-20.

Prior to trial, Suong filed a motion to sever the misdemeanor no contact order violations from the underlying offenses. CP 43-46. The State responded in writing, and the trial court heard arguments from both sides on this issue. 1 RP at 53-61. The trial court denied his motion. 1 RP at 60. Suong renewed his motion to sever on the first morning of trial. 1 RP at 65. The Court again denied the motion. 1 RP at 65.

During the trial, the State asked the Court to exclude all witnesses pursuant to ER 615, and specifically argued a particular potential defense witness should be excluded. 2 RP at 142-43. The trial court found this person was a potential witness and that he was not reasonably necessary in assisting defense in presenting its case; the trial court excluded the witness. 2 RP at 143-44.

At the close of the State's case, defense successfully moved to dismiss the Kidnapping charge. 3B RP at 579-85. The court granted the State's request to instruct the jury on the lesser included offense of Unlawful Imprisonment. 3B RP at 588-89. The jury returned verdicts of

guilty on each count. CP 145-63. The jury returned special verdicts that all charges were domestic violence offenses. *Id.* The court sentenced the defendant to a standard range sentence. 4 RP at 715.

B. ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED SUONG'S MOTION TO SEVER COUNTS

Suong alleges the trial court's denial of his motion to sever denied him a fair trial. However, the trial court properly weighed the appropriate factors when considering whether any counts should be severed for trial, and did not abuse its discretion when it found that continued joinder was appropriate. Suong has not shown the trial court abused its discretion in denying his motion to sever.

Court Rules provide that two or more offenses may be joined in one charging document if the charges are of same or similar character or are based on the same conduct or a series of acts connected together or constituting parts of a single scheme or plan. CrR 4.3(a). Washington is a liberal joinder state, and failure to properly join cases for trial wastes judicial resources. *State v. Thompson*, 88 Wn.2d 518, 525, 564 P.2d 315 (1977), *overruled on other grounds by State v. Thorton*, 119 Wn.2d 578, 835 P.2d 216 (1992); *State v. Wilson*, 71 Wn. App. 880, 886, 863 P.2d 116 (1993), *rev'd in part on other grounds*, 125 Wn.2d 212 (1994). Separate

trials are not favored and courts should view consolidation for trial expansively to promote the public policy of conserving judicial and prosecutorial resources. *State v. Grisby*, 97 Wn.2d 493, 506-07, 647 P.2d 6, 25 (1982), *cert. denied*, 103 S. Ct. 1205, 459 U.S. 1211, 75 L.Ed.2d 446 (1983); *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998), *rev. denied*, 137 Wn.2d 1017 (1999).

A trial court should sever charges for trial if the trial court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense. CrR 4.4(b); *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Whether to sever offenses is within the sound discretion of the trial court, and will only be reversed upon a showing of manifest abuse of discretion. *Id.* The defendant has the burden of demonstrating that joinder of offenses would be so manifestly prejudicial so as to outweigh the concerns for judicial economy. *Id.* at 718.

On appellate review, this Court should review the trial court's consideration of the relevant factors in determining Suong's motion to sever. A court should consider the strength of the State's evidence on each count; the clarity of defenses as to each count, the court's instructions or ability to instruct the jury to consider each count separately; and the cross-admissibility of the evidence. *State v. Russell*, 125 Wn.2d 24, 62-68, 882

P.2d 747 (1994). The presence of these four factors tend to mitigate any prejudice from joinder. In *State v. Hentz*, 32 Wn. App. 186, 647 P.2d 39 (1982), *rev'd in part on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983), this Court found in a case where the defendant alleged error in the trial court's refusal to sever counts, that bare assertions that a joint trial of offenses will create a danger that the jury will accumulate evidence, or that the defendant may be embarrassed in presenting conflicting defenses, or that the jury may conclude the defendant has a propensity for crime do not satisfy the defendant's burden of demonstrating that there is substantial prejudice by the joinder of offenses when his jury was instructed to decide each count separately. *Hentz*, 32 Wn. App. at 190.

In Suong's case, the four *Russell* factors favored joinder. The defendant asserted general denial as to all counts; the State's evidence was strong on all counts given the victim's testimony, the circumstantial evidence of the first disclosure witnesses, and the tape recordings of the defendant's violations. Further, evidence of the no contact order violations would have been admissible at the trial on the underlying charges as it was direct evidence from the defendant of his relationship to the victim and supported her allegations regarding the status of their relationship. The trial court did give an instruction to the jury that they were to consider each count separately. CP 104. It is clear from the record, the trial court

considered each *Russell* factor in determining Suong's motion to sever counts. 1 RP 57-61; CP 66-67.

A trial court abuses its discretion if its decision is manifestly unreasonable or is based upon untenable grounds or untenable reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial court did not deny Suong's motion to sever for an untenable reason, or based upon untenable grounds. Upon an application of the facts of the case to the law, it is clear the trial court's decision was not unreasonable, let alone manifestly unreasonable. Suong has not demonstrated that the trial court abused its broad discretion in hearing this motion, given that our joinder rules are broad and the *Russell* factors favored joinder here. Suong's assertion that the trial court abused its discretion is without merit. The trial court should be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING A POTENTIAL WITNESS FROM THE COURTROOM DURING TRIAL

Suong alleges the trial court abused its discretion by excluding a potential defense witness from the courtroom while the trial was pending. The trial court had reasonable justification to exclude this potential witness from the courtroom pursuant to ER 615 and did not abuse its discretion in so ruling. Suong has not shown the trial court's determination that this individual was a potential witness and that his presence was not

reasonably necessary for the presentation of Suong's case was an abuse of the trial court's discretion. Suong's allegation fails.

ER 615 authorizes a trial court to exclude potential witnesses from the courtroom so that they cannot hear the testimony of other witnesses. A person whose presence is reasonably necessary to the presentation of a party's case may be permitted to remain in the courtroom despite their status as a potential witness. ER 615(c). A question concerning the exclusion of a witness pursuant to ER 615 is within the broad discretion of the trial court. *State v. Schapiro*, 28 Wn. App. 860, 867, 626 P.2d 546 (1981). A trial court's decision will not be disturbed absent a manifest abuse of its discretion. *Id.* "[T]he court's decision will not be overturned unless the defendant can show that he has been prejudiced by an abuse of discretion." *State v. Adams*, 76 Wn.2d 650, 659, 458 P.2d 558 (1969), *rev'd on other grounds by Adams v. Washington*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971).

A trial court abuses its discretion if its decision is manifestly unreasonable or is based upon untenable grounds or untenable reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Suong had the burden of showing the trial court that this person was not a potential witness or that this potential witness's presence in the courtroom was "reasonably necessary to the presentation of" his case. *See* ER 615(c). First, Suong's counsel agreed that this person may potentially be a witness, depending on how the presentation of the State's case proceeded. 2 RP at 144-45. Second, the trial court considered the arguments of

defense counsel and the State and noted that this potential witness was sitting in the back of the courtroom and was not assisting defense counsel. 2 RP at 144. The trial court properly concluded that this witness was not reasonably necessary to the presentation of Suong's case. The trial court clearly considered the appropriate law and the appropriate facts and made a reasonable decision based on what was evident to him at the time. The trial court did not abuse its discretion in excluding defense's potential witness from the courtroom. The trial court should be affirmed.

III. THE "TO CONVICT" INSTRUCTION WAS PROPER AND INCLUDED ALL ESSENTIAL ELEMENTS OF THE CRIME OF VIOLATION OF A NO CONTACT ORDER.

Suong argues the trial court improperly instructed the jury on the offense of violation of a no contact order by failing to include an element that the no contact order was issued pursuant to a particular statute. The trial court properly instructed the jury on the elements of the crime of violation of a no contact order. It is not possible the jury improperly convicted Suong of the counts for violating a no contact order. Suong's argument is without merit. Further, even if Suong's argument is with merit, the State presented sufficient evidence that the only order it contended Suong violated was issued pursuant to RCW 10.99, and therefore any error was harmless beyond a reasonable doubt.

Suong relies heavily on *State v. Arthur*, 126 Wn. App. 243, 108 P.3d 169 (2005) for the proposition that the statute that a no contact order is issued under is an element of the crime of violation of a no contact order which must be proved to a jury beyond a reasonable doubt, and which must appear in the “to convict” jury instructions. However, *Arthur* addressed a very particular issue involving a felony violation of a no contact order. The Court in *Arthur* specifically held that “whether prior no-contact orders fall under the proviso of RCW 26.50.110 is an element of the felony offense.” *Arthur*, 126 Wn. App. at 244. Had the Court found that the evidence that a no contact order was issued pursuant to a specific statute was a necessary element of a gross misdemeanor violation of a no contact order it would have so specified, or at the least removed the word “felony” from its holding. Further, the statute at issue, RCW 26.50.110 has very different language that applies to felony violations than it does for misdemeanor violations, which led to the Court’s decision in *Arthur* as applying only to felony violations.

RCW 26.50.110(1) states in part,

Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order

specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

RCW 26.50.110(1). This part of the statute describes the gross misdemeanor violation. Subsections 4 and 5 apply to felony violations of a no contact order. For example, RCW 26.50.110(5) states in part:

A violation of a court order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

RCW 26.50.110(5). It is clear from the language in subsection 5 of the statute that an element of the crime is that the prior convictions were for violating an order issued under Ch. 26.50, 10.99, 26.09, 26.10, 26.26 or 74.34, whereas subsection 1 simply describes a knowing violation of the order is a violation. It does not indicate an element is the type of order or the lawfulness of the order.

In fact, in *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827(2005), the Supreme Court found that the validity of a no contact order is not an element of the crime of violation of a no contact order. *Miller*, 156 Wn.2d at 29. Further, the issue of whether the underlying no contact order was issued pursuant to a particular statute is properly an issue of law for the court, not the jury to resolve. *Id* at 31. Further, the Court in *Miller* found

that only “applicable no-contact orders which will support conviction on the crime are admissible.” *Id.* at 32. The trial court in Suong’s trial allowed admission of two applicable no contact orders as it was clear from the orders themselves that they were issued pursuant to RCW 10.99 and RCW 26.50. Ex. 4, 5. This was clearly an issue for the trial court and not for the jury. The jury was properly instructed.

Even if this element should have been given to the jury in the to-convict, the error was harmless beyond a reasonable doubt. The State presented evidence of two no contact orders. Ex 4, 5. The State did not introduce or argue any other no contact orders provided a basis for conviction of violation of a no contact order. Exhibit 5 specifically states on the front page,

The court finds that the defendant has been charged with arrested for or convicted of a domestic violence offense and further finds that to prevent possible recurrence of violence this Domestic Violence No Contact Order shall be entered pursuant to Chapter 10.99 RCW.

Ex. 5. It is clear the jury could only have found that this no contact order was issued pursuant to RCW 10.99. The other no contact order, Ex. 4, specifically states,

Respondent committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of petitioner the court concludes as a matter of law the relief below shall be granted.

Ex. 4. Further, Exhibit 4 also states on every page “RCW 26 50 060” in the footer. Contrary to Suong’s assertion, these exhibits do specify the statute under which the no contact orders were issued. This does show any potential error was harmless beyond a reasonable doubt. Suong’s multiple convictions for violating the no contact order should be affirmed.

C. CONCLUSION

Suong’s assignments of error are without merit. The trial court did not abuse its discretion in denying his motion to sever, the jury was properly instructed on the crime of violation of a no contact order, and the court did not abuse its discretion in excluding a potential witness from the courtroom during trial. The trial court should be affirmed in all respects.

DATED this 6th day of February, 2014.

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## February 06, 2014 - 4:21 PM

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