

FILED
OCTOBER 10, 2014
Court of Appeals
Division III
State of Washington

NO. 32124-0-III (Consolidated with 32125-8-III)

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

STATE OF WASHINGTON,

RESPONDENT,

v.

JUAN JOSE SERRANO BERRIOS,

APPELLANT.

BRIEF OF RESPONDENT

**D. ANGUS LEE
PROSECUTING ATTORNEY**

**By: Carole L. Highland, WSBA #20504
Deputy Prosecuting Attorney
Attorney for Respondent**

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney's Office is the Respondent herein.

II. RELIEF REQUESTED

Reversal is not warranted and Appellant's convictions must be affirmed. The matter should, however, be remanded for resentencing.

III. ISSUES

1. Whether joinder of Appellant's two cases, which involved the same victim and occurred closely in time, was appropriate.
2. Whether the Court's limiting instruction was appropriate and adequate to prevent the jury from considering guilt on one charge from evidence regarding another.
3. Whether Appellant should have received credit for all time served on these matters pre-trial.

IV. STATEMENT OF THE CASE

The State adopts the Appellant's statement of the case.

V. ARGUMENT

A. JOINDER WAS APPROPRIATE IN MR. SERRANO BERRIOS' MATTERS AND SEVERANCE WAS APPROPRIATELY DENIED.

CrR 4.3(a) and ER 404(b) provide the requisite guidelines when considering joinder.

CrR 4.3(a) Joinder of Offenses:

Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offense, whether felonies, or both:

- (1) Are of the same or similar character, even if not part of a single scheme or plan; or
- (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

ER 404(b):

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.

The State initially made its intentions regarding the joining of Appellant's matters known to the Court and counsel on September 17, 2012. RP 9, 9/17/12. The State informed the Court that the two cause numbers involved the same victim and had occurred

relatively closely in time. RP 10, 9/17/12. Mr. Serrano Berrios' attorney at the time, Alan White, indicated that he wished to research the issue for possible response briefing. *Id.* The State reiterated its intention on October 15, 2012, at which time, Mr. Serrano Berrios' second attorney, John Crowley, reserved his response. RP 30, 10/15/12. The motion was then continued to December 3, 2012. RP 31, 10/15/12. On December 3, 2012, Mr. Crowley requested additional time to respond. RP 34, 12/3/12. On January 14, and February 26, 2013, Mr. Crowley indicated that the motion to join would not be opposed, and the two cases were then joined for trial. RP 39-41, 1/14/13, 2/26/13. On the record in a later hearing, Mr. Crowley also referenced a severance motion in another matter in which he was involved, which would seem to indicate that he was familiar with the procedure, issues, and ramifications of joinder and severance. RP 46, 4/29/13.

On August 12, 2013, Mr. Serrano Berrios' third attorney, Stephen Kozar, filed a motion to sever the two counts. RP 87, 8/12/13. After having heard argument, the Court denied Mr. Serrano Berrios' motion.

Each of the two cases that Appellant was charged with involved acts of domestic violence involving the same individual, occurring only nine days apart, and involving nearly 70 text messages covering a period of time during which both incidents occurred. The State would argue that Appellant's acts comprised part of a single scheme or plan to terrorize I.H.V. as part of an ongoing pattern of domestic violence.

Joinder may be prejudicial if it encourages the jury to cumulate evidence to find guilt on charges or if it embarrasses the defendant in the presentation of separate defenses. *State v. Sanders*, 66 Wn.App. 878, 833 P.2d 452 (1992). Additionally any potential prejudicial effect can be nullified by (1) strong evidence supporting each count; (2) clear defenses on each count; (3) a proper instruction to the jury to consider the elements of each crime separately; and the fact that evidence on each count is also admissible even if the counts are tried separately. *State v. Eastabrook*, 58 Wn.App. 805, 811-812, 795 P.2d 151 (1990).

Appellant, pre-trial, asserted an alibi defense for the date of July 13, 2012, as well as for July 22, 2012. RP 101, 8/13/13. Mr. Serrano Berrios did not take the stand. RP 34, 11/25/13. However his counsel argued from his cross examination of the victim that,

that on July 13, 2012, the Appellant had been improperly locked out of the apartment which he shared with the victim, and that no assault had taken place RP 65, 11/25/13.

If counts are otherwise properly joined, a refusal to sever will be reversed only for a manifest abuse of discretion. A defendant seeking severance has the burden of demonstrating prejudice that outweighs the concern for judicial economy. *Sanders* at 884. A denial of a CrR 4.4(b) motion to sever multiple charges is reviewed for a manifest abuse of discretion, and a defendant seeking a severance has the burden of demonstrating that a trial involving all counts would be so manifestly prejudicial as to outweigh the desire for judicial economy. *State v. Wilson*, 71 Wn.App. 880, 863 P.2d 116 (1993), *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994), *State v. Rodriguez*, 163 Wn.App. 215, 259 P.3d 1145 (2011 *rev. denied* 173 Wn.2d 1009, 268 P.3d 942 (2012)), *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994). Given that the evidence on one of Mr. Serrano Berrios' cause numbers was admissible in the other under both CrR 4.3(a), as well as ER 404(b), Mr. Serrano Berrios cannot show why the incidents of the two dates were improperly joined, *i.e.*, the burglary and assault of July 13, 2012, would heighten the victim's fears regarding the

appellant's actions towards her on July 22, 2012; the acts of both July 13, 2012, as well as July 22, 2012, would show why the victim felt threatened by the numerous text messages sent by the appellant. In *State v. Barragan*, 102 Wn.App. 754, 9 P.3d 942 (2000), the Court held that prior acts of the defendant were relevant to show victim's state of mind in prosecution for harassment. See also *State v. Grant*, 83 Wn.App. 98, 920 P.2d 609 (1996), *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008).

Additionally, in Mr. Serrano Berrios' cases, the jury found him not guilty of the more serious felony charge of Burglary in the First Degree in 12-1-00373-3 as well as the charge of Malicious Mischief in the Third Degree, and not guilty of all of the charges alleged to have occurred in 12-1-00395-8 on July 22, 2012, *i.e.*, Assault in the Second Degree, the lesser included of Assault in the Fourth Degree, Reckless Endangerment, and Reckless Driving. RP 89-90, 11/25/13. Clearly the jury was able to parse out the evidence for the individual crimes charged, and did not automatically assume guilt on some, because of the inclusion of others.

**B. THE TRIAL COURT PROVIDED AN APPROPRIATE
LIMITING INSTRUCTION WHICH THE JURY IS
PRESUMED TO HAVE FOLLOWED.**

The Court in this case clearly and carefully instructed the jury on more than one occasion that the text messages (which form the basis of Appellant's convictions for harassment and cyberstalking), should not be considered by the jury for any other purpose. RP 91-92, 97, 150-151, 11/21/13, CP 289, 296-297 (12-1-00363-3), RP 32, 34-35, 11/25/13. Jurors are presumed to follow the Court's instructions. *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998), *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). In addition to the gross misdemeanor harassment and gross misdemeanor cyberstalking which the court found were premised on the same evidence and events, the only other charge for which the jury found the Appellant guilty was for the Assault in the Fourth Degree/Domestic Violence incident having occurred on July 13, 2012. RP 89-90, 11/25/13, RP 300 12/17/13. Regarding the July 13th incident, the jury saw pictures of a broken chair which had been used by the victim in an unbroken state to secure her apartment door against entry by the Appellant, as well as pictures of the vinyl flooring torn by the scraping of the chair. RP 57, 60-63, 76, 11/21/13. They heard the 911 call made by the victim, and

heard testimony from both her and the officer regarding observable injury to her mouth. RP 66, 11/22/13, RP 57-60, 11/21/13. The jury heard that Mr. Serrano Berrios had fled the apartment before law enforcement arrived, and that although law enforcement had been looking for Mr. Serrano Berrios, they were unable to locate him until July 26, 2013. RP 59, 82, 11/21/13. With this evidence the jury was at liberty to find that the State had shown sufficient evidence to prove the charge of assault in the fourth degree beyond a reasonable doubt. Having found the Appellant not guilty of the most serious offense having occurred July 13, 2012, as well as not guilty of the offenses of July 22, 2012, it is difficult to understand Appellant's argument that the jury was unable to compartmentalize the evidence to consider the individual, unique and specific acts with which the Appellant was charged.

Jury instructions are sufficient when read as a whole and allow a party to argue its theory of the case. Mr. Serrano Berrios argued that he had not done the acts of July 13, 2012, which the jury, in part believed. He also argued that he had not engaged in reckless driving and reckless endangerment or struck the victim's car on July 22, 2012 which they also believed. It is difficult to

understand how Mr. Serrano Berrios was hampered in his defense or unfairly prejudiced by either the joinder or the jury instructions.

C. THE TRIAL COURT SHOULD HAVE GIVEN MR. SERRANO BERRIOS CREDIT FOR TIME SERVED AND APPELLANT'S MOTION FOR RESENTENCING IS WELL TAKEN.

The State concedes that Appellant should have been given credit for time served and that resentencing in these matters is necessary.

VI. CONCLUSION

Based upon the foregoing, the State respectfully requests this Court deny Mr. Serrano Berrios' appeal, affirm his convictions and remand for resentencing.

DATED THIS 10th day of October, 2014.

Respectfully submitted:

D. Angus Lee, WSBA #36473
Grant County Prosecuting Attorney

Carole L. Highland
Carole L. Highland, WSBA #20504
(Deputy) Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent.)	No. 32124-0-III
)	
v.)	
)	
JUAN JOSE SERRANO BERRIOS,)	DECLARATION OF SERVICE
)	
Appellant)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

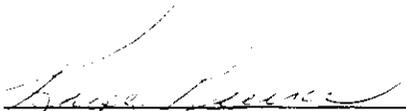
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That on this day I delivered to the Grant County Sheriff's Office an envelope addressed to Appellant and directed that it be delivered to the Appellant at the Grant County Jail containing a copy of the Brief of Respondent in this matter.

Juan Jose Serrano Berrios
c/o Grant County Jail
Grant County Law and Justice Center
35 C Street NW
Ephrata WA 98823

Dated: October 10, 2014.



Kaye Burns