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NO. 51791-1-I
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

CITY OF AUBURN
Respondent/Cross-Appellant,

v.

TERESA A. HEDLUND,

Appellant/Cross-Respondent.

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REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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COMES NOW the Respondent/Cross-Appellant, City of Auburn, hereinafter referred to as the Plaintiff, and in reply to the “Reply Brief of Appellant” filed by the Appellant/Cross-Respondent, Teresa A. Hedlund, hereinafter referred to as the Defendant, respectfully submits the following:

INITIAL ISSUE – PUTTING PLEADINGS INTO PERSPECTIVE

First of all, it is perhaps appropriate to clarify and put into proper perspective some of the potentially confusing references to the Plaintiff’s pleadings made by the Defendant in her Reply Brief. She refers somewhat inconsistently to the Plaintiff’s pleadings as a “Response” and as a “Reply.” *See e.g.*, Defendant’s Reply Brief of Appellant, pages 6, 7. The Plaintiff’s document was actually entitled [Revised] Opening Brief of Respondent/Cross-Appellant. This issue surfaces apparently in connection with the Respondent’s efforts to point out that discretionary review has not been granted the Respondent.¹ The Defendant’s argument in this regard, however, does not fully portray the particulars of this case, which include the fact that while discretionary review may not have been technically granted, it was not denied either. Rather, with the granting of review in the Appellant’s case, the Commissioner *passed* the Plaintiff’s appeal (cross-appeal) to the same panel that would be hearing the Defendant’s appeal. *See* Commissioner

Neel's Ruling dated January 28, 2005, a copy of which is appended hereto for convenient reference, marked as Appendix "A" hereto. That same Ruling also *consolidated* the Defendant's review (Cause Number 51791-1-I) with the Plaintiff's review (Cause Number 55065-9-I).

This makes sense, since both matters arose from the same Auburn Municipal Court – Auburn Municipal Court Cause No. Cause Numbers C78961, 1C7374. The Defendant's appeal stems from the decision of the King County Superior Court, on a writ filed under Cause No. 03-2-00810-9 KNT, involving a motion made mid-trial regarding accomplice liability. In connection with that matter, after a decision by King County Superior Court Judge James Cayce, the Defendant sought review from the Court of Appeals, under Court of Appeals Cause Number 51791-1-I.

After trial and conviction on several counts, the Defendant appealed her convictions to the King County Superior Court under Cause No. 03-1-04645-7 SEA, pursuant to the RALJ rules.² While a total of eleven assignments of error were raised by the Defendant, eight were rejected by King County Superior Court, and three were acted upon, so as to call for the case(s) to be re-tried in segregated trials.

1 The Appellant argues that "[t]he respondent presents several issues for this Court's consideration, although review has not been granted." Reply Brief of Appellant, page 6.

2 The Rules of Appeal of Decisions of Courts of Limited Jurisdiction.

It was from those three issues³ that the Plaintiff cross-appealed.

**REPLY OF RESPONDENT/CROSS-APPELLANT TO
REPLY BRIEF OF APPELLANT**

In response to the arguments submitted by the Defendant regarding the assignments of error identified in the Plaintiff's cross-appeal, the Plaintiff respectfully replies as follows:

STANDARD ON APPEAL

The Defendant expresses some confusion about what standard of review the Plaintiff is asking this Court to employ, suggesting that the Plaintiff "appears . . . to be asking this Court to engage in a de novo review of Judge Burns' pretrial and evidentiary rulings." Reply Brief of Appellant, page 6. That is not the case at all. Rather, the Plaintiff is asking, as it has asked all along, that the evidentiary rulings and the decision regarding the Defendant's motion to sever be measured, properly, through the "manifest abuse of discretion" standard.

In this case, the RALJ court ruled that the portion of the videotape showing the Defendant's young daughter smoking and dancing provocatively

³ The King County Superior Court (RALJ court) reversed the Municipal Court's admission into evidence of the 9-1-1 tape; the admission of part of the video-tape into evidence (during a party at the Defendant's apartment – showing the Defendant's young daughter smoking a cigarette and dancing provocatively at the Defendant's behest), and the denial the Defendant's motion to sever.

should not have been admitted; that the 9-1-1 tape should not have been admitted and that the Furnishing Tobacco to a Minor should have been severed from the other charges. As noted in the Plaintiff's Opening Brief of Respondent/Cross-Appellant, these issues were thoroughly briefed and argued in the Auburn Municipal Court, and the evidentiary rulings were proper and the decision not to sever was likewise proper, each being within the sound discretion of the trial court. Also, according to the Plaintiff's theory of the case, the competition to capture on videotape the most outrageous behavior, which competition continued during the driving, contributing to the recklessness of that driving, also included the part of the videotape showing the Defendant's young daughter smoking and dancing provocatively - at the behest of the child's mother, the Defendant.

The court reviews a trial court's decision to admit evidence for abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Likewise, a trial court's ruling on a motion to sever charges is reviewed for abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

"An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable." *State v. Zunker*, 112 Wn. App. 130, 140, 48 P.3d 344 (2002).

Stated differently, a court abuses its discretion when no reasonable person would take the trial court's view. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997) (citing *Maehren v. City of Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979); *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)).

Looking at the charges that were pending before the trial court when the discretionary decisions were made, and looking at how the videotape supported (could support) the Plaintiff's theory (promoting a competition of shocking and outlandish behavior – even in Tom Stewart's driving), it cannot be said that the trial court's decisions were such that no reasonable person would reach the trial court's view. Those decisions were therefore not an abuse of the trial court's discretion.

So too, it cannot be said that the trial court took positions that no reasonable person would take regarding denial of the Defendant's motion to sever. The Defendant coaxed her young daughter to smoke a cigarette and dance provocatively for the video camera. That was done as a part of the same outlandish competition for the video-camera as her efforts to cajole and coax Tom Stewart to drive outlandishly for the video-camera, and the evidence of the provocative dancing and smoking a cigarette makes the Defendant's actions to promote Tom Stewart's errant driving more probable

than it would be without the evidence.⁴ The dancing and cigarette is thus relevant to the Defendant's conduct regarding Tom's driving.

Per ER 402 any evidence that is relevant to the charges is admissible, and the trial judge is entitled to admit it. That rule states as follows:

Rule 402. Relevant Evidence Generally Admissible;
Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

(ER 402, emphasis added.)

Along with that, one of the considerations the trial court is entitled to heed is the admissibility of the evidence of one crime in the trial of the other if they had been tried separately. *State v. Sanders*, 66 Wn. App. 878, 885, 833 P.2d 452 (1992). Because the provocative dancing and cigarette smoking are thus relevant to the driving charges (both being subject of the video-camera competition), it would make no sense to require a second, separate trial for the Furnishing Tobacco to a Minor charge where the evidence of the dancing and cigarette smoking would be relevant and admitted in both trials.

Broad discretion must be accorded the trial court in determinations of

⁴ Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule of Evidence (ER) 401.

what is admissible. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). See also *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984) (quoting *United States v. Robinson*, 560 F.2d 507, 514 (2d. Cir.1977), cert. denied, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978)).

With that back-drop, the trial court's decisions were entitled to that great deference by the RALJ judge, and even if the RALJ judge might have reached a different conclusion if she were the trial judge, the "actual" trial judge is the one vested with the discretion. In this case, the trial judge exercised his discretion in favor of admitting the evidence. Where the Superior Court is acting as an appellate court, as in this case, it shall accept those factual determinations supported by substantial evidence in the record which were expressly made by the court of limited jurisdiction or which may reasonably have been inferred from the judgment of the court of limited jurisdiction. *State v. Basson*, 105 Wn. 2d 314, 714 P. 2d 1188 (1986). It is not for the Superior Court's scope of review to examine the evidence de novo. *Seattle v. Hesler*, 98 Wn.2d 73, 653 P. 2d 631 (1982). Furthermore, in reviewing a trial court's record, the reviewing court must take great care not to substitute its own judgment. *State v. O'Connell*, 83 Wn.2d 797, 523 P. 2d 872 (1974), *State v. Valentine*, 75 Wn. App. 611, 620, 879 P.2d 313 (1994). Also, with the RALJ appeal rules, more credence is given to the lower court

decisions. *State v. Young*, 83 Wn.2d 937, 523 P.2d 934 (1974).

DENIAL OF MOTION TO SEVER

The Defendant argues that “[u]nder the applicable court rule, a motion to sever joined offenses shall be granted when *the court determines* that severance would promote a fair determination of defendant’s guilt or innocence of each offense. CrRLJ 4.4(b).” See Reply Brief of Appellant, page 9. (Emphasis added.) As noted above, the *trial court* is the court to which CrRLJ 4.4(b) refers. That is the court vested with the broad discretion to determine whether charges are to be severed. Appellate courts⁵ will reverse the trial court’s refusal to sever only for a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). The defendant must demonstrate 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 (citing *State v. Smith*, 74 Wn.2d 744, 755, 446 P.2d 571 (1968)).

The Defendant cites *State v. Sanders*, 66 Wn. App. 878, 885, 833 P.2d 452 (1992), in support of her argument, but that case points out that [even if there were a prejudicial effect], among the factors that the trial court can consider, to justify denial of severance, is the admissibility of the evidence of

⁵ The RALJ court is an appellate court

one crime in the trial of the other, even if the charges were tried separately. *Sanders*, 66 Wn. App. at 885. See also *State v. Cotten*, 75 Wn. App. 669, 686, 879 P.2d 971 review denied 126 Wn.2d 1004, 891 P.2d 38 (1994). Here, the evidence of the Defendant furnishing tobacco to her young daughter – competitively acting out for the video-camera – would be relevant to the Defendant’s charge of operating the same video-camera to capture Tom Stewart’s outlandish – reckless driving. They are linked together. Each is relevant to the other, they make the same conduct more likely than it would be without that evidence. That was the setting in which the trial court deemed the evidence relevant and admissible. Thus, per *Sanders* and *Cotten*, denial of severance was proper since the same evidence would have been relevant – admissible in the trial of each charge.

Again, the trial court has the discretion to decide whether to grant or deny a motion to sever, and that discretion will not be overturned absent a manifest abuse of discretion. It cannot be a manifest abuse of discretion unless based on untenable grounds, and that no reasonable person would take the trial court’s view. *State v. Zunker*, 112 Wn. App. 130, 140, 48 P.3d 344 (2002); *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *Maehren v. City of Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979); *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979). Where the relevance

of evidence to the different charges would result in the same evidence being presented in both trials, if severed, that presents a reasonable basis – a tenable ground – to deny the motion to sever.

ADMISSION OF PORTION OF VIDEOTAPE

The Defendant argues that “[w]hile the image of the minor with a cigarette in her mouth was relevant to the charge of furnishing tobacco to a minor, it was not relevant to prove that Ms. Hedlund was an accomplice to the crime of DUI and should not have been admitted under ER 404(b).” Reply Brief of Appellant, page 12.

That rule does not apply. ER 404(b) states as follows:

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

...

(b) Other Crimes, Wrongs, or Acts. 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.

That rule speaks to unrelated criminal acts. Here, the conduct involved in the charges – all of the charges – were related, and part of a continuous flow of events, connected by time, participants and theme. They are all tied together by the continuous use of the video-camera and the competition to be the most outlandish on camera. That included the

Defendant's giving her young daughter a cigarette and calling for the video-camera to capture that, and the defendant asking her daughter to dance provocatively and telling her to "shake her money-maker" also calling for the video-camera to capture that, just as it included the Defendant getting into the over-crowded, small four-passenger vehicle, with the video-camera, so she could capture – continue capturing – the outrageous behavior, which then also included Tom Stewart's driving – DUI and reckless driving.

The law does not favor separate trials. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). "Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Bythrow*, 114 Wn.2d at 718. Typically such prejudice may be demonstrated by showing "antagonistic defenses" between separate defendants "conflicting to the point of being irreconcilable and mutually exclusive." *State v. Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995). Even then, the existence of mutually antagonistic defenses is not alone sufficient to compel separate trials. Rather, it must be demonstrated that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both defendants are guilty. And again, the burden is on a moving party to come forward with sufficient facts

to warrant the exercise of discretion in his or her favor. *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991).

Rule 4.3 of the Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) provides significant guidance of joinder and severance. That rule states:

Rule 4.3 Joinder of Offenses and Defendants

(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 offenses:

- (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.

The number of offenses in one charging document may be governed by local court rule.

(b) Joinder of Defendants. Unless otherwise provided by local court rule, two or more defendants may be joined in the same charging document:

- (1) When each of the defendants is charged with accountability for each offense included;
- (2) When each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
- (3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:

- (i) were part of a common scheme or plan; or
- (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

Such defendants may be charged in one or more counts together or separately and it shall not be necessary to charge all defendants in each count.

(c) Improper Joinder. Improper joinder of offenses or defendants shall not preclude subsequent prosecution on the same charge for the charge or defendant improperly joined.

(CrRLJ 4.3, emphasis added.)

Here, as indicated above, joinder is warranted where different charges are of the same or similar character, even if not part of a single scheme or plan. At the very least, that could be said here. Furthermore, again, CrRLJ 4.4 states in pertinent part as follows:

Rule 44, Severance of Offenses

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he or she may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(b) Severance of Offenses. The court, on application of the prosecuting authority, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severances will promote a fair determination of the defendant's guilt or innocence of each offense.

The gist of these two court rules is that the trial court, which has the discretion to decide joinder or severance, must evaluate the competing interests of judicial economy versus the promotion of a fair determination of the defendant's guilt or innocence of each offense. Factored in with these is

the question of whether the defendant met the *heavy burden* of demonstrating that a trial involving both counts would be “*so manifestly prejudicial*” as to outweigh the concern for judicial economy. *State v. Cotten*, 75 Wn. App. 669, 879 P.2d 971, *review denied* 126 Wn.2d 1004, 891 P.2d 38 (1994); *State v. Wilson*, 71 Wn. App. 880, 863 P.2d 116, *review granted* 123 Wn.2d 1025, 877 P.2d 694, *reversed in part* 125 Wn.2d 212, 883 P.2d 320 (1993).

That is a heavy burden, one not met in this case. The case law does not just describe this as a burden of asserting “some prejudice” or some embarrassment, but rather says the defendant must bear the burden of demonstrating that a trial involving both counts would be so *manifestly prejudicial* as to outweigh the concern for judicial economy. Again, because the evidence would be the same, there would not even be any embarrassment caused by the added charge, and thus no prejudice. There would be *no prejudice*, much less anything demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.

Just as the rules and authority controlling joinder and severance hold that these are within the sound discretion of the trial judge, the trial judge’s decision to join charges (deny severance) is appropriate where the trial judge concludes that the Defendant did not meet the heavy burden of demonstrating

that a trial involving different counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.

ADMISSION OF 9-1-1 TAPE

Without citation to any authorities, the Defendant argues against the trial court's admission of the 9-1-1 tape, stating for instance, that "Ms. Rosselle's presence in court as a witness made the necessity of admitting the 9-1-1 tape that much more perplexing and lends credibility to the assertion that the tape was offered only for its *dramatic effect*." Defendant's Reply Brief of Appellant, page 14. However, notwithstanding Ms. Rosselle's testimony, the 9-1-1 tape added specificity that supports the credibility of what she said. As noted in Plaintiff's Opening Brief of Respondent/Cross-Appellant, there is significant authority supporting the admissibility of 9-1-1 tapes. *See* ER 803(a)(2) (Hearsay Exceptions and Excited Utterances) and *State v. Davis*, 141 Wn.2d 798, 843, 10 P.3d 977 (2000).

Here, again, the decision to admit evidence or rule on its relevance is within the sound discretion of the trial court, and that discretion will not be overturned absent a manifest abuse of discretion. It cannot be a manifest abuse of discretion unless based on untenable grounds, and that no reasonable person would take the trial court's view. *State v. Zunker*, 112 Wn. App. 130, 140, 48 P.3d 344 (2002); *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d

1353 (1997); *Maehren v. City of Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979); *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

Additionally, it is an unfortunate truism in this case that any description of the accident that took the lives of six young people would be dramatic and tragic, but those are the facts that were the evidence in this case.

The tragedy would not be less if the evidence came from Ms. Roselle's testimony or from the 9-1-1 tape or both. Even if the evidence of Ms. Roselle's testimony and the 9-1-1 tape is not absolutely identical, it is definitely consistent as to most things covered. It may be that the Defendant is arguing that *both were not necessary*, but that is not always an easy call, and it is a call falling within the discretion of the trial judge. Moreover, in order to off-set the prosecution's burden of "beyond a reasonable doubt," the prosecutor is entitled to wide latitude in presenting his or her case and drawing inferences from the evidence. *See, e.g., State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). As noted by the authorities set forth above, the limits on that latitude are set by the trial judge who (in the superior position to evaluate it) is entitled to the discretion to determine whether evidence is relevant. A subsequent, abstract, detached assessment of relevance by the RALJ judge does not count for as much as that of the trial judge. *See, again, State v. Basson*, 105 Wn. 2d 314, 714 P. 2d 1188 (1986);

and *Seattle v. Hesler*, 98 Wn.2d 73, 653 P. 2d 631 (1982).

When all things are considered in the perspective of the trial judge, at the time his discretionary decisions were being made, the evidence is overwhelming. In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the prosecution's case. See *State v. Dejarlais*, 88 Wn. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wn.2d 939, 969 P.2d 90 (1998).

Even if it could be said, *for the sake of argument*, that the trial court erred in admitting the 9-1-1 tape, it was harmless error. See *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), *aff'd sub nom. Davis v. Washington, U.S.*, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). An error is harmless beyond a reasonable doubt if untainted evidence admitted at trial is so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). However, the Plaintiff, again, respectfully submits that not only was the evidence of the case overwhelming, admitting the 9-1-1 tape into evidence was within the sound discretion of the trial judge. There was *no error* in admitting the 9-1-1 tape, and thus there was *no harmless error*.

ACCEPTANCE OF REVIEW

As noted above, the Court Commissioner passed on to this Court's appellate panel the Plaintiff's Motion for Discretionary Review. As set forth in the Plaintiff's Motion for Discretionary Review, the decision of the Superior Court is in conflict with decisions of the Court of Appeals and the Supreme Court, the decision involves an issue of public interest which should be determined by an appellate court; and the Superior Court has departed from the accepted and usual course of judicial proceedings, so as to call for review by the appellate court. *See* Plaintiff's Motion for Discretionary Review.

Additionally, per the authorities cited above and in the Plaintiff's Opening Brief of Respondent/Cross-Appellant, case law rightfully gives the trial court great deference in determining such issues as joinder and severance, relevance and probative versus prejudice. In the matter before this Court, the Defendant challenged a number of evidentiary rulings made by the trial court, the Auburn Municipal Court. Among those, the Defendant argued that videotape evidence of the Defendant's young daughter smoking and dancing in a sexually provocative manner at the direction and coaxing of the Defendant and others at the party at which the videotape was taken was not relevant, and should not have been included in the same trial. That prompted

Judge Mary Roberts of the King County Superior Court to rule, in part, that:

[t]he portions of the video tape that show the defendant's four-year-old daughter with a lit cigarette in her mouth were not relevant to any charge other than furnishing tobacco to a minor. Nor were the portions of the video tape relevant that showed the child dancing provocatively while the defendant said “[s]hake your moneymaker for the camera.”

Judge Roberts’ Order, Appendix “A,” Page 4, (emphasis added).

Judge Robert’s assessment, however, ignores the crucial theory of the Plaintiff’s case (and the cases pending in the municipal court at the time it ruled [which included the charges of DUI and Reckless Driving as an Accomplice]), that the use of the video camera was to solicit, promote and encourage others to act out in what seemed like a competition to act most shocking and outlandish. The Plaintiff’s case was based on the theory that the outlandish behavior of the driver of the fateful vehicle was promoted and encouraged to act out (act outlandishly) by how the camera was being used throughout the day in question. With that, it wasn’t just that the Defendant gave her daughter a cigarette or she had her dance, it was that she did so *for the video camera*. It was for that reason that the Defendant said, when having her daughter act out for the camera, as follows:

Teresa	Kennedy, go grab my cigarettes off of the fireplace.
Kennedy	Ok.
...	
Teresa	Kennedy, Kennedy, Kennedy, Kennedy, Kennedy. On the fireplace, right up here honey.

...
Teresa *Look what my daughter's doing*⁶ (as the young
daughter is smoking a cigarette).

...
Teresa No, no wait hon – give me your cigarette.

...
Teresa Shake your moneymaker *for the camera*.

...
Teresa Shake your moneymaker *for the camera*.

(CP 1188 SEA.)

That same competition for “the camera” carried through with the driver (Tom Stewart) and others during the driving before the fateful accident, e.g.,

Tom *Record me drivin'. What's up cuz? It's me driving. Gotta' record this shit...nigga.' What's up cuz...nigga.'*

(CP 1190 SEA.)

In that regard, as noted above, the evidentiary rulings as to what is relevant are the province of the trial court's discretion. But here, they are also critically tied to the accomplice charges, and thus to the Defendant's issues on appeal. When this Court is reviewing the Defendant's appeal as to whether the Defendant's conduct constitutes accomplice liability, it only makes sense to do so cognizant of the factual issues involved. The Court's

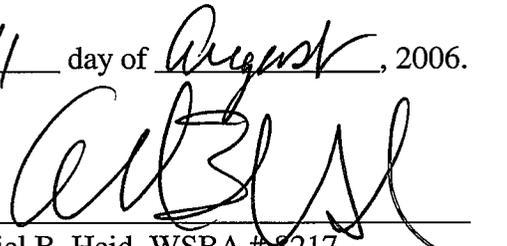
⁶ This was apparently said to the person operating the camera, or at the very least said so that the camera operator directed the camera's attention to the young daughter smoking a cigarette.

review should consider all related issues, so that the decision in this case will be fully reflective of the matter and the factual issues presented to the Court.

CONCLUSION

Based on the facts of this case, and the charges pending against the Defendant when certain evidentiary rulings were made by the trial court, those rulings were well within the trial court's discretion. They should not have been reversed by the RALJ court. Likewise, the trial court's decision on the Defendant's motion to sever was within the trial court's discretion that should not have been reversed by the RALJ court. This Court should reverse the RALJ court (King County Superior Court Cause No. 03-1-04645-7 SEA) rulings, upholding the trial court evidentiary rulings and its ruling on the Defendant's motion for severance, and affirm the convictions from which the Defendant initially appealed.

Respectfully submitted this 11 day of August, 2006.



Daniel B. Heid, WSBA # 8217
Attorney for Respondent/Cross-Appellant
City of Auburn

APPENDIX "A"

COMMISSIONER'S RULING
GRANTING REVIEW OF
HEDLUND'S MOTION,
PASSING REVIEW OF CITY'S
MOTION TO THE MERITS,
DISMISSING HEDLUND'S
CROSS MOTION, AND
CONSOLIDATING CASES

(January 28, 2005)

FACTS

This case arises from a tragic automobile accident on July 16, 2001 in the City of Auburn. The car, driven by Tom Stewart, struck a large concrete pillar. There were no eyewitnesses to the accident. Individuals who came upon the accident scene called 911. Auburn and Kent Police Department officers who responded to the scene found the bodies of five young people who had been ejected from the car. Inside the car they found Stewart in the driver's seat and Hedlund in the front passenger seat. Hedlund was the sole survivor of the accident. She was transported to the hospital, where she was treated over a lengthy time for extensive injuries.

During the subsequent investigation, police found a video camera in the car. The videotape consisted of four parts: the first part showed sequences at an unknown location; the second part showed sequences at a convenience store; the third part showed a party that purportedly occurred at the apartment Hedlund shared with her mother, fiancé, and four-year old daughter; and the fourth part showed a sequence that Hedlund purportedly shot from the passenger seat of the car before the accident. The City's investigation also established that Hedlund, Stewart, and all but one of the passengers had consumed alcohol, and that Stewart was speeding and driving erratically.

On July 10, 2002, the City charged Hedlund as an accomplice to driving under the influence of alcohol, as an accomplice to reckless driving, and to furnishing alcohol to minors. Discovery proceeded. The City's theory of criminal liability was that Hedlund bore accomplice liability for the accident because her

use of the video camera aided, promoted, and encouraged others, including the driver, to act outlandishly. Hedlund sought a bill of particulars, which the trial court granted. Subsequently, the City filed an additional charge of furnishing tobacco to a minor. The trial court denied Hedlund's motion to sever the furnishing alcohol and furnishing tobacco charges from the DUI and reckless driving charges. Thereafter, the court denied Hedlund's motions to dismiss under CrRLJ 8.3(b) (preaccusatorial delay) and Knapstad,¹ again denied her motion for severance, and denied her motion in limine to exclude the City's photographic and videotape evidence.

Trial commenced on January 27, 2003. On January 30, at the close of the City's evidence, Hedlund moved to dismiss the DUI and reckless driving accomplice liability charges. Hedlund argued that the City presented insufficient evidence that she knowingly encouraged driving under the influence. Hedlund also argued that due to her injuries, she was a "victim" under any applicable statute and that she therefore was not an accomplice under RCW 9A.08.020(5). ("Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if: (a) He is a victim of that crime.") The trial court found that there was sufficient evidence to present a jury question regarding Hedlund's alleged knowing encouragement.

But the court agreed that Hedlund was a "victim" and therefore not an accomplice to the DUI and reckless driving charges. The court reasoned that

¹ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986) (pretrial challenge to the sufficiency of the evidence).

RCW 9A.08.020(5) unambiguously states that a victim is not an accomplice; that Hedlund suffered extensive injuries requiring months of hospitalization and rehabilitation; that as one who sustained injuries as a direct result of the crime charged, she is a victim; and that while a jury could conclude that her conduct leading up to the accident was abhorrent, inappropriate, and may well have aided and abetted, there was no way a jury could find that Hedlund was not also a victim of Stewart's reckless and drunken driving. The court dismissed the reckless driving and DUI charges.

The City sought a continuance of trial to allow it to immediately seek a writ of review in the superior court. The parties and the court agreed that the issue of a victim's potential accomplice liability was an issue of first impression. The court recessed the trial for a few days.

The next day, January 31, the City filed a petition for a writ of review. The superior court rejected Hedlund's argument that the petition was barred by double jeopardy and stayed the trial. On February 5, the superior court found that it had jurisdiction to hear the writ, as the City alleged an error of law and had no adequate remedy at law. The court found that Hedlund was a victim of vehicular assault, not DUI and reckless driving, and that RCW 9A.08.020(5) would apply only to vehicular assault. The court concluded that continuation of the jury trial was not barred by double jeopardy, reversed the trial court order dismissing the reckless driving and DUI charges, reinstated the charges, and remanded for continuation of trial.

Hedlund immediately filed a notice of discretionary review and moved for a stay (No. 51791-1-I). A commissioner denied the motion for a stay. Hedlund filed her motion for discretionary review, and the City responded.

In the meantime, trial resumed and Hedlund was convicted of DUI as an accomplice, furnishing alcohol to a minor, and furnishing tobacco to a minor. She was acquitted of reckless driving as an accomplice. Hedlund appealed to the superior court.

A commissioner stayed consideration of Hedlund's motion for discretionary review until the RALJ appeal was concluded.

On September 9, 2004, the superior court on RALJ appeal rejected Hedlund's challenge and affirmed the trial court on the following issues:

(1) delay in filing charges; (2) alleged discovery violations; (3) the request to sever trial of the charge of furnishing alcohol to a minor; (4) whether the accomplice liability theory implicated a first amendment right; (5) admission of the photographs of the accident scene; (6) admission of evidence related to the Total Station Map; ([7]) motion to dismiss for insufficiency of the evidence; ([8]) alleged prosecutorial misconduct during closing argument relating to alleged sexual misconduct by [Hedlund]; and ([9]) alleged prosecutorial misconduct during closing related to a "new" theory of accomplice liability tied to seating arrangements in the car.

But the court concluded that the trial court abused its discretion in refusing to sever the furnishing tobacco to a minor charge from the other charges, allowing the jury to hear the 911 tape, and admitting part three of the videotape showing Hedlund's daughter smoking.

Regarding severance, the court concluded that the tape showing Hedlund's daughter smoking was extremely prejudicial, that the City used the evidence to

argue Hedlund "exploited" and "sacrificed" her daughter in order to show off for friends, that any judicial economy in denying severance was minimal, and that the prejudice far outweighed any economy.

Regarding the 911 tape, the court concluded that the only purpose in allowing the jury to hear the tape in which a witness described the scene, including an erroneous statement that at least one of the victims was decapitated, was to arouse a sense of horror in the jury. The court concluded that the graphic and emotional description was not relevant to any issue in the case, that any minimal relevance far outweighed the prejudice, and that the prejudice was unfair and severe.

Regarding the videotape, the court concluded that the parts showing partying earlier in the day were relevant to support the City's claim that Hedlund furnished alcohol to a minor, the driver of the car. But the part showing Hedlund's daughter with a lit cigarette in her mouth and the part showing the daughter dancing provocatively and showing her bare buttocks with Hedlund's encouragement ("shake your moneymaker for the camera"), were only minimally relevant to the City's theory, particularly given the evidence that Hedlund focused the video camera on the passengers, not the driver. The court concluded that the prejudice was extreme and far outweighed any probative value.

The superior court concluded that the cumulative effect of the errors required a new trial and reversed and remanded for a new trial consistent with the decision. On September 21, 2004, Hedlund filed a motion for clarification of the

superior court decision. On September 27, the City filed a notice of discretionary review (No. 55065-9-I).

On October 4, the court denied Hedlund's motion for clarification and declined to add to its earlier opinion and order. On November 2, Hedlund filed a cross notice of discretionary review. The City subsequently filed a motion to strike the cross notice of discretionary review as untimely.

On January 14, 2005, I heard argument in No. 51791-1-I on Hedlund's motion for discretionary review, and in No. 55065-9-I on the City's motion for discretionary review, Hedlund's cross motion for discretionary review, and the City's motion to strike the cross motion.

DECISION

Hedlund's motion for discretionary review: Hedlund has raised three issues that warrant discretionary review under RAP 2.3(d). First is the issue of whether she is a "victim" for purposes of RCW 9A.08.020(5). Hedlund argues that the statute is unambiguous and applies here. The City argues that a person's ability to avoid accomplice liability as a victim makes sense only if the person was a victim at the time he or she committed the crime as an accomplice. Put differently, the City argues that a person may not be relieved of accomplice liability for a completed criminal act by his or her subsequent injury. This appears to be an issue of first impression and is an issue of public interest which should be determined by an appellate court. RAP 2.3(d)(3).

Second is the issue of whether prosecution of Hedlund on the DUI and reckless driving charges after dismissal was barred by the prohibition against

double jeopardy. Hedlund argues that once the trial court dismissed the charges, even if the decision were erroneous, the charges could not be reinstated without violating double jeopardy. The City argues that prosecution is not barred because it promptly sought the writ of review and prosecution did not involve a second litigation of the same charges. None of the cited cases address this identical situation. See, e.g., State v. Collins, 112 Wn.2d 303, 771 P.2d 350 (1989), and cases cited therein. This is a significant issue of constitutional law that warrants discretionary review under the circumstances. RAP 2.3(d)(2).

Third is the issue of the availability of an interlocutory writ of review sought by the prosecutor following the trial court's dismissal of some of the charges. Hedlund argues that the superior court decision granting the writ is in conflict with Commanda v. Cary, 143 Wn.2d 651, 23 P.3d 1086 (2001), and State v. Epler, 93 Wn. App. 520, 969 P.2d 498 (1999). RAP 2.3(d)(1). She argues that the writ was improperly granted because (1) even if the trial court decision dismissing the charges was in error, it was not in excess of the court's jurisdiction, and (2) the City had an adequate remedy at law. The City argues that the superior court decision is not in conflict with the more recent case of City of Seattle v. Keene, 108 Wn. App. 630, 31 P.3d 1234 (2001) (a statutory writ of certiorari may be granted only when an inferior tribunal has exceeded its jurisdiction or acted illegally and there is no adequate remedy at law). This issue raises questions regarding the applicability of RAP 2.2 and is tied to the issue of double jeopardy. Review is therefore appropriate.

The City's motion for discretionary review: The City seeks review of the superior court's ruling that the trial court erred in denying Hedlund's motion to sever the furnishing tobacco charge from the other charges, admitting the parts of the videotape showing Hedlund's daughter smoking and dancing, and playing the 911 tape for the jury. The City argues that the superior court decision is in conflict with case law because the court failed to accord the trial court decision adequate deference in reviewing the claimed errors. RAP 2.3(d)(1). The panel that considers the victim/accomplice liability and double jeopardy issues will be in a better position to determine whether to review any or all of these additional issues. The parties may brief the issues. I will pass the City's motion for discretionary review to the panel that considers Hedlund's appeal on the merits.

Hedlund's cross motion for discretionary review and the City's motion to strike: A cross motion for discretionary review must be filed within the later of 14 days after service of the notice of discretionary review or 30 days after entry of the challenged decision. RAP 5.2(f). This period is extended by the filing of certain timely post trial motions set out in RAP 5.2(e), including a motion for reconsideration. Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366, 367, 849 P.2d 1225 91993). A motion for clarification is not among the motions listed in RAP 5.2(e). Even if the motion for clarification were treated as a motion for reconsideration, it was not filed and served within 10 days and therefore would not have been timely.² Hedlund's cross motion for discretionary review was

² The superior court entered its decision on September 9, 2004; Hedlund filed her motion for clarification on September 21, 2004.

not timely filed, and she has neither argued nor demonstrated that an extension is required due to extraordinary circumstances or to prevent a gross miscarriage of justice. RAP 18.8(b). The City's motion to strike Hedlund's cross motion for discretionary review is granted. Hedlund's cross motion for discretionary review in No. 55065-9-I is dismissed as untimely.

Now, therefore, it is hereby

ORDERED that Hedlund's motion for discretionary review in No. 51791-1-I is granted. It is further

ORDERED that the City's motion for discretionary review in No. 55065-9-I is passed to the panel. It is further

ORDERED that No. 55065-9-I is consolidated under No. 51791-1-I. The clerk shall set a perfection schedule. And, it is further

ORDERED that the City's motion to strike Hedlund's cross motion for discretionary review is granted and Hedlund's cross motion for discretionary review in No. 55065-9-I is dismissed as untimely.

Done this 28th day of January, 2005.

Mary A. Neel
Court Commissioner

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2005 JAN 28 PM 3:44

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF AUBURN,)	Case No. NO. 51791-1- I
)	
Respondent/)	(King County Superior Court
Cross-Appellant,)	Cause No. 03-1-04645-7 SEA)
vs)	
)	CERTIFICATE OF SERVICE
TERESA A. HEDLUND,)	OF REPLY BRIEF OF
)	RESPONDENT/CROSS-
Appellant/)	APPELLANT
Cross-Respondent.)	

I, Megan B. Stockdale, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date below set forth, I delivered a true and correct copy of the Reply Brief of Respondent/Cross-Appellant concerning the above entitled matter to:

Matthew V. Honeywell, WSBA # 28876
Attorney for Appellant/Cross-Respondent
323 First Avenue West
Seattle, WA 98119

by: personally serving the same on _____.
 depositing the same in the U.S. Mail, postage prepaid, to the above address.
 delivering the same to ABC Legal Messenger Service for delivery to the above address.

SIGNED at Auburn, Washington, this 11 day of August
2006

Megan B. Stockdale
Signature