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FILED
August 18, 2016
Court of Appeals
Division I
State of Washington

No. 74853-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN LEELAND HALE,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT..... 6

1. The trial court abused its discretion in denying Hale’s motion to sever the charges for trial..... 6

a. Hale was unfairly prejudiced by the trial court’s refusal to sever the charges 6

b. To the extent defense counsel waived Hale’s right to challenge the court’s refusal to sever the offenses by failing to make a timely objection, Hale received ineffective assistance of counsel 12

2. Any request that costs be imposed on Hale for this appeal should be denied because he does not have the present or likely future ability to pay them..... 14

E. CONCLUSION 16

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. Const. amend. VI..... 13

Washington Cases

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)..... 13

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000)..... 14

State v. Price, 127 Wn. App. 193, 110 P.3d 1171 (2005) 13

State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986) 7

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994)..... 7, 9

State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009) .8, 9, 10, 11, 13

United States Supreme Court Cases

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d (1984)..... 13

Statutes

RCW 10.73.160(1)..... 14

Court Rules

CrR 4.3(a) 6

CrR 4.4(a) 12

CrR 4.4(b) 7

ER 404(b)..... 10

RAP 15.2(f)..... 15

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying John Hale's motion to sever the two offenses.

2. Hale received ineffective assistance of counsel due to his attorney's failure to renew the motion to sever.

3. If the State substantially prevails, this Court should decline to award appellate costs due to Hale's inability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court should sever multiple charges if consolidation for trial would unfairly prejudice the accused. The reviewing court considers: (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 cross-admissibility of evidence at separate trials. Was Hale unfairly prejudiced by the court's refusal to sever the two charges, where the State's evidence on one count was much stronger than the other, Hale presented different defenses for each count, and evidence on one count would not have been admissible at a separate trial on the other count?

2. An attorney may waive a defendant's right to object to consolidation by not renewing a motion to sever at the close of the

State's evidence. If there is no reasonable tactical basis for failing to make a timely motion and the defendant is prejudiced as a result, the defendant has received ineffective assistance of counsel. Did Hale receive ineffective assistance of counsel where his attorney did not renew her motion to sever at the close of the State's evidence, and Hale was unfairly prejudiced by the consolidated trial?

3. Where Hale is indigent and unable to pay legal financial obligations, should this Court deny appellate costs if the State substantially prevails?

C. STATEMENT OF THE CASE

John Hale is a 69-year-old man who lives in Spokane. RP 382. In 2009 or 2010, he moved to SeaTac to take care of his dying father. RP 382. Hale stayed with his father at his mobile home in a senior residential community called the Bow Lake Trailer Park. RP 238, 382.

Sharon Aspinall also lived at the Bow Lake Trailer Park. RP 382. She and Hale became friends. RP 240-41. Their relationship turned romantic and they married in February 2012. RP 386. They moved in together and continued to live at the Bow Lake Trailer Park. RP 241.

Over time, the relationship went downhill. RP 243-44, 390-91. Hale began to receive messages from God, which he typed into the computer. RP 384-86. Aspinall found this disconcerting, especially when the messages began to refer to her by name. RP 384-86. Aspinall obtained protection orders against Hale. RP 243-44. He was not allowed to contact her or to come within 1,000 feet of the Bow Lake Trailer Park. RP 243-44.

The State alleged Hale violated the provisions of the protection orders on two separate occasions: May 6 and May 10, 2015. CP 42-43. The State charged Hale with two counts of felony violation of a protection order.¹ CP 42-43.

Before trial, the defense moved to sever the two charges. CP 70-76; RP 85-86. Counsel argued Hale's defenses were inconsistent in that he had an alibi defense for count II. RP 85-86. The court denied the motion, finding the two counts were "connected in terms of an allegation of a pattern of conduct by Mr. Hale." RP 96-97.

At trial, Hale admitted he went to the trailer park on May 6 and contacted Aspinall. RP 397. He said God had told him to go see her

¹ The charges were felonies based on the State's allegation that Hale had twice been previously convicted of violating the provisions of a protection order. CP 42-43.

and tell her he had found a house in Spokane that she might like. RP 397. He went to her mobile home and told her he was going to Spokane. RP 397. He told her he loved her, she said she loved him, and she gave him \$20. RP 397.

Hale denied contacting Aspinall or going to the Bow Lake Trailer Park on May 10. RP 399. He could not have gone there because he was in Spokane that day. RP 399. In the morning, he attended services at the Moran United Methodist Church, at 9 and 10:30 a.m. RP 361, 400. In the afternoon, he checked into the Apple Tree Inn and spent the night. RP 399.

The pastor of the Moran United Methodist Church, Barbara Caviezel, corroborated Hale's testimony. RP 359, 361-62. She said Hale attended services in Spokane on May 10 at 9 and 10:30 a.m. RP 361. That night, he slept at the Apple Tree Inn, which had been arranged by members of the church. RP 362.

The manager of the Apple Tree Inn submitted a document showing Hale had checked into the motel on May 10 and checked out the next day. Exhibit 14.

Aspinall testified that on May 10, she saw a man who looked like Hale in the Bow Lake Trailer Park at around 3 p.m. RP 274. She

said she saw the man walking down the middle of the road as she was driving home. RP 261-64. Hale had a habit of walking in the middle of the road. RP 276. The man also seemed to have the same height and build as Hale and walked with the same gait. RP 277, 281. But Aspinall saw him only from the back. RP 277. He turned his head to the side very quickly, then disappeared from view. RP 278.

Aspinall's friend Barbara Morse was just pulling up to her own mobile home nearby. RP 261. Aspinall got into Morse's car and together they drove around looking for the man. RP 261-62, 325-26. They drove past him and turned around. When they drove back, he was gone. RP 326.

Morse confirmed that she saw a man who looked like Hale walking down the middle of the road that day. RP 321-23. She said the time was around 2 p.m. RP 320.

Aspinall returned to her car and called the police on her cell phone. RP 262. King County Sheriff Deputy Ricardo Cueva responded. RP 285-86.

Deputy Cueva's testimony differed from the women's testimonies in regard to the timing of the event. He said he was

dispatched at 8:49 p.m. and arrived at the mobile home park about three to ten minutes later. RP 297, 368.

In closing, defense counsel argued Hale was not at the mobile home park on May 10. RP 455-56. In regard to the May 6 charge, she argued Hale did not know about the protection order at that time. RP 461.

The jury was unable to reach a unanimous verdict as to count II. CP 63, 67. The jury found Hale guilty as charged of count I. CP 66.

D. ARGUMENT

1. The trial court abused its discretion in denying Hale’s motion to sever the charges for trial.

a. Hale was unfairly prejudiced by the trial court’s refusal to sever the charges.

Although CrR 4.3(a)² permits two or more offenses of similar character to be joined in a single charging document, “joinder must not be used in such a way as to prejudice a defendant.” State v. Ramirez,

² CrR 4.3(a) provides:

(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, whether felonies or misdemeanors or both:

(a) 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.

46 Wn. App. 223, 226, 730 P.2d 98 (1986). Washington courts recognize that “joinder is inherently prejudicial.” Id. Even if multiple charges are properly joined in a single charging document, they must be severed for separate trials whenever “the court determines that severance will promote a fair determination of the defendant’s guilt or innocence for each offense.” CrR 4.4(b).

Consolidation of separate counts in a single trial “should never be used in such a way as to unduly embarrass or prejudice a defendant or deny him or her a substantial right.” State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747 (1994). “Prejudice may result from joinder if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition.” Id. at 62-63.

On appeal, a trial court’s refusal to sever charges is reviewed for abuse of discretion. Russell, 125 Wn.2d at 62-63. To determine whether a trial court should have severed charges to avoid prejudice to a defendant, the reviewing court considers (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 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).

Consideration of these factors shows the court abused its discretion in denying Hale's motion to sever. First, the strength of the State's evidence on each count was markedly different. For count I, the May 6 incident, Aspinall testified she saw Hale up close, at the front door of her mobile home. RP 245-46. The two engaged in a conversation. RP 247. The State presented videotape evidence to corroborate her testimony. The videotape showed Hale entering the front gate of Bow Lake Trailer Park at around 1 p.m. that day. RP 218, 227-31. Aspinall testified Hale contacted her at her mobile home "in the afternoon." RP 245.

In contrast, the State's evidence for count II was much weaker. The State presented no videotape or other evidence to corroborate Aspinall's and Morse's claims they saw Hale in the mobile home park. They saw the man they thought was Hale only from a distance and did not speak to him. RP 261-64, 277-78, 325-26.

Moreover, the State's evidence for count II was contradictory. Aspinall and Morse said they saw Hale at around 2 or 3 p.m. RP 274, 320. Aspinall said she called the police immediately. RP 262. But the

responding officer, Deputy Cueva, said he was dispatched much later, at 8:49 p.m. RP 297, 368.

Second, the defenses for each count were different. Hale presented an alibi defense for count II. RP 85-86, 361-62, 399-400. For count I, defense counsel argued Hale did not know about the protection order he allegedly violated. RP 461.

“The likelihood that joinder will cause a jury to be confused as to the accused’s defenses is very small where the defense is identical on each charge.” Russell, 125 Wn.2d at 64. Here, by contrast, the defense was not identical for each charge and thus the potential for jury confusion was high.

Third, the court’s instructions were not sufficient to mitigate the prejudice caused by allowing the State to try both counts in a single proceeding. In Sutherby, although the jury was instructed to decide each count separately,³ it was not instructed that evidence of one crime could not be used to decide guilt for a separate crime. Sutherby, 165 Wn.2d at 885-86. The Supreme Court concluded this weighed in favor of finding that failure to sever the unrelated charges prejudiced Sutherby. Id.

³ The jury instruction in Sutherby provided: “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.” Sutherby, 165 Wn.2d at 885 n.6.

As in Sutherby, the jury in this case was not instructed it could not use evidence of one crime to decide guilt for a separate crime. The instruction provided was identical to the one provided in Sutherby, which stated:

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.

CP 50. The jury was provided no limiting instruction regarding the other act evidence. Thus, the jury instructions did not preclude the jury from using the evidence of one count to infer guilt for the other or from inferring a general criminal disposition. This factor weighs in favor of a finding of prejudice. Sutherby, 165 Wn.2d at 885-86.

Finally, evidence of one count would not have been admissible at a separate trial on the other count. This factor rests on the fundamental principle that “[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 mistake or accident, common scheme or plan, or identity.” Sutherby, 165 Wn.2d at 887; ER 404(b).⁴ The question is whether evidence of

⁴ ER 404(b) provides: “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,

one charge would have been admissible under one of these exceptions at separate trials on the other charges. Id.

Evidence that Hale was guilty of count I would not have been admissible in a separate trial on count II and vice versa. Evidence showing that he contacted Aspinall on May 6 was not relevant or admissible to show he contacted her on May 10. Instead, the evidence would be relevant to show only that he had a general predisposition to violate the protection order. The evidence would therefore have been inadmissible under ER 404(b). Sutherby, 165 Wn.2d at 887. Thus, this factor also demonstrates Hale was prejudiced by the court's failure to sever the offenses.

If the State's evidence on any count is weak and evidence on each count would not have been admissible at separate trials, the denial of severance amounts to an abuse of discretion. State v. Hernandez, 58 Wn. App. 793, 800, 794 P.2d 1327 (1990), abrogated on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).

Here, the State's evidence on one count was weak and evidence on each count would not have been admissible at separate trials. In addition, Hale presented different defenses for each count. The jury

such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

was not sufficiently instructed it could not use evidence of one count to infer guilt for the other. For these reasons, the trial court abused its discretion in denying Hale's motion to sever.

b. To the extent defense counsel waived Hale's right to challenge the court's refusal to sever the offenses by failing to make a timely objection, Hale received ineffective assistance of counsel.

Defense counsel moved prior to trial to sever the two counts. CP 70-76; RP 85-86.

In some cases, counsel must also make a motion to sever charges at the close of the State's evidence in order to preserve the issue for appeal. CrR 4.4(a) provides:

(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 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.

The purpose of requiring counsel to object before or at the close of all the evidence is that the actual prejudice caused by joinder may not surface until the evidence is presented at trial. State v. Harris, 36 Wn. App. 746, 749, 677 P.2d 202 (1984). If counsel fails to make a

timely renewal of a motion to sever, the issue is waived and cannot be raised on appeal. State v. Price, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005), aff'd, 158 Wn.2d 630, 146 P.3d 1183 (2006).

Counsel's failure to make a timely motion to sever may amount to ineffective assistance of counsel entitling the defendant to relief. To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d (1984); U.S. Const. amend. VI.

If there is no reasonable legitimate strategic or tactical reason for counsel's failure to make a timely motion for severance, counsel's performance is deficient. Sutherby, 165 Wn.2d at 884. Failure to move for severance is not reasonable if evidence of one charge would not have been admissible at trial on the other charge. Id. The prejudice prong is satisfied if the motion would properly have been granted if made, and the outcome at a separate trial would probably have been different. Id. at 887; Price, 127 Wn. App. at 203.

As shown above, evidence of one charge would not have been admissible at a separate trial on the other charge and therefore counsel had no reasonable tactical reason not to renew the motion to sever.

In addition, the outcome of separate trials would probably have been different. Hale was therefore prejudiced and is entitled to relief. The conviction must be reversed.

2. Any request that costs be imposed on Hale for this appeal should be denied because he does not have the present or likely future ability to pay them.

This Court has broad discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016); RCW 10.73.160(1). A defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 192 Wn. App. at 389.

Hale does not have a realistic ability to pay appellate costs. At sentencing, the court found Hale was indigent and imposed only those LFOs it deemed mandatory. CP 94.

The court also entered an order authorizing Hale to seek review at public expense and appointing public counsel on appeal. As the

Court noted in Sinclair, RAP 15.2(f) requires that a party who has been granted such an order of indigency is required to notify the trial court of any significant improvement in financial condition. Sinclair, 192 Wn. App. at 393. Otherwise, the indigent party is entitled to the benefits of the order of indigency throughout the review process. Id.; RAP 15.2(f).

There is no trial court record showing Hale's financial condition has improved.

Nor is Hale's financial situation likely to improve to the point where he will be able to pay appellate costs. At sentencing, the court found Hale is mentally ill and ordered him to engage in mental health treatment. RP 498-99; CP 92-100. The court waived the DNA fee due to Hale's mental illness. RP 500. This demonstrates the court's recognition that Hale's mental illness affects his ability to pay LFOs.

Hale is 69 years old. RP 382. His age and mental illness make him unlikely ever to find employment that will be sufficient to enable him to pay appellate costs.

Because Hale is indigent and unlikely ever to be able to pay appellate costs, this Court should exercise its discretion and decline to award costs if the State substantially prevails on appeal.

F. CONCLUSION

The trial court abused its discretion in denying the motion to sever the two counts for trial. The conviction must be reversed.

Respectfully submitted this 18th day of August, 2016.

/s/ Maureen M. Cyr

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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Respondent,)	
)	NO. 74853-0-I
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)	
JOHN HALE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> JOHN HALE (NO CURRENT ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	() () (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF AUGUST, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710