

FILED
NOV 18 2012
COURT OF APPEALS
DIVISION III
SPokane, Washington

Consol No. 30550-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL D. COOMBES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erroneously joined the intimidating a witness and first degree murder charges for trial.
2. The trial court erroneously joined the tampering with a witness and first degree murder charges for trial.
3. The trial court denied defendant a fair trial by joining the charges for trial.
4. The trial court abused its discretion admitting evidence of defendant's gun tattoo.
5. The admission of the tattoo evidence prejudiced defendant.
6. The information charging defendant with tampering with a witness did not give defendant adequate notice of the uncharged alternative means the jury was instructed to consider.
7. The trial court erroneously instructed the jury on uncharged alternative means of committing tampering with a witness.
8. Defendant received ineffective assistance when counsel failed to object to the jury instruction that included an uncharged alternative means of committing tampering with a witness.

II.

ISSUES PRESENTED

1. Did the trial court abuse its discretion in joining the tampering, intimidating, and first degree murder charges for trial?
2. Did the trial court abuse its discretion in admitting evidence of defendant's tattoo?
3. Did the trial court commit error when it instructed the jury regarding an uncharged alternative means of committing the tampering charge?
4. Did counsel's failure to object to the trial court's elements instruction for tampering with a witness constitute ineffective assistance of counsel?

III.

STATEMENT OF THE CASE

The State accepts the Appellant's statement of the case for purposes of this appeal only.

IV.

ARGUMENT

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN JOINING THE TAMPERING, INTIMIDATING, AND MURDER CHARGES.

Appellant claims that the trial court abused its discretion in granting the State's motion to join the tampering with a witness, intimidating a witness, and first degree murder charges. CrR 4.3(a) authorizes joinder of counts where 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 a series of acts connected together or constituting parts of a single scheme or plan. The one proviso is that joinder of offenses should not be used to unduly embarrass, prejudice or deny the defendant a substantial right. *State v. Russell*, 125 Wn.2d 24, 62, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). Prejudice can occur where the defenses to the separate offenses are contrary or when a single trial of separate offenses invites a jury to cumulate evidence to render a guilty verdict. *State v. Russell*, 125 Wn.2d at 63-64. To avoid such prejudice, the trial court must consider a number of factors to determine whether joinder is appropriate, including: (1) the strength of the evidence pertaining to each offense; (2) the clarity of the defenses to each offense; (3) the court's jury instruction that each offense is to be resolved separately; and (4) the cross-admissibility of the evidence of each offense. *State v. Williams*,

156 Wn. App. 482, 500-501, 234 P.2d 1174 (2010). Washington State has never favored separate trials. *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). Finally, the standard of review for a trial court's decision regarding joinder of separate offenses is abuse of discretion. *State v. Russell*, 125 Wn.2d at 63.

Here, the record reflects that the trial court found joinder was appropriate as follows, in pertinent part:

- (1) The facts presented in cause # 2007-1-03527-4 and 2011-1-00443-1...are of a same or similar character as anticipated by through statute and case law. Here, the Court is satisfied that if these matters were to be tried separately, there would be significant overlap and testimony that would clearly be cross-admissible and likely admitted into evidence in both proceedings.
- (2) Consolidation and/or joinder of these respective cases would in fact provide for judicial economy and the Court is unable to discern or reference any specific prejudice demonstrated to Defendant should the State of Washington's motion be granted.
- (3) The Court would find and therefore order that the State's motion for joinder and consolidation is appropriate and is granted.

CP 136-137.

The trial court's Order is further supported by the transcript of the hearing on November 3, 2011 on the motion for joinder. After reviewing the briefs submitted in support of and opposing the motion for joinder coupled with respective counsel's arguments, the trial court made its oral ruling as follows, in pertinent part:

[T]his is...a permissive joinder issue...the allegations in terms of the witness tampering are certainly within the different section of the RCW from a murder portion of the RCW...But the question really is whether these allegations are of the same or similar character or can play into the same set of facts...from my perspective, they are...I am always looking at the question with permissive joinder whether there is significant amount of...overlap or cross-admissibility. I'm confident there absolutely would be here...my next point of analysis would be to consider how, if any way, this would prejudice the defendant...in some fashion...adding charges prejudices an individual who is about to go to trial, but frankly, I cannot find that here. I do not see any prejudice to Mr. Coombes with permissive joinder in this particular case...in terms of judicial economy. Frankly, that does not impact me at all. If I thought, in any way, that the permissive joinder would impact or prejudice Mr. Coombes, I would not provide for it. Judicial economy is at the bottom of the list in terms of my concerns. Mr. Coombes right to a fair trial is at the top...It should be pointed out...that jurors are...instructed that your verdict on one count does not control your verdict on any other count...Finding no prejudice to Mr. Coombes, finding that the issues are...overlapping and cross-admissible, I'm going to grant the State's motion for joinder and consolidation.

Report of Proceedings ("RP") – 110311, pages 6-7.

As the trial court noted, all evidence is prejudicial to one side or the other; that is why it is introduced. *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). Here, the defendant failed to demonstrate that the prejudice resulting from the joining of the charges was greater than the benefits derived from same. The defendant failed to establish that the trial court abused its discretion when ordering the charges joined. Accordingly, the record reflects that the trial court clearly set forth its reasoning, the basis therefore, and its decision granting the motion to join the charges.

B. JOINDER OF THE CHARGED OFFENSES
PROTECTED DEFENDANT'S RIGHT TO A FAIR
TRIAL.

Defendant claims that the joinder of the witness tampering and intimidating a witness charges with the murder deprived him of a fair trial based upon an application of the *Watkins* factors. *State v. Watkins*, 53 Wn. App. 264, 766 P.2d 484 (1989). The *Watkins* factors are those same concerns that were previously identified by the citation to the Supreme Court's decision in *State v. Russell*, *supra*, wherein the Court reiterated the factors it had set out in its decision in *State v. Smith*, 74 Wn.2d 744, 754, 446 P.2d 571 (1968). As discussed in the prior section, the record reflects that the trial court was very cognizant of the factors for determining whether the potential for prejudice required separate trials of the charges against defendant.

Defendant contends that the trial court failed to consider the factors in rendering its decision vis-à-vis the motion for joinder. Defendant's position simply ignores that the trial court specified that its decision regarding joinder was based upon its review of the "files and records herein...the State's memorandum of authority...the Defendant's memorandum of authority...[and] counsel's argument. CP 136-137. The record reflects that the trial court was very much concerned about the impact of the joining of charges upon the defendant's right to a fair trial. 110311-RP 6-7. Neither the *Watkins* nor *Russell* decisions require the

trial court articulate an analysis which sets forth its reasons for granting or denying a motion to join or sever charges with respect to each identified factor.

Nevertheless, here, the trial court specifically referenced that the subject charges were of such a same or similar character that there would be significant overlap of cross-admissible evidence in any trial of the charges. Defendant denied committing the murder, so there would have been no necessity for defendant to commit the tampering or intimidating charges; hence, there was clarity of defenses. Finally, as noted, the trial court noted the potential for prejudice, yet found that joinder of the charges for trial did not raise any articulable issues of prejudice. The defendant's post-trial reliance upon the jury's verdict is hindsight, yet adds nothing to the analysis of whether the trial court abused its discretion in joining the charges for trial. At the time the trial court weighed the evidence for purpose of resolving the motion, the anticipated evidence was strong enough to support the decision to join the charges. The record reflects no basis to conclude that the trial court's joining of charges deprived defendant of a fair trial.

C. EVIDENCE OF DEFENDANT'S TATTOO WAS PROPERLY ADMITTED AND DEFENDANT WAS NOT UNDULY PREJUDICED BY ITS ADMISSION.

Defendant contends that the court improperly admitted a photograph of his gun tattoo acquired after the incident. Defendant characterizes the tattoo as

irrelevant, highly prejudicial and evidence of defendant's previous guilty plea to the murder charge. Absent the jury being advised that defendant acquired the tattoo as a memento of his prior guilty plea, the jury would be completely unaware of any prior guilty plea. The significance of the tattoo to the defendant would not be intuitively obvious to the casual observer. Hence, evidence of defendant's gun tattoo could only be characterized as highly prejudicial if the jury were provided the background story of its significance to defendant; otherwise, it is simply a gun tattoo.

The State offered the tattoo as evidence of the defendant's acknowledgement that the murder weapon was a Smith & Wesson .38 revolver which appeared remarkably similar to the tattoo. The State's theory being that sometime after committing the murder, the defendant took enough pride in his act that he had a depiction of the weapon he used tattooed on his body. Nevertheless, the evidence of the tattoo admitted before the jury was simply that of the gun without any further explanation. The fact that after the incident the defendant had tattooed onto his body a depiction of the exact firearm that witnesses took from defendant is of significance and relevant because it helps establish and corroborate defendant's identity with the murder. The fact of the tattoo of the gun on his body corroborates defendant's own statements to law enforcement admitting his participation in the murder. Finally, the admission of the tattoo

could not constitute a violation of ER 410 since the rule only applies to plea negotiations.

A trial court has broad discretion in the admission or exclusion of photographic evidence. *State v. Tatum*, 58 Wn.2d 73, 75, 360 P.2d 754 (1961). The decision to admit photographs as evidence lies within the sound discretion of the trial court. *Id.*, 58 Wn.2d at 75. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The test also is sometimes viewed in a second way: whether any reasonable judge would rule as the trial judge did. *State v. Nelson*, 108 Wn.2d 491, 504-505, 740 P.2d 835 (1987).

Here, the trial court specifically weighed the probative versus prejudicial value of the photograph and factored in the holding in *State v. Nelson*, 152 Wn. App. 755, 219 P.3d 100 (2009), combined with the nature and timing of the tattoo in determining its admissibility. 121311-RP 200-201. Hence, defendant has not established that the trial court abused its discretion in admitting the cropped photograph of defendant's gun tattoo.

Defendant also contends that the trial court abused its discretion admitting the photograph under ER 404(b). There is no ER 404(b) issue here because the act of getting a tattoo is not evidence of other crimes or bad acts absent some elaboration by defendant regarding why he acquired same. Moreover, it is evidence that tends to establish defendant's knowledge of intimate details of the

murder that could only be known by a participant therein which renders its more probative than prejudicial. When combined with all the other relevant evidence admitted before the jury the tattoo provides significant evidence which connects defendant to the murder, yet does not prevent defendant from claiming that the cropped photo of the tattoo signified that defendant liked Smith & Wesson .38 caliber revolvers. This situation properly leaves the weight and credibility to be accorded the photograph of the tattoo to the jury as the trier of fact. There was no abuse of discretion committed by the trial court in admitting the cropped photograph of defendant's tattoo. Finally, defendant was not unduly prejudiced by the admission of the tattoo photograph.

D. THE WITNESS TAMPERING CONVICTION SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL DUE TO THE TRIAL COURT'S ERROR INSTRUCTING THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING SAME.

The defendant was charged by information with Tampering with a Witness by means of attempting to induce a witness in an official proceeding to absent himself from such proceedings. CP 5. During trial the State produced evidence to support the alternative means of committing the charged crime; however, the State's proposed jury instructions included the uncharged alternative means. CP 69-98. The trial court's instructions to the jury incorporated the State's erroneous witness tampering elements instruction. The record includes

sufficient evidence for the jury to find defendant guilty of either alternative means of committing the charged crime. When a statute provides that crime may be committed by alternative means, yet the information charges only one alternative, it is error to instruct the jury that it may consider the uncharged alternative means regardless of the strength of the evidence admitted at trial that supports the uncharged alternative. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988) (citing *State v. Severns*, 13 Wn.2d 542, 546-548, 125 P.2d 659 (1942)). Accordingly, the State respectfully submits that the tampering with a witness conviction be reversed and remanded to the trial court for a new trial.

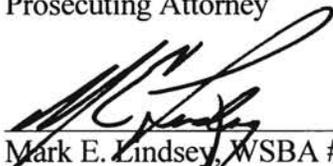
VI.

CONCLUSION

For the reasons stated herein, the defendant's conviction and sentence with respect to the murder in the first degree count should be affirmed, while the conviction for tampering with a witness should be reversed and remanded for a new trial.

Respectfully submitted this 13th day of November, 2012

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