IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WESLEY JAMES LONG, Appellant.	No. 38179-6-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Wesley James Long guilty of two gross misdemeanor protection order violations, and Long subsequently pleaded guilty to one count of second degree possession of stolen property. On appeal, Long challenges (1) the trial court's denial of his severance motion; (2) the admission of certain trial testimony by his wife, Christina Swiger-Long; and (3) the trial court's authority to impose gross misdemeanor sentences consecutive to a felony sentence. We affirm, holding that (1) Long's severance challenge is moot, (2) any error in the admission of Swiger-Long's testimony was harmless, and (3) a trial court has statutory authority to impose consecutive gross misdemeanor and felony sentences.

FACTS

Background

Swiger-Long obtained a temporary protection order on December 14, 2006, prohibiting Long from contacting her or their child, A.T.L. That night, she temporarily moved into her parents' Port Orchard home, taking some valuable property with her. On December 21, 2006, the

Kitsap County Superior Court issued Swiger-Long a permanent protection order for one year and granted her sole custody of their son.

On December 25, 2006, a neighbor checking on Pat and Willard Swigers' cat discovered the Swigers' home had recently been burglarized. Property valued at $57,000 was taken from the Swigers' home including televisions, collectible coins from the 1800s, multiple guns, hunting equipment, jewelry, and family heirlooms. Also stolen were photos of their grandson, A.T.L., and several computers, some of which belonged to their daughter, Swiger-Long.

The Swigers suspected their son-in-law, Long, of the burglary. Most of the stolen property included unique items that Long knew the Swigers owned. William "Billy" Storm and John Clayton "Clay" Crooks committed the actual burglary of the Swigers' home, pleaded guilty, and agreed to testify at Long's trial. Storm and Crooks testified that Long stated he wanted his in-laws to be burglarized, indicated that the job was a "quick come-up," said that the Swigers' home did not have an alarm, told them about the Swigers' Christmas vacation plans, and described the location of various pieces of valuable property in the house.[1] 6 Report of Proceedings (RP) at 646. Additionally, sometime shortly after the burglary, Long called Storm and informed him that the police had discovered the burglary and told him not to return to the Swigers' home.

In January 2007, Long contacted Swiger-Long, moved into her home with her, and the two set about finding some of the stolen property. Around January 22, 2007, Long located the stolen television, Swiger-Long bought it for $200, and then she gave the television back to her parents. Long then coached Swiger-Long into lying to the police about how she found the

[1] A "quick come-up" is slang for "something easy to do, [a] quick job, where you'd make . . . some money easy." 6 RP at 646.

television. The police arrested Long on January 24, 2007, for violating the protection order.[2]

On January 30, 2007, immediately after Long was released from jail, he began calling Swiger-Long's work, home, and cell phone numbers. That same evening, a neighbor heard someone attempt to break into Swiger-Long's home. The neighbor contacted Swiger-Long at work, who in turn called the police. Although the police found broken glass at the front door, it appeared that a dead-bolt on the door prevented access and that no one had entered the home.

On February 6, 2007, the Kitsap County Prosecuting Attorney's office charged Long with one count of second degree burglary for the burglary of the Swigers' home. The police arrested Long on February 8, 2007. Swiger-Long received two letters in the mail from Long sometime in late February 2007.

On September 14, 2007, in a seventh amended information, the State charged Long with first degree burglary of the Swigers' home (count I), two counts of second degree unlawful possession of a firearm related to the burglary of the Swigers' home (counts II and III), residential burglary of the Swigers' home (count IV), third degree theft related to the burglary of the Swigers' home (count V), two counts of gross misdemeanor violations of Swiger-Long's protection order (counts VI and VIII), and residential burglary of Swiger-Long's home (count VII). All the charges, except for the unlawful possession of firearm charges, included domestic violence special allegations.

A jury trial commenced on September 24, 2007, and ended on October 15, 2007. On October 17, 2007, the jury entered guilty verdicts on the two charges of violating a court order

[2] Swiger-Long testified that, at Long's request, she tried to lift the protection order in January 2007. A judge denied the motion. Long pleaded guilty to this violation of the protection order on March 15, 2007, in Kitsap County District Court.

(counts VI and VIII) and entered not guilty verdicts on the charges of second degree unlawful possession of a firearm (count III) and residential burglary of Swiger-Long's home (count VII). The jury was unable to reach a unanimous verdict on the first degree burglary (count I), residential burglary of the Swigers' home (count IV), and third degree theft (count V) charges.[3]

On January 4, 2008, prior to sentencing, the State filed a ninth amended information dropping the charges on which the jury was unable to reach a unanimous verdict and adding a charge of second degree possession of stolen property. Long entered an *Alford*[4] guilty plea to the second degree possession of stolen property charge that same day.

The trial court sentenced Long to 18 months confinement on his plea-based second degree possession of stolen property felony conviction and concurrent 12 months confinement on each of his protection order violation gross misdemeanor convictions. The trial court did not impose community custody. Over Long's objection, the trial court ordered Long to serve the concurrent gross misdemeanor sentences consecutively to the 18-month felony sentence.[5] Long appeals.

ANALYSIS

Motion to Sever

Long challenges the trial court's denial of his motion to sever some of his charges into a

[3] The trial court dismissed count II after the State's case in chief.

[4] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[5] On June 6, 2008, the trial court entered a nunc pro tunc order modifying Long's sentence. It appears that the only substantive change, which Long does not appeal, extended Long's felony sentence from 18 to 30 months. We note that, rather than entering a new judgment and sentence order, with an indication of the amendments, in its nunc pro tunc order the trial court listed a few sentences to be integrated and/or changed in the original sentencing order. We think the better practice is to file an amended judgment and sentence order because it eliminates any errors that could result from having to cross-reference the orders and/or having to interpret the intended changes to the original order.

separate trial. But this alleged error relates only to counts on which the jury was unable to reach a unanimous verdict, the jury entered a not guilty verdict, or were dropped before the trial began. Long resolved any possible severance errors when counts on which the jury did not reach a unanimous jury verdict were dismissed in the second degree possession of stolen property guilty plea agreement.[6] There is no error for us to review on appeal.

Swiger-Long's Challenged Testimony

Long asserts that marital privilege[7] and ER 402, 403, and 404(b) preclude Swiger-Long's testimony about alleged threats he made to kill her. We do not consider the merits of Long's challenge because, assuming without deciding that Swiger-Long's testimony should have been excluded, any error was harmless.

Marital privilege challenges are evidentiary challenges that do not rise to the level of constitutional magnitude. *See State v. Webb*, 64 Wn. App. 480, 488, 824 P.2d 1257 (applying a nonconstitutional harmless error test to a challenge involving a marital communications privilege), *review denied*, 119 Wn.2d 1015 (1992); *see also State v. Denton*, 97 Wn. App. 267, 271-72, 983 P.2d 693 (1999) (analyzing spousal testimonial privilege under an admission of evidence standard). An evidentiary rule error is not prejudicial unless, within reasonable probabilities, the

[6] The possession of stolen property conviction resulted from a plea agreement to which Long entered. Long does not appeal this conviction.

[7] Former RCW 5.60.060(1) (2006). We note that based on Long's objection at trial and arguments on appeal, it is unclear whether he asserted the marital communications privilege or the spousal incompetency testimonial privilege, both of which are contained within former RCW 5.60.060(1). Because any error was unquestionably harmless, we ignore whether Long properly asserted either privilege at trial and address both privileges in this opinion by referring to them collectively as "marital privilege." *See State v. Bonaparte*, 34 Wn. App. 285, 288, 660 P.2d 334, *review denied*, 100 Wn.2d 1002 (1983) (clarifying that "marital privilege" consists of both the testimonial and communication privileges contained in former RCW 5.60.060(1)).

outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Long's challenge to Swiger-Long's testimony is limited to her comments that he made threats against her life. A jury found that Long violated a protection order on January 30, 2007, and again between February 17 and 28, 2007.

The State presented overwhelming evidence of Long's protection order violations. For the first violation, a Qwest records specialist testified that on January 30, 2007, 19 phone calls were made from Long's phone number to three separate phone numbers associated with Swiger-Long—her cell, home landline, and work numbers. Long did not object to the admission of Qwest phone records corroborating this testimony. Additionally, Swiger-Long testified that on January 30, 2007, she received at least five calls to her work number, several calls to her cell phone resulting in multiple voicemail messages, and that she received messages on her home answering machine. For the second violation, Swiger-Long produced two letters that she received in the mail in late February 2007, written in handwriting that she identified as Long's. Long did not object when these letters were admitted as evidence. This evidence is uncontradicted. Any error in admitting Swiger-Long's testimony that Long threatened her life did not prejudice Long's trial. Given the unchallenged uncontroverted evidence, any reasonable jury would have convicted Long of both protection order violations without Swiger-Long's challenged testimony.

Sentencing

Finally, Long contends that the sentencing court lacked authority to run his gross misdemeanor sentences consecutive to his felony sentence and violated the exceptional sentence provisions of the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW. He argues that to impose a gross misdemeanor sentence consecutive to a felony sentence is an exceptional sentence that requires an aggravating factor jury verdict. We disagree.

A court's sentencing authority is statutory. *State v. Phelps*, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002). The SRA governs *felony* sentencing, stating in part, "Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a). But the SRA does not govern misdemeanor sentencing. *State v. Whitney*, 78 Wn. App. 506, 517, 897 P.2d 374, *review denied*, 128 Wn.2d 1003 (1995); *State v. Langford*, 67 Wn. App. 572, 587-88, 837 P.2d 1037 (1992), *review denied*, 121 Wn.2d 1007, *cert. denied*, 510 U.S. 838 (1993); *see* RCW 9.94A.010; *State v. Harstad*, 153 Wn. App. 10, 27, 218 P.3d 624 (2009). Under the statutes applicable to misdemeanors and gross misdemeanors, a trial court has the discretion to impose concurrent or consecutive sentences. *See* RCW 9.92.080(2)-(3).[8] An abuse of discretion

[8] RCW 9.92.080 states:

> (2) Whenever a person is convicted of two or more offenses which arise from a single act or omission, the sentences imposed therefor shall run concurrently, unless the court, in pronouncing sentence, expressly orders the service of said sentences to be consecutive.
>
> (3) In all other cases, whenever a person is convicted of two or more offenses arising from separate and distinct acts or omissions, and not otherwise governed by the provisions of subsections (1) and (2) of this section, the sentences imposed therefor shall run consecutively, unless the court, in pronouncing the second or other subsequent sentences, expressly orders concurrent service thereof.

occurs when the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Whitney and *Langford* firmly establish a trial court's authority to impose misdemeanor sentences consecutive to felony sentences. *Harstad*, 153 Wn. App. at 27; *Whitney*, 78 Wn. App. at 517; *Langford*, 67 Wn. App. at 587-88. Prior Washington law has addressed and rejected Long's argument that the trial court lacks authority to impose consecutive misdemeanor/gross misdemeanor sentences and we decline to revisit this issue here. Moreover, the trial court did not exceed its authority when it sentenced Long to serve each misdemeanor offense concurrently with one another but consecutively to his sentence on the felony offense in accord with its statutory authority. The trial court did not abuse its discretion and we affirm.[9]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

HUNT, J.

[9] Also, we cannot address Long's sentencing argument based on the real facts doctrine in former RCW 9.94A.530(2) (2005) because, again, the SRA does not apply to the sentencing of misdemeanor and gross misdemeanor convictions.