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

STATE OF WASHINGTON, Respondent, v. SAMUEL DAVID OBERT SLATER, Appellant.	)	No. 79335-7-I UNPUBLISHED OPINION

VERELLEN, J. — Samuel Slater appeals his convictions for violation of a court order (domestic violence) and bail jumping. He contends the trial court abused its discretion when it denied his motion to sever the two counts because it did not adequately engage in ER 404(b) analysis when determining the evidence of bail jumping was cross admissible. But the court adequately engaged in ER 404(b) analysis when it recognized an unexplained failure to appear for the trial call is a form of flight, material as consciousness of guilt of violation of the court order. And the court balanced the probative value against any unfair prejudice.

Slater also contends the prosecutor committed misconduct during closing argument. Slater objected to the prosecutor's suggestion that Slater did not appear for trial because he had cold feet and did not want to be there.

Slater does not establish that this comment was improper. For the first time, on appeal, Slater challenges several other comments but does not establish they were so flagrant and ill intentioned that any prejudice could not be cured with an instruction.

We affirm.

FACTS

In April, 2017, the State charged Slater with one count of violation of a court order (domestic violence). On September 8, 2017, Slater did not appear at his trial call hearing. The State amended the information to charge Slater with one count of bail jumping.

Prior to trial in November 2018, Slater moved to sever the two counts. The court denied the motion. During motions in limine, Slater renewed his motion to sever, and the court again denied the motion. The court also denied Slater's motion to exclude argument that his failure to appear on September 8, 2017 was evidence of flight.

Following trial, the jury convicted Slater on both counts. The court sentenced Slater to an exceptional downward sentence of 25 months' incarceration.

Slater appeals.

ANALYSIS

I. Motion to Sever

Slater argues the trial court abused its discretion when it denied his motion to sever.

We review a trial court's denial of a motion to sever for abuse of discretion.[1] "The law does not favor separate trials."[2] To determine whether severance is warranted, trial courts consider

> (1) the strength of the State's evidence on each count; (2) the clarity of the 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.[3]

"A defendant seeking severance has the burden of demonstrating that a trial involving all counts would be so manifestly prejudicial as to outweigh the concern for judicial economy."[4] Slater challenges only the fourth factor.

Slater argues the court abused its discretion when it determined the evidence of bail jumping was cross admissible as to the count of violation of a court order without engaging in an adequate ER 404(b) analysis. We disagree.

> Admissibility of evidence under ER 404(b) requires a three-part analysis. The court must identify the purpose for which the evidence will be admitted; the evidence must be materially relevant to that purpose; and the court must balance the probative

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[1] State v. Huynh, 175 Wn. App. 896, 908, 307 P.3d 788 (2013).

[2] Id.

[3] State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

[4] Huynh, 175 Wn. App. at 908.

> value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.[5]

Here, prior to trial, Slater moved to sever the two counts. As to the cross admissibility, the court stated:

> [T]he case law indicates that this is sort of a factor that can be extremely important. It's the cross admissibility of each charge on to the other charge. Because if they're cross admissible, the prejudice is going to exist whether you sever the case or not. . . . I did look at least at one of the cases cited by the State which specifically held bail jumping is admissible, cross admissible as to evidence of guilt. . . . I'm finding it's likely that there would be cross admissibility. . . .
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> I do agree with [defense counsel] that this case is somewhat unusual in that the prejudice would be greater than in some other cases because of both cases being violating court orders. . . . However, there is some differences in the court orders. I think there's a different nature to not coming for a trial as opposed to violating a protection order.
>
> At any rate, it's not that I don't agree that there is higher prejudice here. However, because of the cross admissibility, I'm finding that the prejudice is going to exist essentially whether it's severed or not and that we're not decreasing the prejudice significantly by severing the cases. Therefore, I'm holding because of judicial economy, the State is permitted to join the cases.[6]

Several days later during motions in limine, Slater renewed his motion to sever. The trial court, which had not presided over the initial motion to sever, denied the renewed motion. The court indicated, "I am not sure I agree" that

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[5] State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).

[6] Report of Proceedings (RP) (Nov. 9, 2018) at 11-13.

"there's more prejudice" because both cases involved violating a court order.[7] Slater argued, "[T]his is essentially 404(b) evidence that wouldn't come in otherwise but for the joinder of these two charges, violations of court orders. . . . If the court's going to agree that previous convictions . . . should not come in under 404(b), then neither should the bail jump itself."[8] In response, the court stated, "I think the test is not prejudice. It's unfair prejudice. And in balancing this, I do not believe that the danger of unfair prejudice outweighs the probative value."[9]

Also during motions in limine, the court denied Slater's motion to exclude argument that his failure to appear on September 8, 2017 was evidence of flight. The following exchange occurred:

> COURT: The prosecution's position is that you, I assume, wish to be arguing that missing trial is evidence of guilt?
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> STATE: That's correct.
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> COURT: And there does seem to be case law supporting that. I think that certainly defense can argue that he did make, you know, 13 other court dates. I think there's support for that in the record. It will just be an argument that's made. I assume we're talking about closing? . . .
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> DEFENSE: Correct.[10]

[7] RP (Nov. 14, 2018) at 27.

[8] Id. at 29.

[9] Id. at 29-30.

[10] Id. at 35-36.

Although the trial court did not use the specific labels, it is clear the court applied the three-part ER 404(b) analysis. The court identified (1) the purpose for which the bail jumping evidence would be admitted, (2) the evidence was materially relevant for that purpose, and (3) the probative value outweighed any unfair prejudice.[11] It is noteworthy that the court expressly mentioned the ER 404(b) "arena" when announcing its denial of the pretrial motion to sever.[12] And as discussed, when the trial court denied the renewed motion to sever on the first day of trial, it was immediately after Slater's reference to ER 404(b) that the court indicated it was balancing the probative value against any unfair prejudice. The court clearly addressed the third part of the analysis. The court weighed the probative value with any unfair prejudice. Slater does not challenge the court's conclusion concerning prejudice; he merely argues the court failed to conduct the appropriate analysis.

And a careful reading of the record reveals the court adequately applied the first and second parts of the ER 404(b) analysis. When addressing Slater's motion in limine to exclude argument that Slater missing the trial call hearing evidenced consciousness of guilt, the court noted that case law supports such an argument.

[11] See Freeburg, 105 Wn. App. at 497.

[12] RP (Nov. 9, 2018) at 12.

The court appeared to be referencing State v. Jefferson[13] and State v. Cobb.[14] In both cases, the State charged the defendants with an underlying crime and, after failing to appear at trial, the State argued the failure to appear was evidence of consciousness of guilt as to the underlying crime. Both cases cite the principle: "The rationale which justifies the admission of evidence of 'flight' is that, when unexplained, it is a circumstance which indicates a reaction to a consciousness of guilt."[15]

After Cobb and Jefferson, Washington courts have further delineated the probative value of evidence of flight. Evidence of flight is admissible when it creates "'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.'"[16] But even if a reasonable inference exists, evidence of flight "tends to be only marginally probative as to the ultimate issue of guilt or innocence."[17] Consequently, "the circumstance or inference of flight must be substantial and real. It may not be speculative, conjectural, or fanciful."[18] An unexplained failure to appear for trial

[13] 11 Wn. App. 566, 524 P.2d 248 (1974).

[14] 22 Wn. App. 221, 589 P.2d 297 (1978).

[15] Jefferson, 11 Wn. App. at 570; Cobb, 22 Wn. App. at 225.

[16] Freeburg, 105 Wn. App. at 497 (quoting State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)).

[17] Id. at 498.

[18] State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965).

is an evasion of prosecution and thus is a form of flight.[19] Although the trial court did not explicitly outline the case law, the court adequately addressed the first and second part of the test when it determined case law allowed arguing that missing trial is evidence of guilt.

The trial court adequately applied the three-part analysis under ER 404(b). The trial court did not abuse its discretion by determining evidence of bail jumping was cross admissible as to Slater's consciousness of guilt of violating a court order. Because Slater has the burden to demonstrate that a trial involving all counts would be so manifestly prejudicial as to outweigh the concern for judicial economy and because his argument is limited to cross admissibility, we conclude the trial court did not abuse its discretion when it denied Slater's motion to sever.

II. Prosecutorial Misconduct

Slater contends the prosecutor committed prejudicial misconduct during closing argument.

[19] See Freeburg, 105 Wn. App. at 497-98 (Flight includes the inference of "a deliberate effort to evade arrest and prosecution. Actual flight is not the only evidence in this category."); Cobb, 22 Wn. App. at 224; Jefferson, 11 Wn. App. at 570.

We review prosecutorial misconduct claims for abuse of discretion.[20] To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of establishing that the conduct was both improper and prejudicial.[21]

> Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. Prejudice on the part of the prosecutor is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict."[22]

Additionally, "[t]he failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."[23] On the other hand, "[i]f the defendant objected to the misconduct, we determine whether the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict."[24]

Here, during closing argument, after discussing the evidence that established Slater violated a court order, the prosecutor stated:

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[20] State v. Brett, 126 Wn.2d 136, 174, 892 P.2d 29 (1995).

[21] State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

[22] State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

[23] State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

[24] State v. Sakellis, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011).

> And here's the last piece. If he didn't do it, why didn't he show up for trial call a year ago? Why didn't he show? Motions are done. Omnibus, pretrials, arraignments, all that pretrial stuff that people have to show up [for] and nothing really every happens, that's done. The day that we find out whether this case is going out or not, he's gone. If he didn't do it, why didn't he show?[25]

Slater did not object to this statement. His only objection came during the following exchange:

> STATE: He didn't show because he got cold feet. He didn't show—
>
> SLATER: Objection.
>
> STATE: —because he didn't want to be there.
>
> COURT: I'll just note it's argument.
>
> STATE: He didn't show to court because he didn't want to go to trial.[26]

Also during closing, the prosecutor made the following statements:

> If he didn't do it, why didn't he show? What did he take a month and a half? There's no evidence that he mistook his date. There's no evidence that the court was notified he wasn't going to be able to make it. He just didn't show on that day that mattered because he's guilty.[27]
>
> And then when it came time to find out guilt or innocence the first go-around, he didn't show. Ladies and gentlemen, you don't sign documents if you're not going to adhere to them. . . .

[25] RP (Nov. 15, 2018) at 215-16.

[26] Id. at 219.

[27] Id. at 220.

> This man is guilty of both crimes. He's banking on the fact nobody else saw it, and he's banking on the fact you're not going to take into consideration he didn't show for the second time. Don't give it to him.[28]

Slater did not object to these statements.

At the start of rebuttal, the prosecutor argued:

> Man, if my case was that weak, I think I'd show up for trial call. I think I'd be there if there were all those contradictions. I think I'd get this thing out of the way and move on with my life. I'd show up. He didn't. He didn't show because he didn't want to face the facts.[29]

Slater did not object to this statement. Also during rebuttal, the prosecutor stated, "If this case was as weak as defense counsel says it is, I would have showed up on September 8."[30] "He didn't show up because he didn't want to face the music. He didn't show because he was there on August 6, and that's why he's guilty."[31] At the end of rebuttal, the prosecutor also argued, "There's no way if he didn't do it he wouldn't show up for his trial call if this case was as weak as possible."[32] Slater did not object to these statements.

In part, Slater argues the prosecutor improperly "argu[ed] an impermissible inference from the evidence, and . . . appeal[ed to] the jury's

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[28] Id. at 222.

[29] Id. at 231.

[30] Id. at 235.

[31] Id. at 236.

[32] Id. at 238.

passion."[33] As to the single comment challenged at trial and several other statements challenged for the first time on appeal, Slater fails to establish that the prosecutor acted improperly. Many of the comments touched on whether Slater had an explanation for his failure to appear. As discussed above, "[t]he rationale which justifies the admission of evidence of 'flight' is that, when unexplained, it is a circumstance which indicates a reaction to a consciousness of guilt."[34] The prosecutor properly argued Slater did not offer an explanation for his failure to appear. Slater fails to show such comments were improper.

As to the comments regarding guilt, Slater cites In the Matter of the Personal Restraint of Glasmann,[35] to argue the prosecutor improperly "instruct[ed] the jury that Mr. Slater was guilty."[36] In Glasmann, during closing argument, the prosecutor presented several slides with pictures of Glasmann and the word "GUILTY" superimposed across his face.[37] Although defense counsel did not object, our Supreme Court determined "the misconduct here was so pervasive that it could not have been cured by an instruction."[38]

Here, unlike Glasmann, the comments did not amount to the prosecutor pervasively offering an improper opinion on Slater's guilt. They were offered in

[33] Appellant's Br. at 18.

[34] Cobb, 22 Wn. App. at 225.

[35] 175 Wn.2d 696, 286 P.3d 673 (2012).

[36] Appellant's Br. at 18.

[37] Glasmann, 175 Wn.2d at 701-02.

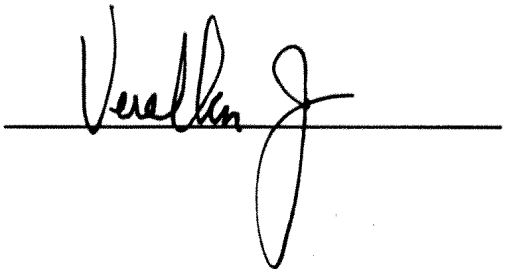
[38] Id. at 707.

the context of the prosecutor's discussion of flight and consciousness of guilt. Although the distinction may be difficult for the jury, a timely objection would have allowed for an instruction that would have cured any prejudice. Slater does not establish the prosecutor's comments were so flagrant and ill intentioned that they evince an enduring and resulting prejudice that could not have been neutralized with a jury instruction.

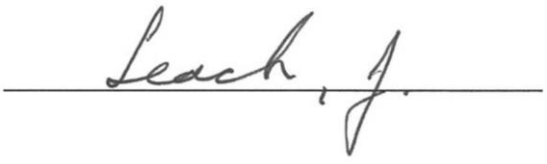
IV. Cumulative Error

Finally, Slater argues the cumulative error requires reversal. "The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal."[39] For lack of a combination of trial errors, we conclude Slater is not entitled to a new trial based on cumulative error.

Therefore, we affirm.



WE CONCUR:



[39] In re Det. of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012).