IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64939-6-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
ROMMEL LIDDELL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 1, 2011

Spearman, J. — Rommel Liddell was charged with one count of residential burglary and one count of domestic violence misdemeanor violation of a court order for acts occurring on April 29, 2009. His motion to sever the two counts for trial was denied. He appeals, claiming that the trial court erred in denying his motion to sever and that insufficient evidence supported the burglary conviction. We disagree as to both claims and affirm.

FACTS

The ground-floor apartment of roommates David Dunlap and Aurora Anderson was burglarized in the evening of April 29, 2009. Dunlap was out of town. Between 8 and 9 p.m., Anderson and her friend Christian DeBoer left Anderson's apartment to visit her neighbors, Jennifer and Alva Emanuel. Anderson locked her door when leaving. Around 9:45 p.m., she heard Emanuel[1]

invite Terrence Nicholson and Rommel Liddell into Emanuel's apartment. Anderson looked out the window and saw Nicholson getting out of the passenger seat of a green Cadillac. She believed she saw Liddell sitting in the driver's seat. Anderson had met Liddell a couple times and associated the green Cadillac with him, as she had seen both him and a short Asian woman, whom she believed to be his girlfriend, driving it. Nicholson and Liddell were friends and had spent time at Anderson's apartment playing video games with Dunlap.

Only Nicholson came inside Emanuel's apartment. When Emanuel asked Nicholson why Liddell did not come up with him, he said Liddell had to "go on a run." Anderson testified that while Nicholson was there, he acted "very strange, like something was wrong" and was "really nervous." Nicholson attributed his nervousness to an upcoming trial and he stayed for only 10 or 15 minutes.

Anderson and DeBoer returned to Anderson's apartment about five minutes after Nicholson left. The front door of the apartment was slightly open and the doorframe was cracked. Various items, including the 42-inch flat-screen television, surround sound system, subwoofer, and Play Station 3, were missing. Anderson went back to the Emanuels' house and called 911. Anderson believed Nicholson and Liddell were involved because of Nicholson's strange behavior, so she and Emanuel walked a quarter of a mile across the street to the

[1] "Emanuel" refers to Jennifer Emanuel.

apartment of Vi Le, whom Anderson believed Liddell was dating. Anderson and Emanuel stood outside the apartment on the sidewalk and saw the green Cadillac parked nearby. They looked into the car for the stolen property but saw nothing. While they were standing there, Nicholson came outside and talked with Emanuel. Liddell then appeared and talked with Emanuel. Emanuel asked Liddell for a cigarette and he responded that he needed to get one from his girlfriend. He left and returned with a cigarette. Anderson heard Liddell ask Emanuel, "[w]hy are you making my place hot?" Anderson and Emanuel soon went back to Anderson's apartment.

Approximately five to ten minutes later, Anderson returned to Le's apartment with police officers. Le allowed the officers inside to look for Liddell but became uneasy when they went upstairs and saw a wide-screen television sitting unplugged on the floor of a bedroom. Officers saw a video game console, DVDs, and video games under a blanket in another bedroom. They did not find Liddell. Upon Le's request, the officers left the apartment. They then obtained a search warrant for Le's apartment and car. They seized the suspected stolen property, which Anderson identified as from her apartment. Officers also found various items of Liddell's in the apartment, such as his debit card, Washington State identification card, Department of Corrections card, and court documents with his name on them. They found photos depicting Liddell and Le together, as well as men's clothing and shoes in a closet. Inside the Cadillac, officers found

a court document with Liddell's name on it but did not find any suspected stolen property. They noted that the Cadillac was big enough to hold the television and other items.

Liddell was arrested on May 1, 2009. He told police he had been at his mother's house and slept there the night of the burglary. He also said he was not supposed to be at Le's house because of a no-contact order. He denied knowing Anderson, Dunlap, or Emanuel. Officers learned that a King County District Court order was in effect on the date of the burglary, prohibiting Liddell from coming within 500 feet of "Vi Lee"[2] or her home, school, or workplace until September 30, 2010.

The State charged Liddell with one count of residential burglary and one count of domestic violence misdemeanor violation of a court order. Liddell moved to sever the charges. The trial court denied the motion, finding that the defenses of general denial were the same and that the charges were mostly based on the same evidence, with the exception of the no-contact order. The court concluded that Liddell would not be prejudiced because the jury would not learn that the no-contact order was for domestic violence.

Dunlap, Anderson, and the investigating officers testified.[3] Dunlap identified Liddell at trial immediately, but Anderson was unable to do so when

[2] Other documents indicate the spelling of Vi's last name to be "Le."

[3] Although the State obtained a material witness warrant for Emanuel, she failed to appear for trial.

first asked. She later identified Liddell. Liddell renewed his motion to sever the counts at the close of the State's case, arguing that evidence admissible in the burglary prosecution would not have been admissible to prove the charge of violation of a court order.

A jury convicted Liddell as charged. He received a standard-range sentence. He appeals his judgment and sentence.

DISCUSSION

Liddell brings two claims on appeal. First, he argues that the trial court erred in denying his motion to sever the two counts. Second, he contends that the evidence was insufficient to prove the charge of residential burglary. We hold that the trial court did not err in denying Liddell's motion to sever and that the evidence was sufficient to support the burglary verdict. We affirm.

Motion to Sever

We review a trial court's denial of a CrR 4.4(b)[4] motion to sever for manifest abuse of discretion. State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992). Joined offenses may be severed if the defendant is prejudiced in presenting separate defenses, or if a single trial would encourage the jury to cumulate evidence or infer a criminal disposition. State v. Watkins, 53 Wn. App.

[4] CrR 4.4(b) provides:

> The court, on application of the prosecuting attorney, 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 severance will promote a fair determination of the defendant's guilt or innocence of each offense.

264, 268, 766 P.2d 484 (1989). The defendant bears the burden of showing that trial on two or more counts "would be so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). In determining the potential of prejudice to a defendant, a trial court must consider (1) the strength of the government's evidence on each count, (2) the clarity of the defenses as to each count, (3) whether a jury instruction can properly guide the jury to consider the evidence of 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).

Liddell argues that the denial of his motion to sever violated his right to a fair trial on the charge of violation of a court order. He contends that while the evidence regarding his relationship with Le may have been admissible for the burglary charge, it was not relevant or admissible for the charge of violation of a court order. Specifically, he refers to the evidence found in Le's residence: men's clothing, photos depicting him and Le as a couple, and pre-April 29 letters or court documents of Liddell's. He further argues that the trial court's error in denying severance was not harmless because without the evidence of Liddell's relationship with Le or circumstantial evidence that he was in her residence before April 29, 2009, the only evidence supporting the court order violation was Anderson's testimony that she saw Liddell outside Le's apartment that evening. He contends that, given Anderson's hesitation in identifying Liddell, the jury may

not have convicted him on that basis alone.

The State argues that the evidence at issue was relevant and admissible to prove violation of a court order. It also argues that Liddell did not show that any potential prejudice from a single trial trumped judicial economy. Finally, it contends that any error was harmless because Liddell cannot show that he would have been acquitted but for the admission of the evidence found inside Le's apartment.

We agree with the State that the evidence was likely relevant and admissible and that even if it was not, the trial court properly concluded that judicial economy outweighed any potential prejudice. First, the evidence found inside Le's apartment was likely relevant and admissible as to the charge of violation of a court order. Relevant evidence is that which has "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." ER 401. The State's theory of the case was that Liddell violated the court order when he put stolen property in Le's apartment on April 29, 2009. Liddell's presence in Le's apartment was a critical piece of evidence in both cases, and evidence from inside the apartment tending to show that he visited or stayed there was relevant in showing his presence at the apartment on April 29, 2009. Furthermore, to prove that Liddell violated the court order on that date, the State had to introduce evidence of the events leading up to the violation. The reason

Anderson and Emanuel went to Le's apartment was because they suspected that the stolen property might be there, and the police had no reason to search Le's apartment other than to investigate the burglary. The existence and location of the evidence inside the apartment, which suggested that Liddell stayed with Le, made it more likely that Liddell was at Le's apartment on April 29, 2009.

Moreover, even if the evidence at issue was inadmissible, the trial court properly weighed the prejudice factors, determined that Liddell was not likely to be prejudiced by a single trial, and concluded that judicial economy outweighed any potential prejudice. The trial court discussed three of the factors on the record. As to the first factor, the court noted that the strength of the State's evidence on each count was the same. For the second, Liddell's defense of general denial was the same as to both counts. As to the fourth factor, the trial court found that the admissibility of the evidence was the same except there was additional evidence consisting of the no-contact order regarding the charge of violation of a court order. We point out that the fourth factor does not automatically require severance when evidence for one count would not be admissible in a separate trial on the other count. Bythrow, 114 Wn.2d at 720.

The factors considered together supported the trial court's conclusion that Liddell was not likely to be prejudiced by a single trial. Moreover, we agree with the trial court that judicial economy outweighed any potential prejudice. The witnesses for both counts were substantially the same and most of the evidence

overlapped. The two-day trial was brief and involved the relatively simple, distinct issues of whether Liddell (1) unlawfully entered the victims' apartment and took property and (2) violated the no-contact order. A jury instruction to consider the counts separately was likely able to be followed given the simple issues involved.[5] The trial court did not err in denying severance.

Sufficiency of the Evidence

Liddell claims the evidence presented by the State to prove the charge of residential burglary was insufficient. On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the

[5] The jury was instructed, "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." To the extent Liddell argues that the jury should have been further instructed regarding its consideration of the evidence, he failed to offer such an instruction for the court's consideration. Accordingly, that issue is waived. See State v. Rodriguez, 146 Wn.2d 260, 271, 45 P.3d 541 (2002).

State's evidence and all inferences that can reasonably be drawn therefrom. Id. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335 (1987)). Thus, this court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (citing State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990)).

Liddell claims that the State did not prove that he entered or remained unlawfully in Anderson's apartment. He argues that mere proximity to recently stolen property does not establish a prima facie case of burglary, citing State v. Q.D., 102 Wn.2d 19, 28, 685 P.2d 557 (1984) and State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). Liddell points out that he himself was not found in possession of the stolen property. Instead, the evidence was that the property was found in Le's apartment and that he and Le had a close relationship. He contends that because the State did not charge him as an accomplice, it was required to prove that he entered the apartment with the intent to commit a crime.

We disagree and hold that the evidence was sufficient for a jury to find beyond a reasonable doubt that Liddell committed residential burglary. For this charge, the State was required to prove:

> (1) That on or about April 29, 2009, [Liddell] unlawfully entered[6] or remained unlawfully in a dwelling;
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
> (3) That this act occurred in the State of Washington.

The evidence was as follows: The doorframe of the victims' apartment was broken and damaged, indicating forcible entry. Anderson and Dunlap testified that Liddell was familiar with their apartment and had been there a few times before the burglary to play video games. Anderson testified that she and Dunlap always kept their blinds shut. This evidence supported the inference that the burglary was committed by someone who had been inside their apartment and had seen the victims' belongings. Nicholson acted in a strange and nervous manner while at Emanuel's and stated that Liddell needed to "go on a run." This evidence, as the State suggests, supported the inference that Nicholson and Liddell colluded to burglarize the victims. The burglary took place within the span of a couple hours, during which Anderson believed she saw Liddell in the driver's seat of the green Cadillac outside Emanuel's apartment. A document with Liddell's name on it was found in the Cadillac, further supporting the inference that Liddell drove it. The stolen property was found in Le's apartment soon after the burglary, and the green Cadillac was parked outside the apartment. There was testimony that the Cadillac was large enough to fit the stolen property inside. Finally, Liddell was seen outside Le's apartment soon after the burglary, and his

[6] Under RCW 9A.52.010 (2), to "enter" property, a person must cross the property's threshold with his body, a part of his body, or an instrument or weapon without permission.

papers, identification, and debit card were found inside the apartment. This evidence, among other evidence, indicated that Liddell stayed at Le's apartment, which supported the inference that he was present in the apartment on the day in question.

The evidence as a whole was sufficient to support the jury's verdict that it was Liddell who unlawfully entered Anderson's apartment with the intent to commit a crime. Unlawful entry, like any other element, can be proved by circumstantial evidence. State v. McDaniels, 39 Wn. App. 236, 240, 692 P.2d 894 (1984); State v. Couch, 44 Wn. App. 26, 29-30, 720 P.2d 1387 (1986).

Liddell's reliance on Q.D. and Mace is misplaced. Those cases stand for the proposition that a defendant's possession of stolen property alone is not sufficient to prove unlawful entry for trespass, Q.D., 102 Wn.2d at 28, or to prove burglary, Mace, 97 Wn.2d at 842-43 (possession of recently stolen property not prima facie evidence of burglary unless accompanied by other evidence of guilt). Here, Liddell himself was not found in possession of the stolen property, although it was found in an apartment in which his belongings were also found. But unlike the defendants in those cases, he was seen outside the victims' apartment around the time of the burglary and then was seen outside the house where the stolen property was found soon after the burglary. "Other evidence of guilt may include . . . the presence of the accused near the scene of the crime." Q.D., 102 Wn.2d at 28.

Affirmed.

Spearman, J.

WE CONCUR:

Schindler, J.

Grosse, J.