

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	DIVISION ONE
Respondent,	)	
	)	No. 65308-3-I
v.	)	
	)	UNPUBLISHED OPINION
ERIC FRANKLIN COSTON,	)	
	)	
Appellant.	)	FILED: November 14, 2011
_____	)	

Dwyer, C.J. – A jury found Eric Coston guilty of one count of attempted promoting prostitution in the first degree, one count of assault in the second degree, and three counts of tampering with a witness. On appeal, Coston fails to demonstrate that the trial court abused its discretion in admitting redacted letters that he wrote to the State’s primary witness from prison. The allegations in Coston’s statement of additional grounds for review are also without merit. We therefore affirm Coston’s conviction.

I

The State charged Eric Coston with one count of attempted promoting prostitution in the first degree, one count of assault in the second degree – domestic violence, and three counts of tampering with a witness. The information alleged that Coston had committed the promoting prostitution and assault offenses “shortly after being released from incarceration.” Clerk’s

Papers at 6.

At trial, Jordyn Burdick testified that she had known Coston for about 10 years and began a “long distance” romantic relationship with him in early 2009. Report of Proceedings (March 3, 2010) at 4. During the first half of 2009, the two communicated through letters and by telephone.

On June 23, 2009, Burdick borrowed Coston’s grandmother’s car and picked up Coston.<sup>1</sup> The two then drove to Kirkland, where they spent the night. On the following day, Coston and Burdick checked into the Black Angus Motel on Aurora Avenue in Seattle. During the next several days, Coston repeatedly urged Burdick to work as a prostitute. He informed her that he did not want her to perform any act for less than \$200 and that she could not return each day until she had made \$700. Burdick became angry and refused to work as a prostitute.

On the evening of June 25, 2009, both Coston and Burdick became increasingly upset and ended up in a heated argument. Coston eventually punched Burdick on the side of the head, causing her to fall over and lose consciousness briefly. Burdick’s eye hurt badly.

On June 26, 2009, Coston and Burdick left the motel and stayed with Coston’s grandmother for a few days. Coston told Burdick to wear sunglasses so that no one would see the injury to her eye. After several days, a friend picked up Burdick, saw her injuries, and drove her to a police station to report the assault.

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<sup>1</sup> The jury was not told that Coston was in prison or that Burdick picked him up from the Clallam Bay Corrections Center.

The jury found Coston guilty as charged on all counts.<sup>2</sup> The trial court bifurcated trial on the rapid recidivism aggravating circumstance. Coston waived his right to a jury trial on this allegation. The trial court found that he had committed the promoting prostitution and assault offenses shortly after being released from incarceration, as alleged. See RCW 9.94A.535(3)(t). Based on the aggravating circumstance, the court imposed an exceptional sentence of consecutive prison terms of 90 and 30 months.

II

Coston contends that the trial court erred in denying a defense motion to exclude letters that he wrote to Burdick while he was in prison. The trial court ruled that the letters were admissible, but permitted the parties to redact any references to Coston's presence in prison or to prison life.

On appeal, Coston contends that the admission of the letters, even without the redactions, was unfairly prejudicial because the letters conveyed evidence of rapid recidivism to the jury, a matter that was reserved for a separate trial. See RCW 9.94A.537(4) (providing for a separate proceeding to establish certain aggravating circumstances, including rapid recidivism). We review a trial court's evidentiary rulings for an abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Coston does not present any argument challenging the trial court's determination that the letters were relevant to show his efforts to groom Burdick for prostitution and to establish his intent. His sole contention on appeal is that

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<sup>2</sup> Coston does not challenge the witness tampering charges on appeal.

despite the redaction of all references to prison, the letters, when coupled with Burdick's testimony, presented a "100% likelihood that a reasonable person would conclude that these letters were written from prison." Br. of Appellant at 14. Coston reasons that because "nobody writes letters anymore, except prison inmates[,] a stack of handwritten letters veritabily screams 'prison!' to the jury." Br. of Appellant at 7 (emphasis omitted). Coston provides no meaningful or persuasive legal argument or citation to relevant authority to support these conclusory allegations. We therefore decline to consider them. See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); see also RAP 10.3(a)(6).

Coston has not shown that the trial court abused its discretion in admitting these letters into evidence.<sup>3</sup>

### III

In his brief, Coston states that he is not appealing the trial court's denial of his motion for a mistrial "as the argument would be redundant to the arguments made on the recidivism evidence." Br. of Appellant at 10 n.38. Nonetheless, Coston has assigned error to the trial court's denial of the motion for a mistrial during Burdick's testimony and devoted a section of his brief to the claim that the denial was "manifestly unjust and an abuse of discretion." Br. of Appellant at 14.

In any event, Coston moved for a mistrial on the basis of Burdick's reference to his probation officer during her testimony. The trial court found that

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<sup>3</sup> To the extent that Coston has raised issues for the first time in his reply brief, we decline to consider them. See State v. White, 123 Wn. App. 106, 114 n.1, 97 P.3d 34 (2004). Accordingly, we need not decide the State's motion to strike portions of Coston's reply brief.

the brief reference was inadvertent and that it had not been emphasized in any way and that, when viewed in context, it did not interfere with Coston's right to a fair trial. On appeal, Coston does not address the trial court's analysis, much less demonstrate that it was unreasonable or based on untenable grounds. Accordingly, he cannot establish that the trial court abused its discretion in denying the request for a mistrial. See State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).<sup>4</sup>

#### IV

In his pro se statement of additional grounds for review, Coston contends that the trial court erred in denying the defense motion to sever the three counts of witness tampering from the attempted promoting prostitution and assault charges. We review the trial court's decision for an abuse of discretion. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

CrR 4.4(b) requires severance if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." The defendant has the burden of demonstrating that the manifest prejudice of a single trial on the offenses outweighs the concern for judicial economy. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). The court examines several factors to ascertain the potential for prejudice: "(1) the strength of the State's evidence on each count; (2) the clarity of defenses to

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<sup>4</sup> Coston has withdrawn his contention that the trial court erred in entering a conviction on assault in the second degree – domestic violence. He concedes that the jury is not required to enter a finding on the domestic violence designation. See State v. Hagler, 150 Wn. App. 196, 201, 208 P.3d 32 (2009) (domestic violence designation does not alter elements of the underlying offense and need not be proven to the jury).

each count; (3) the court's instruction to the jury as to the limited purpose for which it was to consider the evidence of each crime; and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined." State v. Eastabrook, 58 Wn. App. 805, 811-12, 795 P.2d 151 (1990).

Contrary to Coston's assertions, the State's evidence on each count was relatively strong. Coston denied committing assault and attempted promoting prostitution. He asserts that his defense to the witness tampering charges was "not the same," but fails to identify what that defense was or how it would have conflicted with his other defenses. Statement of Additional Grounds for Review at 4. As the trial court correctly noted, the evidence of the offenses would have been cross admissible in separate trials. See State v. Sanders, 66 Wn. App. 878, 885-86, 833 P.2d 452 (1992) (in prosecution for rape and witness tampering, fact of rape charge admissible in separate witness tampering trial to show why the tampering occurred; evidence of witness tampering admissible in separate rape trial to show consciousness of guilt). Finally, in denying the severance motion, the trial court invited defense counsel to propose proper limiting instructions. Under the circumstances, the trial court did not abuse its discretion in denying the severance motion

Coston next contends that the trial court violated his constitutional right to present a defense when it precluded the defense from impeaching Burdick with evidence of her drug use at the time of the offenses. In general, evidence of drug or alcohol use is admissible to impeach the credibility of a witness "if there

is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony.” State v. Russell, 125 Wn.2d 24, 83, 882 P.2d 747 (1994).

In support of the planned impeachment, defense counsel relied primarily on Burdick’s statement during a defense interview in January 2010 that she had not used drugs for the previous two years and the fact that she was apparently in rehab during pretrial proceedings in February 2010. But as the trial court noted, this was not a sufficient foundation to support an inference that Burdick was using drugs or was influenced by drugs at the time of the charged crimes in June 2009. The trial court did not abuse its discretion in excluding the proposed evidence based on an insufficient foundation.<sup>5</sup>

Coston contends that the late amendment of the information presented him with a Hobson’s choice of requesting a continuance or sacrificing his right to be represented by counsel who was sufficiently prepared to present a defense. The record provides no support for this conclusory allegation. The State gave the defense prior notice of its intent to amend the information. The defense did not object on the basis of inadequate preparation. At best, Coston’s allegations rest on matters outside the record and therefore cannot be raised on direct appeal. See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

Coston next contends that the Department of Corrections was obligated to

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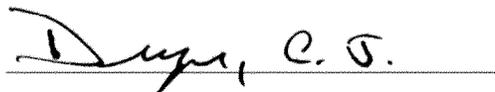
<sup>5</sup> In its ruling, the trial court expressly noted that it was willing to accommodate an additional defense interview of Burdick and reconsider the issue before her testimony. But Coston does not allege that the defense renewed the motion.

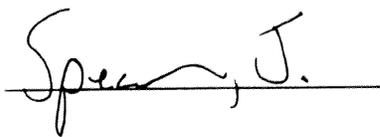
notify him of the rapid recidivism aggravating factor upon release from prison. RCW 9.94A.535 imposes no such obligation. “[A]ll sane persons are presumed to know the law.” State v. Spence, 81 Wn.2d 788, 792, 506 P.2d 293 (1973), rev’d on other grounds, 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974). Coston’s argument also rests on the faulty assumption that the rapid recidivism aggravating factor did not exist until 2005. But RCW 9.94A.535(3)(t) merely codified an existing common law aggravating circumstance. State v. Williams, 159 Wn. App. 298, 314, 244 P.3d 1018, review denied, 171 Wn.2d 1025 (2011).

Coston’s contention that the trial court erred in not bifurcating trial on the rapid recidivism aggravating factor is equally frivolous. The trial court granted the defense motion to bifurcate on February 25, 2010.

Affirmed.

We concur:

  
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