IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. VENIAMIN P. PURIS, Appellant.	No. 62751-1-I DIVISION ONE UNPUBLISHED OPINION FILED: January 19, 2010

Appelwick, J. — Veniamin Puris appeals his conviction for possession of a stolen vehicle and second degree possession of stolen property, arguing that the trial court erred by allowing the State to amend the information to join additional charges. By failing to renew his motion to sever, Puris waived his right to have claims severed into separate trials. Joinder of the charges into a single charging document was proper, because the offenses were all of the same or a similar character, and joinder did not create undue prejudice. The trial court did not abuse its discretion. We affirm.

FACTS

On November 12, 2007, Beau Worley reported his work truck stolen in Renton. On November 28, City of Redmond police officers located the truck in Federal Way. After placing the area under surveillance, officers observed the defendant Veniamin

Puris remotely unlock and begin to enter the truck. The officers arrested Puris. A search of Puris's wallet revealed a Citibank Mastercard and a Chevron gas credit card in the name of R. J. Barnecut, as well as a receipt for the purchase of gas using the Mastercard that day. The owner of the gas station provided a video surveillance tape that showed Puris pumping gas into the stolen truck, retrieving the receipt, and leaving the gas station. Barnecut reported that his credit cards were stolen from his car in the West Seattle area, although the date of the theft was unknown.

After obtaining permission from Worley, the officers searched the truck. The officers located two checkbooks in the name of Matthew Fotheringham and a Washington vehicle license plate issued to Leisa and David Rall. Fotheringham's checkbooks had been in his vehicle, which was stolen on either November 19 or November 20. The Ralls had not noticed the theft of their license plate so the date of that theft was unknown.

The State initially charged Puris with possession of a stolen vehicle (Count I), relating to the Dodge truck, and possessing stolen property in the second degree (Count II), relating to the Chevron card. Over defense objection, the State later amended the information to include three additional counts: two counts of possession of stolen property in the second degree (Count III and IV), relating to the MasterCard and the checkbooks, and possession of stolen property in the third degree (Count V), relating to the license plate. Puris did not subsequently brief or argue for severance under CrR 4.4. A jury convicted Puris only on the first three counts.

During pretrial proceedings, the trial court judge notified the parties that he knew the victim Barnecut. Puris asked the judge for more information about the nature of the

relationship and whether he felt it would prejudice the outcome. Judge Heavey explained that he knew the victim enough to say, "Hi, how are you," but that his last contact with Barnecut was twelve to fifteen years previously. The judge stated he did not believe this would affect his rulings in the case. The next day Puris's trial counsel objected and requested recusal. The judge declined to recuse himself, because of the delay in the objection, but permitted Puris to file an affidavit of prejudice. Puris's counsel did not file an affidavit. The case was then assigned to another judge for trial, due to scheduling conflicts. Judge Heavey presided over only the CrR 3.5 and CrR 3.6 hearings and ruled on the motion not to grant leave to amend.

DISCUSSION

I. Amendment of Information/Severance

Puris contends that the trial court erred when it allowed the State to amend the information to include three additional charges. He contends that "[t]he sheer multiplicity of counts in and of itself likely prejudiced the defendant by portraying him pre-trial as a serial possessor of stolen property" and that the jury may have cumulated the evidence of the various crimes to find guilt.

CrR 2.1(d) allows an information to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced. The defendant has the burden of showing prejudice. State v. Brown, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). The trial court's ruling on a motion to amend an information is reviewed for abuse of discretion. State v. James, 108 Wn.2d 483, 490, 739 P.2d 699 (1987). Abuse of discretion occurs when the ruling of the trial court is manifestly unreasonable or discretion was exercised on untenable grounds or for untenable reasons. State v.

Cunningham, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

Joinder allows two or more offenses to be joined in one charging document, with each offense stated in a separate count, when 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 on a series of acts connected together or constituting parts of a single scheme or plan. CrR 4.3(a). Because the rule is written in the disjunctive, if one of the two prongs of the test is met, we need not inquire further. State v. Bryant, 89 Wn. App. 857, 866, 950 P.2d 1004 (1998). This rule is construed expansively to promote the public policy of conserving judicial and prosecution resources. State v. Hentz, 32 Wn. App. 186, 189, 647 P.2d 39 (1982), rev'd in part on other grounds by, 99 Wn.2d 538 (1983). The question of whether two offenses are properly joined is a question of law reviewed de novo. Bryant, 89 Wn. App. at 864.

If joinder is not proper but offenses were consolidated in one trial, the convictions must be reversed unless the error is harmless. Id. Where joinder is proper, the offenses shall be consolidated for trial, but the trial court may sever the offenses if doing so will promote a fair determination of the defendant's guilt or innocence in each offense, considering any resulting prejudice to the defendant. CrR 4.4; Bryant, 89 Wn. App. at 864. A trial court's refusal to sever is reviewed for manifest abuse of discretion. Bryant, 89 Wn. App. at 864.

Here, the trial court denied Puris's pretrial objection to the joinder of the offenses into a single information. Because he failed to renew[1] the motion to sever before the

[1] We state "renew" because the trial court considered Puris's objection to the motion to amend the information to be a motion to sever. If, however, it would not be properly considered a motion to sever, then Puris failed to *make* a motion to sever before the close of evidence and thus cannot raise the issue on appeal under CrR 4.4 (a)(1).

close of trial, Puris waived the issue of severance and cannot raise it on appeal. Id.; CrR 4.4(a)(2). Thus, only the issue of joinder was preserved for our review. Nonetheless, because both rules, joinder and severance, are based on the same underlying principle, that the defendant receive a fair trial untained by undue prejudice, the "pure" legal issue of joinder cannot be decided in a vacuum without considering prejudice. Bryant, 89 Wn. App. at 865. We therefore, first address the issue of joinder.[2]

To determine whether joinder was proper, we must first look at whether the charges are of the same or similar character. CrR 4.3(a). The trial court found the offenses were of the same or similar character, because they are all possession of stolen property charges. Similarly, in State v. Smith the trial court joined two counts of murder, four counts of robbery and an assault count, involving offenses that occurred over a period of six months, because each offense included robbery. 74 Wn.2d 744, 754, 446 P.2d 571 (1968), vacated in part, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), overruled on other grounds in State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). The charges in that case were related as a series of property crimes involving the same players and in a close temporal proximity. Id. The offenses here were sufficiently similar. They involved stolen property located in the same vehicle. They were related in time. The trial court correctly concluded that the charges were of a similar character. Because at least one prong of CrR 4.3 was met, we need not inquire further.

[2] The State contends that Puris conceded that joinder was proper. This is incorrect. Although Puris conceded, pretrial and on appeal, that the defendant had notice of the State's interest in amendment of the information to join additional charges, Puris in fact argues that the trial court erred in allowing joinder due to prejudice.

We must next determine whether Puris was prejudiced by joining the offenses. Prejudice may result from joinder if the defendant is embarrassed in the presentation of separate defenses or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition. State v. Russell, 125 Wn.2d 24, 62–63, 882 P.2d 747 (1994). The courts recognize several factors which may offset prejudice from joinder:

> (1) the strength of the state's evidence on each count, (2) the clarity of defenses to each count, (3) the court properly instructed the jury 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.

Bryant, 89 Wn. App. at 867–68 (quoting State v. York, 50 Wn. App. 446, 451, 749 P.2d 683 (1987)).

The evidence against Puris was strong. He used the remote key fob to unlock the stolen vehicle and approached it. Surveillance video from a local gas station recorded Puris filling the stolen vehicle with gas using a credit card that was not in his name. The receipt for the gas was found in the wallet that was in his possession. Puris's argument that he was not aware that the truck and the items contained inside were stolen because he had borrowed the truck from his friend Nick, a person for whom he was not able to provide a last name or contact information, was improbable at best.

Puris's defenses on all the charges were clear. He argued one defense at trial: that he did not have knowledge that the items were stolen.

The jury was instructed to consider each charge separately. The jury's adherence to this instruction is evidenced by its verdict of not guilty on counts IV and V.

Evidence of the additional charges would have been cross-admissible to show

knowledge, which was a material issue at trial.[3] ER 404(b).[4] Puris analogizes to State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986), to argue that the improper finding regarding cross admissibility here caused grave prejudice. In Ramirez, the court found that where two allegations of indecent liberties with minors were not cross-admissible but were tried together, the jury may have cumulated the evidence to infer guilt and therefore required a new trial. Id. at 228. However, sexual offenses are often inherently prejudicial. State v. Bythrow, 114 Wn. 2d 713, 718–19, 790 P.2d 154 (1990). Additionally, the court in Ramirez found that the two crimes were not cross-admissible, because the elements which the State intended to use them to prove were not material issues for the jury. Ramirez, 46 Wn. App. at 227–28. Here, Puris's knowledge that the truck and the additional items were stolen was a material issue for the jury to consider, and therefore the facts that he possessed multiple items belonging to other persons are cross-admissible.

We hold the trial court properly joined the offenses. We further hold the trial court did not abuse its discretion in declining to sever offenses or in allowing the information to be amended to include the additional counts.

II. Ineffective Assistance

Puris asserts that his attorney rendered ineffective assistance of counsel by failing to file an affidavit of prejudice.

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[3] The evidence here may have been cross-admissible under additional theories such as res gestae, as found by the trial court, or the common plan or scheme exception to ER 404(b). However, we need not analyze all possible theories of cross admissibility once we determine that the evidence would have been cross-admissible under any theory. ER 404(b).

[4] ER 404 (b) states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). If defense counsel's conduct may be deemed legitimate trial strategy or tactic, it will not be considered deficient. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Puris argues that an affidavit of prejudice would have been granted if timely filed. Puris presents no evidence supporting his assertion.

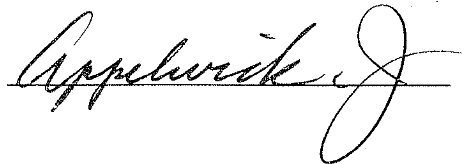
Puris's defense counsel's performance did not fall below the standard of reasonableness. The grounds for the affidavit of prejudice were negligible at best. The trial court judge stated he had not seen the victim for at least ten years. He also stated that the relationship would not affect his rulings. The decision not to file an affidavit of prejudice was a legitimate tactical decision. Because counsel's performance was not deficient, we need not address prejudice. Puris was not denied effective assistance of

counsel.

III. Appearance of Fairness

Puris assigns error to the trial court for violating the appearance of fairness doctrine. However, Puris does not offer argument on this issue. We will not review an issue raised in passing or unsupported by authority or persuasive argument. See State v. Johnson, 119 Wn.2d 167, 170–71, 829 P.2d 1082 (1992).

We affirm.



WE CONCUR: