Supreme Court No. 101899-1
COA No. 56561-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONNY ELLIOTT,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF LEWIS COUNTY

PETITION FOR REVIEW BY THE SUPREME COURT

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A. IDENTITY OF PETITIONER

Donny Elliott was the defendant in Lewis County No. 21-1-00547-21, the appellant in COA No. 56561-7-II, and is the petitioner herein.

B. COURT OF APPEALS DECISION

Mr. Elliott seeks Supreme Court review of the Court of Appeals Decision issued March 14, 2023. See Appendix.

C. ISSUES PRESENTED ON REVIEW

1. Separate trials are required where trying multiple counts together will result in prejudice to the defendant. A particular aspect of prejudice is the joined trial of a physical assault or threatening act, tried together with other acts which make the defendant appear to have a propensity for anger or "eruptive behavior" (in the State's words below) and thus, allegedly, would be more likely to be guilty of the crimes charged. In a legal analysis in this case that was contrary to law, the trial court allowed Mr. Elliott's assault and harassment trial

to also be the venue where acts similar to those charged were placed in front of the jury.

Did the inclusion of prior acts in the form of angry text messages violate ER 404(b) and thus dispositive militate against a joined trial where the evidence carried severe and cumulative prejudice because text messages - unnecessary to show that Mr. Elliott committed an assault or that the harassment complainant had "reasonable fear" which also revealed to the jury that Mr. Elliott had been violent in the past - because the vehicle for inclusion of those text message was that were tried as a violation of a no-contact order?

2. Did the trial court abuse its discretion by denying severance without conducting the all-important ER 404(b) analysis on the record, to state what the possible relevance, prejudice or State's need for the evidence justified the charges being tried together? In those circumstances, did the trial court err in denying severance under CrR 4.4(b)?

3. Was the now-acknowledged ineffective assistance of counsel for failure to subsequently renew the severance motion that material and prejudicial to Mr. Elliott, allowing this no court to have confidence in the outcome of trial, and thus requiring the Supreme Court to take review under RAP 13.4(b), and on review, to reverse all of Mr. Elliott's convictions?

4. Did the Court of Appeals err and merit this Supreme Court granting review of Mr. Elliott's case where the Court of Appeals decision erred as a matter of law by expressly condoned the trial court's reasoning that the other acts were admissible because they were "related enough" to the charges of assault, where the trial court must presume that ER 404(b) evidence is not admissible, and exclude the evidence, in cases where it is of marginal utility?

D. STATEMENT OF THE CASE

The facts are set forth in the briefs of the appellant (Petitioner herein) and the Court of Appeals decision. The

crucial procedural facts of the trial court's error and Mr. Elliott's counsel's ineffective assistance are addressed infra.

At trial, where the court had denied Mr. Elliott's motion to sever the no-contact order charge, that charge was proved via the text message of April 28, and because of non-severance, the fact of Mr. Elliott's two prior domestic violence crimes also had to be read to the jury. RP 68, RP 85-86, RP 215. The jury convicted Mr. Elliott of violation of a no-contact order - domestic violence, for texting Ms. Brager. RP 338. In the text message, Mr. Elliott swore at Ms. Brager and, as the State characterized it, he used vulgar language that the prosecutor said demonstrated a "convincing hostility" toward Ms. Brager and showed his "eruptive" behavior toward her. RP 92, RP 156-61; Exhibit 2. Unsurprisingly, the jury convicted Mr. Elliott on the July 1 allegations of second degree assault - domestic violence, unlawful imprisonment - domestic violence; and felony harassment- domestic violence. RP 338.

Mr. Elliott appealed but the Court of Appeals affirmed his convictions. See Appendix.

E. ARGUMENT

SUPREME COURT REVIEW UNDER RAP 13.4(b)(1) AND RAP 13.4(b)(2) IS WARRANTED IN MR. ELLIOTT'S CASE, WHERE THE TRIAL COURT AND THE COURT OF APPEALS MISAPPLIED THE CASE LAW ESTABLISHED BY THIS COURT AND OTHER DECISIONS OF THE COURT OF APPEALS.

(i). Mr. Elliott's Motion to Sever the Charges was wrongly denied by a trial court that failed to conduct the ER 404(b) cross-admissibility analysis on the record and erred in admitting ER 404(b) evidence by holding a joined trial of the primary charges and a separate allegation of violation of a no-contact order?

1. Review is warranted where the Court of Appeals decision is in conflict with decisions of the Supreme Court or other Courts of Appeal.

Under RAP 13.4(b), the Supreme Court will grant review of a petitioner's case where the decision below was contrary to decisions of this Supreme Court and other decisions of the Court of Appeals. As argued herein, this Court should grant review, under RAP 13.4(b)(1) and RAP 13.4(b)(2).

2. Procedural Context.

Mr. Elliott moved to sever the felony violation of a no-contact order charge from the other offenses. RP 88. The defendant and the complainant had exchanged multiple text messages near the time of the alleged violent offenses of July 1. RP 87-89. The trial court hypothesized that the text message of April 28 showed that Ms. Brager had fear of Mr. Elliott, which, for purposes of harassment, was "reasonable." RP 91-92. Raising an argument the State had not advanced, but instead, taking the court's suggestion, the prosecutor described that Mr. Elliott swears at Ms. Brager in the message, argued that the message demonstrated a "convincing hostility by Mr. Elliott towards Ms. Brager," and used "vulgar language towards her, apparently, unprovoked." RP 91-92. The text message also demonstrated Mr. Elliott's inclination to engage in "eruptive behavior." RP 92; Exhibit 2.

Without analyzing the factors required for assessing a motion to sever, the trial court ruled that severance from the

violent alleged crimes would be denied, because the text message "is related enough and gives background if nothing else" and "involve[d] the same two parties" and "I think argument certainly could be made that it is relevant to Count 2 and the reasonableness of her fear." RP 93. The text message that the State selected as vulgar, portrayed Mr. Elliott as a person who was enduringly hostile toward Ms. Brager, and prone to eruptive behavior was admitted to the jury. RP 157-61; Exhibit 2. This should not have occurred, as the causes should have been severed.

3.Error of law by the trial court and ineffective assistance by trial counsel.

Trial counsel was ineffective for failing to renew Mr. Elliott's motion to sever. A severance motion must be renewed before or at the close of evidence. Defense counsel was ineffective for forgetting the technical requirement to renew the severance motion he so vigorously sought prior to trial. CrR 4.4(a)(2). This violated Mr. Elliott's right to the effective

assistance of counsel, under the Sixth Amendment and Wash. Const. art. I, § 22. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

A defendant asserting ineffective assistance must show (1) that his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing Strickland, 466 U.S. at 686; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

The prosecutor on appeal conceded that Mr. Elliott's counsel provided ineffective assistance of counsel - and the Court of Appeals agreed arguendo. The appellate prosecutor was correct to concede the matter. Failing to renew an unsuccessful severance motion constitutes a waiver, and a deficiency in failing to preserve the issue. CrR 4.4(a)(2); State v. Henderson, 48 Wn. App. 543, 545, 551, 740 P.2d 329

(1987). And, in the circumstances of this case, no conceivable legitimate tactic can explain counsel's failure to renew the motion. See State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). As evidenced by the original motion to sever, trial counsel was well aware of the harm that would result from the jury learning of a prior alleged no-contact order violation, which included frightening language, appeared to show a predilection toward violence, and was accompanied by an admission that Mr. Elliott had two prior violations.

Nothing happened during trial to mitigate the prejudice counsel correctly anticipated when the motion was initially brought. Counsel simply neglected to renew the motion as a non-deficient counsel would know is required. See State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989). As argued herein, Mr. Elliott suffered prejudice by the non-severed charges being tried together, and reversal is required.

4. Severance was required in order to ensure a fair determination of guilt or innocence.

Joined trials of disparate events are "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). The rules governing severance are based on the fundamental concern that an accused person receive "a fair trial untainted by undue prejudice." State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998). A trial court must grant a motion to sever offenses if it determines that "severance will promote a fair determination of the defendant's guilt or innocence of each offense." (Emphasis added.) CrR 4.4(b).

In particular, a court must sever counts when the defendant establishes that "the jury may infer guilt on one charge from evidence of another charge," or "the cumulative evidence may lead to a guilty verdict on all charges when, if considered separately, the evidence would not support every charge." State v. Slater, 197 Wn.2d 660, 676-77, 486 P.3d 873 (2021). Certainly, a court must sever joined offenses where the

jury will employ a joined charge to "infer a criminal disposition" to commit the other counts. Slater, 197 Wn.2d at 677. The text message charge tried together in this case was precisely that sort of offense with all its attendant unfair prejudice.

5. The trial court failed to engage in a proper analysis of the factors regarding severance, including the crucial issues of ER 404(b) and ER 403 prejudice.

The key issue in severance is whether the single trial will prejudice the defendant. State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747 (1994). While a trial court's decision is reviewed for abuse of discretion, precedent does not allow a single trial "if prosecution of all charges in a single trial would prejudice the defendant." State v. Bluford, 188 Wn.2d 298, 393 P.3d 1219 (2017).

To determine whether severance is warranted due to the potential prejudice and other considerations, the courts employ a four-part test:

> (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.

Russell, 125 Wn.2d at 63; Slater, at 677. Here, Ms. Brager's testimony - if the jury gave it credence - that Mr. Elliott choked her and took her into the house by force showed the reasonableness of any fear Ms. Brager might have had that his alleged later threat to kill her caused her "reasonable" fear. See, e.g., RP 136 ("I was afraid for my life."). If the jury believed what Ms. Brager said happened, it could convict. The frightening text message carried no equality of evidentiary support, yet it persuaded the jury on the other counts. Neither were the available defenses to the entirely different events at all similar, being separated in time, with one provable by documentary evidence.

Further, the notion that judicial economy required a joined trial of a charge that could easily be disposed of in a

second trial - almost surely to the bench, there being no real defense - which might take one half of a day, could not be persuasive to any reasonable jurist.

The unwarranted interjection of frightening text message evidence from three months prior, that went officially, albeit tangentially, to one of the three serious July 1 counts, caused deeply unfair prejudice on all the primary charges. Severance was wrongly denied. For example, in Slater, the defendant was charged with felony bail jumping and a domestic violence no-contact order charge. Slater, at 677. The trial court did not identify a proper purpose for which the other misconduct evidence could be admitted, other than as evidence of flight, which the Supreme Court concluded was an invalid basis. Id., at 666-67. Any remaining purpose carried the impermissible inference that the defendant was the type of person who violates court orders. Id. at 679. The Slater Court stated,

> Missing one court hearing does not rise to the level of flight evidence from which one can infer consciousness of guilt on the underlying

> crime. The judges in this case abused their discretion when they repeatedly denied Slater's motion to sever the charges because the charges are not cross admissible. Further, although we need not reach this issue, the admission of the FTA as evidence of consciousness of guilt allowed the prosecutor to capitalize on the admission and to make improper comments regarding Slater's alleged guilt and propensity to violate court orders.

Slater, at 666. Here, it is true that evidence of prior interactions between a defendant and a complainant may be relevant to the alleged victim's reasonableness of fear, for purposes of harassment. But this does not eliminate the need for assessment of the unfair prejudice of the evidence under ER 404(b) and its ER 403 component. See, e.g., State v. Thach, 126 Wn. App. 297, 310-11, 106 P.3d 782 (2005) (although State putatively proffered prior bad acts to explain victim's actions rather than to show defendant's propensity, trial court was still required to conduct ER 404(b) analysis). The Supreme Court's ultimate decision in Slater was that the risk of improper propensity inferences outweighed any claimed necessity of introducing

conduct at a different time to show state of mind. The probative value of such evidence was too greatly outweighed by its obvious, unfairly prejudicial effect. Slater, a 678-80.

The same is true in Mr. Elliott's case. In assessing the need for severance, the court was required to analyze the severance factors, including the cross-admissibility of evidence under ER 404(b). Russell, 125 Wn.2d at 66 ("The final factor is whether evidence of each count would be cross-admissible under ER 404(b) if severance were granted"). A vital aspect of ER 404(b) is the analysis of prejudice under ER 403. State v. Jackson, 102 Wn.2d 689, 693, 689 P.2d 76 (1984); State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982); 5 Karl B. Tegland, *Washington Practice: Evidence* § 404.32, at 603-04 (5th ed.2007).

Below, the trial court failed to conduct any on the record factor analysis. To justify the admission of prior acts under ER 404(b), a trial judge must "(1) find by a preponderance of the

evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The court must conduct this analysis on the record. State v. Sublett, 156 Wn. App. 160, 195, 231 P.3d 231 (2010), aff'd, 176 Wn.2d 58, 292 P.3d 715 (2012).

Stating that the text message evidence offered background between the two parties was not an analysis of the required factors. See RP 93. Had the court engaged in the proper analysis, it would have recognized that the mere fact of minor, attenuated prior act evidence being technically relevant to an uncontentious issue within one of the three primary counts did not warrant admission of evidence of a prior domestic violence offense, particularly in a case charging three serious domestic violence crimes. See State v. Gunderson, 181 Wn.2d 916, 923–24, 337 P.3d 1090 (2014).

Unfairly, it was only upon the trial court's *sua sponte* supposition that the April 28 text message was probative of reasonable fear for the harassment count that the prosecutor aggressively addressed that theme. RP 91-92.

But what was left unaddressed was the unfair propensity prejudice. That issue should have been evaluated in this case, and a proper assessment would have resulted in an order granting Mr. Elliott's severance motion. State v. Gunderson, 181 Wn.2d at 923. In this case, the evidence was deeply prejudicial and had minimal probative value, such that no reasonable court could admit the evidence of the text messaging contact months before the charged crimes. Severance should have been granted.

The Court of Appeals was wrong to condone the trial court's reasoning under the theory that the other criminal charge - violation of a court order by text message - was "related enough" to be admitted as part of Mr. Elliott's trial. Appendix (Decision, at page 3).

But this Supreme Court has long and clearly stated the rule - doubtful cases in the context of the prosecutor seeking to introduce prejudicial ER 404(b) evidence must be resolved in the *accused's* favor. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Severance in this matter would promote not a fairer trial, but a fair trial, on the charges of assault, imprisonment, and harassment, and a separate resolution of the quickly resolvable no-contact order violation charge would hardly have wreaked no quantum of havoc on judicial economy.

No reasonable court which properly weighed the factors for severance including ER 404(b) and ER 403 would ever determine that the judicial economy of trying the no-contact order with the primary charges outweighed the severe unfairness to Mr. Elliott in a single trial on four offenses.

Drastically, the unfair prejudice to the defendant is at its highest in cases such as the present one, when the prior acts are domestic violence offenses, similar to the charged

crimes. Gunderson, 181 Wn.2d at 925. Prior acts of domestic violence are therefore admissible only for limited purposes, "[o]therwise, the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose." Gunderson, at 925.

(ii). Reversal is required.

The text messaging that was interjected into Mr. Elliott's trial - which also carried with it the necessity of Mr. Elliott admitting he had violated no-contact orders as to Ms. Brager twice before - offered *de minimis* weight, if any, in a case that already included claims of conduct on the day in question which would cause any person fear - if the finder of fact were persuaded that Mr. Elliott actually engaged in that behavior.

As a result of these errors, Mr. Elliott was prosecuted on allegations of assault, unlawful imprisonment, and harassment - threat to kill. If the complainant Ms. Brager and her daughter B. were believed in what they said happened, the question whether the threat caused "reasonable" fear would hardly, if at

all, be at issue. But the no-contact order charge was predicated on a highly prejudicial text message which portrayed Mr. Elliott as vulgar, hostile toward Ms. Brager, and showed him as harboring a tendency to "eruptive" behavior. Thus the single trial allowed the jury to infer that Mr. Elliott had a criminal disposition.

Conviction on the primary charges was the result - in a case where the complainant was of dubious credibility because of a highly possible motivation to fabricate the claims after she lost custody of B. Reversal is required when "the prejudicial effect of trying the charges together outweighs the need for judicial economy." Slater, 197 Wn.2d at 679.

The denial of severance made the difference in this prosecution for assault, imprisonment, and threats to kill, because the case was close and the credibility of the complainant - as to whether these things happened at all - was dubious. The jury did not need extraneous evidence to be convinced of whether her account would cause a person to have

a reasonable fear - if it believed the events of July 1 happened. The single trial allowed the April 28 text message evidence to undergird the State's weak case, which consisted of a complainant with significant, adduced evidence of motivation to falsely accuse Mr. Elliott, and a child whose account of events appeared disturbingly identical and possibly coached. Because severance was denied, the State was able to introduce evidence of the frightening text message, which unfairly and prejudicially clothed Mr. Elliott with a propensity for violence. See Slater, 197 Wn.2d at 680.

This Court should accept review to the Supreme Court, under RAP 13.4(b)(1) and RAP 13.4(b)(2). On review, this Court should find that reversal of Mr. Elliott's convictions is required.

F. CONCLUSION

Mr. Elliott asks that this Supreme Court accept review, and reverse his judgment and sentence.

This brief contains 3,924 words formatted in Times New Roman font 14.

Respectfully submitted this 13th day of April, 2023.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONNY ROY ELLIOTT, Appellant.	No. 56561-7-II UNPUBLISHED OPINION

PRICE, J. — Donny R. Elliott appeals his convictions following a jury trial. As a result of an assault that occurred in July 2021, Elliott was convicted of second degree assault, felony harassment—threat to kill, and unlawful imprisonment. Elliott was also convicted of one count of violation of a court order for sending text messages on April 28, 2021, while a no-contact order was in place. Before trial, Elliott moved to sever the violation of a court order charge from the other charges, which the trial court denied. Following the testimony, Elliott's counsel failed to renew the motion as required by the criminal rules.

Elliott argues the trial court erred in denying his motion to sever and asserts that he received ineffective assistance of counsel due to his counsel's failure to renew the motion to sever. We affirm Elliott's convictions.

FACTS

I. BACKGROUND

Elliott was previously in a relationship with Jacqueline Brager, and the pair have two children together, a minor daughter, B., and an adult son, Connor. At the time of the assault, B. was about nine years old.

The relationship between Elliott and Brager was rocky, causing Brager to obtain a no-contact order against Elliott. On April 28, 2021, despite the existence of a no-contact order, Elliott sent multiple text messages to Brager.

About three months later, in July of 2021, Elliott assaulted Brager. Elliott grabbed Brager by the throat, pulled her into his basement from outside, threatened her life, and forced her to stay and cook for him. Brager did not report the incident to police until a few months later, in September 2021.

Elliott was charged with second degree assault (count I), felony harassment—threat to kill (count II), unlawful imprisonment (count III), and violation of a court order (count IV). The violation of the court order charge was tied to the text messages Elliott sent to Brager on April 28. All of Elliott's charges included the allegation that Brager was an intimate partner, making each a domestic violence charge.

II. PRETRIAL

Elliott's case proceeded to a jury trial. Before the trial began, the parties stipulated that Elliott had two previous convictions for violating court orders. Elliott's counsel then moved to sever count IV from the others, arguing that the April 28 text messages would be overly prejudicial to Elliott's other charges.

In response, the State explained the content of the text messages as "[Elliott] . . . swear[ing] at [Brager]" and then making "a string of unresponded to apologies about his bad mood." Verbatim Rep. of Proc. (VRP) at 91. The trial court observed that the reasonableness of Brager's fear would be at issue for the felony harassment charge and questioned whether the text messages would apply to those facts. The State answered that the messages "demonstrate a convincing hostility by Mr. Elliott towards Ms. Brager" and show Elliott's "eruptive behavior." VRP at 92.

The trial court denied Elliott's motion to sever, explaining that the text messages were "related enough" and would be relevant to the harassment charge and Brager's fear. VRP at 93. The trial court stated, "I find that [on] balance . . . it's appropriate that the State be able to proceed with this April 28th charge as alleged in Count [IV]." VRP at 93.

III. ELLIOTT'S TRIAL

At trial, Brager testified against Elliott. She testified that over one weekend in July 2021, B. was going to stay with Elliott at his home. Before then, Elliott and B. had previously not had much contact.

With B. already at Elliott's house for the weekend, Brager arrived around 11:00 a.m. on Saturday morning. Also present at the home was Elliott's young son from a different mother. Once Brager arrived, all four, Elliott, Brager, B., and Elliott's other son, went to a nearby river.

When they returned from the river, Elliott and Brager began arguing about their adult son, Connor. At that point, B. told Brager that she did not want to stay with Elliott as initially planned, and B. went inside of Elliott's house to gather her belongings. Elliott and Brager remained outside of the house, arguing.

Brager testified that Elliott followed her to her car as she prepared to leave with B. Elliott was angry and blamed Brager for B. wanting to leave his house. Elliott reached through Brager's open car window and grabbed Brager's face and neck while she was in the driver's seat. As Brager rolled up her window to protect herself from Elliott, B. came back outside toward the car. B. entered the car from the back-passenger door, but Elliott followed B. to get into the car. Elliott tried grabbing Brager's neck again from the back seat with one of his feet hanging out of a car door. When Brager began backing her car up, Elliott grabbed Brager's keys from the ignition, effectively stopping the car. With the car stopped, Elliott grabbed Brager's neck again, restricting her ability to breathe. B. was still in the vehicle, yelling.

At some point, the assault moved from the car to Elliott's front yard. B. and Elliott's other son were yelling in the front yard, and Elliott told them to "shut up" because someone was going to hear them. VRP at 140.

Brager testified that Elliott then pulled her into his basement by her throat, with B. and Elliott's son following them. Elliott put Brager up against a wall with his hands around her throat and squeezed. Brager stated that she could not breathe or scream. Brager felt like she was going to pass out and could hear the children yelling.

Elliott finally let go. Brager fell to the floor and B. ran to be beside her. Elliott then hit Brager on the side of the head, and when B. screamed, he hit B. too. At some point, Elliott held a blade-like woodworking tool and told Brager he was going to kill her with it. Brager testified she believed Elliott's threat.

Elliott then commanded Brager to get up and go upstairs, pulling her by her neck and then by her shirt. Brager stated she was afraid for her life but did not think she was able to leave Elliott's

house. Once upstairs, Elliott eventually demanded that Brager "fix him dinner." VRP at 149. Elliott would not let Brager use the restroom alone or drink anything unless it was alcohol.

Eventually, around 5:00 in the evening, Elliott laid on his bed with his son. Brager and B. laid on another bed nearby. Elliott intermittently fell asleep and would call Brager's and B.'s names to check that they were still there. When Elliott fell asleep for a longer period, Brager and B. ran to Brager's car and escaped from the house.

Brager testified that she did not initially report what had happened to the police because she felt responsible for the events, considering she had a protection order against Elliott. Brager also stated Elliott had brainwashed her into thinking that his actions were her fault, delaying her reporting.

During Brager's testimony, the State sought to admit the April 28 text messages that Elliott sent her. After authentication by Brager, the text messages were admitted. Elliott's messages stated:

> Good, bring [Connor] out to help me for a[ ]little bit. Could use his muscles[.]
>
> And a BIG F[*]CK YOU TOO!!
>
> Listen, I'm sorry I'm grumpy lately! It just seems I've been getting stepped on a lot lately. Plus when [you're] late or don't answer that pretty much tells me that you really don't care. If you only knew what it feels like to not have your son in your life, I try like h[*]ll and he just don't give a f[*]ck about me!! There's nothing more I can do, it is what it is I guess. Honestly[,] I'm ready to get the f[*]ck out of here, sick of this co-parenting and Salinger house bull sh[*]t and my job. I hate it all and ready for my life. Anyways, sorry for the rude comments.

Suppl. Clerk's Papers, Ex. 2. The trial court also admitted other text messages exchanged between Brager and Elliott following the events in July and photographs of Brager's bruised neck as additional exhibits.

B. also testified at the trial. Her testimony was consistent with Brager's testimony about the July assault events, including Elliott dragging Brager to his basement, preventing her from leaving the house, holding Brager by the throat, and threatening Brager with the woodworking tool.

At the close of evidence, Elliott's counsel did not renew his motion to sever count IV. The jury found Elliott guilty of all four of the charged counts.

Elliott appeals.

ANALYSIS

Elliott makes two arguments related to his counsel's motion to sever count IV (violation of a court order). First, he argues the trial court erred when it denied his pretrial motion to sever. Second, he argues he received ineffective assistance of counsel when his counsel failed to renew the motion to sever at the close of evidence. We reject both arguments.

I. LEGAL PRINCIPLES

A. SEVERANCE OF COUNTS UNDER THE CRIMINAL RULES

The criminal rules address joinder and severance of claims and parties. CrR 4.3(a) provides that the State may join two or more offenses into one charging document when the offenses are "of the same or similar character, even if not part of a single scheme or plan" or "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). The criminal rules address severance in CrR 4.4(b) (Severance of Offenses), which states:

> The court, on application of the prosecuting attorney, or on application of the defendant . . . 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.

"Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). "To determine whether to sever charges to avoid prejudice to a defendant, a court considers '(1) the strength of the State's evidence on each count; (2) the clarity of 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.' " *Id.* at 884-85 (quoting *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)).

It may be appropriate to deny severance even if not all four of the factors are met. *See State v. Bythrow*, 114 Wn.2d 713, 720-23, 790 P.2d 154 (1990) ("[T]he fact that separate counts may not be cross[-]admissible does not necessarily represent a sufficient ground as a matter of law [to sever the offenses]."). "A defendant 'seeking severance ha[s] the burden of demonstrating that a trial involving [all] counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.' " *State v. Slater*, 197 Wn.2d 660, 676, 486 P.3d 873 (2021) (alterations in original) (quoting *Bythrow*, 114 Wn.2d at 718).

When a pretrial motion to sever is denied by the trial court, the motion may be renewed before or at the close of evidence. CrR 4.4(a)(2). But "[s]everance is waived by failure to renew the motion." CrR 4.4(a)(2).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

To show ineffective assistance of counsel, the appellant must demonstrate that their counsel's performance was deficient and the deficient performance prejudiced the appellant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013). Failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 700.

To show prejudice, the appellant must demonstrate a reasonable probability that the outcome of the proceeding would have been different if counsel had not performed deficiently. *State v. Johnson*, 12 Wn. App. 2d 201, 210, 460 P.3d 1091 (2020), *aff'd*, 197 Wn.2d 740, 487 P.3d 893 (2021).

When a defendant argues ineffective assistance of counsel related to a failure to move for severance, the defendant must show that (1) the motion to sever would have been granted *and* (2) he would have been acquitted of the charges in separate trials.[1] *Sutherby*, 165 Wn.2d at 884.

II. FAILURE TO RENEW MOTION TO SEVER WAIVED ARGUMENT ON APPEAL

Elliott argues that the trial court erred when it denied his pretrial motion to sever the violation of a no-contact order count from the other counts.

[1] *See also State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012) (In cases of joinder of multiple defendants, the defendant demonstrates prejudice for ineffective assistance of counsel by showing "[(1)] a competent attorney would have moved for severance, [(2)] that the motion likely would have been granted, and [(3)] that there is a reasonable probability he would have been acquitted at a separate trial.").

However, as noted above, when a pretrial motion to sever is denied by the trial court, it must be renewed by the close of evidence or the issue is waived. CrR 4.4(a)(2). Here, Elliott's counsel did not renew his initial motion to sever. As a result, Elliott has waived appeal of the trial court's denial of his motion to sever.

III. ELLIOTT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

Elliott next argues that he received ineffective assistance of counsel because his counsel did not renew his motion to sever at the close of evidence.

Assuming, without deciding, that Elliott's counsel was deficient for failing to renew his motion to sever,[2] Elliott must still show prejudice by showing both that a motion to sever was likely to be granted and the jury would not have found him guilty in separate trials.

To show the motion to sever would have been granted had it been renewed at the close of the evidence, Elliott concentrates on two of the four factors for prejudice: factor one (strength of State's evidence on each charge) and factor four (cross admissibility of the evidence).

A. STRENGTH OF STATE'S EVIDENCE FOR COUNTS I, II, AND III

With respect to factor one, Elliott argues that because of the weakness of the State's evidence, the jury relied on the April text messages to convict him of the counts related to the July events. The State responds that each count related to the July assault was clearly proven by strong evidence and not by the April text messages. The State's position is persuasive.

[2] The State agrees with Elliott that his counsel's failure to renew the motion to sever count IV from the other counts was deficient, but argues that Elliott cannot show prejudice.

For this factor, severance is proper "when one case is remarkably stronger than the other." *State v. MacDonald*, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004), *review denied*, 153 Wn.2d 1006 (2005).

Looking separately at each count, there is strong supportive eyewitness testimony. For count I, the second degree assault charge, the State was required to prove that Elliott intentionally assaulted Brager by strangulation or suffocation. RCW 9A.36.021(1)(g). This count was supported by both Brager's detailed testimony that Elliott held her by her throat and she could not scream or breathe, as well as B.'s corroborative eyewitness testimony.

For count II, felony harassment—threat to kill, the State was required to show that Elliott knowingly threatened to kill Brager immediately or in the future, Elliott's words placed Brager in fear that Elliott's threat would be carried out, and Elliott acted unlawfully in his harassment of Brager. RCW 9A.46.020(1)(a)(i), (2)(b). For this charge, Brager testified that Elliott told her he was going to kill her while wielding a blade-like woodworking tool in his hands. Brager also testified she believed Elliott's threat when he held her by the neck such that she was unable to breathe. B.'s testimony was also directly supportive of these facts, including Elliott's use of the woodworking tool.

Finally, for count III, unlawful imprisonment, the State was required to show that Elliott knowingly restrained Brager by restricting her movement without her consent, the restriction substantially interfered with Brager's liberties, and Elliott did not have the legal authority to restrain Brager. RCW 9A.40.040; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 39.16 (5th ed. 2021). Again, through Brager's firsthand account of the assault, including Elliott forcibly pulling her into his basement and preventing her from leaving

until he fell asleep, together with B.'s testimony supporting Brager's version of the assault, the evidence on this count was strong.

Viewed separately, the evidence on each of these counts was strong. As shown below, the April text messages were not irrelevant to these counts, but the language used in the actual text messages makes the messages unlikely to be misused by the jury to inappropriately find a propensity for assault, harassment, or imprisonment. In the face of such strong eye-witness testimony from Brager, Elliott cannot show that factor one indicates a motion to sever would have been granted.

B. CROSS ADMISSIBILITY OF TEXT MESSAGES FOR OTHER CHARGES

Elliott also argues that factor four, cross admissibility, supports his position. Elliott contends that if the trial court had conducted an ER 404(b) analysis, it would have determined that the text messages were more prejudicial than they were probative for counts I, II, and III and, therefore, would not have been cross-admissible. The State argues the opposite, that the April text messages would have been cross-admissible for Elliott's other charges, in part, because the messages would help the jury understand Brager's delay in reporting.

To assess cross admissibility, the trial court should typically consider whether, under an ER 404(b) analysis, the evidence of each charge would be admissible in separate trials if severance was, or had been, granted. *Slater*, 197 Wn.2d at 677. ER 404(b) provides, "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." An ER 404(b) analysis requires the trial court to conduct a four-part test:

> "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

The text messages pass ER 404(b)'s four-part test.[3] First, it is undisputed that the text messages were actually sent to Brager from Elliott. For the second and third elements, the text messages and evidence of the violation of a court order would be relevant to the history between Elliott and Brager and the reasonableness of Brager's fear for count II, felony harassment—threat to kill. *See State v. Riley*, 12 Wn. App. 2d 714, 722, 460 P.3d 184, *review denied*, 195 Wn.2d 1031 (2020) (evidence of prior bad acts that showed reasonableness of the victim's fear for telephone harassment charge were relevant and admissible). In addition, the evidence would have been relevant to Brager's reasoning for her delayed report to the police. *See State v. Fisher*, 165 Wn.2d 727, 744-46, 202 P.3d 937 (2009) (evidence of prior bad acts was admissible to show why the victim delayed reporting when delayed reporting was an issue in the case). During the trial, Brager explained that she felt responsible for the assault when there was a no-contact order in place. Accordingly, the no-contact order and text messages are relevant to, and support, this testimony.

For the final part of the ER 404(b) test, the text messages are not highly prejudicial to Elliott compared to their probative value. The text messages only show Elliott cursing at and then apologizing to Brager and were not overly violent in nature. When that minimal prejudice is

[3] Elliott argues that the court's failure to conduct an ER 404(b) analysis to determine whether the text messages were overly prejudicial warrants a new trial. But as stated above, Elliott has waived any argument that the trial court erred related to severance.

weighed against the probative value of showing the relationship between Brager and Elliott to partially explain the reasonableness of Brager's fear and delay in reporting, the text messages were more probative than prejudicial. Thus, the text messages would have passed an ER 404(b) analysis to be cross-admissible.

Because the State's evidence on all counts was strong and the text messages would have been cross-admissible, Elliott cannot show that a motion to sever, had his counsel renewed the motion at the close of testimony, would have been granted, much less that the outcome of separate trials would have been different.[4] Elliott's ineffective assistance of counsel claim fails because he cannot satisfy the prejudice prong.

CONCLUSION

Elliott's challenge to the trial court's denial of his motion to sever has been waived, and his ineffective assistance claim fails because he has not shown he was prejudiced by any deficient performance. We affirm Elliott's convictions.

[4] Elliott makes no attempt in his briefing to argue that severance would have resulted in acquittals in separate trials. *See Sutherby*, 165 Wn.2d at 884 (prejudice for ineffective assistance requires both that the motion to sever would have been granted and that the defendant would have been acquitted in separate trials). However, because we decide Elliott has not made the initial showing that a renewed motion would have been granted, we do not further address this issue.

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 in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:

MAXA, P.J.

VELJACIC, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 56561-7-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: April 13, 2023

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