NO. 43432-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN CARLOS PARRA-INTERIAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael H. Evans, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to sever the counts for trial.

2. Unmitigated prejudice from joinder of offenses denied appellant a fair trial.

3. The State presented insufficient evidence to prove second degree rape.

Issues pertaining to assignments of error

1. Appellant was charged with rape and burglary committed in June 2010 and solicitation and conspiracy to commit murder in December 2011. Against repeated defense objections, the court consolidated the charges for trial. Where the State's evidence as to the initial charges was weak, the defenses to the charges differed, the evidence was not cross admissible, and the testimony would not have been duplicated in separate trials, did unmitigated prejudice from joinder deny appellant a fair trial?

2. The State charged appellant with second degree rape, alleging the victim was physically helpless because she was not fully awake when the intercourse occurred. Where the evidence showed that the victim was awakened by touching of her thighs, was aware of what was happening, and was able to object before the touching progressed to

intercourse, must appellant's conviction be reversed for insufficient evidence?

B. STATEMENT OF THE CASE

1. Procedural History

On June 16, 2010, the Cowlitz County Prosecuting Attorney charged appellant Juan Carlos Parra-Interian with second degree rape and first degree burglary. CP (10-1-00557-6) 1-2; RCW 9A.44.050(1)(b); RCW 9A.52.020(1)(b). The information was amended, alleging that the rape involved an invasion of the victim's privacy and the burglary was committed with sexual motivation. CP (10-1-00557-6) 51-52.

On December 18, 2011, the Cowlitz County Prosecutor charged Parra-Interian with solicitation to commit first degree murder and conspiracy to commit first degree murder. CP (11-1-01263-5) 1-2; RCW 9A.28.030; RCW 9A.28.040; RCW 9A.32.030. The State sought consolidation of the charges for trial, and Parra-Interian filed written motions opposing joinder and seeking severance. CP (10-1-00557-6) 22, 23-33; CP (11-1-01263-5) 3-4. The court granted the State's motion, and the case proceeded to a consolidated jury trial before the Honorable Michael Evans.

The jury returned guilty verdicts and special verdicts finding the aggravating factors had been proven. CP (10-1-00557-6) 148-51; CP (11-

1-01263-5) 25-26. Parra-Interian filed a motion for arrest of judgment and dismissal of the rape and burglary convictions. CP (10-1-00557-6) 152-54. The court denied the motion and proceeded with sentencing. It imposed concurrent standard range sentences of 159 months to life on the rape convictions and 91 months to life on the burglary, which included a 24-month enhancement based on the jury's finding of sexual motivation. CP (10-1-00557-6) 161-77. The court imposed consecutive sentences of 280.5 months on the solicitation charge and 240 months on the conspiracy charge, to be served concurrently with the rape and burglary sentences, but consecutive to the 24-month enhancement. CP (11-1-01263-5) 29-41.

Parra-Interian filed timely notices of appeal in both cases. CP (10-1-00557-6) 178; CP (11-1-01263-5) 49. This Court consolidated the cases on appeal.

2. Substantive Facts

a. The rape and burglary charges

On June 12, 2010, SA and her boyfriend Christopher McGowan had a graduation party at their home for McGowan's foster brother. SA's sister, Ashley Kruis, attended the party and spent the night afterwards, as

did McGowan's other brother, Andrew Fleming-Davis. 2(A)RP[1] 233-34. Everyone at the party had been drinking except SA. 2(A)RP 235.

SA and McGowan went to bed around 2:30 a.m. They had sex first and then went to sleep. 2(A)RP 236. During the night their two-year-old son began to cry, so McGowan brought him into bed with them. 2(A)RP 237.

Sometime later, SA was awakened when she felt someone touching her inner thighs. 2(B)RP 274. She was still groggy and partially asleep, but she was aware of what was happening. 2(A)RP 240, 274-79. She assumed it was McGowan, and she did not object. 2(A)RP 242. The touching continued for about 20 minutes, eventually progressing to digital penetration. 2(B)RP 276, 290. She continued to believe it was McGowan, so she was still "okay with it." 2(B)RP 276, 278. SA started becoming uncomfortable when the person stopped touching her to turn off the television. 2(A)RP 242-43. The man got back into bed, and SA felt his penis on the back of her thighs. 2(A)RP 243-44. When she felt him remove the birth control patch from her lower back, she became fully awake and alert, and she knew it was not McGowan. 2(A)RP 244-45. SA

[1] The Verbatim Report of Proceedings is contained in 14 volumes, designated as follows: 1RP—1/5/12, 1/13/12, 3/9/12; 2(A)RP—3/12/12; 2(B)RP—3/12/12; 3(A)RP 3/13/12; 3(B)RP 3/13/12; 4(A)RP—3/14/12; 4(B)RP—3/14/12; 5RP—3/15/12; 6RP—3/16/12; 7(A)RP—3/19/12; 7(B)RP—3/19/12; 8RP—3/20/12, 4/6/12, 5/11/12; 9(A)RP—3/9/12; 9(B)RP—3/9/12, 3/12/12, 3/15/12.

curled up to the head of the bed and tried to wake McGowan, and the man left the room. 2(A)RP 246.

SA never saw the person who touched her and could not describe him, despite the fact that the television was on, partially illuminating the small room. 2(A)RP 246; 2(B)RP 273. She assumed at first that it was Fleming-Davis, because he was the only other man in the house, and she told McGowan that his brother had tried to rape her. 2(A)RP 247; 3(A)RP 422. McGowan left the room to confront Fleming-Davis, and he saw Juan Carlos Parra-Interian in the hallway. 3(A)RP 423-24.

Parra-Interian was a friend of SA's family, and McGowan knew him well. 3(A)RP 356, 371, 402. Parra-Interian told McGowan that he had seen Fleming-Davis leave the bedroom. 3(A)RP 425. Fleming-Davis was asleep in the living room at that point, and McGowan shook him and told him he needed to answer some questions. 3(A)RP 326. Parra-Interian stood behind McGowan and backed him up. 3(A)RP 427, 453. As McGowan and Parra-Interian confronted Fleming-Davis, SA ran out of the house and across the street to her parents' house. 2(A)RP 249.

SA told her parents she had been attacked. 2(A)RP 253. Her father immediately went across the street to SA's house. 3(A)RP 378. He saw McGowan yelling at Parra-Interian and told Parra-Interian to leave.

3(A)RP 479. Parra-Interian went out the front door to his truck and drove away. 3(A)RP 479.

SA told her mother that Parra-Interian had tried to rape her. 3(A)RP 376. Her mother called 911 and reported what SA said. 3(A)RP 376; 4(A)RP 643-46. Police responded and interviewed SA, McGowan, and Kruis.

Kruis had been asleep on the couch when Parra-Interian leaned over her and asked where SA and McGowan were. 3(A)RP 358. Kruis testified she could hear Fleming-Davis snoring at that time. She pointed to SA's room and went back to sleep. She did not see what Parra-Interian did after that. 3(A)RP 359. The next thing she was aware of was McGowan yelling at Fleming-Davis. Parra-Interian was still in the room. 3(A)RP 360.

According to McGowan, when he saw both Fleming-Davis and Parra-Interian in the house, he was confused, and he asked SA how he could determine who had touched her. She suggested that he smell their hands. 3(A)RP 427-28. He smelled nothing unusual on Fleming-Davis's hands. 3(A)RP 428-29. McGowan testified that he then turned to Parra-Interian, but Parra-Interian had walked outside. When McGowan followed him and asked to smell his hands, Parra-Interian said he had to leave. 3(A)RP 430.

Police contacted Parra-Interian at his apartment complex. Parra-Interian was extremely intoxicated, but he agreed to accompany them to the police station. 3(A)RP 483-86. He was placed in an interview room, where he remained for several hours. 3(A)RP 487-87. After he left, police found a birth control patch, of the same brand SA said she used, on the floor of the interview room near where Parra-Interian had been sitting. 2(B)RP 323; 3(A)RP 489. The patch was later determined to have SA's DNA on it, as well as Parra-Interian's. 3(B)RP 565-66.

Parra-Interian was arrested, and a warrant was obtained to collect swabs from his hands. 3(A)RP 388-90. Analysis showed DNA from at least two people was present on the swab from Parra-Interian's left hand, and Parra-Interian and McGowan were both possible contributors. 3(B)RP 578. The State's expert testified it was likely McGowan's DNA came from sperm present in the swab. 3(B)RP 584. SA's DNA was not found on the swabs from Parra-Interian's hands. 3(B)RP 594.

The defense presented evidence that Parra-Interian and his wife, Yolanda Ayala, worked for the drug task force. Detective Watson testified that on June 11, 2010, he was meeting with Parra-Interian and Ayala in a restaurant parking lot when another couple parked next to them, waiting to speak to Parra-Interian and Ayala. 4(B)RP 802-03. Watson left the area so they could speak. When he returned, Parra-Interian identified

the man as McGowan and said that McGowan had invited him to a party at McGowan's house the next day. Parra-Interian told Watson he planned to go to the party. 4(B)RP 804-06. Parra-Interian confirmed this testimony, explaining that as a task force informant, he was required to keep detectives apprised of his activities. 5RP 1041-45, 1063.

Parra-Interian testified that he spent the evening of June 12, 2010, with his wife at a casino, and he became highly intoxicated. 5RP 1045-46. When they left the casino, his wife was tired, so she went home, but Parra-Interian decided he wanted to go to McGowan's party. 5RP 1046. He tried calling first, but he received no answer, and he headed to McGowan's house around 3:00 a.m. 5RP 1049-50. When Parra-Interian arrived, the lights were on and the door was open, so he entered the house. 5RP 1050. He saw Ashley Kruis asleep on one of the couches, woke her up, and asked where SA and McGowan were. She pointed toward the bedroom. 5RP 1050-51.

At that point Parra-Interian saw someone he had never seen before come out of the other room, wiping his hands on his pants as he walked. The man walked to the empty couch in the room and lay down. 5RP 1051-52. Parra-Interian then heard SA shouting from the other room that someone had raped her, and McGowan came out of the room. 5RP 1052. He walked over to the man on the couch, and he seemed upset. Parra-

Interian approached and tried to help McGowan, grabbing the man's hand. Parra-Interian testified that the man's hand felt slippery and sticky. 5RP 1053-54. SA's father then walked in the house and told Parra-Interian to leave. 5RP 1054-55.

b. The solicitation and conspiracy charges

On November 28, 2011, Ron White, an inmate at the Cowlitz County Jail, told a corrections officer that fellow inmate Parra-Interian approached him to solicit a murder for hire. 4(A)RP 649, 658. That information was passed along to the prosecutor's office and the Kelso Police, and an investigation was begun. 4(A)RP 651. A detective met with White at the jail and arranged for him to wear a body wire to record a conversation with Parra-Interian. 4(A)RP 659-60. White then returned to his unit at the jail, and two detectives observed him speak with Parra-Interian while listening to the transmitted conversation. 4(A)RP 664-65.

During the conversation, White asked the name of the woman Parra-Interian wanted him to "take out." He also told Parra-Interian that when he brought this woman to his car, he would shoot her twice, and "she's dead." 5RP 939. White told Parra-Interian he would "take your snitch out," then head to Oregon. 5RP 941. White asked if she would walk outside with him, and Parra-Interian said he was pretty sure she would. 5RP 945.

On December 5, 2011, White was released from jail. 4(A)RP 668. He met with detectives and again agreed to wear a body wire. While he was at the police station, White received a call from a woman who said she was going to get money and a gun and meet with him later. 4(A)RP 674. Detectives attached the body wire and drove White to the area near the arranged meeting location. 4(A)RP 675, 679. Officers listened as White met with a woman, identified as Yolanda Ayala. 4(A)RP 682, 713.

During the meeting, Ayala showed White a photograph. 5RP 963. White told her he needed $2500. He said he planned to have SA come to the car and put two rounds in her, but he would not do anything until he had the money. 5RP 964-67. Ayala said she did not know what White was planning to do; she just knew SA was going on vacation. 5RP 968. White asked who would be at the house, and Ayala listed SA's family members. She told White to introduce himself as a cop, get her in the car, and take her somewhere else. 5RP 969.

Police followed Ayala as she left the meeting with White, and she was arrested after officers stopped her vehicle. 4(A)RP 714, 716. She had three cell phones in her car when she was arrested, and those were taken into evidence. 4(A)RP 717. One of the phones had a photograph of SA on it. 5RP 913. Police also searched her apartment and seized a document with SA's name on it from the bedroom, $7500 from one location in the

apartment and $1100 from another location, and a letter in Spanish from Parra-Interian to his wife. 4(A)RP 729, 731, 733-34; 4(B)RP 787. In the letter, Parra-Interian gave Ayala instructions for her meeting with White. 4(B)RP 792-93.

White testified that he was convicted of second degree theft in 2007, defrauding by check in 2008, third degree theft in 2009, and three counts of second degree theft and making false statements in 2010. 4(B)RP 840. In November and December 2011 he was in the Cowlitz County Jail on charges of felony harassment and intimidating a witness. Id.

White testified that a newspaper article about his case was published while he was in jail. The article identified him as a member of a white supremacist group and indicated he had been accused of threatening a police officer, and White said the article was a topic of discussion among his fellow inmates. 4(B)RP 842-43. According to White, after the article was published, Parra-Interian approached him and offered him $10,000 to make the witness against him disappear, saying he wanted her dead. 4(B)RP 844, 846. White claimed that Parra-Interian told him that he had previously tried to get rid of the witness by having someone burn down her garage and that he was going to have another person take care of her, but that person had been arrested. 4(B)RP 847-48.

White further testified that he asked Parra-Interian how he wanted the witness to disappear, and Parra-Interian said he did not care, then he made a hand gesture, implying a gun. 4(B)RP 850; 5RP 1088. When White asked what he should do if her child was there, Parra-Interian told him to "do it." 4(B)RP 850. White again asked what he should do if SA's child was present when he shot her, and Parra-Interian said, "That too." 4(B)RP 851.

According to White, the agreement was that Parra-Interian's people would give him $2500 up front and the rest when the job was done. They would also provide a weapon and pictures of the intended victim. 4(B)RP 850.

White told Parra-Interian he had a stolen police vest. He planned to go up to the witness and identify himself as police, lead her to his car, and shoot her twice. 4(B)RP 855. White told Parra-Interian he was going to Oregon as soon as it was done, and he kept saying he needed the money. 4(B)RP 856. When White met with Ayala, she showed him pictures of the intended victim on a cell phone, but she did not give him either money or a firearm. 4(B)RP 862.

Parra-Interian testified that he speaks some English, but he needs an interpreter to understand every word. 5RP 1035. He had an interpreter throughout the trial. He did not have an interpreter during his

conversations with White, however, and he did not understand everything White said. 6RP 1124-25. Parra-Interian testified that he never engaged with White to have him commit murder. 6RP 1104. When White approached him in jail and offered his services to get Parra-Interian's case dismissed, Parra-Interian understood that the plan was for White to get SA drugged out on cocaine and take her to a casino in Oregon so that she would not be available to testify at trial. 6RP 1104-06. When White said he was going to "take her out," Parra-Interian believed he was talking about taking SA to the casino. 6RP 1108. Parra-Interian admitted he was soliciting and conspiring to commit witness tampering, but he never intended to have SA killed. 6RP 1112-13.

C. ARGUMENT

1. UNMITIGATED PREJUDICE ARISING FROM CONSOLIDATION OF THE CHARGES DENIED PARRA-INTERIAN A FAIR TRIAL.

Parra-Interian was charged with second degree rape and burglary in June 2010 and with solicitation and conspiracy to commit murder in December 2011. Before either case proceeded to trial, the State moved to consolidate them under CrR 4.3 and CrR 4.3.1, arguing that the offenses could have been joined in the same information because they were parts of a single scheme or plan. CP (10-1-00557-6) 22, 34-35; 1RP 12-14.

Parra-Interian had different attorneys in each case. James Morgan represented him on the rape and burglary charges, while Edward DeBray represented him on the conspiracy and solicitation charges. Both attorneys filed motions for severance under CrR 4.4. CP (10-1-00557-6) 23-33; CP (11-1-01263-5) 3-4. At a pretrial hearing, Morgan objected to joining the cases for trial and argued that severance was necessary to protect Parra-Interian's right to a fair trial. First, he noted that the two cases were not based on the same conduct, as the actions charged in the first case occurred a year and a half before the actions in the second. 1RP 15-16. Next, counsel argued that Parra-Interian would be prejudiced by consolidation, because there was a gross disparity in the strength of the State's evidence in the two cases. 1RP 19. DeBray concurred in the objection, arguing that a full account of the burglary and rape would not be admissible in a separate trial on the conspiracy and solicitation charges. 1RP 21.

The court agreed that the two sets of charges were not of the same or similar character, but it found they were connected together and constituted a single plan or scheme. 1RP 25. It agreed with the defense that the evidence of the two cases was not cross-admissible, and with the State that judicial economy was an important concern. 1RP 25. Considering the probable cause statements, the court determined that there

was not a great disparity in the strength of the State's evidence as to the separate charges, and it noted that the defenses were distinct and relatively clear. It granted the State's motion to consolidate the charges for trial. 1RP 26. Both defense attorneys renewed the objection to consolidation prior to trial. 1RP 56.

Following White's testimony, Morgan moved for a mistrial on the rape and burglary charges and renewed the motion for severance. 4(B)RP 878. Counsel argued that when White testified that Parra-Interian said he should shoot SA's child too, the jurors were visibly angered and upset, glaring at Parra-Interian. Having heard that testimony, they were clearly prepared to convict Parra-Interian of anything they could, and there was no way he could get a fair trial on the rape and burglary charges. No matter how many instructions they were given, they would not be able to compartmentalize the evidence. 4(B)RP 878-79.

The court denied the motion. It stated that it is not unusual for jurors to express emotion to certain evidence, but those emotions fade over time. The court noted that the jury would be instructed to look at the charges individually, and juries are presumed to follow the court's instructions. 4(B)RP 887-88.

Morgan renewed the motions for severance and a mistrial at the close of the State's case and again after Parra-Interian testified. 5RP

1000; 7(A)RP 1181. The court again denied the motions. 5RP 1001; 7(A)RP 1186.

Severance of offenses properly joined for trial is required where it is necessary to promote a fair determination of guilt or innocence. The court's failure to sever offenses is reversible for a manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). While Washington has a liberal joinder rule, "joinder must not be utilized in such a way as to prejudice a defendant." State v. Harris, 36 Wn. App. 746, 749-50, 677 P.2d 202 (1984)(citing State v. Smith, 74 Wn.2d 744, 466 P.2d 571 (1958), vacated in part, 408 U.S. 934 (1972)). Washington courts have recognized that joinder of offenses is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986).

Even where joinder is legally permissible, the trial court should not join offenses for prosecution in a single trial where joinder prejudices the accused. State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017 (1999). Prejudice will result if a single trial invites the jury to cumulate evidence to find guilt or to otherwise infer a criminal disposition. State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989) (citing Smith, 74 Wn.2d at 754-55). "A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent

feeling of hostility engendered by the charging of several crimes as distinct from only one." Harris, 36 Wn. App. at 750.

When assessing whether the trial court abused its discretion in denying a motion for severance, the appellate court must balance the inherent prejudice from joinder against the presence of mitigating factors. These factors include (1) the strength of the State's evidence as to each count; (2) the clarity of the defenses as to each count; (3) whether the trial court properly instructed the jury to consider the evidence of each crime separately; and (4) the admissibility of evidence of the other charges if not joined for trial. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Finally, any "residual prejudice" must be weighed against the need for judicial economy. Id. (citing State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993)).

These factors failed to mitigate the substantial prejudice resulting from joining the rape and burglary charges from 2010 and the conspiracy and solicitation charges from 2011 in a single trial.

Where the State's evidence is not uniformly strong, severance may be necessary to ensure a fair trial. State v. Hernandez, 58 Wn. App. 793, 800, 794 P.2d 1327 (1990), overruled on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 99, 812 P.2d 86 (1991). For example, in Hernandez, the defendant was charged with three robberies of three

different businesses on three different dates. Id. at 795. Each charge was based on the testimony of eyewitnesses whose identifications varied as to reliability. Id. at 800. The evidence on one count was quite strong, mitigating any prejudice caused by joinder, where the evidence on the other two counts "was somewhat weak," creating a likelihood of "significant prejudice." Id. The court held, "It is apparent to us that where the prosecution tries a weak case or cases, together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case." Id. at 801.

By contrast, in Kalakosky, the trial court properly denied a motion to sever five counts of rape, where the State's case was strong for each count, with significant corroborating evidence supporting each conviction. Kalakosky, 121 Wn.2d at 538-39. The Court concluded,

> Given that the crimes were not particularly difficult to "compartmentalize", that the State's evidence on each count was strong, and that the trial court instructed the jury to consider the crimes separately, we conclude that the trial court was well within its broad discretion in finding that the potential prejudice did not outweigh the concern for judicial economy.

Id. at 539.

Parra-Interian's case is far more similar to Hernandez on this factor. The State's evidence on the rape and burglary charge was weak. SA never identified Parra-Interian, and she was not even able to describe

her assailant because she said she never saw him. In fact, she initially accused McGowan's brother, who was present in the house at the time. No DNA from SA was found on Parra-Interian, and there was no evidence that Parra-Interian's DNA was found on SA. Parra-Interian's presence in the house and contact with McGowan and his brother could explain how SA's birth control patch came to be in the interview room at the police station. As to the burglary charge, there was evidence that before the alleged incident, McGowan had invited Parra-Interian to the party at his house. This was not merely a self-serving statement by Parra-Interian made after the allegations of burglary arose. The evidence showed that he told the task force detective about the invitation the day before the party.

By contrast, the body-wire recordings provided strong evidence that Parra-Interian solicited a crime and conspired to prevent SA from testifying against him. As Parra-Interian testified, he did not like being in jail and he believed that if SA were not available to testify, the charges against him would be dismissed and he would be released.

Because the cases were joined, it was highly likely the jury would be influenced by the strong evidence of solicitation and conspiracy in deciding the rape and burglary case. As in Hernandez, joinder created the distinct danger that the jury would find the weaker case fortified by the stronger case. Severance was necessary to ensure a fair trial.

The next factor to consider is the clarity of defenses as to each count. "The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each charge." Russell, 125 Wn.2d at 64 (quoting Hernandez, 58 Wn. App. at 799); see also State v. Sutherby, 165 Wn.2d 870, 885, 204 P.3d 916 (2009) (defense counsel ineffective for failing to move to sever possession of child pornography charge from child rape and molestation charges, where defense to pornography charge was unwitting possession and defense to rape and molestation charges was mistake or accident). For example, in Russell, the defense to both offenses was a general denial. 125 Wn.2d at 65. Finding this factor supported joinder, the Supreme Court quoted the trial court's observation that "It isn't as though there will be a self-defense argument on one and a different type of defense on another one, or that there will be an admission of one or a denial of another." Russell, 125 Wn.2d at 65.

Here, however, there was an admission of wrong-doing on the solicitation and conspiracy counts and a denial as to the rape and burglary charges. Although Parra-Interian denied that his intent was to solicit murder, he admitted committing a crime to prevent SA from testifying about the rape and burglary charges, because he was afraid he would remain incarcerated. As the Russell Court observed, the conflict between

the two defenses would likely confuse the jury. This factor does not mitigate the prejudice inherent in joinder.

Next, the court instructed the jury to consider each charge separately:

> 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.

CP 122 (Instruction No. 3). Parra-Interian acknowledges that this instruction has been approved by appellate courts in the context of severance determinations as generally favoring joinder. Bythrow, 114 Wn.2d at 723. This factor is not dispositive, however. See e.g. Harris, 36 Wn. App. at 750 ("despite an instruction to consider the counts separately, there was extreme danger that the defendants would be prejudiced.").

The fourth factor to consider is whether the evidence to be presented is cross-admissible. Cross-admissibility considerations involve evaluating whether the evidence of various offenses would be admissible to prove the other charges if each offense was tried separately. Ramirez, 46 Wn. App. at 226. "In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence." Sutherby, 165 Wn.2d at 887 (internal citations omitted).

Here, the trial court acknowledged that there would be only limited cross admissibility in separate trials. 1RP 25. While the jury in each trial

would learn of the nature of the charges in the other case, it would not hear the details of the accusations. 1RP 21, 25.

Even considering any mitigation by these factors, the residual prejudice engendered by joining the charges for trial far exceeded any concerns for judicial economy. Joining charges for trial did little to conserve judicial resources, as the two cases involved separate witnesses, other than the investigating officer. SA and her family would not have had to testify in the conspiracy and solicitation trial, nor would the DNA experts. And, while the conspiracy and solicitation charges had some relevance to Parra-Interian's consciousness of guilt in the rape and burglary case, the full details of that investigation were not needed to prove those charges. The likelihood of repetition of evidence was nominal had the charges been properly severed.

On the other hand, the prejudice created by the joint trial was significant. The primary concern underlying review of a severance decision is whether evidence of one crime taints the jury's consideration of another charge. Bythrow, 114 Wn.2d at 721. That was the case with White's testimony regarding the details of the solicitation charge. As Attorney Morgan pointed out, the jury was visibly outraged when White testified that Parra-Interian said he should kill SA's child as well. Once the jury heard that testimony, it was ready to convict Parra-Interian of any

crime the State charged, regardless of any weaknesses in the State's case or instructions to consider charges separately. The latent feeling of hostility engendered by the presentation of several charges in a single trial was brought to the forefront by White's testimony.

A trial court's failure to grant severance requires reversal when the danger of prejudice from the evidence of various counts deprives the accused of a fair trial. Harris, 36 Wn. App. at 752. White's testimony on the solicitation charge tainted the jury's consideration of the rape and burglary charges, and Parra-Interian did not receive a fair trial. His convictions must be reversed.

2. THE STATE FAILED TO PROVE SECOND DEGREE RAPE AS CHARGED, AND PARRA-INTERIAN'S CONVICTION MUST BE REVERSED.

For a criminal conviction to be upheld, the State must prove every element of the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Walton, 64 Wn. App. 410, 415, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). But, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the

prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

The State charged Parra-Interian with second degree rape under the following statutory provision:

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
> ...
>
> (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated[.]

RCW 9A.44.050. The State alleged that SA was physically helpless during the sexual intercourse. CP (10-1-00557-6) 51. "Physically helpless" has a specific definition under Washington law. By statute, "'Physically helpless' means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5). Unless the alleged victim meets this definition, the evidence does not establish second degree rape. See State v. Bucknell, 144 Wn. App. 524, 529-30, 183 P.3d 1078 (2008).

In Bucknell, the victim suffered from Lou Gehrig's disease. She was bedridden and was unable to move from her chest down. Bucknell, 144 Wn. App. at 526. Bucknell was convicted of second degree rape under the physical helplessness prong, but the Court of Appeals reversed. Despite the victim's physical limitations, she was able to talk, answer questions, and understand and perceive information. Because she had the ability to verbally communicate her unwillingness to participate, she was not "physically helpless" as defined by statute. The evidence was therefore insufficient to convict Bucknell of second degree rape. Bucknell, 144 Wn. App. at 529-30.

The State's theory in this case was that SA was physically helpless because she was not fully awake during the sexual intercourse. 7(A)RP 1173; 7(B)RP 1334, 1413. It is established in Washington that a person who is asleep is physically helpless. State v. Puapuaga, 54 Wn.App. 857, 861, 776 P.2d 170 (1989) ("The state of sleep appears to be universally understood as unconsciousness or physical inability to communicate unwillingness. Therefore, any rational trier of fact could have found beyond a reasonable doubt that the victim was physically helpless based on the evidence that she was asleep."). No case has gone so far as to hold that a person who is groggy but aware of what is going on and capable of responding is physically helpless, however.

Here, by her own account, SA woke up when she felt someone touching her thighs. 2(B)RP 274. She was aware of the touching before it progressed to sexual intercourse:

> Q: Okay. So, the thing that actually woke you up was the fact that someone was touching your thighs? Correct?
> A: Yes.
> …
> Q: Okay. You mentioned here today that the person was running their fingers up and down your thighs, something to that effect. Is that correct?
> A: Yes.
> Q: Okay. And – and, it was after you woke up to the sensation of someone touching your thighs that the person then moved, subsequently, to touching further up your body. Correct?
> A: Yes.
> Q: Okay. However, by the time this person is done touching your thighs and moves up to the upper – upper areas of your body, according to your testimony, by that time, you've already been awakened by the touching of the thighs. Correct?
> A: Yes.

2(B)RP 274-75.

Although SA described herself as "mostly asleep", a 4 on a scale of 10 with 10 being fully awake, she testified that she could have protested the touching before it progressed to intercourse, but she did not, because she thought it was McGowan. 2(A)RP 240; 2(B)RP 278-79. Significantly, SA never testified that she was unable to object. Rather, she testified that she could have objected if she wanted to, but she believed it was McGowan, so she did not:

> Q: And isn't it also true that, if in fact you had – while this touching is going on, you're awakened by the touching of the thighs, and the touching then progresses to digital penetration. If, in fact, you were at all upset or anything with what was going on, you could have turned around and looked at who was behind you. Correct?
> A: Yes.

2(B)RP 279.

When the trial court denied the defense motion to dismiss the rape charge, it stated the decision was a fairly close call, and it was not completely sold that SA was physically helpless because she was partially asleep. The court believed, however, that there was evidence SA had been drinking, and the jury could therefore find that she was physically helpless. 7(A)RP 1176-78.

Contrary to the court's recollection, there was no evidence SA had been drinking. Although the probable cause statement indicated that SA and McGowan said they were intoxicated, the detective who wrote the statement was unable to identify the source of that information and testified it was likely a misinterpretation of what McGowan had said. 3(B)RP 543-45. SA testified she was not drinking that night. 2(A)RP 235; 2(B)RP 265. She did not tell the police she had been drinking, and she never said in any interviews that she had been drinking. 2(B)RP 265-66. Both SA's sister and McGowan testified that SA had not been drinking as well. 3(A)RP 356, 418. And the nurse who examined SA at

the hospital testified she did not appear to have been drinking and did not appear intoxicated. 2(B)RP 303. There was no basis for the jury to find that SA was physically helpless due in any part to intoxication.

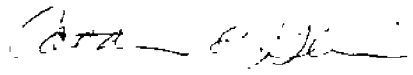
The evidence does not establish that SA was "physically unable to communicate unwillingness to an act" when the sexual intercourse occurred. She was awakened, at least partially, by the touching that preceded the intercourse. During the twenty minutes or so that this touching continued, SA was aware of what was going on and was capable of communicating an objection. She was not unconscious, asleep, or in any other way physically helpless during the sexual intercourse. Because the State did not produce sufficient evidence that SA was incapable of consent by reason of being physically helpless, Parra-Interian's conviction of second degree rape must be reversed and the charge dismissed.

D. CONCLUSION

The court's refusal to sever the counts denied Parra-Interian a fair trial, and his convictions must be reversed. In addition, the second degree rape charge must be dismissed for insufficient evidence.

DATED this 12th day of April, 2013.

Respectfully submitted,



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Certification of Service

Today I forwarded a copy of the Brief of Appellant in *State v. Juan Carlos Parra-Interian*, Cause No. 43432-6-II to:

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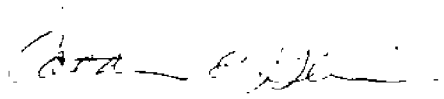

Catherine E. Glinski
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