SUPREME COURT NO. 90764-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUAN CARLOS PARRA-INTERIAN,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 43432-6-II
Cowlitz County No. 10-1-00557-7 and 11-1-01263-5

PETITION FOR REVIEW

CATHERINE E. GLINSKI
Attorney for Petitioner

GLINSKI LAW FIRM PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Constitutional Provisions

Statutes

Rules

A. IDENTITY OF PETITIONER

Petitioner, JUAN CARLOS PARRA-INTERIAN, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the August 12, 2014, unpublished decision of Division Two of the Court of Appeals affirming his convictions of second degree rape, first degree burglary with sexual motivation, solicitation to commit first degree murder, and conspiracy to commit first degree murder.

C. ISSUES PRESENTED FOR REVIEW

1. Parra-Interian 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 Parra-Interian a fair trial?

2. The State charged Parra-Interian 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 Parra-Interian's conviction be reversed for insufficient evidence?

D. STATEMENT OF THE CASE

A complete statement of the case, with citations to the lengthy record, is contained in the Brief of Appellant at 2-13. Because that brief will be forwarded as part of the Court of Appeals record to this Court, to avoid repetition, petitioner incorporates that statement by reference.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS'S CONCLUSION THAT PARRA-INTERIAN HAS NOT DEMONSTRATED THAT PREJUDICE FROM JOINDER DENIED HIM A FAIR TRIAL CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT AND THE COURT OF APPEALS.

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. 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 trial court 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.

During the course of trial, Ron White, a former inmate at the Cowlitz County Jail, testified that Parra-Interian approached him to solicit a murder for hire. 4(B)RP 844, 846. White testified that in discussing the

details of the plan he asked Parra-Interian what he should do if the intended victim's child was present, and Parra-Interian told him to kill the child too. 4(B)RP 850-51.

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.

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.

In this case, Parra-Interian argued at trial and on appeal that joinder was prejudicial because the State's case on the rape and burglary was weaker that the evidence on the conspiracy and solicitation. In rejecting this argument, the Court of Appeals concluded that it rested on the mistaken belief that a case based on circumstantial evidence is weaker than a case based on direct evidence. Opinion, at 6.

Contrary to the Court's assertion, Parra-Interian does not maintain that the State's evidence on the rape and burglary charges was weak because it was circumstantial rather than direct but because it does not reliably connect him to the crime. 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. These alternate explanations for

the State's evidence weaken the inferences needed to support the State's case and make the identification of Parra-Interian as the perpetrator less reliable. By contrast, the body-wire recordings provided strong evidence that Parra-Interian solicited a crime and conspired to prevent SA from testifying against him.

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, this 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.

The next factor that weighs against joinder is the lack of cross-admissibility of the evidence. 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.

Moreover, 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. The Court of Appeals's decision to the contrary conflicts with this Court's decisions in Russell and Sutherby and with the Court of Appeals's decision in Hernandez. RAP 13.4(b)(1)(2).

2. THE COURT OF APPEALS'S CONCLUSION THAT THE EVIDENCE WAS SUFFICIENT TO CONVICT PARRA-INTERIAN OF RAPE CONFLICTS WITH A PRIOR DECISION OF THE COURT OF APPEALS AND PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

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.

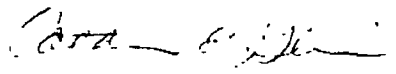
The evidence does not establish that SA was "physically unable to communicate unwillingness to an act" when the sexual intercourse occurred. She was awakened, at least partially, by the touching that preceded the intercourse. During the twenty minutes or so that this touching continued, SA was aware 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. The Court of Appeals's conclusion that the evidence here was sufficient to support Parra-Interian's conviction conflicts with Bucknell, and review is appropriate under RAP 13.4(b)(1). Further, whether the definition of "physically helpless" can be expanded to include a person who is groggy but aware of what is going on and capable of responding is an issue of substantial public importance meriting review. RAP 13.4(b)(4).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the Court of Appeals' decision.

DATED this 11th day of September, 2014.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

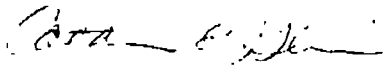
Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of this Petition for Review directed to:

Juan Carlos Parra-Interian, DOC # 356878
Delta East 112
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

And via email to:

Cowlitz County Prosecutor's Office
sasserm@co.cowlitz.wa.us

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
September 11, 2014

GLINSKI LAW FIRM PLLC

September 11, 2014 - 1:04 PM

Transmittal Letter

Document Uploaded: 434326-Petition for Review.pdf

Case Name:
Court of Appeals Case Number: 43432-6

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Catherine E Glinski - Email: glinskilaw@wavecable.com

A copy of this document has been emailed to the following addresses:

sasserm@co.cowlitz.wa.us

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JUAN CARLOS PARRA-INTERIAN, Appellant.	No. 43432-6-II (Consolidated with No. 43519-5-II) UNPUBLISHED OPINION

LEE, J. — A jury found Juan Carlos Parra-Interian guilty of second degree rape, first degree burglary with sexual motivation, solicitation to commit first degree murder, and conspiracy to commit first degree murder. Parra-Interian appeals all of his convictions, arguing that the trial court erred by denying his motion to sever the charges. He also challenges his rape conviction, arguing that insufficient evidence supports the jury's verdict. Because Parra-Interian failed to meet his burden to demonstrate that a joint trial on all the charges was manifestly prejudicial, the trial court did not abuse its discretion by refusing to sever the charges. Furthermore, sufficient evidence supports the jury's verdict on the rape charge. Accordingly, we affirm.

FACTS

In June 2010, SA[1] and her fiancé, Christopher McGowan, had a small party. After the party, SA and McGowan went to bed, had sexual intercourse, and went to sleep. Later in the night, SA partially woke up because she felt someone touching her inner thighs and vagina. At first, SA was not alarmed because she believed that McGowan was touching her. However, when the man attempted penile penetration and tore off her birth control patch, she knew it was not McGowan and she became alarmed.

SA attempted to wake McGowan as the man left the room. Originally, SA believed that McGowan's brother had assaulted her because she thought McGowan's brother was the only other adult male in the house at the time. When McGowan left the room, he was surprised to discover that Parra-Interian was also in the house. SA suggested that McGowan smell their hands to determine which man assaulted her. McGowan smelled his brother's hands and did not smell anything unusual. While this was happening, Parra-Interian left the house. McGowan confronted him in the driveway, but Parra-Interian would not let McGowan smell his hands. Parra-Interian got in his car and left.

After police located Parra-Interian, he was brought to Kelso Police Department and place in an interview room. After Parra-Interian left the interview room, detectives found a birth control patch on the floor of the interview room. Forensic testing confirmed that both SA's and Parra-Interian's deoxyribonucleic acid (DNA) was on the birth control patch. Testing also showed that McGowan's DNA profile from a "sperm fraction" was on Parra-Interian's fingers. 3B Report of Proceedings (RP) at 578.

[1] We refer to the victim by her initials to protect her privacy.

The State charged Parra-Interian with second degree rape and first degree burglary with sexual motivation. Parra-Interian was incarcerated in Cowlitz County Jail pending trial. While in jail, Parra-Interian approached another inmate, Ronald White, and asked him to kill SA. White reported his conversations with Parra-Interian to the jail staff. White agreed to wear a wire, and did so on two different occasions. White first wore a wire in jail during a discussion with Parra-Interian about planning SA's murder. White next wore a wire during a meeting with Parra-Interian's wife where they confirmed the plan and White was given pictures of SA. Both conversations were recorded.

The State then charged Parra-Interian with solicitation to commit first degree murder and conspiracy to commit first degree murder. The State moved to join all charges for trial. Parra-Interian objected to a joint trial. The trial court joined the charges for trial, finding that the charges were a series of acts that were connected together and that evidence would be cross admissible, although the evidence introduced in separate trials may be more limited.

At trial, SA testified regarding the facts as related above. When asked to describe her consciousness level at the time of the assault, SA testified that on a scale of one to ten, with one being "completely asleep" and ten being "all the way awake," she was "a four" when she first felt someone running fingers up her legs and touching inside her vagina. 2A RP at 240.

White also testified at trial. White testified about the conversations that took place during the undercover operations, as well as conversations he had with Parra-Interian that were not recorded. During his testimony, White made the following two statements:

> [WHITE]: I said, "What if [SA's] child's there?" "Do it."
>
> . . . .
>
> [WHITE]: Again, I said, "What if there -- what if her child's there?" "That too."

4B RP at 850-51.

After White's testimony, Parra-Interian renewed his motion to sever the charges and requested a mistrial on the rape and burglary charges. His attorney stated that after watching the jury during White's testimony, "you could see smoke coming out of [the jurors'] ears" and that the jurors were "visibly angered and visibly upset." 4B RP at 878. He argued that the jury is "quite clearly prepared to convict him of everything they can possibly convict him on." 4B RP at 878. The trial court denied Parra-Interian's motion, ruling that

> there was no objection at the particular time. Jurors are presumed to follow instructions, and I've seen more than once when jurors have expressed significant emotion during parts of trials, and that have come back and have followed instructions, and actually have -- that returned verdicts that seemed contrary to their -- to their emotions. So, I -- I think jurors are scrupulous. That's been my experience, they're very scrupulous in their duties. They take seriously the fact that they're to -- to look at each charge individually, and each element individually, and each element has to be proved beyond a reasonable doubt. The fact that there may be a strong emotion in hearing testimony on one day, we are planning on going until Monday with testimony, and then closing arguments would be at that time. So, I think any -- I think emotions fade over time. Certainly they're going to remember testimony. So -- so I think, all that being said, I'll -- I'll deny the motion for severance and deny the motion for mistrial.

4B RP at 887-88.

The jury found Parra-Interian guilty of all charges. Parra-Interian appeals.

ANALYSIS

Parra-Interian challenges his convictions, arguing that the trial court abused its discretion by denying his motion to sever the charges. He argues that the trial court abused its discretion because the charges were improperly joined as a matter of law. He also argues that joining the charges for trial was prejudicial. However, joining the charges was legally permissible under CrR 4.3 and CrR 4.3.1, and Parra-Interian has not shown that a joint trial was so manifestly prejudicial that he did not receive a fair trial. Parra-Interian also argues that there was insufficient evidence to support the jury's verdict on the second degree rape charge because the

State failed to prove that SA was physically helpless at the time of the sexual intercourse. But the State presented evidence that would allow a reasonable jury to find that SA was asleep for at least part of the sexual intercourse; therefore, sufficient evidence supports the jury's verdict finding Parra-Interian guilty of second degree rape. Accordingly, we affirm Parra-Interian's convictions.

A. JOINDER/SEVERANCE

We review a trial court's decision denying a CrR 4.4(b) motion to sever charges for a manifest abuse of discretion. *State v. Eastabrook*, 58 Wn. App. 805, 811, 795 P.2d 151, *review denied*, 115 Wn.2d 1031 (1990). Charges may be joined if they 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)(2). However, even offenses properly joined under CrR 4.3 may be severed under CrR 4.4 whenever the trial court "determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b); *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). A defendant seeking severance of properly joined charges bears the burden of demonstrating that "a trial involving [all] counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Bythrow*, 114 Wn.2d at 718.

A defendant is prejudiced by joined offenses if (1) the defendant has to present possibly conflicting defenses for the offenses; (2) the jury may infer guilt on one charge from evidence presented on another charge; or (3) the cumulative evidence may lead to a guilty verdict on all charges when, if considered separately, the evidence would not support every charge. *Bythrow*, 114 Wn.2d at 718. In determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State's evidence on each count, (2) the clarity of defenses as to each count, (3) the court's instructions to the jury to consider each count

separately, and (4) the cross admissibility of evidence for the other charges even if they were tried separately. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). "[A]ny residual prejudice must be weighed against the need for judicial economy." *Russell*, 125 Wn.2d at 63.

Here, the trial court properly joined the charges for trial. Parra-Interian's acts were clearly connected because solicitation and conspiracy to commit murder were meant to prevent SA, the victim of his rape charges, from testifying. Therefore, the trial court did not abuse its discretion by joining these charges with the rape and burglary charges for trial. Accordingly, the relevant question is whether Parra-Interian has met his burden to show that the trial court manifestly abused its discretion by not severing the charges because the joint trial was so manifestly prejudicial it outweighed the benefits of a joint trial.

Parra-Interian fails to meet his burden to show manifest prejudice according to the *Russell* factors. First, although Parra-Interian alleges that the State's evidence was significantly stronger on the solicitation and conspiracy charges, he is incorrect. Second, even in a joint trial, Parra-Interian's defenses to each count were clear. Third, the trial court correctly instructed the jury to consider each count separately. Fourth, the evidence on each count would have been cross admissible. Given these factors, any potential prejudice arising from a joint trial does not outweigh the need for judicial economy in this case. *Russell*, 125 Wn.2d at 63.

Regarding the strength of the State's evidence on each count, Parra-Interian's argument that the State's evidence was weaker on the rape case relies on the mistaken assumption that a case based on circumstantial evidence is weaker than a case based on direct evidence. It is well-established that circumstantial and direct evidence are considered equal. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Here, the State had strong circumstantial evidence

supporting the rape and burglary charges: Parra-Interian had no reason to be in the house because the party was over and everyone was asleep at the time he entered the house; he was the only person awake at the time of the rape; he refused to allow McGowan to smell his hands; SA's birth control patch with his and SA's DNA was found in the interrogation room he had been in; and he had McGowan's sperm on his fingers. Similarly, the State had strong direct evidence against Parra-Interian for the conspiracy and solicitation charges: White's testimony and the wiretap recordings. Under the law, the strength of the State's strong circumstantial evidence on the rape charge is equivalent to the strength of the State's direct evidence on the solicitation and conspiracy charges. Accordingly, there was not a disparity in the strength of the State's evidence that demonstrates a joint trial resulted in manifest prejudice.

Regarding the clarity of defenses on each count, Parra-Interian's defenses were clear. Parra-Interian essentially presented general denials on all counts.[2] Thus, there was little to no risk that the jury would have been confused by his general denial defense on all counts.

Regarding the jury instructions, there is no dispute that the trial court properly instructed the jury to consider the evidence on each count separately. We presume that juries follow the trial court's instructions. *Russell*, 125 Wn.2d at 84. Therefore, because we presume that the jurors considered the evidence on each count separately, the court's instruction to the jury reduced any potential prejudice from a joint trial.

Finally, the evidence on the charges was cross admissible. Parra-Interian concedes that some evidence of each charge would have been admissible in a trial on the other charge; however, he argues that because the full extent of the evidence may not have been admissible in

[2] Parra-Interian argues that he denied the rape, admitted to witness tampering, and denied having the intent to commit murder. His argument might have some merit if the State had charged lesser-included offenses on the solicitation and conspiracy charges, but the State did not.

the other trial, a joint trial was manifestly prejudicial. Parra-Interian specifically argues that the trial court erred by refusing to sever the charges because the jury's reaction to White's testimony, in and of itself, resulted in a manifest prejudice that required the trial court to grant his motion for a mistrial and sever the charges. We disagree.

As we noted above, the State had a very strong circumstantial case on the rape. Further, the State did not even mention White's testimony regarding killing the child during its closing argument. Outside of Parra-Interian's assertions during his argument on the motion for a mistrial and to sever, there is nothing in the record to support Parra-Interian's contention that the sole reason the jury convicted Parra-Interian for the rape and burglary was because of White's testimony regarding killing the child.

And Parra-Interian did not object to the testimony at the time that it was given, nor did he request that the trial court instruct the jury to disregard the testimony. We recognize that declining an instruction to disregard prejudicial testimony is a legitimate trial tactic meant to avoid drawing additional attention to prejudicial evidence. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Because Parra-Interian declined to draw additional attention to the prejudicial testimony, and the testimony was not mentioned again, the prejudicial nature of the testimony was mitigated. Moreover, the jury was specifically instructed to decide the case based on the facts and that they "must not let [their] emotions overcome [their] rational thought process." 7B RP at 1309. Again, we must presume that the jury followed this instruction and did not decide the case based on their initial emotional reaction to White's testimony. Accordingly, Parra-Interian has failed to demonstrate manifest prejudice resulting from White's testimony regarding Parra-Interian's instructions to kill SA's child.

Overall, while Parra-Interian may have suffered some prejudice from a joint trial, the rules do not prohibit a joint trial simply because the defendant suffers some prejudice. The law requires that the defendant demonstrate a manifest prejudice that denied him a fair trial. Here, in light of the *Russell* factors, Parra-Interian has failed to meet his burden to prove that a joint trial was so prejudicial that it outweighed the benefits of judicial economy in this case. Accordingly, Parra-Interian has failed to show that the trial court abused its discretion by refusing to sever the properly joined charges.

B. SUFFICIENCY OF THE EVIDENCE

Parra-Interian also argues that there was insufficient evidence to support the jury's verdict on the rape charge because the State failed to prove that SA was physically helpless. "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. All "reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are deemed equally reliable. *Delmarter*, 94 Wn.2d at 638. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict Parra-Interian of second degree rape, the State had to prove that (1) Parra-Interian engaged in sexual intercourse and (2) the victim was "incapable of consent by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(1)(b). Sexual intercourse occurs upon any penetration, however slight, and includes penetration by an object. RCW

9A.44.010(1)(a)-(b). 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). It is established that a person who is asleep is physically helpless. *State v. Puapuaga*, 54 Wn. App. 857, 861, 776 P.2d 170 (1989).

Here, SA's testimony on direct examination supports the reasonable inference that because she was partially woken up by Parra-Interian digitally penetrating her, Parra-Interian had digitally penetrated her while she was sleeping. Taking the evidence in the light most favorable to the State, sufficient evidence supports the rape conviction. Parra-Interian argues that SA's testimony on cross-examination implied that Parra-Interian did not penetrate her until after she was partially awake. However, it is the jury's responsibility to resolve conflicting testimony. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Accordingly, Parra-Interian's sufficiency of the evidence claim fails.

We affirm.

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.

LEE, J.

We concur:

HUNT, J.

BJORGEN, A.C.J.