70860-1

70860-1

NO. 70860-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID HANSEN III,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

The State presented two cases of comparable evidentiary strength on each count of first-degree robbery. The defendant could not convincingly show why separate trials were necessary to facilitate his defenses. The court instructed the jury to consider the counts individually and evidence of intent and a common plan was cross-admissible. Given the absence of any specific prejudice to the defendant's rights, did the trial court abuse its discretion in denying the defendant's motion to sever?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged David Hansen by information with two counts of first-degree robbery. CP 1-2. Prior to trial, Hansen moved to sever the counts. CP 19-24. The trial court read the briefing of the parties and heard argument on the defendant's motion. 7/1/13 RP 3.

Hansen's attorney informed the court that the defendant intended to assert self-defense to the charge in Count I, and the defendant wished to testify in support of that defense; but planned to remain silent on Count II. 7/1/13 RP 3. The defense argued that

Hansen's silence on the latter count, coupled with his self-defense claim on Count I, would lead the jury to infer that Hansen was "hiding something." 7/1/13 RP 4. Hansen's attorney also stressed that the modus operandi of the charged offenses appeared to be dissimilar. 7/1/13 RP 6.

The State countered that the relevant case law unequivocally established that a defendant's desire to testify only to one count was not a sufficient cause alone for severance. 7/1/13 RP 7. Moreover, the offenses were arguably of such a "similar nature" that joinder of the counts was appropriate as a matter of law. 7/1/13 RP 9.

The court agreed with the State, noting that a defendant's unwillingness to testify to every count does not alone warrant severance. 7/1/13 RP 13. The court added, "The same or similar character of the cases and nature of the crimes is significant here." 7/1/13 RP 13. The court added, "[t]he jury can and will be instructed on how to consider evidence when there are multiple counts" and concluded that the interest in "judicial resources and judicial economy" made severance unwarranted in this case. 7/1/13 RP 13. Following trial, the jury convicted Hansen as charged. CP 74, 75.

2. SUBSTANTIVE FACTS

On the evening of November 13, 2012, Troy Bodnar placed an ad on Craigslist soliciting sex and mutual drug use. 7/2/13 AM RP 86-87; 7/2/13 PM RP 28. David Hansen, who Bodnar had never met, responded to the ad by email. 7/2/13 AM RP 90, 94. Bodnar arranged for Hansen to come to his Seattle townhouse. 7/2/13 AM RP 90.

Upon Hansen's arrival, the two injected methamphetamine and had sex over the course of the next several hours. 7/2/13 AM RP 92; 7/2/13 PM RP 32. At some point, Hansen proposed performing further sexual acts on Bodnar in exchange for money. 7/2/13 AM RP 93. Bodnar, however, grew uneasy and asked Hansen to leave. 7/2/13 AM RP 94. He then put on his clothes and went into the bathroom. 7/2/13 AM RP 94. When Bodnar stepped back into the bedroom, he was immediately hit over the head and knocked down with what he later surmised was a glass candleholder. 7/2/13 AM RP 110; 7/2/13 PM RP 9. Hansen warned him to stay on the ground because he had a gun, and proceeded to run out of the house with Bodnar's iPad. 7/2/13 AM RP 110-11. Bodnar chased after Hansen, but could not prevent

him from escaping. 7/2/13 PM RP 9-10. Bleeding profusely from his head wound by then, Bodnar called 911. 7/2/13 PM RP 13-14.

Bodnar was taken by ambulance to a nearby hospital, where he received stitches to close the lacerations on his head. 7/2/13 PM RP 16. After returning to his house, responding Officer Wade Jelcick of the Seattle Police Department spoke to Bodnar about what had happened. 7/2/13 AM RP 59. Jelcick observed that Bodnar seemed embarrassed in recounting the robbery, and would not allow police into his bedroom. 7/2/13 AM RP 63, 74. At trial, Bodnar explained that he felt "shameful" and "nervous" about the night's events, not least because he had been using illicit drugs. 7/2/13 PM RP 20. He testified that he was also apprehensive about the presence of police because he had been on hold for several minutes after calling 911, and the police had not arrived until he was already being taken into the ambulance. 7/2/13 PM RP 20.

Officer Jelcick took into evidence the candleholder that Bodnar believed he had been assaulted with. 7/2/13 AM RP 60. Later examination revealed that two of the comparable prints matched that of Hansen. 7/2/13 PM RP 86-86. With this information in hand, investigating Detective Dale Williams created

a photo montage of suspects that included Hansen and showed it to Bodnar. 7/2/13 PM RP 58-59. Bodnar positively identified Hansen as the man who had robbed him. 7/2/13 PM RP 24.

On the evening of January 4, 2013, David Hansen arrived at Al Payne's Seattle apartment. 7/3/13 RP 15. Earlier that night, Payne had invited a friend named Josh Jasperson over to smoke methamphetamine together. 7/3/13 RP 13. There was also an implicit expectation of sex, but no overt agreements were made. 7/3/13 RP 13. After Payne and Jasperson used methamphetamine, Jasperson called Hansen and encouraged him to come to Payne's apartment. 7/3/13 RP 15. Payne did not know Hansen. 7/3/13 RP 15. There was also an implicit expectation of sex, but no overt agreements were made. 7/3/13 RP 13.

Once there, Hansen began using methamphetamine as well. 7/3/13 RP 16. He then proceeded to disrobe and perform oral sex on Jasperson while Payne watched. 7/3/13 RP 16. The three men spent the remainder of the night together until Hansen left in the early morning hours of the following day. 7/3/13 RP 18.

That afternoon, Hansen returned to Payne's residence, unexpectedly showing up at the back door of the apartment.

7/3/13 RP 20. Jasperson was still there. 7/3/13 RP 18. Within minutes after Hansen entered, he pulled out a gun from the waistband of his pants, pointed it at Payne's head, and said: "[T]his is a robbery; don't move or I'll kill you." 7/3/13 RP 21-22. Hansen collected Payne and Jasperson's cell phones before taking a laptop, several watches, and a wallet all belonging to Payne and fled. 7/3/13 RP 25-26.

Later, Jasperson brought over a mutual friend so Payne could use a phone to cancel his credit cards. 7/3/13 RP 26, 50-51. However, Payne did not report the robbery for at least two weeks, in part because he did not feel he had the strength to talk to police about such a traumatizing incident without becoming upset. 7/3/13 RP 31. He was finally spurred to do so by reading a story in a local newspaper of a similar robbery that he suspected Hansen had also committed. 7/3/13 RP 31-32. Payne offered police Hansen's address, which he had managed to track down in the interim from various friends. 7/3/13 RP 51. Detective Michael Magan compiled a photo montage including Hansen's picture and showed it to Payne. 7/2/13 AM RP 28. Like Troy Bodnar, Payne positively identified Hansen as the person that had robbed him. 7/3/13 RP 33.

C. ARGUMENT

The State presented two cases of comparable evidentiary strength on each count of first-degree robbery. The defendant could not convincingly show why separate trials were necessary to facilitate his defenses. The court instructed the jury to consider the counts individually and evidence of intent and a common plan was cross-admissible. Given the absence of any specific prejudice to the defendant's rights, the trial court did not abuse its discretion in denying the defendant's motion to sever.

Joinder of offenses is governed by CrR 4.3 and RCW 10.37.060. The rule and the statute are consistent. State v. Thompson, 88 Wn.2d 518, 525, 564 P.2d 315 (1977). RCW 10.37.060 provides:

> When there are several charges against any person . . . for the same act or transaction, or for two or more acts or transactions connected together . . . which may be properly joined, instead of having several indictments or informations the whole may be joined in one indictment, or information, in separate counts; and, if two or more indictments are found, or two or more informations filed, in such cases, the court may order such indictments or information to be consolidated.

Similarly, CrR 4.3(a) provides in part:

> Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses:
>
> (1) Are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) Are based upon the same conduct or on a series of acts connected together or constituting part of a single scheme or plan.

Washington courts have consistently treated Rule 4.3 as a liberal joinder rule which gives the trial court broad discretion. Thompson, 88 Wn.2d at 525; accord State v. Robinson, 38 Wn. App. 871, 881, 691 P.2d 213 (1984); see also State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990) (trial court refusal to sever counts "is reversible only upon a showing that the court's decision was a manifest abuse of discretion). A broad joinder rule comports with the "important public policy of conserving judicial and prosecutorial resources." State v. Heintz, 32 Wn. App. 186, 189, 647 P.2d 39 (1982); see Bythrow, 114 Wn.2d at 722 (Defendant seeking severance must not only show prejudicial effects of joinder, "but they must also demonstrate that a joint trial would be so prejudicial as to outweigh concern for judicial economy.").

CrR 4.4(b) requires severance of charges upon a motion by the defendant if the trial court determines that such action "will promote a fair determination of the defendant's guilt or innocence of each offense." To prevail, the defendant bears the burden of showing that joinder is so prejudicial that it outweighs the need for judicial economy. State v. Williams, 156 Wn. App. 482, 500, 234 P.3d 1174 (2010). Moreover, on appeal, the defendant must point to specific prejudice in the record to support a finding that the trial court's refusal to sever was an abuse of discretion. Bythrow, 114 Wn.2d at 720.

In scrutinizing the joinder of offenses for signs of prejudice, courts examine several factors, including: 1) the strength of the State's evidence on each count; 2) the clarity of defenses to each count; 3) the court's instruction to the jury to consider the counts separately; and 4) the cross-admissibility of the evidence. Williams, 156 Wn. App. at 501. No one factor is considered preeminent; "all must be assessed in determining whether potential prejudice requires severance." State v. Warren, 55 Wn. App. 645, 655, 779 P.2d 1159 (1989).

Even where the trial court errs in denying a motion to sever, the defendant is not entitled to a reversal of his or her convictions if

the error was harmless. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). A trial court's denial of a motion to sever is reviewed for manifest abuse of discretion. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). The trial court manifestly abuses its discretion only if it makes an untenable or unreasonable decision. State v. Yuen, 23 Wn. App. 377, 380, 597 P.2d 401 (1979).

Here, analysis of the relevant factors strongly weighs in favor of the conclusion that Hansen was not prejudiced by joinder of the offenses. Hansen has failed to show that any of his arguments have sufficient merit to outweigh the need for judicial economy. Hansen's claim that the trial court abused its discretion by failing to sever the counts against him should be rejected.

In complaining of undue prejudice, Hansen attempts to avail himself of the multi-factor test elaborated above to argue that severance of the counts under CrR 4.4(b) was justified. However, none of the test's attendant inquiries can be resolved so as to allow this court to hold that Hansen has met his burden of demonstrating specific prejudice.

Severance may be appropriate when the State has joined offenses and "one case is remarkably stronger than the other."

State v. MacDonald, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004). Hansen submits that, in the present matter, "the relative strength of Count I improperly bolstered the weaker Count II." App. Br. at 8. To that end, he notes that the State supplemented the testimony of Troy Bodnar on Count I with that of a latent fingerprint examiner and two responding officers, while Count II was sustained by the credibility of Al Payne alone. App. Br. at 8.

Hansen overstates the significance of the testimony in question and fails to account for substantial similarities in the State's presentation of evidence. For instance, latent print examiner Aleah Cole testified for the State and informed the jury that two of the four comparable latent prints recovered from the glass candleholder at Bodnar's residence could be traced to Hansen. 7/2/13 PM RP 80, 86. Yet, this testimony was hardly an inculpatory "smoking gun" that made the strength of Count II pale in comparison. Bodnar revealed that he never saw Hansen grab a hold of the candleholder, nor did he ever see him carrying it in his hands prior to or after the assault. 7/2/13 PM RP 8-9, 37. In truth, Bodnar only assumed that he had been struck by the candleholder because it was found out of place in the wake of the robbery. 7/2/13 PM RP 9. Furthermore, the State did not seek DNA testing

to link Bodnar's injuries to the candleholder, and Hansen's own attorney indicated the lack of any blood on the object. 7/3/13 RP 119. Thus, while Cole's testimony may have been useful in establishing that Hansen was in Bodnar's house on the night of the incident, it was by no means incontrovertible proof of the robbery.

The State also called Officers Wade Jelcick and Elizabeth Consalvi. 7/2/13 AM RP 40-50, 51-78. Consalvi indicated that other than photographing Bodnar and the residence, she did not take any witness statements and was not tasked with collecting evidence. 7/2/13 AM RP 49. Meanwhile, Jelcick's testimony actually proved helpful to Hansen's defense in Count I insofar as it allowed Hansen to assail Bodnar's credibility by framing him as generally evasive and uncooperative. 7/2/13 AM RP 69, 77-78.

The lynchpin of the State's case on either count, then, was the testimony of Bodnar and Payne, who recounted their victimization at length and in compelling detail. 7/2/13 AM RP 79-112; 7/2/13 PM RP 5-55; 7/3/13 RP 8-68. Both implicated Hansen as the perpetrator of the respective robbery committed against them, and neither previously had any difficulty selecting him from a photo montage to corroborate their narrative of events. Because there was insignificant additional evidence to cumulate

between Counts I and II in the State's favor, the jury evaluated Bodnar and Payne's testimony separately. In doing so, it made credibility determinations and concluded that Bodnar and Payne were independently credible enough to establish Hansen's guilt beyond a reasonable doubt.

A defendant's desire to testify only as to some – but not all – of the counts charged is insufficient reason to require severance. State v. Weddel[1], 29 Wn. App. 461, 467, 629 P.2d 912 (1981). Severance may be required, "only if a defendant makes a convincing showing that [he or she] has important testimony to give concerning one count and a strong need to refrain from testifying about another." State v. Watkins, 53 Wn. App. 264, 270, 766 P.2d 484 (1989).

Here, Hansen argues that his intention to assert self-defense in the context of Count I and a general denial on Count II sufficed to meet this standard, largely because the jury might have learned of his prior convictions even if had he only testified as to Count I.

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[1] Hansen submits that the "trial court mistakenly relied on Weddel," and attempts to distinguish the case from the record before this court. App. Br. at 9-11. Ultimately, such an effort is inconsequential. While the State concedes that Weddel may not be factually similar in every respect, the trial court invoked the decision for the sound legal principles it articulates, not to apply it by analogy.

App. Br. at 11. This claim is unpersuasive and should be dismissed on several grounds.

First, Hansen misstates his burden. He alleges that, having expressed his concern about possibly being impeached on the stand with prior convictions, the "requisite 'convincing showing' of prejudice" was made.[2] App. Br. at 11. The correct standard does not merely call for speculation about the adverse consequences of testifying in a joint trial. Instead, the "convincing showing" requirement entails an obligation to elaborate the important testimony Hansen would have had to give regarding his self-defense claim on Count I, as well as to adequately explain why his silence was warranted on Count II. Watkins, 53 Wn. App. at 270.

Second, Hansen falls short of satisfying the first prong of this test. In Weddel, the court looked to the federal evidentiary equivalent[3] of CrR 4.4 and accompanying case law to hold that the defendant must "present enough information" regarding the

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[2] Impeachment by prior convictions stemming from testimony in a joint trial was expressly rejected as prejudicial in Weddel: "[W]e conclude that the overriding reason why [the] defendant chose not to testify was...his realization that the State would use a prior burglary conviction for impeachment. Therefore, his...final argument concerning prejudice caused by joinder of counts is without merit." 29 Wn. App. at 468.

[3] FRCP 14.

testimony of the count he or she wishes to take the stand on for the court to intelligently evaluate the severance motion. 29 Wn. App. at 468 (citing Baker v. United States, 401 F.2d 958, 977 (D.C. Cir. 1968)). More recent decisions have affirmed that the defendant must disclose with particularity why such testimony should be deemed "important." See e.g. United States v. Alexander, 135 F.3d 470, 477 (7th Cir. 1998) ("[G]eneral assertions...are insufficient to establish prejudice; we have required specific examples of the exculpatory testimony that the defendant would give"); United States v. Fenton, 367 F.3d 14, 22 (1st Cir. 2004) (Denial of severance motion affirmed where defendant "offered no hint as to the specific information that his testimony would convey").

Before the trial court, Hansen provided little more than a cursory recital as to the nature of his proposed self-defense testimony on Count I. 7/1/13 RP 11-12. At no point did he come to explain how he might have been provoked into using force against Bodnar, nor did he stipulate that he ever felt his personal safety was threatened. There is no basis for this court to derive the substance and weigh the importance of the testimony Hansen intended to present. Accordingly, Hansen has failed to make a

"convincing showing" that severance was imperative to facilitate his separate defenses.

Prior to closing arguments, the trial court instructed the jury in preparation for its deliberation. 7/3/13 RP 89-100. The instructions included the following admonition, taken verbatim from the relevant Washington pattern jury instruction: "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 the other count." 7/3/13 RP 94; WPIC 3.01. Jurors are presumed to follow the trial court's instructions, absent evidence to the contrary. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Here, no such evidence is facially apparent. The instruction was proper and this court should adhere to the presumption that the jury took heed of its substance.

Under ER 404(b), evidence of other crimes, wrongs, or acts is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In this case, the common plan or scheme provision of ER 404(b) informs the cross-admissibility analysis. This type of misconduct, "arises when an individual devises a plan and uses it repeatedly to

perpetrate separate but very similar crimes." State v. Lough, 125 Wn.2d 847, 855, 889 P.2d 847 (1995).

Before admitting ER 404(b) evidence, the trial court must first 1) find by a preponderance of the evidence that the misconduct actually 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 of the evidence against its prejudicial effect. Lough, 125 Wn.2d at 853. Severance is not mandated simply because evidence of one count is shown to be inadmissible in a separate trial on the other count. Bythrow, 114 Wn.2d at 720.

Here, the court briefly engaged in the requisite analysis. It remarked in passing that the two counts were "likely" cross-admissible, as evidenced by the fact that Payne only reported he had been robbed after reading about an incident akin to the earlier Bodnar robbery. 7/1/13 RP 13. However, the court's failure to conduct a meaningful ER 404(b) inquiry was harmless because Hansen would not have been able to prevail in challenging cross-admissibility had separate trials been granted.

First, assuming that the State elected to prosecute Hansen for the Payne robbery prior to the Bodnar case, it would have easily

been able to establish by a preponderance of the evidence that Hansen committed the earlier offense against Bodnar. The scope, detail, and credibility of Bodnar's testimony alone would have been enough to demonstrate at an evidentiary hearing that the crime (more likely than not) took place.

Second, evidence of the Bodnar robbery would have been offered for a legitimate purpose. Rather than impermissibly pointing to a criminal propensity, the fact that Hansen robbed Bodnar could be intended to show that he also later robbed Payne pursuant to the same overarching scheme. In discerning the existence of a common plan, courts have insisted that "the similarity [between acts] must be clearly more than coincidental; it must indicate conduct created by design." State v. Sexsmith, 138 Wn. App. 497, 505, 157 P.3d 901 (2007). The record in this case suggests that Hansen deliberately targeted educated, middle-aged gay men who were part of the same social circle. 7/2/13 AM RP 81; 7/2/13 PM RP 25; 7/3/13 RP 9-10. Methamphetamine use and consensual sex were invariably a precursor to the criminal conduct. 7/2/13 AM RP 92; 7/2/13 PM RP 32; 7/3/13 RP 15-16. And the robberies were separated by less than two months. 7/2/13 AM RP 86; 7/3/13 RP 12. There can be little doubt that Bodnar

and Payne were victims of the same criminal plan, not offenses perpetrated in isolation.

Hansen relies on State v. Hernandez for the proposition that – as in that case – the robberies here were "[not] committed in a particularly unique manner to justify cross-admissibility." 58 Wn. App. 793, 794 P.2d 1327 (1990); App. Br. at 14. But the court in Hernandez was essentially preoccupied with the modus operandi of the charged crimes – a distinction that goes to establishing "identity" under ER 404(b), not a common plan. 58 Wn. App. at 798. As this court has explained elsewhere:

> [E]vidence of unique modus operandi is relevant when the focus of the inquiry is the identity of the perpetrator. In contrast, the common plan or scheme exception is generally used when the occurrence of the crime or intent are at issue, not when identity is the issue.

State v. Yarbrough, 151 Wn. App. 66, 88, 210 P.3d 1029 (2009) (citations and attribution marks omitted). Furthermore, proving a common plan under ER 404(b) requires a lower level of similarity between acts than that required to show identity through modus operandi. State v. Foxhoven, 161 Wn.2d 168, 179, 163 P.3d 786 (2007).

Unlike in Hernandez, where the culprit behind the series of robberies was the primary source of contention, the evidence here inexorably leads to Hansen as the only possible suspect in the crimes committed. As Hansen's attorney made clear in her closing argument, the pivotal issue at trial was whether the robberies transpired as the State alleged. 7/3/13 RP 115. ER 404(b)'s common plan provision is amenable to addressing that question; the Hernandez decision is not, and should be disregarded.

Third, evidence of the Bodnar robbery would have been relevant to the prosecution of the crime against Payne. ER 401 defines "relevant evidence" as that which has the "tendency to make the existence of any fact...of consequence to the determination of the action more probable or less probable" than it would be without it. Where, as in this case, the existence of a common plan "makes it more probable that the [act] occurred as charged," ER 404(b) evidence is relevant. State v. York, 50 Wn. App. 446, 457, 749 P.2d 683 (1987). Also, to the extent Hansen argued at trial that Payne's credibility cast doubt on the State's account of the incident, his earlier and closely similar robbery of Bodnar undercuts the strength of such a defense. 7/3/13 RP 122-26.

Finally, the probative value of the Bodnar robbery would not have been outweighed by the danger of prejudice. "The principal factor affecting the probative value of the evidence of the defendant's prior misconduct is the tendency of that evidence to demonstrate the existence of a common design or plan." Lough, 125 Wn.2d at 863. Here, as the preceding discussion illustrates, that tendency is very strong. Our Supreme Court has previously observed that where "evidence is undeniably probative of a central issue in the case," "[t]he ability of...unfair prejudice to substantially outweigh the probative force of [the] evidence is quite slim." Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994) (quoting United States v. 0.161 Acres of Land, 837 F.2d 1036, 1041 (11th Cir. 1988)). The Bodnar robbery would have been probative of the fundamental dispute in the Payne case; namely, whether the victim was robbed in accordance with the State's version of events. The balance of these considerations demonstrates the likely cross-admissibility of the evidence under ER 404(b) had separate trials been granted.

In addition to exposing the prejudicial effects of joinder, a defendant moving for severance must also carry the burden of showing that such prejudice outweighs the need for judicial

economy. Williams, 156 Wn. App. at 500. In the present matter, the strength of the State's evidence, Hansen's failure to convincingly articulate his defenses, the instructions given to the jury, and the likely cross-admissibility of the evidence make the risk of prejudice remote.

Hansen maintains that "[t]he interest in judicial economy is served where testimony would [not have to] be repeated in separate trials," and concludes that because the testimony for Count I would not need to be repeated at a separate trial for Count II, joinder "did not promote judicial economy" in this case. App. Br. 14-15. But even adopting Hansen's position that virtually no testimony would have to be repeated between the two robbery prosecutions, it is nevertheless true that judicial economy inheres not only in the avoidance of repetitive testimony, but a host of other elements as well:

> Foremost among these concerns is the conservation of judicial resources and public funds. A single trial obviously only requires one courtroom and judge. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is significantly reduced when the offenses are tried together. Furthermore, the reduced delay on the disposition of the criminal charges, in trial and through the appellate process, serves the public.

Bythrow, 114 Wn.2d at 723. See also State v. Israel, 113 Wn. App. 243, 290, 54 P.3d 1218 (2002) ("Separate trials are not favored in Washington").

In State v. Bythrow (the decision which enumerated the concerns above), the court's severance analysis was colored by a pattern of strikingly similar facts that it proceeded to weigh against the need for judicial economy:

> Bythrow's trial lasted [two] days.[4] The State presented evidence of the [two] robberies in sequence with one exception. Different witnesses testified concerning different offenses. The issues and defenses were simple...The court instructed the jury that "[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"... [I]n light of the short trial, the relatively simple issues, the jury instructions, and the strength of the State's evidence, it does not appear likely that the jury was influenced in determining [the] defendant's guilt of either robbery by knowledge of the other.

Id. The court went on to conclude that, ultimately, the need for judicial economy, "outweigh[ed] the minimal likelihood of prejudice through joinder of the charges." Id. Here, the record is strikingly similar to the circumstances of the trial in Bythrow. Even if this

[4] Hansen's trial was also two days long. 7/2/13 AM RP; 7/2/13 PM RP; 7/3/13 RP.

court finds that evidence of one robbery would not have been cross-admissible, as in Bythrow, any residual prejudice accruing to Hansen as a result of joinder was outweighed by the need for judicial economy.

A trial court's error is deemed harmless if, within reasonable probabilities, the outcome of the trial would have been the same in the absence of the error. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The weight and credibility of each victim's candid and intimate testimony would have been ample evidence to secure a conviction in separate trials. Thus, although the State's analysis has failed to yield any readily apparent sign that the trial court abused its discretion in denying Hansen's motion for severance, the proper remedy in the alternative would not be reversal of his convictions.

D. CONCLUSION

After correctly determining that the defendant's right to a fair trial would not be unduly prejudiced, the trial court properly engaged in the exercise of its discretion and denied the defendant's

severance motion. For the reasons cited above, this Court should affirm the convictions against Hansen.

DATED this 10 day of September, 2014.

Respectfully submitted,

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By: _____
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to, Sarah Hrobsky, at Washington Appellate Project 1511 Third Ave, Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent in State of Washington v. David Hansen III. Cause No. 70860-1- I, in the Court of Appeals for the State of Washington.

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

Jill Carter — 9-16-14

Name Jill Carter — Date

Done in Seattle, Washington