NO. 71842-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

TYLER FARRAR-BRECKENRIDGE,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

The defendant was convicted of raping BB and CL, best friends who were known to the defendant. The rapes occurred over a year apart but both girls disclosed to each other weeks of the rapes. Counsel made a tactical decision to try to the cases together and argued that the girls were telling similar unbelievable stories in concert to implicate his client. Was counsel ineffective when he decided to try the counts together, thus providing him with arguments on motives and fabrications?

II. STATEMENT OF THE CASE

The defendant was convicted following a jury trial of three counts of Rape of a Child Third Degree. 5RP 188. Counts I and II occurred in November 2012 and the victim was CL (born February 1997). CP199. Count III occurred in the summer of 2011 and the victim was BB (born April 1997). Id.

Granite Falls is a small town; the high school population is only 600. 2RP 23. Everyone knows everyone else. RP 24.

In 2011 and 2012, the defendant (dob 12/29/93) and his younger brother Zach lived with their mother in Granite Falls. 4RP 124-25. The Farrar house was a teenage hang out where often up to 15 kids would gather. 3RP 32. Alcohol was almost always

available. 3RP 31. Although the brothers had upstairs bedrooms, for a time in the summer of 2011, Zach had a broken leg and was sleeping in the downstairs living room. 4RP 130-32. The defendant slept upstairs on a mattress on the floor. 3RP 128.

The B. family - including mother RB and sisters MB and BB - lived in Granite Falls. 3RP 106, 107, 110, 200-01. MB was in an on-going sexual relationship with both Zach Farrar and the defendant. 3RP 37; 4RP 134; 4RP 13.

The L. family lived in Granite Falls, just a five minute walk from the Farrars'. 2RP 26-27. JL was Zach Farrar's best friend. 2RP 21. CL, JL, and their mother, TL, all considered Zach part of their family and the feeling was mutual. 2RP 24; 3RP 28-29; 62; 4RP 126. CL and BB were best friends. 2RP 87.

One night in the summer of 2011, then 14-year old BB and her sister MB, JL and his sister CL, and various other teenagers went to visit Zach. 3RP 34-35. CL was upstairs in the defendant's room watching TV with MB and him. 2RP 75-76. JL saw her go upstairs. 3RP 36. He did not want CL to be alone with the defendant so he followed her. Id. There, he found the defendant's door locked. Id. He banged on it until CL came out. Id. He sent her home. 3RP 37-38. JL remembered that BB was at the Farrars',

too, but was unaware that that was the night the defendant raped BB. 3RP 38-39, 46-47.

After everyone had gone to sleep downstairs, BB could not find a place to lie down so she went upstairs. 3RP 120. She went to the defendant's room and lay down lay down on his mattress. 3RP 120. BB summed up what happened. "[He] started kissing me... forced me to suck his dick... raped me... his penis went in... my vagina. I remember crying." 3RP 119. She saw the defendant's tattoo, both the upper and lower parts. 3RP 130. She did not want to have sex and did not like it. 3RP 132. She noticed a two-part tattoo on the defendant's stomach. 3RP 130. The lower part was below his belt line. 3RP 131. Although the defendant was sometimes at her house, she had never seen him there without a shirt but she might have seen him without one at a skate park. 3RP 150.

After the rape, BB, still in a state of undress, wearing perhaps a bra and shorts, grabbed some things and ran downstairs. 3RP 134-35. She tried to awaken some of her friends but eventually just went to sleep. Id. Neither JL nor Zach remembers anyone waking him up. 3RP 49-51. BB left the next morning and at first told no one what had happened. 3RP 135-36.

In the fall of 2012, BB changed schools in 2012 and spoke to a counselor at her new school. 3RP 136. BB told her what had happened. 3RP 136. The counselor reported it to CPS. 3RP 137.

The school also called BB's mother RB and directed her to take BB to Dawson Place to get counseling. 3RP 202. RB remembered that this happened sometime in October, the first time she heard about the sexual assault. 3RP 207.

At the end of November 2012, RB took BB to Dawson Place twice. 3RP 207, 138. BB reported that still, a year later, she almost always tried to avoid places and people that reminded her of the rape. 3RP 189. Sarah Adams, a mental health provider who worked at Dawson Place, met with BB in November 2012. 3RP 213 and 216. Adams reported that BB was able to describe other incidents in her life clearly, 4RP 23, but that BB's speech became stilted and slow when discussing the rape. 4RP 28. Adams explained that the inconsistent manners of speaking could be indicative of a traumatic event. Id.

RB explained that BB has some intellectual functioning problems and received both occupational and physical therapy. 3RP 205-06.

RB knew the police wanted to speak with BB, but she had moved to Everett by then, was working long hours, and had difficulty coordinating her schedule with the Granite Falls Police. 3RP 204.

Meanwhile, by November 2012, 15-year old CL had become a drinker. She drank at home; she drank at the Farrar's; she sometimes snuck out of the house. 2RP 29. One night between November 1 and 14, CL was drinking at home. 2RP 21-32. Rating her intoxication on a scale of 1-10, CL put herself at a 6 with slurred speech. Id.

In the early morning hours, CL logged on to her facebook account where the defendant was one of her friends. Id. She and the defendant began messaging one another. Ex.10. It was unusual for him to message CL. 2RP 35.

The defendant invited her to come over and watch a movie. 2RP 29. The conversation ended with CL saying she was going to sleep. Ex. 10. Instead, CL snuck out her window and walked to the Farrars', believing that she and the defendant would watch a movie and drink beer. 2RP 42.

Once there, CL and the defendant played beer pong until she threw up. 2RP 46-47. The defendant helped her clean up and started kissing her. Id.

On the couch in the living room, CL had penile-vaginal intercourse with the defendant. 2RP 48. They got dressed, went upstairs, and had anal intercourse. 2RP 54-56. It hurt. 2RP 57. During the encounter, CL could see a two-part tattoo the defendant abdomen. 2RP 122-23. She had previously seen a photo of the upper part of the tattoo on facebook. 2RP 126. No picture of the lower part had been posted. Id.

After the rape, the defendant told CL to leave and she walked home. 2RP 58. CL did not tell her parents because she regretted it and thought they would be mad. 2RP 59-60.

CL first disclosed the rape to her cousin Kayla almost two weeks later on Thanksgiving. 2RP 62. Within a short time, she disclosed to a friend in Colorado, BB, JL, and Zach. 2RP 61, 66, 65, 61, Supp RP 8. She had already learned from BB that the defendant had raped her. 2RP 67.

Kayla, JL, BB, and Zach all remembered the disclosures. Kayla said CL acted as if she was ashamed. 3RP 24. JL said he had overheard CL telling Kayla and asked her to tell him. 3RP 41-

42. BB said she remember CL telling her within a week or two of the rape and giving her a lot of details. 3RP 141. Zach remembered that CL was upset and crying when she told him. Supp. RP 9.

In February 2013, JL told his mother that something had happened to CL which led to CL's disclosure to her mother. 2RP 66-67. TL "flipped out" when she learned CL had been raped. 3RP 77. TL reported the rape to the police. 3RP 80.

TL was also concerned because a year earlier she had heard from CL that something had happened to BB. 3RP 80-81. TL called BB's mother RB. 3RP 81. It was in March 2013 when RB took BB for a video interview at the Granite Falls Police Department. 3RP 205. That was the first time she heard details of BB's rape. 3RP 212.

TL also contacted another girl, Savannah Grandlund, in May 2013. 5RP 126. On facebook, TL asked Savannah to come forward with any information she had about the rapes. Id. Savannah said she did not want to come forward because she was a good friend of Zach's. 5RP 127. Savannah said, "I don't want nothing brought up." Id.

Savannah Grandlund testified that she did not remember any of the facebook conversations, that her account had been hacked, and that perhaps her phone had autocorrected words in the messages she sent TL. Supp. RP 31-37. She also testified that she was angry with CL and MB because of a time she had taken the blame and was punished for something they had done. Supp. RP 31.

Zach described how his car accident necessitated his living downstairs in the summer of 2011. 4RP 130-132. Zach remembered the night that BB slept over. 3RP 136. He did not know where BB slept and was not paying attention. 3RP 154. He did not remember her coming downstairs, trying to walk him up, of her leaving. 4RP 141-42.

MB remembered the night that she, BB, CL, and Zach had been at the Farrars. She remembered JL getting CL out of the defendant's room. 5RP 21. She did not remember any scene with BB. 5RP 17.

The defendant testified. 5RP 29-123. He remembered the night JL had taken CL out of his room. 5RP 43-44. He said he had sex with MB and went to bed between midnight and 2 am. 5RP 57.

After MB left, BB knocked on his door. Id. He told her she could sleep on his floor but she got into his bed. Id.

Having BB in his bed made him uncomfortable so he asked BB to leave. 5RP 59-60. This, he said, made BB angry. 5RP 60. He said BB made up the allegations because she was mad he had rebuffed her sexual advances. 5RP 94.

The defendant explained his facebook messages to CL. 5RP 61. He said he was inviting her *and* her brother JL over. 5RP 62. He said CL never came without JL so she would have known she should bring him. 5RP 62. He said CL said no and did not come over. 5RP 63.

Pretrial, in his motions in limine, defense counsel wrote:

> After CL disclosed her alleged rape to her mother and law enforcement, [TL] went on a witch-hunt for all of the girls in Granite Falls who she believed were raped by Tyler. BB was mentioned as a possible candidate to bolster her daughter's allegations and [TL] brought BB to the Granite Falls Police Department.

CP 164. Defense described how TL had disliked the defendant's attitude toward young girls even before CL disclosed to her. CP 173. In fact, TL had considered reporting the defendant to the police before CL's rape but did not want to get involved. Id.

Defense counsel alerted the court that he would be opening the door to testimony about BB's disclosure to CL. 2RP 6. Counsel believed that CL would testify that BB told her that the defendant had made a pass at her but that BB and the defendant had not had sex. 2RP 5-6. He said, "I think the Court can see my strategy behind that, why I'm doing that." 2RP 6.

During trial, in response to an attempt to admit passages from BB's mental health intake form, defense told the court that he intended to argue that BB's spotty memory showed she had made up the rape allegations. 3RP 223-224.

After both sides rested, the jury was given an instruction packet that included WPIC 3.01 which read:

> 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 99. In closing, defense argued that neither rape was supported by any testimony other than the victim's. 5RP 156.

In his closing, defense argued that CL was the State's best witness and not a good one because she was drunk on the night she claimed to have been raped. 5RP 157. CL's description of the

rape made no sense; her recollection of facebook conversations contradicted the transcripts. 5RP 157-168.

Defense argued that BB was an even worse witness, "far more problematic" than CL. 5RP 161. BB had answered, "I don't know," 99 times. Id. BB's testimony was inconsistent, both internally and when compared with other witnesses' testimony. 5RP 162, 166. BB's description of the rape was nonsensical. 5RP 163. She was, he argued, "amazingly unbelievable." 5RP 167.

Counsel the asked the jury, "Why are they doing this?...Why would they lie?" 5RP 167. He answered his own question. He suggested that BB was upset with the defendant for kicking her out of his bedroom. Id. BB, he argued, was angry with the man who was sleeping with her sister but would not sleep with her. 5RP 168.

Counsel said that BB had told a lie that got no traction. Id. When she told her sister, nothing happened. But BB and CL were best friends, shared secrets, and decided to hold the defendant accountable. Id.

Counsel reminded the jury that CL said she was raped on November 14. 5RP 169. By a few days after Thanksgiving, CL had disclosed to BB. Id. Within seven days, BB told a nurse, her

school counselor. Id. Was that a coincidence? Counsel said he did not know because he could not look into their brains. Id.

Also coincidental, he continued, was the similarity in BBs and CL's descriptions of the rapes. 5RP 169. They both described a rapist who just hung out in his bedroom, waiting for victims. Id. The defendant did not go out, did not leave his room, and gave no one a ride. That, he said, was odd. Id.

Counsel argued, "Two girls, best friends, who do everything together say they were raped by the same man and they're the same amount of proof, none. Just their word. That is all." 5RP 176.

No one argued that evidence of one crime was evidence of the defendant's sexual motivation.

III. ARGUMENT

A. COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE MADE A REASONABLE STRATEGIC DECISION TO TRY COUNTS INVOLVING TWO VICTIMS TOGETHER, ALLOWING HIM TO ARGUE THAT THIS WAS A VINDICTIVE WITCH HUNT BY TWO GIRLS MAKING FALSE ALLEGATIONS.

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); *see* U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. The guarantee applies to

all critical stages of the proceedings. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

Reviewing courts presume strongly that that counsel's representation was effective. State v. McFarland, 128 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To prevail in an ineffective assistance of counsel claim, the defendant must show both that his counsel's representation was deficient and that the deficiency prejudiced him. McFarland, 127 Wn.2d at 335; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). An attorney's performance is deficient if it falls below an objective standard of reasonableness; prejudice occurs when, but for the deficient performance, the outcome would have been different. Id. at 334-35.

The defendant must overcome a strong presumption that defense counsel's performance was reasonable. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Counsel's mistake must have been so serious that, in effect, counsel was not functioning as counsel. Id. The threshold for deficient performance is high. Strickland, 466 U.S. at 689; State v. Sutherby, 165 Wn.2d 870, 883,

204 P.3d 916 (2009). The defense must show that there was no conceivable strategic or tactical reason for counsel's actions. Grier, 171 Wn.2d at 33.

The defendant also bears the burden of showing a reasonable probability that but for the mistake, the outcome would have been different. Thomas, 109 Wn.2d at 266. If the defendant fails to satisfy either element of the test, his claim fails. State v. Kyllo, 116 Wn.2d 856, 862, 215 P.3d 177 (2009).

The defendant has not shown ineffective assistance because he has not met his burden on either prong.

B. THE DEFENDANT HAS NOT SHOWN DEFICIENT PERFORMANCE BECAUSE THE RECORD SHOWS THAT COUNSEL MADE A LEGITIMATE STRATEGIC DECISION NOT TO SEVER THE COUNTS.

The record shows that trial counsel made a tactical decision to try all three counts together. When a defendant complains about choices that can be characterized as legitimate trial strategy, the reviewing court may not find deficient performance. Grier, 171 Wn.2d 33-44. Only when the defendant can demonstrate that there was no conceivable legitimate tactic has he met his burden. Id. at 33.

Counsel referred to his strategy in his motions in limine. He referred to his strategy at the trial. He elicited testimony supporting his theory. And he argued his theory to the jury. His theory of the case was that BB and CL were colluding to get back at the defendant for his rejection of BB.

In his motions in limine, counsel said CL's mother was on a witch hunt to find people who would come forward to her cause. He described how Tawnya disliked the defendant.

At trial, counsel questioned TL about her own efforts to find a third girl, Savannah, to come forward and testify against the defendant. He questioned CL and BB about their relationship and how close it was. He established a reporting time line that linked CL's first allegations with BB's disclosures. He told the court that he was not going to object to testimony regarding BB's disclosure to CL and said, "I think the Court can see my strategy behind that, why I'm doing that."

Defense's closing argument contained his theory of the case: that both girls were colluding and making up similar and fantastic stories about sexual encounters with the defendant, encounters that never happened. BB claimed to have disclosed to CL in 2011, but disclosed to no one else what had happened until

the fall of 2012. Only then, in the fall of 2012, did CL jump on the bandwagon and begin to disclose a very similar rape.

The record in this case is not silent on counsel's theory. Counsel articulated that CL's mother, too, was on a witch hunt, looking for other possible victims to hold the defendant accountable. Counsel articulated that these charges against his client were the result of collusion by two unreliable girls, one of whom was angry at a perceived slight by the defendant over a year earlier.

Defendant relies on State v. Sutherby, 165 Wn.2d 870, for the proposition that joinder can be particularly prejudicial in sex cases, even when a jury is instructed to consider the charged crimes separately. 165 Wn.2d at 884. But that case is very different from ours. Sutherby was charged with child rape and possession of child pornography. Pretrial, the trial court asked if there would be a motion to sever. The State answered no, claiming that the pornography evidence was admissible in any case as it was probative of Sutherby's sexual motivation. After conviction, Sutherby appealed on the grounds of ineffective assistance.

The Supreme Court overturned Sutherby's convictions. It found that the failure to move to sever was not a reasonable

strategic decision. 165 Wn.2d at 884. There was no possible advantage to a joint trial once the State had announced its intention to use the pornography evidence to show Sutherby's sexual inclination toward children. Id. There was nothing in the record that shows any possible advantage to having the cases tried together.

The present case is entirely different. In this case, there was an advantage to trying the counts together. The record illustrated counsel's strategy. Moreover, the record illustrates the facts on which counsel relied. Both girls told similar stories; both cases relied primarily on the victim's testimony; the timing of the disclosures could be argued to be suspect. Leaving the cases joined gave counsel what he wanted: a motive for the girls' "lies" against his client.

Counsel told the jury to ask themselves why the victims had come forward. That, he said, was the big question, a question that certainly would have been asked in separate trials. By trying the cases together, counsel had a motive to suggest to the jury. He had an argument to answer that question. BB was a woman scorned and CL was helping her get revenge on the defendant.

One need not speculate about counsel's reasoning. Counsel made clear on the record what his tactic was.

The present case is unlike Sutherby in another important way. There, the State argued that the pornography showed the defendant's motives and that he was a predator who raped children. 165 Wn.2d at 876. In this case, the State did not suggest or argue that evidence of one rape showed a propensity to commit another. The jury was instructed properly instructed that it was to consider both counts separately.

In Sutherby, the court found no indication of any possible advantage to a joint trial. Id. at 884. In the present case, the perceived advantages exist in the record. The defendant has not shown that he was deprived of counsel when his attorney developed a theory of the case that was assisted by having two victims, each of whose testimony made the other less reliable.

Because the defendant has not shown the lack of a reasonable legitimate tactic, his argument fails and his conviction should be affirmed. The court need not address the other prong.

C. THE DEFENDANT HAS NOT SHOWN A REASONABLE PROBABILITY THAT A MOTION TO SEVER WOULD BE GRANTED.

To show prejudice from his counsel's performance, this defendant must show both that a motion to sever would have been granted and that, had it been granted, there is a reasonable probability the jury would not have found him guilty. See Sutherby, 165 Wn.2d at 884. Having failed to show that this was not a tactical decision, the court need not consider the second prong of the Strickland test. However, the defendant cannot show prejudice because a motion to sever probably would not have been granted.

The motion to sever likely would not have been granted because the offenses were properly joined. Multiple offenses may be joined in one charging document when they are "of the same or similar character, even if not part of a single scheme or plan." CrR 4.3(a). Washington has a 'liberal joinder rule' and separate trials are not favored. The rule on joinder is expansive to conserve judicial and prosecutorial resources. See State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017 (1999). Failure to properly join cases wastes judicial resources. . State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Properly joined offenses should stay joined for trial unless

the defendant can show that a joint trial would be so prejudicial that it would outweigh the concern for judicial economy. Id.

Joinder in sex cases is particularly prejudicial in sex cases. Sutherby, 165 Wn.2d at 884. However, inherent prejudice can be offset by certain factors, none of which is which more important than the others: (1) the strength of evidence on each count; (2) the clarity of defenses on each; (3) court instructions; and (4) cross-admissibility of evidence. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), cert. denied, 614 US 1129 (1995). Severance is not required simply because evidence on separate counts may not be cross-admissible; the burden is on the defendant to show prejudice. Bythrow, 114 Wn.2d at 721.

1. The Counts Should Not Have Been Severed Because Evidence On Each Count Was Similarly Strong.

The State's evidence on the rapes of CL and the rape of BB was similarly strong. Both victims testified about a sexual assault. Both disclosed to each other within weeks or months of the rapes. Both disclosed to the police and personnel at Dawson Place. Both were subject to inconclusive sexual assault examinations.

In State v. MacDonald, 122 Wn. App. 804, 807, 95 P.3d 1248 (2004), Division III discussed denial of a severance motion after reversing a case for prosecutorial misconduct. MacDonald had been convicted of two counts of rape in a joint trial. The court reversed his convictions because impeachment evidence about one of the victims had been withheld. On that count, there was no physical evidence of the rapes, only testimony. In the next trial when the impeachment would be available, the evidence on one count became significantly weaker than on the other. When one case is remarkably stronger, severance is proper. Id. at 815, citing Russell, 125 Wn.2d at 63-64.

Our case is entirely different because there is virtually no difference in the strength of the cases. Each count was based primarily on the victim's testimony. Unlike MacDonald, there was no evidence suppressed that, if admitted, would make one count significantly weaker than the other.

On the other hand, in State v. Kalakosky, 121 Wn.2d 525, 536, 852 P.2d 1064 (1994), the Supreme Court affirmed the denial of a severance motion on five counts of rape/attempted rape. The evidence available on each count of rape was similar in nature. In the first, a man in a ski mask armed with a gun and a knife

kidnapped a 13-year old, taped her up, and raped her. In the second, a man in a ski mask kidnapped a girl at gunpoint, bound her, and raped her. In the third, a man in a ski mask and armed with a gun broke into the victim's home, taped her up, raped her, and threatened to shoot her baby. In the fourth, a man with a ski mask kidnapped a woman, bound her, and raped her after hitting her with a gun. In the fifth, a man in a ski mask kidnapped a 17-year old, blindfolded her, and raped her in an alley. The evidence was not cross-admissible under ER 404(b), but a joint trial was proper because evidence on each count was similarly strong and a jury would be able to compartmentalize it. Id. at 539.

The same is true in the present case. Evidence of the rapes of CL and BB were virtually identically strong with neither being weaker than the other.

The first factor favors joinder.

2. The Counts Were Properly Joined Because The Defenses On Each Count Were Clear And Not Conflicting.

The defendant concedes that his defenses were clear and not conflicting, a general denial. Appellant's brief, p. 19, footnote 7. Thus, the second factor favors joinder.

3. The Counts Were Properly Joined Because Jury Instructed To Consider Each Count Separately.

The jury was instructed:

> 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.

WPIC 3.01. This is the proper instruction.

In State v. Bradford, 60 Wn. App. 857, 808 P.2d 174 (1991), the jury was provided with WPIC 3.01. The jury then asked the court whether they could consider knowledge from one count when deliberating on another. The judge told the jury they were free to decide what evidence to use on each count. The Court of Appeals rejected a suggestion that the jury should have instructed further and held that the trial court's response was proper. Id. at 861. The WPIC committee note has suggested that adding language may be a comment on the evidence or be more confusing than helpful.

Discussing this factor In Sutherby, the court noted that although the jury was properly given WPIC 3.01, the State had argued that evidence of the child pornography was evidence of the defendant's sexual desires for children. Id. at 886. The State was thus inviting jurors not to consider the counts separately and

explicitly said that evidence of child pornography was evidence of the defendant's propensity to abuse children.

There was no such invitation in our case. The State made no argument on propensity. The defendant has not and cannot point to any suggestion in the record that evidence of one rape was evidence of the other.

The third factor favors joinder.

4. The Counts Were Properly Joined Despite The Cross-Admissibility Issue.

As discussed above, "the fact that separate counts would not be cross admissible in a separate proceeding does not necessarily represent a sufficient ground to sever as a matter of law". Kalakosky, 121 Wn.2d at 538. When evidence of other crimes is not admissible, the concern is not whether the jury hears the evidence but rather whether the jury can compartmentalize the evidence so evidence of one count does not taint the jury's consideration on another. Bythrow, 114 Wn.2d at 721

In the present case, there was no danger that the jury could not have compartmentalized the evidence. The issues were distinct; the crime occurred a year apart. The trial lasted

only a week. When the issues are relatively simple and the trial lasts a short time, the jury can be reasonably expected to compartmentalize the evidence. Bythrow, 114 Wn.2d at 721.

The fourth factor favors joinder.

5. The Need For Judicial Economy Outweighed Any Prejudice The Defendant Might Have Suffered.

Joint trials are inherently prejudicial but the law still favors them. Bythrow at 713. Only if a defendant can point to specific prejudice has he overcome the need for judicial economy. Id. An even stronger showing of prejudicial effect must be made in a severance motion than in a 404(b) motion to exclude evidence. Id. at 722-23.

The defendant has pointed to no specific prejudice. The need for judicial economy here outweighed any perceived prejudice from a joint trial. This trial lasted a week; two separate trials could have lasted a week each because most witnesses would have been called in both cases.

Zach Farrar was the defendant's brother and lived in the same house with him when the rapes occurred. He was present the night BB was raped; his room was next to the room where the defendant raped CL. He was mentioned in the texts between the

defendant and CL. CI disclosed to him. He would have testified in both cases.

JL was CL's brother and was there the night BB was raped. CL disclosed to him. He likely would have been called in both cases.

TL was CL's mother and CL disclosed to her. TL organized an attempt to identify all of the defendant's victims. She was the catalyst for BB's trip to the Granite Falls Police Department. Her so-called "witch hunt" would likely have made her a witness in separate trials.

CL and BB each would have been called to testify in the other's case as they disclosed to each other. CL was also present for at least part of the evening the defendant raped BB.

Separate trials, involving the same witnesses, likely would have taken twice the time as a joint trial. With no specific prejudice, a motion to sever likely would not have been granted.

Each of the four factors in the present case favors joinder and none outweighs the strong public policy of joint trials that conserve judicial resources. The defendant has not shown that a motion to sever would likely have been granted. Therefore, his argument fails on this prong as well.

IV. CONCLUSION

For the foregoing reasons, the convictions should be affirmed.

Respectfully submitted on February 3, 2015.

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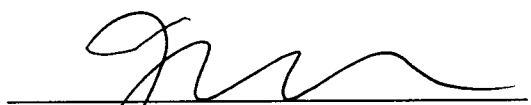
By: 

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