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No. 98951-6
COA No. 36539-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO ABONZA

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Antonio Abonza asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Antonio Abonza*, No. 36539-5 (July 28, 2020). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

Offenses may only be joined in an information where they are of the same character or are based on connected acts. Properly joined counts must be severed when the defendant may suffer prejudice from the joined offenses. Mr. Abonza moved to sever the trespass count from the rape count because they were not of the same character or connected acts and he would suffer prejudice from a joint trial as the evidence supporting the counts was not cross-admissible. Without a complete analysis as required, the trial court found the evidence supporting the counts cross-admissible under ER 404(b) and denied the motion to sever. Is an issue of significant public interest presented requiring a decision of this Court where the trial court's erroneous

denial of the severance motion led directly to the admission of otherwise inadmissible evidence establishing prejudice from the failure to sever?

D. STATEMENT OF THE CASE

On April 13, 2018, Anthony Abonza, a student at Washington State University (WSU) in Pullman, was socializing at a bar when he saw Ashley Meyer, who also a student a WSU. RP 173. Mr. Abonza and Ms. Meyer were in a class together during the fall 2017 semester and jointly worked on a project. RP 171. The two spoke briefly. RP 171.

At approximately 1:00 am, Ms. Meyer left the bar and walked home. RP 174. Ms. Meyer had been drinking and was, as she described, very intoxicated. RP 174. Shortly after arriving at home, Ms. Meyer received a text from Mr. Abonza asking to come over. RP 175. Ms. Meyer agreed and the two “hung out” watching a movie on Ms. Meyer’s laptop. RP 175-76. The two discussed Ms. Meyer’s pet hedgehog and she then noticed Mr. Abonza undressing. RP 184. Mr. Abonza sat on the bed next to Ms. Meyer and she either fell asleep or passed out. RP 185.

Ms. Meyer said she awoke around 7:00 am with Mr. Abonza's hand touching her side. RP 186. She stated she rolled on her back and Mr. Abonza got on top of her. RP 186-87. She claimed Mr. Abonza began to kiss her and she told him she did not want to have sex. RP 189. Ms. Meyer stated that Mr. Abonza began having sexual intercourse with her. RP 187. She said she told Mr. Abonza five times to stop until he finally stopped. RP 187-88. He dressed and Ms. Meyer escorted him out of her apartment. RP 188. Ms. Meyer attempted to contact her best friend to tell her what had happened but her friend did not respond. RP 189-91.

Ms. Meyer again saw Mr. Abonza at the bar on May 1, 2018. RP 193. She did not speak to him and went home shortly after. RP 193.

After she returned to her apartment, Ms. Meyer received a text from her roommate stating that someone had just walked into her room. RP 194. Ms. Meyer then heard someone trying to get into her room, jiggling the door knob, and calling her name. RP 195-96. She recognized the voice as Mr. Abonza's. RP 196. Ms. Meyer texted her roommate, told her she knew who the person was, and did not want him in the building. RP 195-96. The roommate's boyfriend escorted Mr.

Abonza out of the building and he was subsequently arrested by Pullman Police. RP 198-99.

Mr. Abonza admitted entering Ms. Meyer's apartment building on May 2, 2018, without permission because he wanted to talk to her. RP 244. He admitted he had been drinking. RP 244. Mr. Abonza stated that he was intoxicated as well on April 13, 2018, and Ms. Meyer and he began kissing and had consensual sex that night. RP 246. The next morning, he was rubbing Ms. Meyer's body and kissing her. RP 247. He began having intercourse with her, but when she said she did not want to, he stopped. RP 247.

The State charged Mr. Abonza with residential burglary. CP 1-2. The State subsequently filed an amended information charging Mr. Abonza with a count of third degree rape for the incident that occurred on April 14, 2018, and a count of first degree criminal trespass for the incident that occurred on May 2, 2019. CP 9-10. On December 12, 2018, the first day of trial, Mr. Abonza moved to sever the counts for trial because the offenses were not a single scheme or plan, nor were the offenses of a similar character or a connected series of acts. CP 12-21; RP 5-7. The trial court subsequently denied the severance motion. CP 50-52 ("The Court does conclude that judicial economy was served

by a single trial on all counts, and in this case you're going to have the same roommates testifying"). Mr. Abonza renewed his motion to sever the following day. RP 26-27.

In order to ameliorate the prejudice he would suffer from a joint trial, Mr. Abonza entered a guilty plea to the criminal trespass count. CP 27-33; RP 31-35. The court also granted the State's motion, ruling the facts admitted by Mr. Abonza in his guilty plea could be admitted at trial under ER 404(b). CP 51; RP 29-30.

Following a jury trial on the rape count, Mr. Abonza was found guilty as charged. CP 49; RP 295. The Court of Appeals affirmed, finding, in light of Mr. Abonza's guilty plea to the trespass, that he essentially received the benefit he would have gotten had the counts been severed. Decision at 4.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

The court's failure to grant the severance allowed the admission of the evidence of trespass at the rape trial.

Offenses properly joined under CrR 4.3(a) should be severed if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

Joinder must not be used in such a way as to prejudice a defendant.

Prejudice may result if the defendant is embarrassed in the presentation

of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition. *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), *overruled on other grounds*, 85 Wn.2d 758, 539 P.2d 680 (1975).

In assessing whether severance is appropriate, a trial court weighs the prejudice inherent in joined trials against the State's interest in maximizing judicial economy. *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). Factors the trial court considers when assessing prejudice include (1) the strength of the State's evidence with respect to each charge, (2) the jury's ability to keep the evidence separate, (3) the court's instructions to the jury to consider the evidence separately, and (4) the cross-admissibility of the offenses had they not been tried together. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

The two charged incidents were separate and distinct. Each count involved a different date of occurrence. Thus, there was no evidence that overlapped from one count to the other. Where the evidence with respect to each charge is separate and distinct, it is easier for the jury to evaluate the pertinent evidence without regard to the

other charges. *State v. Harris*, 36 Wn.App. 746, 751, 677 P.2d 202 (1984).

While consideration of the first three factors seems to favor joinder, analysis of the fourth factor, the cross-admissibility of the counts, leads to the inescapable conclusion that severance of the two counts for trial was required. Initially, the trial court failed to properly consider the admissibility of the counts under ER 404(b) as required.

Whether evidence is admissible under ER 404(b) requires the court to determine: (1) whether the evidence is relevant to prove any of the issues permitted by ER 404(b); (2) whether any prejudicial effect is outweighed by the probative value; and (3) whether limitation of the purpose for which the jury may consider the evidence can be accomplished. *State v. Watkins*, 53 Wn.App. 264, 270, 766 P.2d 484 (1989). The trial court failed to consider any of these factors, merely making a conclusory statement that the counts would be cross-admissible as *res gestae* evidence, or admissible regarding Mr. Abonza's "intent, knowledge, preparation, plan, motive, or absence of mistake." CP 51; RP 16, 29-30.

First, the evidence would not be admissible for the purposes of intent as neither offense, rape nor trespass, have intent as an element.

See State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697(1982) (where the State intends to offer evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense). That a prior act “goes to intent” is not a “magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].” *Id.* There are other circumstances in which prior acts may properly prove intent beyond mere propensity to act such as using prior acts to show a certain plan, which can imply intent. Such use of prior acts turns on the facts of the acts themselves, not on the propensity of the defendant to commit the acts. *State v. Wade*, 98 Wn.App. 328, 336, 989 P.2d 576 (1999). Such a link was not argued by the State and no such link existed, thus the only use of the prior act evidence was for Mr. Abonza’s propensity to commit the offense.

The evidence also was not admissible to show the absence of mistake. Mistake or accident is not a material issue unless first raised by the defendant. *State v. Ramirez*, 46 Wn.App. 223, 228, 730 P.2d 98 (1986). “Evidence of other misconduct that the State offers to prove absence of mistake or accident must directly negate such a defense.” *Id.*

Otherwise, evidence of lack of mistake or accident is not relevant and is inadmissible. *Id.* Here, Mr. Abonza's defense was a general denial. He did not argue mistake or accident. Thus any evidence relating to accident or absence of mistake was irrelevant and, therefore, inadmissible on this ground.

Further, the trial court's conclusion the prior act evidence was admissible as evidence of motive was erroneous. "Motive" is a "[c]ause or reason that moves the will[;] ... [a]n inducement, or that which leads or tempts the mind to indulge in a criminal act." *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981), *quoting* Black's Law Dictionary 1164 (4th ed. rev. 1968). Motive is distinguishable from "intent," which is the purpose or design with which the act is done. *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995). In the absence of any explanation by the trial court or the prosecution as to how this evidence was logically relevant to motive, the evidence demonstrates little more than a general propensity to violate rules, precisely the purpose forbidden under ER 404(b). *Saltarelli*, 98 Wn.2d at 365.

Finally, the evidence was not admissible as *res gestae*. Under the *res gestae* or "same transaction" exception, evidence of other crimes is admissible "to complete the story of the crime on trial by proving its

immediate context of happenings near in time and place.” *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (internal quotation omitted); *State v. Fish*, 99 Wn.App. 86, 94, 992 P.2d 505 (1999). Each act must be “a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.” *Powell*, 126 Wn.2d at 263 (internal quotation omitted). Two acts occurring weeks apart do not explain “the immediate context” of one another.

Contrary to the Court of Appeals conclusion, Mr. Abonza did not receive the remedy he sought. The issue is not a question of an evidentiary issue alone as the Court of Appeals framed it, but one that was essential part of the remedy for severance. Had the court granted the motion to sever, it would have necessarily found the evidence of the trespass was not cross-admissible, thus inadmissible at Mr. Abonza’s subsequent rape trial. This is the reason why Mr. Abonza seeks a new trial, as the trial court’s denial of the motion to sever necessarily impacted the admission of the trespass evidence. Thus, despite Mr. Abonza’s guilty plea to the trespass count, the jury may have used the evidence of the trespass to infer a criminal disposition on the part of Mr. Abonza, which necessarily resulted in his being found guilty of the rape.

This Court must grant review to clarify the prejudice aspect of the severance motion, especially in light of situations such as this, where the denial of the severance motion lead directly to the admissibility of evidence which would have been inadmissible had the severance been granted.

Mr. Abonza must be granted a new trial.

F. CONCLUSION

For the reasons stated, Mr. Abonza asks this Court to grant review and reverse his rape conviction.

DATED this 25th day of August 2020.

Respectfully submitted,

s/Thomas M. Kummerow

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Washington Appellate Project – 91052

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APPENDIX

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

STATE OF WASHINGTON,)	
)	No. 36539-5-III
Respondent,)	
)	
v.)	
)	
ANTONIO ABONZA,)	UNPUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — Antonio Abonza appeals from a conviction for third degree rape, arguing that the court erred by denying his request to sever charges. We affirm the conviction and remand to strike the criminal filing fee from the judgment.

FACTS

The relevant facts are largely procedural, so only a brief description of the two incidents is necessary. The rape occurred April 14, 2018, when Abonza had sexual relations with a sleeping woman in her apartment and continued to force himself on her after she awoke and told him to stop. He also was charged with first degree criminal trespass at the same location 18 days later for entering the apartment in the middle of the night. The two matters were joined for trial.

Mr. Abonza moved to sever the counts prior to trial, arguing that it was unduly prejudicial to try them together. At the conclusion of the pretrial hearing, the court denied the motion. On the morning of the first day of the jury trial, the defense renewed the motion to sever. The court again denied the request.¹

Mr. Abonza then pleaded guilty to the criminal trespass charge. The State sought clarification of the admissibility of the trespass incident under ER 404(b). The trial court ruled that the evidence was admissible for limited purposes.² The matter then proceeded to jury trial. The victim primarily testified about the rape incident and only briefly about the subsequent trespass. The victim's two roommates testified concerning the trespass. Mr. Abonza testified in his own behalf that the couple engaged in consensual sexual relations until she stated that it was uncomfortable and he stopped. He also said that he came to the house on May 2 because he needed to talk to the victim after learning she was upset about their previous encounter.

The jury convicted Mr. Abonza of third degree rape. After vacating the original sentence, the court imposed concurrent 12 month terms on the two counts at a resentencing. Mr. Abonza timely appealed to this court. A panel considered his appeal without conducting argument.

¹ The court entered written findings concerning the severance hearing following trial.

² The court also gave a written limiting instruction to the jury.

ANALYSIS

This appeal challenges the severance rulings and the imposition of the \$200 criminal filing fee at sentencing. The State concedes error on the filing fee and we accept the concession. The trial court may not impose discretionary LFOs on indigent defendants. *State v. Ramirez*, 191 Wn.2d 732, 750, 426 P.3d 714 (2018). Accordingly, we remand for the court to strike the filing fee.

The severance issue is before us in a strange posture. Mr. Abonza preserved the severance issue by renewing it at the beginning of trial. CrR 4.4(a)(2).³ However, Mr. Abonza created a *de facto* severance by pleading guilty to the trespass charge. Typically, we review a decision whether to sever charges for abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 536, 852 P.2d 1064 (1993). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

It is the defendant's burden to establish abuse of discretion by showing that "a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Factors to be considered when analyzing a motion to sever include (1) whether the defendant was

³ "If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion." CrR4.4(a)(2).

confounded in presenting separate defenses, (2) whether the jury might infer a criminal disposition from the two offenses, and (3) whether the jury might cumulate evidence to find guilt where it would otherwise not. *Id.* The remedy for improper joinder of offenses is reversal for a new separate trial with the offenses severed. *E.g., State v. Bluford*, 188 Wn.2d 298, 316, 393 P.3d 1219 (2017).

It is the remedy issue that is the sticking point in this case. Assuming that Mr. Abonza showed that the court erred by denying his motion, the remedy would be a retrial of the rape charge without the trespass charge. But he already received that remedy. The two charges were not tried together due to his guilty plea on the gross misdemeanor offense. He already has received the remedy he seeks in this appeal.

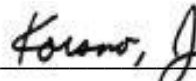
In actuality, his challenge should be directed to the evidence concerning the trespassing incident used at the rape trial. The prosecutor properly noted that the evidence presented an issue governed by ER 404(b) and obtained a pre-trial ruling admitting the evidence. The defense does not assign error to that ruling, nor directly challenge it on appeal except as a component of the severance challenge. Instead, he treats an evidentiary issue as if it were a severance problem.

In light of the fact that the two charges were not tried together, Mr. Abonza cannot show that he was prejudiced by the court's severance rulings. Having already obtained the remedy he would have obtained if the court had agreed with his severance motions, he simply was not harmed.

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The conviction is affirmed and the case remanded to strike the filing fee.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

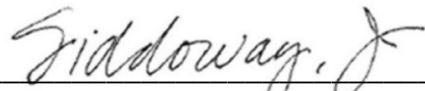


Korsmo, J.

WE CONCUR:



Pennell, C.J.



Siddoway, J.

IN THE SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 36539-5-III
)	
ANTONIO ABONZA,)	
)	
PETITIONER.)	

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WASHINGTON APPELLATE PROJECT

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