Supreme Court No. 100856-2
COA No. 82177-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AQUILINO CORONEL-CRUZ,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Aquilino Coronel-Cruz was the defendant in King County No 18-1-05942-5-KNT, and the appellant in COA No. 82177-6-I.

B. COURT OF APPEALS DECISION

Mr. Coronel-Cruz seeks Supreme Court review of COA No. 82177-6-I and reversal of all of his convictions on the basis of an unfair trial on multiple charges that should not have been prosecuted in a single trial. See Decision (Appendix A).

C. ISSUES PRESENTED ON REVIEW

1. Whether, considering all of the factors that preclude joinder and require severance, including lack of cross-admissibility of evidence and the presence of propensity prejudice, the trial court departed from the case law in allowing counts 1, 2 and 3 as allegedly committed against the complainant M. to be tried along with the charges in counts 4, 5 and 6 claimed by M.'s older brother E.

2. Whether the Court of Appeals departed from the case law where the charged acts would not be cross-admissible in separate trials as "common scheme or plan."

3. Whether the error was prejudicial requiring reversal, where the older brother W.'s frightening allegations of physically forceful sexual behavior toward him by Mr. Coronel-Cruz caused the jury to find Mr. Coronel-Cruz guilty on counts 1 through 3 as to M.

D. STATEMENT OF THE CASE

1. Allegations and charging.

Mr. Aquilino Coronel-Cruz was charged with six counts of child sexual offenses alleged to have been committed by him against M. and W., respectively, in whose homes Mr. Coronel-Cruz lived in 2017 and 2018, as a friend of their mother.[1] CP 1, 76, 78.

[1] For purposes of clarity, E.M.A.H. (counts 1, 2 and 3) is hereafter referred to as "M." and E.W.A.H. (counts 4, 5 and 6) is referred to as "W.," which represent the complainants' given names as used by the family and by the parties at trial.

The mother, Ms. Diima Herrera, lived with her two sons, M. and W., in Kent and later in Renton. The defendant, Mr. Coronel-Cruz, had a separate bedroom in each house; he had moved out about three months prior to October 29, 2018, but would frequently pick up M. and run an errand for Diima. RP 1088. 1095.

On that date, Ms. Herrera wanted to check her younger son M.'s Facebook account on his cell phone, since it had been a month since she had done so. RP 1083-85. M. was resistant and said, "no," and when Ms. Herrera reviewed M.'s Facebook account, she saw many photos of what appeared to be gay men. RP 1087-88.

Ms. Herrera took M. into her bedroom and began questioning M., who eventually stated that he thought he was gay, and it appeared that W. heard or learned about this crying, upset conversation later, several times. RP 1089, 1143-44. Ms. Herrera began crying, because she couldn't believe that all this "was real." RP 1089. She asked M., who she said was 10 or 11

years old at the time, "if somebody had ever touched his private parts," which M. denied. RP 1089-90. Ms. Herrera said that she had read about the topic of homosexuality, and she learned that it could be caused by another person:

> [T]here is a percentage, and I don't know exactly what that percentage is, of homosexuals who are homosexual because at one time they were touched inappropriately.

RP 1089. Ms. Herrera had also read in magazines about this, all of which led her to believe that M. must have been sexually abused. RP 1099.

Ms. Herrera stated, "[W]e do believe in Jesus Christ, and we do worship him;" she also stated that hers was a Christian home. RP 1090, 1099. Ms. Herrera believed that homosexuality was a sin against God. RP 1091. She testified that she only told M. that homosexuality was a sin after this incident, but when she was asked if the pastor at their church had preached that homosexuality was a sin, she could only reply that he had not preached about that subject "lately." RP

1091-92. That night, Ms. Herrera took both her sons M. and W. to see the pastor and the three of them, along with the pastor, prayed together. RP 1143-44.

The next day, Ms. Herrera continued talking with M., who continued to *deny* he had been touched. RP 10992-3, 1101-02, 1144-45. However, after questioning M. further and asking if Mr. Coronel-Cruz had touched him, M. responded that Mr. Coronel-Cruz had touched him. RP 1093, 1102, 1144-45. Ms. Herrera also asked if Mr. Coronel-Cruz had touched M.'s private parts - the first mention of such a phrase -and M. answered yes, so Ms. Herrera immediately called the police. RP 1093, 1102, 1144-46.

When Ms. Herrera brought M. to the police the next day, and to the hospital for an examination, she also began asking her older son W. "questions similar to what [she] had asked M.," and W. told her he had been touched similarly. RP 1094-95.

After a series of interviews in which M. would say nothing about particular sexual acts, in which his mother removed him from the interview room and then asked that a Spanish interpreter be provided (despite the fact that M. plainly spoke English), M. eventually stated that when his mother saw his phone, she lost her mind, started yelling, and got mad, at which point M. stated that Mr. Coronel-Cruz had put his penis on his butt. M. also stated that Mr. Coronel-Cruz would buy him treats or sweets to not tell about any abuse allegations.

On November 5, 2019, when Detective Scott went to pick up M's sexual assault kit from the hospital, she was approached by Ms. Herrera and her son W., and Ms. Herrera explained that W. was at the hospital for an exam because he was also alleging that Mr. Coronel-Cruz had done things to him. RP 847-48, RP 998.

After charges were brought as to M., Mr. Coronel-Cruz was subsequently charged with one count third degree child molestation, one count attempted third degree child

molestation, and communication with a minor for immoral purposes, against W. CP 118-19.

2. Motions and trial.

The defense had sought to preclude a joined trial. On October 5, 2020, the State moved to join the original information as to "M." with further charges of offenses allegedly committed against his older teenage brother W. RP 53, 331-32. On October 19, prior to trial, the defense filed a motion in opposition to the joinder of the charges against Mr. Coronel-Cruz, and alternatively seeking severance. The arguments and the court's decisions were based on the parties' pleadings, including reports and/or interviews of the complainants, along with the evidence at trial, throughout which Mr. Coronel-Cruz renewed his motion for separate trials. RP 60-62 (10/19/20); Pre-trial exhibits 1 and 2; Trial exhibits 1,5-7, 9-14, 23. The joinder was permitted and the motion to sever was denied. RP 42-150, RP 159-62, RP 332-33.

Defense counsel re-raised the issue of severance on October 29, noting that "given a number of the juror answers during *voir dire* indicating that more than one child made it more concerning to them [including] one of the jurors who indicated it might suggest somebody was a habitual sex offender . . . I am renewing my position to sever at this point." RP 793.

Indeed, several jurors had been excused for cause on the ground that they announced they could not morally be "fair" and follow the law a where a man was alleged to have sexually touched another male, with one juror, no. 3, stating, "there is a special place in hell" for such individuals. RP 498-500. Juror no 23 stated, "I thought it was against a girl. I have a 15-year-old daughter. But then this is actually now -- it's even worse." RP 503-04. Yet when it came to the crucial issue of propensity, prospective juror no. 25 was *not* excused for cause, after stating, "it's hard to absorb two people with accusations," even after the prosecutor joined in the request that this juror be

excused for cause. RP 520-22' RP 773 (Juror no. 25 was later excused by peremptory challenge). Nevertheless, the defense's renewed motion to sever was denied. RP 793-94.

At trial, M. stated that he and his brother shared a room in the homes where they had lived with their mother when M. was 10 and 11 years old. RP 1164-68. His testimony alleged that Mr. Coronel-Cruz had been in his own room multiple times, and on distinct occasions, when M. went there to watch television the defendant put his penis inside M.'s anus and also in his mouth. RP 1170-73, 78. M. also said Mr. Coronel-Cruz had taken M. for a car ride while running an errand, such as picking up food, where he had M. touch his penis or put it in his mouth. RP 1187-91.

W. stated that when he watched television in Mr. Coronel-Cruz's room like M. had, Mr. Coronel-Cruz would show him his penis, and then would "grab me and will hug me and will bite me [and] sometimes he will paddle on my butt, on my rear." RP 1273-74. Mr. Coronel-Cruz would also touch W.

near his penis over his clothes, and "[s]ometimes, he would come from behind and will put his body against my body." RP 1276.

At the close of evidence, the defense again renewed the motion, asking that the court instruct the jury to disregard all evidence arising as to claims by complainant W. or grant the motion to sever and hold two separate trials. RP 1160-61. The court relied on its prior reasoning and again denied the motion. RP 1161.

A mistrial was later declared on the counts as to W. – 4, 5 and 6 - after the jury could not agree on them. The jury delivered verdicts of guilty on counts 1, 2 and 3 as to M. RP 1475, 1483.

E. ARGUMENT

REVIEW IS WARRANTED WHERE THE TRIAL COURT ERRED IN ALLOWING JOINDER AND IN DENYING SEVERANCE, AND THE GUILTY VERDICTS AS TO M. WERE THE RESULT OF THE INCLUSION OF THE CHARGES AGAINST W.

1. Review of the issue of separate trials is warranted under RAP 13.4(b)(1) and (2).

The Court of Appeals decision departs from decisions of this Court and the Courts of Appeal which require substantial similarity for admission of evidence of "common scheme." Review is warranted under RAP 13.4(b)(1)(2).

2. On the question of analyzing prejudice of erroneous joint trials, review is warranted under RAP 13.4(b)(1).

The Court of Appeals claimed that the lack of guilty verdicts on the counts involving the older complainant shows that the jury must have properly considered the charges separately, and therefore, in conducting a single trial and if error occurred there was no prejudice. Decision, at p. 16-17. This reasoning is untenable and unsupported and must be rejected.

3. The Court of Appeals endorsed a ruling of "common scheme" in a case where the facts of both sets of allegations are merely descriptions that routinely categorize most child sex offenses.

Offenses are eligible for joinder if they "[a]re 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)(1), (2). Here, there was no valid common scheme exception to ER 404(b) applicable, but instead simply propensity prejudice under ER 403. The question of prejudice is central. State v. Bluford, 188 Wn.2d 298, 305-08, 393 P.3d 1219 (2017). Lack of cross-admissibility requires severance. State v. Wilson, 1 Wn. App.2d 73, 81-82, 404 P.3d 76 (2017); CrR 4.4.

The lack of ER 404(b) cross-admissibility required separate trials. ER 404(b) provides that evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith [but] may, however, be admissible for other purposes, such as . .

. plan." See, e.g., State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

Mere reference to ER 404(b)'s oft-employed common scheme exception is not enough to invoke the rule. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The court must (1) find by a preponderance of the evidence that the accused committed the other acts; (2) identify the non-propensity purpose for which the evidence is meant to be introduced; (3) decide 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. State v. Lough, 125 Wn.2d 847, 852, 889 P. 2d 487 (1995); see also State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). The court must be particularly careful when completing steps (3) and (4) in a sex case, because the unfair prejudice potential of prior acts is at its highest in sex cases. Saltarelli, 98 Wn.2d at 363.

The court in this case determined that evidence of all the charges was cross admissible pursuant to ER 404(b) to show common scheme or plan. This Court reviews decisions to admit evidence under ER 404(b) for abuse of discretion. State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). In "doubtful cases, the evidence should be excluded." Vy Thang, at 642.

There was no common scheme here so as to establish ER 404(b) cross-admissibility. It is a generic fact of sex abuse allegations that the child was alone with the defendant. Mr. Coronel-Cruz did not "isolate" M. in Mr. Coronel-Cruz' room; rather, his room was always a separate bedroom in the houses, where M. went of his own accord because it had a television. RP 1172-78. But this is immaterial anyway - there is no plan or scheme established as a result of an alleged perpetrator committing the claimed acts in a room or other area where the two individuals are the only ones present. Sex offenses are not committed in the presence of other

individuals. The fact that a molestation was alleged to have occurred in a house or a room with the door shut or in a car occupied only by the two parties in question, is a mere routine description of the common, drudgerous manner of factual circumstances that characterize such crimes in general. They do not equate to common scheme.

As noted by Lough, 125 Wn.2d at 853, 555, common scheme means that the defendant has "devised a plan and uses it repeatedly to perpetrate separate but very similar crimes." Lough, 125 Wn.2d at 855. Such a plan is found when the defendant's scheme creates the repeated opportunity to commit the crime. In Lough, for example, the defendant acted pursuant to a plan to rape his prior victims, and the current victim, by drugging their drinks. Lough, at 850-51.

Similarly, in State v. Gresham, a defendant used the fact that the child victim was a friend of his own similarly aged daughter, and because the two families were close, the child stayed overnight at Gresham's home on a monthly basis. He

would then wait for the child, apparently out of habit, to come downstairs for a drink of water where he was lurking and used those opportunities to touch her. State v. Gresham, 173 Wn.2d 405, 417-19, 269 P.3d 207 (2012). The Court found these instances were "naturally to be explained as 'individual manifestations' of the same plan." Gresham, at 421 (quoting Lough, at 860).

The same cannot be said here. Mr. Coronel-Cruz lived as a member of the household and allegations that he touched the children in the household and in his car when others were not around to see the claimed wrongdoing is not a "plan." "[T]he degree of similarity for the admission of evidence of a common scheme or plan must be substantial." DeVincentis, 150 Wn.2d at 19-20 (quoting Lough, at 860). The trial court erred in entering findings of fact 4(a) through (f) that the acts described by the State in its offer of proof were cross-admissible under ER 404(b). The sharing of a residence within the family with a person who the family called "uncle" is no more than a

description of his informal part of the family. CP 182. And the fact that the incidents took place during the same time period might be a factor in favor of joinder, but the time frame had no probative value. CP 182. And the defendant did not have discussions with both alleged victims as to their sexuality; as to M. the defendant supposedly called him a girl once or twice, and talked about the color pink. See RP 1204-05; CP 182.

Absent the required degree of substantial similarity, the alleged acts toward W. served no purpose other than to suggest that the defendant had a character to engage in child sexual abuse. Such evidence is "clearly inadmissible." State v. Acosta, 123 Wn. App. 424, 433, 98 P.3d 503 (2004); see, e.g., State v. Harris, 36 Wn. App. 746, 747-48, 677 P.2d 202 (1984) (defendants did not act pursuant to a common scheme based on allegations that they raped two women, in separate incidents several weeks apart, in which the defendants allegedly gave rides to the women in their car and then engaged in forcible sexual intercourse with them). No common scheme was

established, yet the propensity prejudice under ER 403 was obvious and it did not warrant a joined trial for purposes of judicial economy.

4. Reversal is required for the erroneous joined trial.

The Court of Appeals decision relies on intermediate appellate court cases in which it was said that the fact that a jury found the defendant not guilty on one complainant's charges, and not the other's, shows that a joint trial was not prejudicial because the jury must have properly considered the charges separately. Decision, at p. 16-17 (citing State v. Standifer, 48 Wn. App. 121, 126–27, 737 P.2d 1308 (1987); State v. York, 50 Wn. App. 446, 452, 749 P.2d 683 (1987)). This reasoning is untenable and must be rejected. This Supreme Court states that reversal is required where the joint trial was manifestly prejudicial. State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991).

There is no significance to the fact of differing verdicts because the jury is always told to consider the counts separately

and it is presumed to do so. See State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Further, the Court of Appeals' legal reasoning is untenable, and not a proper basis to find lack of prejudice. To the contrary - the lack of guilty verdicts on counts 4 to 6 supports Mr. Coronel-Cruz's argument that he was greatly prejudiced by the ER 404(b) ruling. The jury's verdicts on counts 1, 2 and 3 would have been different absent the testimony of his brother. W., an older, stronger teenager, made claims at trial of forceful attempts made by Mr. Coronel-Cruz at having sexual activity with him, stating "[s]ometimes, he would come from behind and will put his body against my body, on my back. And I was trying -- I will try to escape, but he will grab me strongly" and from behind. RP 1276-77. W. said he could feel Mr. Coronel-Cruz's erect penis pushing on his buttocks. RP 1276-78. Frightening for any jury to hear, W. claimed that he could not get away, because Mr. Coronel-Cruz was stronger than him. RP 1278-79. In addition, W. alleged

that while they were in his car, Mr. Coronel-Cruz tried to put his hands near W.'s crotch area, and then his buttocks, and W. fought him off. RP 1280-83. These assertions by W. supported his younger brother's claims and satisfied their mother's belief that any suspected homosexual curiosity by M. could be explained as the result of him having suffered abuse by a perpetrator.

The court plainly erred in finding that the strength of the evidence on each count was relatively the same. CP 189. Because the facts and indeed the very crimes charged were primarily different the defenses were to a meaningful degree antagonistic. CP 189. And since the evidence of sexual abuse of M. and W. was not cross-admissible, M. and W. would not be testifying twice if separate trials were held. CP 189. Mr. Coronel-Cruz has shown specific prejudice resulting from the joinder. See State v. Jones, 93 Wn. App. 166, 171, 968 P.2d 888 (1998). The defendant's alleged conduct toward W., had it occurred, would be reprehensible. But there was no scheme

shown and W's testimony should not have been a part of a trial on the original counts, where there was no ER 404(b) cross-admissibility under "common scheme." CP 95-113. To Mr. Coronel-Cruz's prejudice, the court maintained that reasoning over the course of multiple renewals of the motion to sever by the defense, even as the similarities between the incidents, never substantial, fell away as trial proceeded. The defendant's pre-trial motion for separate trials should have been granted at every juncture it was made, and the argument against joined counts only got stronger as trial proceeded and the expected unfair prejudice to Mr. Coronel-Cruz mounted.

The trial court erred and reversible prejudice was caused when evidence appearing to establish propensity in Mr. Coronel-Cruz to molest children was wrongly admitted, despite the fact that the common scheme exception to ER 404(b) did not apply. This rendered 50 percent of the trial an inadmissible presentation of bad character and propensity evidence. Such prejudice to the defendant far outweighs the interest in judicial

economy resulting from a single trial. State v. Bythrow, 114 Wn.2d 713, 724, 790 P.2d 154 (1990). This is plainly true regardless of the absence of guilty verdicts on the charges as to W., because the jury would surely have been horrified at the thought of what force Mr. Coronel-Cruz might have used when he perpetrated the alleged anal and oral rape of 10-year-old M. If W.'s claims as to Mr. Coronel-Cruz's alleged conduct toward him had not been a part of the trial as to M., the outcome of trial would have been different. This Court should reverse counts 1, 2 and 3.

F. CONCLUSION

Mr. Coronel-Cruz's joined trial was an unfair trial that deprived an innocent man of the ability to secure the only proper verdicts – "not guilty." The court should not have violated Mr. Coronel-Cruz's right to a fair trial simply because it was convenient for the prosecution to hold a single trial. Neither should the court have allowed the prosecution to secure guilty verdicts on the counts of conviction – allegations where

the complainant's accusations against Aquilino were likely untrue statements that he made to his mother in order to explain the pornography she found on his cell phone. "[N]o amount of judicial economy can justify requiring a defendant to endure an unfair trial." State v. Bluford, 188 Wn.2d at 310. Mr. Coronel-Cruz respectfully requests that this Court accept review, and reverse all of his convictions.

This Petition for Review contains 3,858 words formatted in font Times New Roman size 14.

Respectfully submitted this 20th day of April, 2022.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. AQUILINO CORONEL-CRUZ, Appellant	No. 82177-6-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — The State charged Aquilino Coronel-Cruz with one count of child molestation in the first degree and two counts of rape of a child in the first degree for his alleged acts against E.M., and two counts of child molestation in the third degree and one count of communication with a minor for immoral purposes for his alleged acts against E.W. The trial court granted the State's motion to join the charges and denied Coronel-Cruz's motion to sever them. A jury found him guilty of the charges relating to E.M. It deadlocked on the charges relating to E.W.; the court declared a mistrial as to those. Coronel-Cruz appeals, claiming the trial court abused its discretion in granting joinder and denying severance. For the reasons below, we affirm.

I. BACKGROUND

A. Facts

Coronel-Cruz lived with his nephew's ex-girlfriend, D.H.A., and her minor sons, E.M. and E.W., for three years until about August 2018. The boys called Coronel-Cruz "Tio" or "Uncle." E.M. and E.W. shared a bedroom. Coronel-Cruz

had his own room with a television. E.M. and E.W. watched movies with Coronel-Cruz in his room. While Coronel-Cruz lived with them and after he moved out, he often took E.M. to run errands. Also while living with them, Coronel-Cruz drove E.W. to soccer practice, to Walmart, and "to eat."

On October 30, 2018, D.H.A. saw "pornographic pages of homosexuals," "[j]ust men," on E.M.'s Facebook page. At that time, E.M. was about 11 years old. E.M. told D.H.A. that he thought he was gay while E.W. was in the room. D.H.A. "separated [E.M. from E.W.] to talk to [E.W.] about it." She said she asked E.M., "Why did he think he was homosexual, if somebody had ever touched his private parts." The next day, E.M. told D.H.A. that Coronel-Cruz touched him. D.H.A. contacted law enforcement, and the day after, she took E.M. to a medical examination and forensic interview with a child interview specialist. E.M. told the child interview specialist that Coronel-Cruz raped him "a lot of times" with the most recent rape occurring on October 27.

Within the next few days, E.W. told D.H.A. that Coronel-Cruz abused him as well. The alleged abuse occurred within the year before, beginning when E.W. was about 14 years old. On November 5, D.H.A. took E.W. to a medical examination. A few days later, the child interview specialist who interviewed E.M. interviewed E.W.

B. Procedural History

The State first charged Coronel-Cruz with one count of child molestation in the first degree and two counts of rape of a child in the first degree for his alleged acts against E.M. The State moved to amend the information by adding two

charges of child molestation in the third degree and one charge of communication with a minor for immoral purposes for his alleged acts against E.W. It also moved to join all six charges in one trial under CrR 4.3 and RCW 10.37.060. It contended,

> The counts in this case are appropriately joined for trial because the acts are of a same or similar character under CrR 4.3, and they are of the same class under RCW 10.37.060. These charges of child rape and molestation were committed against the two minor siblings whom the defendant resided with; in either their own home, in the defendant's vehicle, or in the defendant's new residence; and are of a highly similar nature, and would be cross-admissible as evidence of common scheme or plan or motive pursuant to ER 404(b).

And the State argued against severance. It contended that the strength of the State's evidence was the same for each charge because the evidence was largely E.M.'s and E.W.'s testimonies, Coronel-Cruz's defense was general denial to all claims, the court could instruct the jury to compartmentalize the charges, and the evidence was cross-admissible as that of a design or pattern of behavior. It said the evidence was cross-admissible as a pattern involving Coronel-Cruz inviting E.M. and E.W. to watch movies alone with him in his room, asking them about their sexual preferences, driving them individually in his car, and touching their buttocks and penises during the same period. The State also discussed judicial economy, highlighting that if the court did not join the charges, E.M. and E.W., their mother, the primary detective, and child interview specialist would testify twice. It also focused on the "inherent trauma" to E.M. and E.W. should they testify twice.

Coronel-Cruz opposed joinder and moved to sever charges involving alleged acts against E.M. from those involving alleged acts against E.W. Coronel-Cruz said that the evidence supporting E.W.'s allegations was weaker than that supporting E.M.'s. He contended, "[T]he State's evidence on each count is bolstered by having all these charges heard together." He said, "There certainly would not be testimony in regard to DNA in a separate trial regarding counts involving [E.W.]" He also said the defense as to the charges involving alleged acts against E.M. was clearer than the defense as to the charges involving alleged acts against E.W. because, when D.H.A. confronted him about photos she found on his phone, E.M. was motivated to fabricate the story about Coronel-Cruz so she would not think he was gay. Coronel-Cruz said that, assuming the use of a jury instruction about considering each charge independently, because the trial was likely to be long, it would be harder for the jury to compartmentalize. And he said that there were "great differences between these two children and their relationship with Mr. Coronel-Cruz." Finally, he contended the court should not consider judicial economy given the seriousness of the charges against him.

In a pretrial ruling, the trial court considered each severance factor and whether the potential for manifest prejudice outweighed judicial economy. First, it found that because the charges "are all intentional acts, and so the mens rea is similar," the evidence the State must present for the charges involving each victim was not "so different." Second, it found the "clarity of defense" factor was not an issue because Coronel-Cruz's general denial defenses to each count did

not conflict. Third, it stated it would instruct the jury to consider the charges separately and presume the jury would follow its instructions. Fourth, it said,

> What is persuasive to the Court is that the individuals who are alleged to have been abused here were of the same family; that they were under the same roof; that there was a familiarity between these alleged victims and the defendant in that they knew him; there was some sort of relationship with the individual; that there was this persuasion to come into the bedroom and act in a certain way; or that there was a similar theme of going on errands, and then allegedly these acts occurred in the vehicle. Those similarities and patterns do suggest a pattern of design that would be cross-admissible to each others' cases.
>
> . . .
>
> And then weighing that out in terms of judicial economy and presentation of witnesses and a similarity in the number of witnesses that would have to testify in both cases, that weighs in favor of trying the cases jointly.

The trial court granted the motion to amend the information and join the charges and denied the motion to sever.

At the start of trial, Coronel-Cruz renewed his motion to sever. In denying the motion, the court said,

> [T]he Court understands that 404(b) acts, by their very nature, can be prejudicial, but the question [is], are they more probative than prejudicial? And when the Court analyzes it in that way, I do find that they are more probative than prejudicial. And the reasons for joining these cases [as] previously articulated under the legal standards remain.

During trial, E.M. testified to the following: He spent more time alone with Coronel-Cruz when D.H.A. was working. He and Coronel-Cruz watched movies in Coronel-Cruz's room. Coronel-Cruz would offer to buy him candy and then would take E.M.'s clothes off and "touch [his] private parts." He said that Coronel-Cruz would put his penis in E.M.'s anus and mouth. E.M. also said that

Coronel-Cruz "would make threats" when E.M. "would tell him 'no.'" E.M. said that he rode with Coronel-Cruz in his car and sometimes Coronel-Cruz "would bring [him] to a place like—he will go to the store and buy something. And then after that, he would make [E.M.] put [Coronel-Cruz's] penis in [his] mouth." E.M. said that Coronel-Cruz would say he would "make [E.M.] feel like a woman," he would "call [E.M.] a girl," and he would tell E.M. to "like the color pink or style like that." E.M. said that Coronel-Cruz introduced him to "pictures of men naked." When asked if Coronel-Cruz ever showed him "pictures of men doing sexual acts with each other," E.M. responded, "Yes."

E.W. testified to the following: He often watched television with Coronel-Cruz in Coronel-Cruz's room. E.W. said that when Coronel-Cruz came home from work, "he invited [me] to go watch Netflix." He also said that while they were in Coronel-Cruz's bedroom, he "showed me his parts. . . . It was the part of you use[d] for reproduction." E.W. said, "Sometimes he will grab me and will hug me and will bite me. Sometimes he will paddle on my butt, on my rear, and that was just strange for me," and, "Sometimes he would come from behind and will put his body against my body, on my back. . . . I will try to escape, but he would grab me strongly." E.W. said Coronel-Cruz did this multiple times and when that happened, he could feel Coronel-Cruz's penis against his buttocks. He said that while in the car, Coronel-Cruz tried to grab between his legs and he tried to push Coronel-Cruz away. He also said that Coronel-Cruz took his hand and put it between Coronel-Cruz's legs while in the car. E.W. said,

One time, I had a soccer practice, and I asked him if he could give

> me a ride. And he asked me if I would allow him to hug me and for my body to be all over his body. And I told him, no, that that was not right. And then he just grabbed me and he did what he said he was going to do.
>
> . . .
>
> He'd like grab me and pull all of his body towards me.

When asked whether Coronel-Cruz ever talked with him about having sex with men, E.W. responded, "I think, yes." And E.W. said Coronel-Cruz told him that he could set him up with a woman and "that this woman could help me lose my virginity," and asked E.W. to send him a picture of his penis that Coronel-Cruz could give to the woman, which E.W. did. E.W. said that he never told anyone about these instances because he was scared, and that Coronel-Cruz threatened him and told him he would strike him if he told anyone.

Following E.W.'s testimony, Coronel-Cruz renewed his motion to sever, and the trial court acknowledged that it was "an appropriate motion to raise . . . given that the testimony was not exactly how we expected the testimony to be." The court noted that the incidents occurred two years ago and that E.W. and E.M. are "young boys who have different level[s] of memory recall." It acknowledged, "There is a difference in some of the types of activities that are alleged by [E.M.] versus the alleged activities by [E.W.]." But the court found there were "similarities in the tactic of isolation and that there are some similarities in the way that it happened allegedly in the bedroom." It found substantial similarities in the alleged acts because "they happened for a sexual purpose, that there was isolation that occurred, that there was no accident involved, that there was discussions of sexual gratification, [and] that they

happened in vehicles." The court denied the motion. Before the end of trial, Coronel-Cruz again renewed his motion to sever, which motion the court denied for the same reasons.

The jury returned guilty verdicts for the three charges involving acts against E.M. The jury deadlocked as the charges involving acts against E.W.; the court declared a mistrial as to those.

During the sentencing hearing, the State proposed written findings of fact and conclusions of law on ER 404(b) cross-admissibility and an order on Coronel-Cruz's motion to sever, both of which the court entered.

Coronel-Cruz appeals.

II. ANALYSIS

Coronel-Cruz says the trial court abused its discretion in granting joinder and denying severance of the counts involving acts against E.M. and E.W. We disagree.

We review a trial court's ruling on joinder and severance for abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Also, we review a trial court's evidentiary ruling for abuse of discretion. State v. Slater, 197 Wn.2d 660, 667, 486 P.3d 873 (2021). "'Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" Id. (quoting State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

CrR 4.3(a) provides,

Two or more offenses may be joined in one charging document, with

> each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
>
> (1) Are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.[1]

CrR 4.4(b) provides that a trial court "shall grant a severance of offenses whenever . . . the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense."

"Prejudice may result from joinder 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. Russell, 125 Wn.2d 24, 62–63, 882 P.2d 747 (1994). A defendant "seeking severance ha[s] 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.

To determine whether the "potential for prejudice" requires severance, a trial court considers four factors:

> (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.

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[1] See also RCW 10.37.060 ("When there are several charges against any person, or persons, for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, 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 informations to be consolidated.").

Russell, 125 Wn.2d at 63. "[A]ny residual prejudice must be weighed against the need for judicial economy." Id.

A. Cross-admissibility of evidence

Coronel-Cruz focuses on the fourth severance factor.[2] He says the trial court abused its discretion by joining the charges and denying severance because the evidence was not cross-admissible. We disagree.

Generally, under ER 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But evidence of other acts of misconduct may be admissible for other limited purposes, including proof of "a common scheme or plan." ER 404(b); State v. Lough, 125 Wn.2d 847, 865, 889 P.2d 487 (1995). "[A] common scheme or plan" arises "when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." Id. at 855. "Evidence of this second type of common scheme or plan is admissible because it is not an effort to prove the character of the defendant." State v. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012) (Emphasis omitted).

[2] Coronel-Cruz also contends the trial court erred in its findings on the first and second factors. The court wrote, "As to the first factor, the Court finds that, as the evidence on all counts rests almost entirely on a credibility analysis of the named-victim, the strength of the evidence on each count is relatively the same. As to the second . . . , the Court finds that the defenses as to each count are clear and not mutually antagonistic." Coronel-Cruz contends the strength of the evidence was not "relatively the same," and that because the facts and the crimes charged were different, his defenses to each count were "antagonistic." Because his defense was a general denial, it is not readily apparent how this would be so. Nor does he support those contentions with argument or citation to the record. RAP 10.3(a)(6) (Appellants must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record."). So we do not address them. State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) ("This court will not consider claims insufficiently argued by the parties.").

We read ER 404(b) along with ER 403, "which allows a trial court to exercise its discretion to exclude otherwise relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice.'" Slater, 197 Wn.2d at 677 (quoting ER 403).

Upon Coronel-Cruz's initial motion for severance, the court found the evidence cross-admissible. It said, "[I]n weighing out of that information—the probative value versus its prejudicial value—that there would be more probative value in admitting those—that conduct that is alleged in both cases." Each time Coronel-Cruz renewed his motion, the trial court reiterated the same rationale, finding the evidence "more probative than prejudicial." When Coronel-Cruz moved for severance after E.M. and E.W. testified, the trial court acknowledged, "[T]he testimony was not exactly how we expected the testimony to be," and that "[t]here is a difference in some of the types of activities that are alleged by [E.M.] versus the alleged activities by [E.W.]." But it found there was a common scheme or pattern sufficient to join the cases. The court entered the following written findings of fact and conclusions of law:

> 4. All evidence supporting the charged crimes concerning [E.M.] and [E.W.] are cross-admissible as to the charged crimes of the other victim under the 404(b) exception of common scheme or plan, based on the following factors shared between the incidents involving both victims:
>
> a. They both shared a residence with the defendant.
>
> b. They both regarded the defendant as a member of the family, calling him "uncle."
>
> c. The incidents took place within the same period between the summer 2017 and fall 2018.
>
> d. The incidents with both victims took place in the defendant's bedroom and in the defendant's car.

e. The incidents occurred after the defendant was able to isolate both victims in those locations.

f. The defendant had discussions with both victims as to their sexuality and/or their sexual identity.

5. The Court finds that evidence of these substantial similarities constitute more than mere coincidence and establish a common design by the defendant to satisfy his sexual compulsions through sexual abuse of children.

6. The Court finds that such evidence is highly probative of the defendant's common scheme or plan, and that its probative value is not outweighed by any danger of unfair prejudice.

Coronel-Cruz says there was no common scheme sufficient to establish ER 404(b) cross-admissibility. In contending the trial court abused its discretion, he assigns error to several findings of fact and conclusions of law on ER 404(b) cross-admissibility. "Appellate review of findings of fact is limited to determining whether they are supported by substantial evidence, and, if so, whether the findings support the conclusions of law and judgment." State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). "Substantial evidence exists where there is a 'sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.'" In re Pers. Restraint of Davis, 152 Wn.2d 647, 679, 101 P.3d 1 (2004) (quoting State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

Coronel-Cruz assigns error to finding of fact 3, which says,

> All evidence concerning the defendant's conduct towards [E.W.] goes to the charged crimes [involving acts against E.W.], so there is no uncharged evidence that would constitute 404(b) evidence of lustful disposition as to [E.W.]. The only exception is evidence that the defendant offered [E.W.] *marijuana and cocaine*, and/or [E.W.]'s observations of the defendant using marijuana and cocaine. *This evidence is only admissible if [E.W.] can clearly articulate that such incidents occurred during or immediately before/after incidents of charged crimes.* This evidence would be admissible under the

> 404(b) exception of common scheme or plan, as it is relevant to the defendant's design of fostering a relationship of secrecy and hidden behaviors with both victims that they were expected to keep from their mother.

(Emphasis added.) Coronel-Cruz says that because there was no testimony about drugs used to entice the boys or to create a secret with them, there was no evidence of a common scheme or plan. But the court conditioned its ruling on E.W. testifying that the drug-related incidents occurred during, immediately before, and immediately after the charged crimes.[3] E.W. did not so testify, and the trial court did not incorporate any such drug-related incidents into its ruling on joinder and severance. And as discussed below, plenty of cross-admissible evidence of a common scheme or plan shows that the trial court acted within its discretion.

Coronel-Cruz says the trial court erred in entering findings of fact 4(a) through (e), quoted above. But E.M. and E.W. testified that they shared a residence with Coronel-Cruz and called him Tio, and that the alleged incidents occurred during the same time frame and while alone with him in his bedroom and car. E.M. testified:

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[3] Although this finding was entered after trial, it appears to have been drafted as if E.W. had not yet testified. As mentioned above, during the sentencing hearing, the State proposed written findings of facts and conclusions of law. The trial court then inquired, "[T]he findings, No. 3 talks about an exception about the use of marijuana and cocaine, and I don't recall that that was discussed. . . . I know that the testimony never came in as to that. And so is this provision talking about what was proffered by the State, but, ultimately, it never did come in?" The State responded, "Correct, Your Honor." Defense counsel explained, "I believe that where we left it was that [the State] would have to elicit information specifically relating those incidents . . . , and I don't believe that it was ever elicited." After further discussion, the court said, "As I read it more carefully, it does say, the evidence is only admissible if that condition was made—or that foundation was laid." It also said the instruction "does sort of reserve, in a way, or preconditions the admission of that evidence based on certain issues to be presented to the Court," and entered the findings and conclusions.

> I remember that sometimes we would be home alone, and he would do the same things he did the first time or sometimes he—in his car, he would—he would bring me to a place like—he will go to the store and buy something. And then after that, he would make me put his penis in my mouth.

E.W. also testified to being alone with Coronel-Cruz in his car when he tried to grab between E.W.'s legs or take E.W.'s hand and put it between his legs. So substantial evidence supports those findings.

Coronel-Cruz assigns error to finding of fact 4(f), saying he did not discuss E.M.'s and E.W.'s sexuality with them.[4] But E.M. testified that Coronel-Cruz said he would "make [E.M.] feel like a woman," "call [E.M.] a girl," and tell E.M. to "like the color pink or style like that." E.W. testified that Coronel-Cruz talked with him about having sex with men and Coronel-Cruz told him that he could set E.W. up with a woman. So substantial evidence supports this finding too.

Coronel-Cruz assigns error to findings of fact and conclusions of law 4[5] through 6, which we treat as conclusions of law on cross-admissibility. He says there was no evidence of a common scheme or plan because he did not isolate E.M. in his room. He also says that the allegations of molestation occurring behind his closed bedroom door or in his car are "mere routine descriptions[s] of the common . . . factual circumstances that characterize such crimes in general." "[W]hile the prior act and charged crime must be markedly and substantially similar, the commonality need not be 'a unique method of committing the crime.'"

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[4] Coronel-Cruz also assigns error to the trial court's findings of fact and conclusions of law 1 and 2 and its unnumbered findings of fact. But he does not provide argument to support his claims, so we do not address them. See RAP 10.3(a)(6); Elliott, 114 Wn.2d at 15.

[5] Excluding its subparts.

Gresham, 173 Wn.2d at 422 (quoting State v. DeVincentis, 150 Wn.2d 11, 20–21, 74 P.3d 119 (2003)). Findings of fact 4(a) through (f) support conclusions 4 through 6. Coronel-Cruz repeatedly used his relationship with and proximity to E.M. and E.W. to isolate the boys in his room and car, touch them, and discuss their sexuality, which supports the conclusions that the "substantial similarities constitute more than mere coincidence and establish a common design by the defendant to satisfy his sexual compulsions through sexual abuse of children." This evidence is also "highly probative of the defendant's common scheme or plan," and Coronel-Cruz has not shown that the danger of unfair prejudice outweighs its probative value.

Thus, substantial evidence supports findings 4(a) through (f), which support the trial court's conclusions in 4 through 6 that the evidence was cross-admissible.

B. Potential for prejudice versus judicial economy

Coronel-Cruz says the joinder and denial of severance was manifestly prejudicial and outweighed the need for judicial economy. We disagree.

As discussed above, a defendant "seeking severance ha[s] 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.

> Joinder of offenses carries the potential for prejudice if (1) the defendant may have to present separate, possibly conflicting, defenses, (2) the jury may infer guilt on one charge from evidence of 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.

Slater, 197 Wn.2d at 676–77. After we consider the severance factors, we also weigh the residual "potential for prejudice" "against the need for judicial economy."[6] Russell, 125 Wn.2d at 63. "Foremost among these concerns is the conservation of judicial resources and public funds." Bythrow, 114 Wn.2d at 723.

Because the joinder and severance analyses require weighing the potential for prejudice with judicial economy, we consider them together. See State v. Bluford, 188 Wn.2d 298, 305–10, 393 P.3d 1219 (2017).

In Slater, our Supreme Court considered judicial economy and said, "[W]hile two trials are certainly more time and effort than one trial, the witnesses as to each charge in this case were different. Witnesses would not be tasked with showing up to both trials." 197 Wn.2d at 680. There, the need for judicial economy was outweighed by the potential prejudice because the evidence of each crime was not cross-admissible. Id. Unlike Slater, if the court tried the charges in separate cases, it would have called the witnesses to testify in both trials, including E.M. and E.W., their mother, the primary detective, and the child interview specialist. Here, considering the cross-admissibility of the testimonial evidence and weighing cross-admissibility against judicial economy, the trial court acted within its discretion in determining a lack of impermissible prejudice from trying the counts together.

[6] Also, where "each alleged victim would testify in the other's trial," joinder would ensure a "less traumatic trial for the alleged victims, their families, and other witnesses." State v. Beale, noted at 135 Wn. App. 1027, 2006 WL 3018106, at *4; see GR 14.1(c) ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.").

Coronel-Cruz says that the lack of guilty verdicts on the counts involving E.W. shows that the verdicts would have been different on counts involving E.M. if the court had severed the counts. But this court has held that, in the event of joinder and differing verdicts, joinder is not necessarily prejudicial because the different verdicts may show that the jury followed the court's instruction to consider the charges separately. See State v. Standifer, 48 Wn. App. 121, 126–27, 737 P.2d 1308 (1987); State v. York, 50 Wn. App. 446, 452, 749 P.2d 683 (1987). His claim fails because the trial court instructed the jury to consider each charge separately, and we presume the jury followed the instructions.[7] See State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) ("We presume the jury was able to follow the court's instruction.").

The trial court acted within its discretion by joining the charges and denying severance.

We affirm.

Chun, J.

WE CONCUR:

Verellen, J.

Dwyer, J.

[7] Jury instruction 25 provides, "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."

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82177-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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