Supreme Court No. 102122-4

No. 83322-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDY ROYAL,

Petitioner.

PETITION FOR REVIEW

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I. INTRODUCTION

Randy Royal lived in the White Street community for many years, struggling with substance abuse. Sometimes he shared drugs with women he met on the street, including sharing drugs in exchange for sexual activity.

Mr. Royal was charged with second-degree rape by two different women in early 2020. Although these two alleged incidents were alleged to have occurred several months apart and under different circumstances, the trial court denied Mr. Royal's motion to sever.

Mr. Royal was acquitted of the weaker count, but the prejudice caused by the erroneous severance ruling resulted in a guilty verdict on the remaining count. Mr. Royal appealed based on this error, and also argued that the court failed to adequately determine his offender score. The Court of Appeals affirmed Mr. Royal's judgment and sentence in a partially published opinion, which merits further review.

II. IDENTITY OF PETITIONER AND RELIEF SOUGHT

Mr. Royal seeks review of the Court of Appeals decision affirming his conviction and sentence.

III. ISSUES PRESENTED

1. In a motion for severance, the defendant must show that the prejudice of trying multiple counts together would outweigh the judicial economy of doing so. Evidence of other offenses is presumptively inadmissible to show action in conformity, and the State bears a substantial burden to demonstrate admissibility for another purpose. Did the trial court abuse its discretion in denying severance where the additional count caused undue prejudice, the defenses were in conflict, and the strengths of the counts greatly varied. Did the court's finding of a common scheme and its balancing of the factors amount to an abuse of discretion, and does the Court of Appeals decision thus conflict with decisions of this Court, meriting review? RAP 13.4(b)(1).

2. A trial court's calculation of a person's offender score must be supported by its findings of the person's criminal history. Where the State presented insufficient evidence to support Mr. Royal's offender score, and likewise the trial court's findings of criminal history do not support the offender score, the case must be remanded for resentencing under the proper offender score. Is the Court of Appeals decision finding Mr. Royal agreed to his offender score calculation based on defense counsel's pre-sentence memorandum supported by the record, and is the decision in conflict with decisions of this Court, meriting review? RAP 13.4(b)(1).

IV. STATEMENT OF THE CASE

1. Mr. Royal is arrested for separate incidents.

In late 2019, Randy Royal was known for riding his bicycle around the White Center community. RP 515, 524. He was a small-time methamphetamine (meth) user who had friends and relatives in the neighborhood. RP 527-29.

In October 2019, Betty Thorson accused Mr. Royal of

rape. RP 529-30. Ms. Thorson stated she had been homeless, sleeping outside, and struggling with an addiction to heroin for over 30 years. RP 532-32. Ms. Thorson claimed that when Mr. Royal asked to smoke meth with her, she agreed. RP 527-29. She also claimed that he suddenly hit her in the head as they smoked, and he raped her. RP 529-30.

The account Ms. Thorson told officers at the scene and the account she told at trial differed significantly. RP 610-11. Officers did not take any photographs of Ms. Thorson because they did not observe any injuries. RP 609. No sexual assault examination evidence was presented at trial because officers never sent the "rape kit" to the crime lab. RP 535, 655.

Ms. Thorson later admitted she was angry at Mr. Royal because he had taken $100 out of her bag to pay for the drugs she smoked. RP 576. As she said, "I just got robbed for $100."

RP 576. Rather than charge Mr. Royal with theft, the State charged Mr. Royal with rape in the second degree. CP 17-19.[1]

A few months later, Mr. Royal encountered Stephanie White, a woman whose aunt lived in White Center. RP 660-61, 699. Ms. White had been addicted to meth and heroin for a number of years and was experiencing homelessness. RP 690-92. At the time Ms. White met Mr. Royal in 2020, she had a daily meth habit and was "just roam[ing] the streets using drugs." RP 693, 725. "Sometimes it'd be free. Sometimes I'd have to pay." RP 726. Ms. White admitted she sometimes traded sex for the meth she needed. RP 726, 750. She claimed she was not working as a prostitute the night she met Mr. Royal, "but it doesn't mean that I haven't been other nights in the past." RP 750.

Ms. White said that she followed Mr. Royal at 11:00 p.m. when he asked if she wanted to get high. RP 699. After

[1] The jury acquitted Mr. Royal of this count, but the claim is discussed because it is relevant to the analysis of the

buying some sodas with Mr. Royal's money, RP 699-700, the two went to a construction site in the neighborhood. RP 701-02. After securing the area for privacy, Mr. Royal and Ms. White smoked his methamphetamine and had sexual relations for the better part of the night. RP 715, 732. There was no discussion of how Ms. White would compensate Mr. Royal for her share of the meth.

The next day, Ms. White claimed that Mr. Royal had suddenly hit her in the face, which broke her glasses and left her with a cut on the bridge of her nose. RP 705-06. She said that later in the evening, Mr. Royal became irate when he could not find his remaining meth and suspected Ms. White had stolen it. RP 713-14. He told Ms. White to "strip down" so he could search her for the missing meth, although she protested she did not have it. Id. Even though Ms. White said Mr. Royal threatened to beat her for taking his meth, she denied this was the way she sustained her facial injury. RP 737-38. Ms. White

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severance motion. CP 95.

admitted she had no money to pay Mr. Royal back for the meth they smoked that night, but claimed the sex was not transactional and that she did not steal from Mr. Royal. RP 739.

Ms. White returned to her aunt's home the next morning and immediately showered. RP 717. Apparently aware of the inconsistencies in her story, she did not want to file a police report; however, her aunt insisted. RP 717-18. Ms. White's aunt, a survivor of sexual assault and a recovered substance user herself, was sensitive to what Ms. White endured on the street. RP 756-58, 762-63. She pressured Ms. White to report she was raped, even though Ms. White did not want to. RP 763, 768, 770.

Although law enforcement officers knew Mr. Royal's identity, no arrest was made for three months.

2. Mr. Royal is arrested and moves for severance.

In late April 2020, Mr. Royal was arrested after an unrelated incident at an Aurora Avenue motel. RP 86-88, 793.

Mr. Royal was ultimately charged with rape in the second degree of Stephanie White for the incident in January 2020 at the construction site. CP 17 (count 1). Mr. Royal was also charged with rape in the second degree of Betty Thorson for the earlier incident in October 2019. CP 18 (count 4). Additionally, Mr. Royal was charged with assault in the second degree with sexual motivation and unlawful imprisonment for the later incident at the Aurora Avenue motel in April 2020. CP 17-18 (counts 2 and 3). Finally, Mr. Royal was charged with assault in the second degree of Zeynab Muhamed in September 2019. CP 18 (count 5).

Before trial, Mr. Royal moved for severance of the five counts. RP 23-27. The trial court partially agreed, severing counts 2 and 3 (Aurora motel) from the others, as well as count 5 (assault of Zeynab Muhamad). RP 38-39.[2] The court denied

[2] Mr. Royal was acquitted after trial of count 4, as to Betty Thorson; in a separate trial, he was acquitted of count 5 as to Zeynab Muhamed. CP 95; CP 137. The State moved to dismiss counts 2 and 3 (Aurora motel) before trial. RP 1291-92.

severance of count 1 (alleged rape of Stephanie White) and count 4 (alleged rape of Betty Thorson), finding the two "rapes allegedly appear to have been carried out in the same manner." RP 39. The court found "it promotes judicial economy to try them together, and that there won't be prejudice to the defendant by trying them together." Id.

Mr. Royal renewed his motion to sever during the trial. RP 305-11. The motion was again denied. Id.

3. Trial and post-trial proceedings.

Following a jury trial, Mr. Royal was acquitted of the rape of Betty Thorson. CP 95. He was convicted of one count – the second-degree rape of Stephanie White. CP 94. Mr. Royal moved for a new trial, arguing that even though the jury acquitted him of Ms. Thorson's allegations, he was denied a fair trial, facing multiple accusers and allegations of multiple violent sexual offenses. CP 138-69.

The court denied the motion for a new trial. CP 194. Mr.

Royal appealed, but the Court of Appeals, in the unpublished portion of its opinion, affirmed, finding the court did not abuse its discretion by denying the motion to sever. Slip op. at 14-15.

Mr. Royal received a standard range sentence, even though the prosecutor failed to produce evidence of his prior convictions. RP 1363, 1370; CP 206. The Judgment and Sentence (J & S) states that Mr. Royal's most recent conviction before this was from December 28, 2012. CP 206.

In the published portion of the Court of Appeals opinion, the Court found that because Mr. Royal's trial counsel acknowledged his client's criminal history in his presentence memorandum, the trial court did not err in relying on that acknowledgment. Slip op. at 15.

V. ARGUMENT

The Court of Appeals, in the unpublished portion of its opinion, disagrees with Mr. Royal's claim that he was unduly prejudiced by the prosecution of two rape counts in a single trial. Slip op. at 9. Yet this Court's case law demands a trial

court scrupulously weigh any potential prejudice caused by joinder of counts against the judicial economy of a joint trial. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Because the trial court's analysis fell short of the robust analysis required, the Court of Appeals decision is in conflict with this Court's own case law, and this Court should grant review. RAP 13.4(b)(1).

1. **This Court should grant review because the trial court abused its discretion in denying the motion to sever, and the Court of Appeals decision is in conflict with decisions of this Court.**

    a. Severance is required when a joint trial would prejudice the accused.

Because the right to a fair trial is a fundamental right of the accused, multiple counts must be severed when joinder would cause prejudice. State v. Bluford, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017). Severance of offenses is necessary where it prevents undue prejudice. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Undue prejudice includes the risk that a single trial invites the jury to cumulate

evidence or to infer a guilty disposition. State v. Sanders, 66 Wn. App. 878, 885, 833 P.2d 452 (1992); State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989).

A court must consider these factors when determining whether the potential for prejudice requires severance: 1) the strength of the State's evidence on each count; 2) the clarity of defenses as to each count; 3) the court's instructions to the jury to consider each count separately; and 4) the admissibility of evidence of other charges even if not joined for trial. Bluford, 188 Wn.2d at 311-12 (quoting Russell, 125 Wn.2d at 63).

b. The joint trial caused Mr. Royal prejudice, and the court should have granted the severance motion.

The trial court misapplied the four Bluford factors. Had the court properly balanced these factors, it would have severed the two rape cases as Mr. Royal requested.

As argued below, the court erred when weighing the strength of the evidence. Severance should be granted where the strength of one count may bolster a weaker count. Bluford,

188 Wn.2d at 311-12; Russell, 125 Wn.2d at 63-64. Here, the additional concern was that the jury may have been influenced by the aggregation of accusations, levering them to bolster the weaker elements of the stronger count (Stephanie White) – even after acquitting Mr. Royal of the overall weaker count (Betty Thorson). CP 95.

The court's failure to sever these two rape cases invited jurors to compensate for any doubts they had with Ms. White's testimony, and to cumulate the evidence, bolstering that count, in order to reach a compromise verdict of sorts, rather than to look critically at each individual accusation. The Court of Appeals suggests in a footnote that the trial court was unaware how weak the case involving Ms. Thorson was because trial counsel did not specifically refer to Ms. Thorson's testimony. Slip op. at 11 n.10 (citing Bluford, 188 Wn.2d at 310).

But this cannot be what this Court meant when it stated, "[A]ny prejudice that emerges over the course of the trial must still be addressed in a motion for severance that is timely raised

and renewed." Bluford, 188 Wn.2d at 310 (citing CrR 4.4(a)(2)). It is nonsensical for the appellate court to suggest the court who presided over the trial itself was unaware that one of its two alleged victims provided testimony riddled with inconsistencies. The court heard the same testimony the jury did, and the jury acquitted Mr. Royal of the weaker count involving Ms. Thorson. CP 95.

As to the second factor, Mr. Royal had a strong need to testify about consent on count 1, but not about his denial defense in count 4. See Brief of Appellant, at 20-22. Because the court's failure to sever the two counts prejudiced Mr. Royal's right to testify, the court's decision constitutes an abuse of discretion.

Mr. Royal agrees there was no error in the court's instructions to the jury; however, the instructions alone could not overcome the error resulting from the court's improper denial of the motion to sever.

Finally, the trial court's analysis erroneously determined

the two counts were cross-admissible as part of a common scheme or plan under ER 404(b). RP 31. The court's analysis failed to properly weigh the prejudice to Mr. Royal from a joint trial on two violent sex offenses, while giving improper weight to the State's briefing on cross-admissibility under ER 404(b). CR 180-81; RP 32. Even though the court found a similar "method" between the two alleged victims, this conclusion is at odds with this Court's discussion of modus operandi in Bluford. 188 Wn.2d at 312-13.

The Court of Appeals implies Mr. Royal "confuses the concept of modus operandi with common scheme or plan." Slip op. at 14. This is because the trial court and the State did so. The court used the phrase "common method" as well as "motive el grande" in its oral ruling. RP 32. It is unclear whether this was the court's spoken error or a transcription error for "modus operandi," since the State argued both exceptions under ER 404(b) in its brief and argument opposing severance. CP 180-81; RP 32.

Regardless, the court erroneously determined the two counts were cross-admissible as part of a common scheme or plan, despite its failure to adequately weigh the prejudice to Mr. Royal from a trial on two violent sex offenses. RP 31.

c. The court abused its discretion when it refused to grant severance, and the Court of Appeals decision conflicts with decisions of this Court.

Where prejudice is caused by the joinder of counts, "no amount of judicial economy can justify requiring a defendant to endure an unfair trial." Bluford, 188 Wn.2d at 311. The remedy for the erroneous denial of a motion to sever is reversal. Id. at 316.

A court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or if it was reached by applying the wrong legal standard. Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp., 122 Wn. 2d 299, 339, 858 P.2d 1054 (1993).

The Court of Appeals decision is in conflict with decisions of this Court. This Court should grant review. RAP 13.4(b)(1).

2. A defense pre-sentencing memorandum does not relieve the State of its burden to prove a defendant's criminal history, or the court's obligation determine an offender score.

"The trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). The burden remains on the State to prove a defendant's criminal history, not on the defendant. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

The Court of Appeals found Mr. Royal's defense sentencing memorandum submitted by counsel amounted to an affirmative acknowledgment of his criminal history. Slip op. at 7. The memo stated that the State had correctly calculated his offender score as 12, and even though two

additional adult convictions were included in his offender score by the court (bringing his score to 14), the court's error was academic, since it does not change Mr. Royal's standard range. Slip op. at 8.

Mr. Royal did not admit or acknowledge any particular prior convictions, although he did not object to his offender score. RP 1363. The Judgment and Sentence indicates that Mr. Royal's most recent felony conviction was from December 28, 2012. CP 206. The court made insufficient findings of Mr. Royal's criminal history because the State failed in its burden to provide evidence of it. All of Mr. Royal's alleged prior convictions were in King County, the same county which prosecuted him for the instant offense. The State did not produce evidence of them.

The State also provided no evidence, and likewise, the court made no findings, as to the length of Mr. Royal's prior incarceration, or the date of release from the most recent alleged conviction in 2012. Where there is no finding as to a

crucial fact, a reviewing court must presume the party with the burden of proof did not meet its burden. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); State v. Ramirez, 190 Wn. App. 731, 735, 359 P.3d 929 (2015).

Because the State did not meet its burden to prove Mr. Royal's offender score and the trial court made insufficient findings, this Court should grant review. RAP 13.4(b)(1).

VI. CONCLUSION

For the reasons set forth above, Mr. Royal respectfully requests that this Court grant review, as the Court of Appeals decision is in conflict with decisions of this Court. This Court should grant review. RAP 13.4(b)(1).

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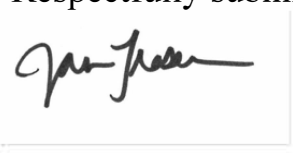
DATED this 21st day of June, 2023.

Respectfully submitted,



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

THE STATE OF WASHINGTON, Respondent, v. RANDY LEE ROYAL, Appellant.	No. 83322-7-I PUBLISHED IN PART OPINION

BOWMAN, J. — Randy Lee Royal appeals his jury conviction for second degree rape. Royal argues the State failed to prove his prior convictions in calculating his offender score. He also claims that the trial court erred by denying his motion to sever an additional second degree rape charge. In the published portion of our opinion, we hold that when a defendant affirmatively presents his criminal history to the trial court in a presentence memorandum for the purpose of calculating his offender score, he acknowledges those convictions under RCW 9.94A.530(2) and relieves the State of its burden to prove them. In the unpublished portion of our opinion, we conclude that the trial court did not abuse its discretion by denying Royal's motion to sever. We affirm.

FACTS[1]

On October 4, 2019, B.T. was homeless and living in White Center. Late that evening, she was sitting in a stairwell behind a strip mall. At some point, Royal approached B.T., asking if she wanted to smoke methamphetamine (meth). B.T. knew Royal and agreed to smoke with him. Royal hung blankets around the area to shield them from public view. B.T. and Royal then smoked meth together.

Without warning, Royal punched B.T. in the face and told her that if she resisted, he would hit her again. He then pulled off B.T.'s pants and raped her for several hours. During the assault, Royal instructed B.T. to hold a pipe to his mouth so that he could smoke meth while raping her. In the early morning of October 5, Royal allowed B.T. to put on her clothes. As Royal put on his shoes, B.T. fled. She ran to a nearby Starbucks and used the barista's cell phone to call the police. When they arrived, B.T. told the police that Royal assaulted her. Officers interviewed B.T. and photographed the area where the assault occurred.

Late in the evening on January 28, 2020, Royal approached S.W. while she waited at a bus stop in White Center.[2] S.W. recognized Royal but knew him only as "R&R." Royal asked if she wanted to " 'smoke some drugs.' " S.W. agreed, and they went to a nearby vacant townhome still under construction. They entered one of the unfinished rooms and Royal put up pieces of drywall to block the opening. After they smoked meth, Royal removed his pants and told

[1] We discuss only those facts presented to the trial judge at the motion to sever.

[2] The bus stop is in front of the Department of Social and Health Services (DSHS) White Center Community Services Office.

S.W. to " 'suck his dick.' " She refused, and Royal punched her in the face, breaking her glasses and cutting the bridge of her nose. Royal then told her that if she resisted, he would kill her. Royal forced S.W. to undress and raped her for several hours. During the assault, Royal took several breaks so that he could smoke meth. Early the next morning on January 29, S.W. fled and ran to her aunt's house nearby. She reported the assault to police the next day on January 30.

On April 28, 2020, officers arrested Royal after an incident with E.C. On May 1, 2020, the State charged Royal with one count of second degree rape of S.W.[3] On February 26, 2021, the State amended the information, adding one count of second degree rape of B.T. and asserting all charges were part of a common scheme or plan.[4]

Before trial, Royal moved to sever the charges. He argued that he could not have a fair trial if the jury heard evidence from both counts. The State responded that the jury would hear evidence from each case regardless because it was cross admissible to show a common scheme or plan. The trial court denied Royal's motion, determining that the rapes "appear to have been carried out in the same manner. . . . [S]o, . . . B.T. and S.W. can be tried together."[5]

[3] The State also charged Royal with one count of second degree assault of E.C. with sexual motivation and one count of false imprisonment of E.C. Those charges are not at issue in this appeal.

[4] The State also added one count of second degree assault of Z.M. That charge is not at issue in this appeal.

[5] The court severed the charges involving E.C. and Z.M.

At trial, B.T. testified that after speaking to police, she went to Harborview Medical Center to complete a sexual assault examination. A police detective testified that law enforcement did not process the rape kit in time for trial. During cross-examination of B.T., defense counsel attacked her credibility and elicited several statements inconsistent with her earlier statements to the police.

After B.T.'s testimony, Royal renewed his motion to sever. He made no substantive argument and referred the court to his pretrial severance motion. The court again denied the motion to sever.

S.W.'s testimony mostly aligned with her earlier statements to police. She testified that she also completed a sexual assault examination, which included a vaginal swab. DNA[6] analysis confirmed the presence of Royal's DNA. During cross-examination of S.W., defense counsel also attacked her credibility.

At the close of trial, defense counsel argued that B.T. was not credible because of the multiple inconsistent statements in her testimony. And he argued that S.W. consented to sex with Royal in exchange for drugs. The jury acquitted Royal of second degree rape of B.T. but convicted him of second degree rape of S.W.

Before sentencing, Royal moved for arrest of judgment and a new trial. The court denied the motion. In his sentencing memorandum, Royal represented that his "offender score is 9+ based on his criminal history." He then listed these 10 adult and 2 juvenile felony convictions as his criminal history:

> [C]ontrolled substance distribution, theft in the first degree, attempt to elude a police vehicle, theft in the first degree, escape in the

[6] Deoxyribonucleic acid.

> second degree, conspiracy to deliver cocaine, promoting prostitution in the second degree, taking a motor vehicle without permission, possession of stolen property in the first degree and possession of stolen property in the second degree. . . . Royal also has juvenile felony convictions for theft in the second degree and robbery in the first degree.

Royal asserted that his "sentencing range . . . is 210 to 280 months."

At his sentencing hearing on October 8, 2021, Royal again agreed to the calculation of his offender score and standard range:

> [PROSECUTOR:] Before we move forward, I'll ask — well, the State calculates his offender score as a 14. This crime has a seriousness level of 11, a standard range of 210 to 280 months on indeterminate sentence, maximum term of life in prison, and/or $20,000. I'll ask [defense counsel] if he agrees with that.
>
> [DEFENSE COUNSEL]: Yes, that's correct.

The trial court sentenced Royal to a mid-range, indeterminate sentence of 245 months to life. Royal appeals.

ANALYSIS

Offender Score

Royal argues that "[t]here was insufficient evidence to establish [his] criminal history and offender score." We disagree. Because Royal affirmatively agreed to all but two of his prior convictions, he relieved the State of its obligation to prove them. And excluding the two unproved convictions from Royal's offender score does not change his standard range, so that error is harmless and does not warrant resentencing.

Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the trial court determines a standard sentencing range using a grid based on a crime's seriousness and a defendant's offender score. RCW 9.94A.505, .510, .520,

.525. An offender score is the sum of points accrued for prior and current convictions. RCW 9.94A.525.

The State must prove the existence of a defendant's prior convictions by a preponderance of the evidence. State v. Cate, 194 Wn.2d 909, 912-13, 453 P.3d 990 (2019). Bare assertions of a defendant's criminal history are not enough. State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). The State must provide some kind of evidence to satisfy its burden. Id. "This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing 'some minimal indicium of reliability beyond mere allegations.' " State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009)[7] (quoting State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999)). Such evidence may include certified copies of prior judgments, comparable documents of record, or transcripts of prior proceedings. State v. Wilson, 113 Wn. App. 122, 136, 52 P.3d 545 (2002). A sentencing court must "specify the convictions it has found to exist," and all of this information "shall be part of the record." RCW 9.94A.500(1). Whether a prior felony exists " 'is a question of fact.' " State v. Arndt, 179 Wn. App. 373, 378, 320 P.3d 104 (2014) (quoting In re Pers. Restraint of Adolph, 170 Wn.2d 556, 566, 243 P.3d 540 (2010)).

We review a sentencing court's calculation of an offender score de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). But we review underlying factual determinations for abuse of discretion. In re Pers. Restraint of Toledo-Sotelo, 176 Wn.2d 759, 764, 297 P.3d 51 (2013). A court abuses its

[7] Emphasis and internal quotation marks omitted.

discretion when its decision is unreasonable or exercised on untenable grounds or for untenable reasons. State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

While the burden to prove criminal history generally rests with the State, a court may rely on information "admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing" to determine a defendant's sentence. RCW 9.94A.530(2). The State's burden to prove prior convictions is relieved "only if the defendant affirmatively acknowledges the alleged criminal history." Hunley, 175 Wn.2d at 917. A defendant's "mere failure to object" to State assertions of criminal history at sentencing does not result in an "acknowledgment." Id. Nor does a defendant affirmatively acknowledge his prior convictions by agreeing to the State's sentencing recommendation, the standard sentencing range, or the offender score. Mendoza, 165 Wn.2d at 928; State v. Ramirez, 190 Wn. App. 731, 734, 359 P.3d 929 (2015).

Royal argues that "[w]ithout certified copies of [his] prior convictions, it was impossible for the court to accurately determine [his] offender score." But Royal presented his criminal history to the court in his presentence memorandum for the purpose of calculating his offender score. Royal's assertion of his criminal history amounts to an affirmative acknowledgment of facts and information introduced for the purpose of sentencing. See Mendoza, 165 Wn.2d at 928. So, the trial court could rely on those facts and information in calculating his offender score. See RCW 9.94A.530(2).

Even so, the judgment and sentence shows the trial court included in his offender score two prior adult convictions that Royal did not affirmatively acknowledge—possession of stolen property in the second degree and conspiracy to deliver a substance in lieu of a controlled substance. Because the State failed to prove the existence of those convictions by a preponderance of the evidence, the trial court erred by counting them in Royal's offender score.

Generally, the remedy for an incorrect offender score is resentencing using a corrected score. State v. Schwartz, 194 Wn.2d 432, 438, 450 P.3d 141 (2019). But a recalculated offender score that does not affect a defendant's standard range is harmless unless the trial court conveyed a desire to impose a sentence at the low end of the standard range. State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996); State v. Kilgore, 167 Wn.2d 28, 41-42, 216 P.3d 393 (2009); see, e.g., State v. Derri, 17 Wn. App. 2d 376, 411 n.14, 486 P.3d 901 (2021) (error in offender score was harmless when the State failed to prove a juvenile conviction, resulting in an offender score of 16 instead of 17), aff'd, 199 Wn.2d 658, 511 P.3d 1267 (2022).[8] Royal's recalculated offender score reduces from 14 to 12. The recalculated score does not impact his standard range. And

[8] We recognize that another panel from this court relied on McCorkle to hold that an offender score error that does not affect the standard range is not harmless when the " 'record does not clearly indicate that the sentencing court would have imposed the same sentence' without the erroneous offender score." State v. Griepsma, 17 Wn. App. 2d 606, 621, 490 P.3d 239 (quoting State v. McCorkle, 88 Wn. App. 485, 499-500, 945 P.2d 736 (1997), aff'd, 137 Wn.2d 490, 973 P.2d 461 (1999)), review denied, 198 Wn.2d 1016, 495 P.3d 844 (2021). But McCorkle relies on Parker, which held that "[w]hen the sentencing court incorrectly calculates the standard range . . . , remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." McCorkle, 88 Wn. App. at 499; State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (emphasis added). Because the incorrect offender score here did not affect Royal's standard range, the analysis in McCorkle does not apply.

the record here does not show that the trial court wanted to sentence Royal to the low end of the standard range. As a result, the trial court's error was harmless and we need not remand for resentencing.[9]

The panel has determined that the rest of this opinion has no precedential value and should not be published in accordance with RCW 2.06.040.

Severance

Royal argues that the trial court erred by denying his motion to sever because he was "unduly prejudiced by the prosecution of both rape counts in a single trial." We disagree.

We review an order denying severance for manifest abuse of discretion. State v. Thanh Pham Nguyen, 10 Wn. App. 2d 797, 814, 450 P.3d 630 (2019). "Severance" refers to "dividing joined offenses into separate charging documents." State v. Bluford, 188 Wn.2d 298, 306, 393 P.3d 1219 (2017). Under CrR 4.3(a)(1), the trial court has considerable discretion to join two or more offenses of "the same or similar character, even if not part of a single scheme or plan." State v. Eastabrook, 58 Wn. App. 805, 811, 795 P.2d 151 (1990). Still, under CrR 4.4(b), the court "shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." A defendant seeking severance must show that a single trial on both counts " 'would be so manifestly prejudicial as to

[9] Because we conclude that the trial court properly relied on Royal's affirmative acknowledgment of his criminal history in calculating his offender score, we do not address the State's argument that Royal invited the error.

outweigh the concern for judicial economy.' " State v. Moses, 193 Wn. App. 341, 359-60, 372 P.3d 147 (2016) (quoting State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990)).

To determine whether potential prejudice warrants severance, the trial court must consider

> "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) 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."

Thanh Pham Nguyen, 10 Wn. App. 2d at 815 (quoting State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)). The court must also weigh any potential prejudice against the judicial economy of a joint trial. Id.

1. Strength of the Evidence

The first severance factor concerns the relative strength of the State's evidence on each count. Russell, 125 Wn.2d at 63. Severance may be proper when the evidence on one count is "remarkably stronger" than the other. State v. MacDonald, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004). Evidence is strong enough on each count if it would allow a rational jury to find the defendant guilty of each charge independently. See State v. Bryant, 89 Wn. App. 857, 867, 950 P.2d 1004 (1998); Bythrow, 114 Wn.2d at 721-22.

Here, both cases largely turned on credibility. And both victims detailed the allegations of sexual assault. B.T. knew Royal and immediately identified him as the person who raped her. S.W. was less familiar with Royal but was able to identify him as "R&R." The evidence on both counts would allow a

rational jury to find Royal guilty of each charge independently, and there was no significant difference in the strength of the State's evidence on each count.[10]

2. Clarity of Defenses

The second severance factor is whether joinder prejudiced the clarity of the accused's defenses to each count. Russell, 125 Wn.2d at 64. A trial court must sever counts if "the defendant makes a convincing showing . . . that he has both important testimony to give concerning one count and a strong need to refrain from testifying about the other." State v. Weddel, 29 Wn. App. 461, 468, 629 P.2d 912 (1981). But "a defendant's mere desire to testify only to one count is an insufficient reason to require severance." Id. at 467.

Royal claims joinder prejudiced him because he had a "strong need to testify" about S.W.'s alleged consent "but not about his denial of [B.T.'s] count." But Royal does not identify what testimony he planned to offer in defense of S.W.'s allegations or why joinder precluded him from testifying.[11] He states only that his defense "would have been enhanced by his own testimony." Royal fails

[10] Royal argues the State's evidence as to B.T. was "relatively weaker" because DNA evidence supported S.W.'s case and B.T. damaged her credibility on cross-examination. But this information was not before the court when it denied severance. And we review "only the facts known to the trial judge at the time" of the pretrial motion. Bluford, 188 Wn.2d at 310. While Royal renewed his motion to sever after B.T.'s testimony, he made no argument that the relative strength of each count changed during trial. Instead, he referred the trial court back to the argument in his pretrial brief.

[11] It is likely Royal chose not to testify in S.W.'s case to avoid being impeached by his own statements. When police arrested Royal in April 2020, he told them that he met S.W. at a "trap house" and that "they didn't meet at DSHS." He said they smoked meth and S.W. performed oral sex on him in a "port-a-potty" at the construction site. And he denied assaulting her. The trial court determined that Royal's statements were admissible under CrR 3.5, but the State did not offer them at trial. In his motion for arrest of judgment, Royal argued that he "could have been impeached with these statements if he chose to testify" and that the court's refusal to exclude those statements "affected [his] decision not to testify on [S.W.'s] Count."

to show he had important testimony to offer in one case and a strong need to refrain from testifying in the other.

3. Jury Instructions

The third severance factor is whether the trial court properly instructed the jury to consider each count separately. Russell, 125 Wn.2d at 66. Royal concedes that the court properly instructed the jury. And the record shows the court told the jury that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." We presume the jury followed the court's instructions. Id. at 84.

4. Cross Admissibility

The fourth severance factor asks whether evidence of each count would likely be cross admissible under ER 404(b) if the court granted severance. Russell, 125 Wn.2d at 66. Under ER 404(b),

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Here, the State argued evidence of each count would be cross admissible to show that Royal acted under a common scheme or plan.

There are two categories of common scheme or plan evidence: (1) "[W]here several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" and (2) where "an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." State v.

Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). The State argued and the court agreed that the evidence here would satisfy the second category.

Evidence of a common scheme or plan is not offered to show the defendant's propensity to commit a crime. See State v. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012). Instead, the evidence is offered to show that the defendant developed a plan to commit the alleged crime and acted in conformity with that plan. Id. To admit evidence of such a plan "requires substantial similarity between the prior bad acts and the charged crime." State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). And "a common plan or scheme may be established by evidence that the defendant 'committed markedly similar acts of misconduct against similar victims under similar circumstances.' " Id. at 27 (Chambers, J., concurring) (quoting Lough, 125 Wn.2d at 852); see, e.g., Gresham, 173 Wn.2d at 422-23 (defendant's prior acts were similar enough to demonstrate a common plan when they showed that he "took a trip with young girls and at night, while the other adults were asleep, approached those girls and fondled their genitals"); State v. Slocum, 183 Wn. App. 438, 455, 333 P.3d 541 (2014) (defendant's prior acts were similar enough to demonstrate a common plan when they showed that he invited both victims to sit with him in his recliner so that he could touch their privates).

Here, the allegations against Royal were similar enough to support the trial court's determination that they would likely amount to a common scheme or plan. In each case, Royal approached homeless women late at night. He lured them with the offer of drugs and secured privacy with each victim by moving

objects to conceal his actions from public view. And he gained compliance by suddenly punching each victim in the face and threatening further violence.[12] The trial court did not abuse its discretion by concluding that the evidence on each charge would likely be cross admissible to show a common scheme or plan.

Citing Bluford, 188 Wn.2d at 312-13, Royal argues that the trial court abused its discretion because the evidence was not distinct enough to show modus operandi. But Royal confuses the concept of modus operandi with common scheme or plan. The purpose of modus operandi evidence is to " 'corroborate the identity of the accused as the person who likely committed the offense charged.' " State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) (quoting State v. Irving, 24 Wn. App. 370, 374, 601 P.2d 954 (1979)). Evidence is admissible to prove modus operandi

> "only if the method employed in the commission of both [the prior act and the charged offense] is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged."

State v. Foxhoven, 161 Wn.2d 168, 176, 163 P.3d 786 (2007) (quoting Vy Thang, 145 Wn.2d at 643) (quoting Russell, 125 Wn.2d at 66-67)). But Royal's identity was never at issue. And the record shows that the trial court's

[12] Royal is about six feet five inches tall and weighs over 200 pounds. B.T.'s defense counsel described him as "twice her size." S.W. told police that Royal is "much bigger than her in stature" and testified at trial that he is "a lot stronger than I am."

determination rested on common scheme or plan, not modus operandi.[13]

5. Judicial Economy

Finally, we balance any residual prejudice resulting from a joint trial against the need for judicial economy. Russell, 125 Wn.2d at 63. "A single trial obviously only requires one courtroom and judge. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is significantly reduced when the offenses are tried together." Bythrow, 114 Wn.2d at 723. "Furthermore, the reduced delay on the disposition of the criminal charges, in trial and through the appellate process, serves the public." Id. Here, the balance in favor of judicial economy is clear because Royal fails to show prejudice under any of the severance factors.[14]

Because Royal affirmatively acknowledged his criminal history in his presentence memorandum for the purpose of calculating his offender score, the trial court did not err in relying on that information. And including two unproved convictions in his score resulted in harmless error. Finally, the court did not

[13] At the severance motion hearing, the State argued that evidence for each charge was cross admissible to show a common scheme or plan. The trial court determined that "B.T. and S.W. look like part of the same [modus operandi]. . . . And it really shows a similar method between the two alleged victims." But the court determined that the evidence was cross admissible because "these rapes allegedly appear to have been carried out in the same manner." And later, the court clarified that "I believe, my ruling was that this was [ER] 404(b) evidence of a common scheme or plan."

[14] Royal's acquittal on B.T.'s charge also evidences a lack of prejudice.

abuse its discretion by denying Royal's motion to sever. We affirm his conviction and sentence.

WE CONCUR:

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. 83322-7-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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Date: June 21, 2023

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