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70860-1

No. 70860-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DAVID J. HANSEN, III,

Appellant.

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

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# BRIEF OF APPELLANT

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SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

The trial court violated Mr. Hansen's constitutionally protected right to due process, as well as CrR 4.4(b), when it denied Mr. Hansen's motion to sever two counts of robbery in the first degree, and thereby allowed admission of highly prejudicial evidence that was not otherwise cross-admissible.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Fourteenth Amendment and Article I, section 3 right to due process, as well as CrR 4.4(b), require severance of counts when necessary to promote a fair determination of the guilt or innocence of the defendant. Where the trial court denied Mr. Hansen's motion to sever the two counts of robbery in the first degree and thereby allowed admission of highly prejudicial evidence that was not otherwise cross-admissible, when the two counts involved different victims, occurred almost eight weeks apart and under different circumstances, and involved different defense theories, must his convictions be reversed for violation of his right to due process and CrR 4.4?

C. STATEMENT OF THE CASE

On November 13, 2012, David Hansen went to Troy Bodnar's house in response to an advertisement Mr. Bodnar placed on Craigslist for a sexual encounter and to "party," a code word for drug use. 7/2/13(AM)

RP 86-88; 7/2/13(PM) RP 28. They had not met before. 7/2/13(AM) 94. Over the next several hours, they injected methamphetamine and engaged in sex. 7/2/13(AM) RP 89, 92; 7/2/13(PM) RP 32. Mr. Hansen offered to perform additional sexual acts in exchange for money. 7/2/13(AM) RP 93. Mr. Bodnar refused and asked Mr. Hansen to leave. 7/2/13(AM) RP 93, 94. Mr. Bodnar went into the bathroom to dress, but as he came out of the bathroom he was struck on the back of his head and knocked to the floor. 7/2/13(AM) RP 97, 110; 7/2/13(PM) RP 6. According to Mr. Bodnar, Mr. Hansen stated he had a gun and then ran toward the door with Mr. Bodnar's iPad. 7/2/13(AM) RP 103, 110-11; 7/2/13(PM) RP 10. Mr. Bodnar did not see a gun, but he saw Mr. Hansen holding a glass candleholder, which he assumed was used to strike him. 7/2/13(PM) RP 5, 7, 9, 51-52. Mr. Bodnar chased after Mr. Hansen but Mr. Hansen escaped out the back door with the iPad. 7/2/13(PM) RP 9-10.

Mr. Bodnar called 911. 7/2/13(PM) RP 14. He was taken by ambulance to a hospital where he received six stitches and was discharged. 7/2/13(PM) RP 16-17. Back at his house, Officer Wade Jelcick interviewed Mr. Bodnar and took the candleholder into evidence. 7/2/13(PM) RP 19, 57. Mr. Bodnar did not allow Officer Jelcick into his bedroom, purportedly because he was ashamed and he wanted to hide the evidence of drug use. 7/2/13(AM) RP 104; 7/2/13(PM) RP 21, 63. He

also did not report that Mr. Hansen mentioned a gun or that they used drugs. 7/2/13(AM) RP 72-73.

Det. Dale Williams was assigned to investigate the robbery of Mr. Bodnar. 7/2/13(PM) RP 56. A fingerprint lifted from the candleholder matched Mr. Hansen. 7/2/13(PM) RP 58, 80-81, 86. Det. Williams created a photo montage that included Mr. Hansen and showed it to Mr. Bodnar who identified Mr. Hansen as the person who robbed him. 7/2/13(PM) RP 58-59, 61.

Almost eight weeks later, on January 4, 2013, Al Payne invited Josh Jasperson, an acquaintance, to his house where they smoked methamphetamine. 7/3/13 RP 12-13, 14. Mr. Jasperson arranged for Mr. Hansen to join them. 7/3/13 RP 15. Mr. Jasperson knew Mr. Hansen but Mr. Payne had not met him before. 7/3/13 RP 15. Mr. Hansen arrived, smoked methamphetamine, engaged in sex with Mr. Jasperson, and left several hours later. 7/3/13 RP 16-17. Mr. Hansen never discussed money. 7/3/13 RP 17.

The following afternoon, Mr. Hansen allegedly returned to Mr. Payne's house by the back door. 7/3/13 RP 18-20. Mr. Jasperson was still there. 7/3/13 RP 19. At first Mr. Hansen was friendly, but after about 15 minutes, he purportedly pulled a gun from his waistband and said, "This is a robbery." 7/3/13 RP 21-22. He then took their cellular telephones, as

well as Mr. Payne's laptop computer, several watches, and his wallet, and left through the back door. 7/3/13 RP 24-26. Mr. Payne used a borrowed telephone to cancel his credit cards and then took a sleeping aid and went to sleep. 7/3/13 RP 26-28, 50.

Two weeks later, Mr. Payne reported the robbery to police after he read a newspaper report about a robbery at gunpoint following a sexual encounter in a car that matched the description of Mr. Hansen's car. 7/3/13 RP 31-32. He gave the police Mr. Hansen's address and a description of his car. 7/3/13 RP 51. According to Mr. Payne, he also gave the police Mr. Jasperson's e-mail address but he was unable to provide his telephone number because it was stored in his stolen cellular telephone. 7/3/13 RP 34-35.

Det. Michael Magan was assigned to investigate the robbery of Mr. Payne. 7/2/13(AM) RP 6. According to Det. Magan, Mr. Payne would not provide any contact information for Mr. Jasperson or for the person whose telephone he borrowed to cancel his credit cards. 7/2/13(AM) 32-33. Det. Magan created a photo montage that included Mr. Hansen's photo and showed it to Mr. Payne who identified Mr. Hansen as the person who robbed him. 7/2/13(PM) RP 23-24.

Mr. Hansen was charged in a single information with two counts of robbery in the first degree, Count I charging robbery of Mr. Bodnar by

infliction of bodily injury, and Count II charging robbery of Mr. Payne by display of a firearm. CP 1-2. Mr. Hansen moved to sever the count, which was denied. 7/1/13 RP 3-12; CP 19-24. Following a jury trial, Mr. Hansen was convicted as charged. CP 74, 75.

D. ARGUMENT

**The trial court erroneously denied Mr. Hansen's motion for severance of the two counts, and thereby allowed admission of confusing, irrelevant, and highly prejudicial evidence, in violation of Mr. Hansen's constitutional right to a fair trial, as well as in violation of CrR 4.4(b).**

1. A defendant is entitled to severance of counts where joinder prevents a fair determination of guilt or innocence.

A defendant has the constitutional right to due process and a fair trial. U.S. Const. Amend. XIV; Wash. Const. art. I, sec. 3. To this end, separate counts must be severed when joinder would prevent a fair trial.

CrR 4.3 provides, in pertinent part:

> (a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, 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.

However, joinder should never be used in such a way as to deny a defendant a substantial right. *State v. Weddel*, 29 Wn. App. 461, 464, 629 P.2d 912 (1981) (citing *State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968), *vacated on other grounds sub nom. in Smith v. Washington*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972)). Thus, where joinder is technically proper but would result in unfair prejudice, the counts must be severed. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998); *State v. Gatalski*, 40 Wn. App. 601, 606, 699 P.2d 804 (1985).

CrR 4.4 provides, in pertinent part:

> (b) Severance of Offenses. The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), 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.

CrR 4.4(b) includes the term "shall," which creates a mandatory duty. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Severance 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).

Washington courts have articulated four specific concerns regarding improper joinder: 1) a defendant may be confounded or embarrassed in presenting separate defenses; 2) the jury may use evidence of one crime to improperly infer a defendant's criminal disposition; 3) the jury may cumulate evidence of several crimes to find guilt when, if considered separately, it would not find guilt; and 4) the jury may feel a latent hostility against the defendant engendered by charging several crimes as distinct from a single charge. *Smith*, 74 Wn.2d at 754-55 (citing *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964)); *State v. York*, 50 Wn. App. 446, 450-51, 749 P.2d 683 (1988). To assist courts in weighing these concerns, the Supreme Court set forth the following "prejudice-mitigating" factors that a court must consider 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 consider each count separately; and 4) the admissibility of evidence of other charges even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994); *accord State v. Rodriguez*, 163 Wn. App. 215, 228, 259 P.3d 1145 (2011).

A trial court's decision on a motion to sever is reviewed for manifest abuse of discretion. *Bryant*, 89 Wn. App. at 864.

2. Mr. Hansen was entitled to severance of the counts.

The foregoing concerns and the lack of prejudice-mitigating factors mandated severance of the two counts of robbery.

*a. Strength of the evidence.*

Severance is warranted where the strength of one count bolsters a weaker count. *Russell*, 125 Wn.2d at 63-64. Here, the relative strength of Count I improperly bolstered the weaker Count II. To establish Count I, the State relied not only on the credibility of Mr. Bodnar, but also on the testimony of the responding officer and the latent fingerprint examiner. By contrast, to establish Count II, the State relied exclusively on the credibility of Mr. Payne. In both cases, however, the alleged victims were less than forthcoming with the investigating detectives. Mr. Bodnar did not allow Det. Williams into his bedroom, purportedly because he was embarrassed and wanted to hide his drug use. 7/2/13(AM) RP 104; 7/2/13(PM) RP 21, 63. In addition, he also did not report that Mr. Hansen mentioned a gun or that they used drugs, details that seem improbable a victim would forget. 7/2/13(AM) RP 72-73.

Mr. Payne was similarly reticent with Det. Magan. He did not report the incident for several weeks, and when he did make a report, he withheld contact information for two witnesses who could corroborate his account. 7/2/13(AM) RP 32-33.

In light of the comparative weakness of the evidence to establish Count II and the failure to be by both alleged victims, joinder invited the jury to cumulate the evidence and to infer criminal disposition, rather than to look closely at the lack of evidence as to Count II and lack of credibility of the individual alleged victims.

*b. Clarity of defenses.*

A defendant's desire to testify on one count but not on another count requires severance where the defendant has important testimony to give on the one count and a strong need to remain silent on the other count. *Russell*, 125 Wn.2d at 65 (citing *Watkins*, 53 Wn. App. at 270). Here, prior to trial, Mr. Hansen indicated that he had separate defense theories for the two counts; for Count I, his defense was self-defense, whereas for Count II, his defense was general denial. CP 22. He noted that to present evidence of self-defense as to Count I, he needed to take the stand and thereby expose himself to impeachment with his prior convictions. On the other hand, he did not need to give up his right to remain silent to present his defense of denial as to Count II. 7/1/13 RP 5-6, 12. Therefore, the jury was needlessly and prejudicially informed of Mr. Hansen's prior convictions as to Count II.

The trial court mistakenly relied on *Weddel*, which is distinguishable from the present case. 7/1/13 RP 12. In *Weddel*, the

defendant was seen under suspicious circumstances on one victim's property, but there was no evidence of an attempted entry. 29 Wn. App. at 462-63. The following day, the defendant was seen approximately one mile away from the first location leaving the another victim's property which had been burglarized. *Id.* at 463. Based on the two incidents, the defendant was charged with attempted burglary and burglary, and the charges were joined for trial. *Id.* at 463-64. At trial, the defendant presented alibi witnesses for the burglary charge but no evidence for the attempted burglary charge. *Id.* at 464. Following a jury trial, the defendant was convicted of burglary and acquitted of attempted burglary. *Id.* On appeal, the defendant contended joinder was unduly prejudicial because, *inter alia*, it frustrated his desire to testify concerning the burglary charge but to remain silent concerning the attempted burglary charge. *Id.* at 465. The court disagreed, and noted a defendant's desire to testify only to one count is insufficient to require severance unless the defendant makes a "convincing showing to the trial court that he has both important testimony to give concerning one count and a strong need to refrain from testifying about the other." *Id.* at 468 (citing *United States v. Jardan*, 552 F.2d 216 (8th Cir. 1997) and *Baker v. United States*, 401 F.2d 958 (D.C. Cir. 1968)). Because the defendant did not make the requisite

showing to the trial court and he presented three witnesses to support his alibi defense, the court ruled the joinder was not an abuse of discretion.

By contrast, here, unlike the defendant in *Weddel*, Mr. Hansen did not have witnesses to support his defense of self-defense as to Count I. Moreover, he did make the requisite "convincing showing" of prejudice, in that the jury would learn of his prior convictions if he testified, even if his testimony pertained only to Count I.

*c. Instructions.*

Although the court properly instructed the jury to consider each count separately, instructions alone could not overcome the improper bolstering resulting from joinder, the confusion of defenses, the prejudice resulting from his need to testify to present his defense theory on Count I and his equally compelling need to remain silent on Count II, and the admission of evidence that was not otherwise cross-admissible.

*d. Cross-admissibility of evidence.*

Cross-admissibility of evidence is analyzed under ER 404(b). *Gatalski*, 40 Wn. App. at 607; *York*, 50 Wn. App. at 453. ER 404(b) provides:

> (b) Other Crimes, Wrongs, or Acts. 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. 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.

In determining whether evidence is admissible under ER 404(b), courts must "(1) identify the purpose for which the evidence is to be admitted; (2) determine that the evidence is relevant and of consequence to the outcome; and (3) balance the probative value of the evidence against its potential prejudicial effect." *State v. Lough*, 70 Wn. App. 302, 313, 853 P.2d 920 (1993) (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

Without any analysis, the court found the two counts were "likely cross-admissible," noting "Mr. Payne has a significant delay in reporting, explained by reading about the defendant's other case that happened a couple months later." 7/1/13 RP 13. This is unsupported by the record. Mr. Payne contacted police two weeks after the incident, not "a couple of months later." 7/3/13/RP 29. Moreover, Mr. Payne never explained why he did not report the incident promptly. Rather, he explained why he eventually reported, that is, he read an article about a robbery at gunpoint in a car that matched the description of Mr. Hansen's car. 7/3/13 RP 31. Plainly, the article Mr. Payne read was not about the incident at Mr. Bodnar's house.

Further, under ER 404(b), the evidence for the two counts was not cross-admissible. In Count I, the State alleged Mr. Hansen robbed Mr. Bodnar by infliction of bodily injury with a candleholder, after Mr. Hansen responded to Mr. Bodnar's on-line advertisement to engage and sex and drug use. CP 1; 7/2/13(AM) RP 86-88, 89, 92, 97, 110; 7/2/13(PM) RP 5-7, 9, 51-52. By contrast, in Count II, almost eight weeks later, the State alleged Mr. Hansen robbed Mr. Payne by display of a firearm, one day after Mr. Hansen was invited to Mr. Payne's house by a third party where he engaged in sex and drug use, and left without incident. CP 1-2; 7/3/13 RP 12-13, 14-15, 16-17, 21-22. Although both incidents involved a sexual encounter and methamphetamine use, those details are not so unique at to overcome the other dissimilarities between the incidents and the inherent prejudice of joining otherwise unrelated charges.

In *State v. Hernandez*, the defendant was convicted of three counts of robbery, based on separate incidents that occurred in a ten day period of time, in which the robber entered a store, displayed a gun, asked for money, and fled upon receiving the money. 58 Wn. App. 793, 799, 794 P.2d 1327 (1990), *disapproved on other grounds in State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). On appeal, the State argued the counts were properly joined because the evidence of all three incidents would

have been cross-admissible at separate trials to establish identify. 58 Wn. App. at 798. The appellate court disagreed and ruled that, although the stores that were robbed were similar in nature, the manner of robbery was not so unique as to create a high probability that the same person committed all three crimes. 58 Wn. App. at 799. *See also State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) ("Here, despite an instruction to consider the counts separately, ... the prejudice-mitigating factor that evidence of each rape would be admissible in a separate trial for the other, is glaringly absent. This being so, there is a clear violation of the rule prohibiting use of evidence of other crimes or misconduct in order to convict.").

Similarly here, there was no showing that the robberies were committed in a particularly unique manner to justify cross-admissibility and the court's finding to the contrary is unsupported by the record.

3. The prejudice of joinder outweighed the need for judicial economy.

The interest in judicial economy is served where testimony would be repeated in separate trials. For example, in *Russell*, 125 Wn.2d at 68, the court noted that judicial economy was served by joiner where the crimes were uniquely similar and the testimony of witnesses acquainted with the defendant during the time of the crimes would be repeated if

counts were severed. *See also York*, 50 Wn. App. at 453 (multiple offenses that occurred on school campus involved testimony of school's physical layout and schedule, and contact between the defendant an victims which would be repeated if counts were severed).

Here, the testimony for Count I would not need to be repeated at a separate trial for Count II. The incidents occurred in separate locations, involved separate alleged victims, and were alleged to have been committed by separate means. The manner in which Mr. Hansen met Mr. Bodnar was markedly different than the manner in which he was introduced to Mr. Payne. The incidents were separately investigated, the only overlap occurring when the two detectives went together to Mr. Hansen's address in an unsuccessful attempt to arrest him. Under these circumstances, joinder of the two counts did not promote judicial economy.

4. The proper remedy is reversal.

Where a trial court erroneously denies a motion to sever, the proper remedy is reversal, unless the error was harmless. *Bryant*, 89 Wn. App. at 864; *State v. Ramirez*, 46 Wn. App. 223, 228, 730 P.2d 98 (1986). The error was not harmless here. As discussed, given the disparate relative strength between the count, the differing defense theories, the lack of factual similarity in the counts, the inherent prejudice of joining two

unrelated charges, and the difficulty in compartmentalizing the evidence relevant to each count, the error was not harmless. In the absence of prejudice-mitigating factors as well as the lack of judicial economy, the trial court's failure to sever the counts was an abuse of discretion. Reversal is required.

E. CONCLUSION

The trial court abused its discretion in denying Mr. Hansen's motion to sever the counts. For the foregoing arguments, Mr. Hansen requests this court reverse his convictions and remand for severance and separate new trials.

DATED this 10th day of June 2014.

Respectfully submitted,

SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

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

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>DAVID HANSEN,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | NO. 70860-1-I |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] DAVID HANSEN<br>347567<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13TH AVE<br>WALLA WALLA, WA 99362 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 17TH DAY OF JUNE, 2014.

X_____

**Washington Appellate Project**
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710