70860-1

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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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# REPLY BRIEF OF APPELLANT

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A. ARGUMENT

**The two counts of robbery were improperly joined.**

Mr. Hansen was entitled to severance of the two counts of robbery. Severance is required when joinder is unfairly prejudicial and prevents a fair trial, in violation of a defendant's constitutional right to due process. U.S. Const. Amend. XIV; Wash. Const. art. I, sec. 3; CrR 4.4; *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). A trial court must consider the following "prejudice-mitigating" factors: (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).

Factors (1), (2), and (4) mandated severance here. The strength of Count I bolstered the relative weakness of Count II; Mr. Hansen had separate defense theories, self-defense and denial, and he needed to give up his right to remain silent to present evidence of self-defense, thereby unnecessarily exposing him to impeachment with his prior convictions o the remaining count; and, the evidence of the two robberies was not cross-admissible under ER 404(b).

The State argues the relative strength of Count I did not make the strength of Count II "pale in comparison." Br. of Resp. at 11. That is not

the correct criterion. An evaluation of the relative strength of the counts is necessary to determine whether the jury could cumulate evidence to find guilt or infer a criminal disposition, not to determine whether one count pales in comparison. *Russell*, 125 Wn.2d at 62-63.

The State quotes *State v. MacDonald*, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004), in which the court stated severance is required when one count is "remarkably" stronger than the other. Br. of Resp. at 10-11. However, *MacDonald* did not make the generalization that severance is appropriate *only* when the relative strength of the counts is remarkably unequal. Significantly, no case has cited *MacDonald* for that generalization in the ten years since it was decided. The State's reliance on *MacDonald* is misplaced.

The State contends Mr. Hansen did not provide sufficient details of his proposed testimony regarding self-defense for Count I and his need to remain silent for Count II. Br. of Resp. at 13-16. The trial court, however, did not express any need for more detail and did not deny the severance motion due to an alleged lack of detail. CP 19-24. Rather, the trial court denied the motion, without analysis, on the basis the two counts were "likely" cross-admissible and Mr. Payne's delay in reporting the incident was "explained by reading about the defendant's other case that happened a couple months later." 7/1/13 RP 13.

Moreover, this contention is unsupported by the record. As to Count I, Mr. Hansen clearly indicated that he needed to take the stand to present evidence of self-defense 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. In fact, in *Russell*, the trial court stated, "It isn't as though there will be a self-defense argument on one and a different type of defense on another one...." 125 Wn.2d at 65. Therefore, the jury was needlessly and prejudicially informed of Mr. Hansen's prior convictions as to Count II. *See State v. Garcia*, 179 Wn.2d 828, 847, 318 P.3d 266 (2014) (recognizing "the danger of injustice associated with admitting evidence of a criminal defendant's past convictions").

To support its contention, the State cites two federal cases, *United States v. Alexander*, 135 F.3d 470 (7th Cir. 1998) and *United States v. Fenton*, 367 F.3d 14 (1st Cir. 2004), both of which discuss Federal Rule of Criminal Procedure (FRCrP) 14, which is markedly different from CrR 4.4.[1] FRCrP 14 provides:

> Relief from Prejudicial Joinder.
> (a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the

[1] Mr. Hansen recognizes *State v. Weddell*, 29 Wn. App. 461, 467, 629 P.2d 912 (1981), characterized FRCrP 14 as "substantially similar" to CrR 4.4, but that characterization is unsupported by a comparison of the language of the two rules.

> court *may* order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.
> (b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

(Emphasis added). Use of the term "may" denotes permissive discretion. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). By contrast, CrR 4.4 uses the term "shall," which denotes a mandatory duty, and provides in relevant 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.

(Emphasis added).

In addition, neither the defendant in *Alexander* nor the defendant in *Fenton* asserted a "strong need" to refrain from testifying on certain counts. In *Alexander*, the defendant was convicted of eleven counts of bankruptcy fraud and two counts of mail fraud, the first count of mail fraud alleging a fraudulent insurance claim and the second count of mail fraud alleging a fraudulent loan application. 135 F.3d at 474. On appeal, the defendant argued the trial court erroneously denied his severance

motion because he wanted to testify regarding the second count of mail fraud only, and he asserted without elaboration that his intended testimony would compromise his defense on the remaining charges. *Id.* at 477. The court ruled:

> We have observed that where joinder is based on the "similar character" of the indictments charges, the risk of potential prejudice to the defendant is enhanced, and the district court must therefore be especially vigilant in monitoring the proceedings for developing unfairness. ... Alexander has ... only generally asserted that any testimony supporting his representations on the mortgage loan application would harm his defense on the personal bankruptcy fraud charges. That sort of general statement does not meet the standard we have set for a severance on this ground – that the defendant make a "'convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.'"

*Id.* (internal citations omitted).

Similarly, in *Fenton*, the defendant was convicted of 31 counts stemming from a drug-trafficking conspiracy, including several counts relating to a car pipe bombing allegedly in retaliation against another drug dealer. 367 F.3d at 17, 20 (1st Cir. 2004). The defendant argued the counts related to the pipe bombing incident should have been severed because he wanted to assert his innocence on those charges, which might have exposed him to giving incriminating testimony on the other charges. *Id.* at 22. The First Circuit was unconvinced, and stated:

> Apart from his bald assertion of innocence as to the pipe bombing counts and an unparticularized claim that the government's witnesses were not credible, his motion offered no hint as to the specific information that his testimony would convey. This sort of empty rhetoric is insufficient to mandate severance on the basis of a perceived need to testify.

*Id.* Here, however, Mr. Hansen clearly articulated his need to refrain from testifying on Count II to prevent the jury from learning of his prior convictions. The federal cases are inapposite.

The State argues the two incidents were cross admissible as evidence of an "overarching scheme." Br. of Resp. at 18. This argument overstates the similarities and ignores the many dissimilarities. 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 to indicate "conduct

created by design"[2] to overcome the inherent prejudice of joining otherwise unrelated charges.

The State argues the two incidents evidenced a common plan or scheme for purposes of ER 404(b). Br. of Resp. at 19-21. However, a "common plan or scheme" entails more than mere similarity of offenses:

> Common scheme, plan or design has been described as: An antecedent mental condition which evidentially points to the doing of the act planned. Something more than the doing of similar acts is required in evidencing design, as the object is not merely to negative an innocent intent, but to prove the existence of a *definite project* directed toward completion of the crime in question.

*State v. Harris*, 36 Wn. App. 746, 751, 677 P.2d 202 (1984) (quoting M. Slough and J. Knightly, *Other Vices, Other Crimes*, 41 Iowa Law Review at 329-30 (1956) (emphasis added by court).

The State cites *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990), for the argument that the need for judicial economy here outweighed the prejudice from joinder. Br. of Resp. at 23-24. Unlike Mr. Hansen, however, the defendant in *Bythrow* never asserted he had important testimony to give on one count and a strong need to remain silent on the other. Accordingly, *Bythrow* is not controlling.

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[2] *State v. Sexsmith*, 138 Wn. App. 497, 505, 157 P.3d 901 (2007).

B. CONCLUSION

Improper joinder may confound the presentation of separate defenses, influence the jury to infer a criminal disposition, encourage a jury to cumulate evidence, or engender a latent hostility towards a defendant. *State v. Smith*, 74 Wn.2d 744, 754-55, 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). Here, considering all the "prejudice-mitigating" factors, the trial court abused its discretion in failing to sever the two counts of robbery. For the forgoing reasons, and for the reasons set forth in the Brief of Appellant, Mr. Hansen requests this court reverse his convictions and remand for separate trial.

DATED this 17th day of October 2014.

Respectfully submitted,

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

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

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY 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 III<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 OCTOBER, 2014.

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