71842-8 71842-8

No. 71842-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

TYLER FARRAR-BRECKENRIDGE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Tyler Farrar-Breckenridge was charged with three counts of third degree rape of a child, arising from two separate alleged incidents that occurred more than a year apart and involved two different complaining witnesses. Although evidence of the first two charges would not have been admissible in a separate trial on the other charge, defense counsel did not move to sever the charges. Counsel's failure to request severance prejudiced Mr. Farrar-Breckenridge because, given the lack of a limiting or cautionary instruction, it is inevitable that the jury used the inflammatory evidence of other sexual misconduct to decide guilt on the unrelated charge and to infer that Mr. Farrar-Breckenridge had a general propensity for sexual offending. Under these circumstances, Mr. Farrar-Breckenridge received ineffective assistance of counsel, requiring that the convictions be reversed and remanded for separate trials.

B. ASSIGNMENT OF ERROR

Tyler Farrar-Breckenridge received ineffective assistance of counsel due to his attorney's failure to move the court to sever unrelated charges of third degree child rape involving different complaining witnesses.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A defense attorney provides ineffective assistance of counsel if he fails to move the court to sever unrelated charges, the court would likely have granted a severance if one had been requested, and there is a reasonable probability the outcome of the proceeding would have been different. Here, did Mr. Farrar-Breckenridge receive ineffective assistance of counsel, where his attorney failed to request severance of unrelated charges, it is likely the court would have granted a severance if requested, and the outcome of the proceeding would probably have been different had the jury not been allowed to consider inflammatory evidence of unrelated acts of sexual misconduct?

D. STATEMENT OF THE CASE

1. The charges

The State charged Mr. Farrar-Breckenridge with three counts of third degree rape of a child, RCW 9A.44.079. CP 199. The first two charges arose from an incident that allegedly occurred sometime during November 2012 and involved C.L. CP 199. At that time, C.L. was 15 years old and Mr. Farrar-Breckenridge was 20 years old. CP 199; 2/24/14RP 86. The third charge arose from an incident that allegedly occurred sometime during summer 2011 and involved B.B. CP 199.

B.B. was then 14 years old and Mr. Farrar-Breckenridge was 19 years old. CP 199; 2/24/14RP 86.

Mr. Farrar-Breckenridge's attorney never moved to sever the counts involving C.L. from the count involving B.B., and thus all three charges were tried together in a single trial.

2. Trial testimony

a. Alleged incident involving B.B.

In the summer of 2011, Mr. Farrar-Breckenridge was living in Granite Falls with his parents and younger brother Zach. 2/24/14RP 29. That July, Zach suffered serious injuries in an automobile accident. 2/21/14(a.m.)RP 130. When he came home from the hospital, he slept in a bed downstairs. 2/21/14(a.m.)RP 131-32.

B.B. was also living with her family in Granite Falls that summer. 2/20/14RP 110. One day, she, her older sister Marissa, and a couple of friends, went to Zach's house to visit him and see how he was doing. 2/20/14RP 113; 2/21/14(a.m.)RP 137-40. The group of friends ended up spending the night at Zach and Tyler's house. 2/20/14RP 114, 118; 2/21/14(a.m.)RP 137-40.

B.B. said that everyone else had found a place to sleep downstairs but there was no room for her. 2/20/14RP 158-59. She said

someone told her to go upstairs to sleep in Tyler's room. 2/20/14RP 159. At the beginning of her testimony, B.B. said she could not remember who told her to sleep in Tyler's room, but later while testifying she said it was Zach who told her to do so. 2/20/14RP 159, 194. In response to Zach's suggestion, she went upstairs to sleep in Tyler's room. 2/20/14RP 158-59.

Tyler testified he was in his room watching a movie and trying to go to sleep when B.B. knocked on his door and said there was nowhere to sleep downstairs. 2/24/14RP 58. He told her she could sleep on the floor, which was carpeted, and he gave her a blanket and a pillow. 2/24/14RP 59. But then she tried to get in bed with him, so he asked her to leave. 2/24/14RP 60. She left, looking angry and upset. 2/24/14RP 60. He finished watching the movie and went to sleep. 2/24/14RP 61. He did not have sex with B.B. 2/24/14RP 61.

B.B. remembered very little about that evening but claimed that while she was in Mr. Farrar-Breckenridge's room, he forced her to perform oral sex on him and then they had penile-vaginal intercourse. 2/20/14RP 119. She said she cried and pushed him away, then left the room, saying she had to use the bathroom. 2/20/14RP 119-20. She left some of her clothing, including her bra, behind in Tyler's room.

2/20/14RP 134, 177. When she got downstairs, she woke up either Zach or his friend Jake and told him what had happened, but that person told her "It's O.K. Just go to sleep." 2/20/14RP 172. She said she had to borrow a bra from her friend Savannah the next day. 2/20/14RP 177.

B.B.'s testimony about the event was vague and incomplete. For example, she was unable to say what she had been doing before she went to Tyler's room, or whether he was already in the room when she got there. 2/20/14RP 128, 160. She could not say whether he said anything to her or touched her before the oral sex. 2/20/14RP 129, 161. She could not say how her clothes came off or whether he was wearing all of his clothes. 2/20/14RP 132. She could not say what, if anything, she was wearing when she left the room. 2/20/14RP 134, 169. She could not say whether she went to sleep at all that night, and could not remember leaving the house the next day. 2/20/14RP 134-35.

Mr. Farrar-Breckenridge has a tattoo on his abdomen, which B.B. said she observed during the incident. 2/20/14RP 130. He had posted photos of himself showing the tattoo on his Facebook page, and B.B. was friends with him on Facebook. 2/19/14RP 122, 126; 2/20/14RP 11, 153; 2/24/14RP 47. Also, the tattoo is visible when he

is not wearing a shirt. 2/24/14RP 47-48. B.B.'s older sister Marissa, who had a sexual relationship with Tyler, said he would sometimes walk around her house without a shirt on and B.B. might have seen him without his shirt on at their house. 2/24/14RP 16, 23.

None of the other people who slept over at Zach's house that night could corroborate B.B.'s account of what happened. Zach said he did not tell B.B. to sleep in Tyler's room and never would have told her to do that. 2/21/14(a.m.)RP 142. Both Zach and Jake said they did not remember B.B. coming downstairs, scantily clad, saying she had been raped. They would have remembered that if it had actually happened. 2/20/14RP 50; 2/21/14(a.m.)RP 142. Savannah said she never loaned a bra or any other clothes to B.B. and did not carry an extra bra with her. She and B.B. did not wear the same bra size and B.B. would not have been able to fit into one of her bras. 2/21/14(a.m.)RP 25. Finally, Marissa said that if B.B. had come downstairs that night alleging rape, she would have remembered it. 2/24/14RP 17.

B.B. did not tell anyone her story about having sex with Mr. Farrar-Breckenridge until over a year later, when she was visiting the school counselor for an unrelated reason and said she had been raped.

2/20/14RP 135-37, 180. 197; 2/21/14(a.m.)RP 107, 111. The counselor reported the matter to the police. 2/20/14RP 137; 2/21/14(a.m.)RP 112.

b. Alleged incident involving C.L.

C.L. was a friend of B.B.'s and the sister of Zach's friend Jake. 2/19/14RP 25. She also lived in Granite Falls. 2/19/14RP 21-22.

One night during November 2012, C.L. was at home drinking alcohol with her brother and a friend of the family who was visiting from out of town. 2/19/14RP 32. She became drunk. 2/19/14RP 32-33. Later that night, at around 1 a.m., C.L. went on Facebook and received a message from Mr. Farrar-Breckenridge, who was a Facebook friend of hers. 2/19/14RP 35; Exhibit 10.

That summer, Mr. Farrar-Breckenridge was working the late shift at Boeing and ordinarily did not go to sleep until early in the morning. 2/24/14RP 92, 95-96. That night, he was at home watching a movie and was on Facebook while texting others. 2/24/14RP 89-90. When he noticed C.L. was online on Facebook, he struck up a conversation with her. 2/24/14RP 90; Exhibit 10. He told her he was drinking beer and watching "Revenge of the nerds 2 [sic]," and said, "You should join." Exhibit 10 at 2. C.L. declined, saying she did not feel well and was going to go to bed. Exhibit 10 at 2, 5. The Facebook

conversation, admitted as an exhibit at trial, shows C.L. ended the conversation by saying, "well i'm [sic] gonna go to sleep. goodnight [sic]." Exhibit 10 at 5. Mr. Farrar-Breckenridge responded, "Ok night." Exhibit 10 at 5.

Mr. Farrar-Breckenridge testified he had intended to invite both C.L. and her brother Jake to come over to watch a movie. 2/24/12RP 61-62. He naturally assumed that if C.L. came over she would bring her brother because she never came over without him, and Mr. Farrar-Breckenridge knew she was not allowed to come over alone. 2/24/14RP 61-62. In fact, C.L. did not come over that night and said she was going to go to bed instead. 2/24/14RP 63-65; Exhibit 10 at 5.

C.L. told a different story. She said that even though on the Facebook message she had told Mr. Farrar-Breckenridge she was going to bed, she actually sneaked out of her window and went over to his house. 2/19/14RP 41. She said that once she got there, she drank some beer and then threw up in the kitchen because she had had too much to drink. 2/19/14RP 42-43, 46. As they were cleaning it up, Mr. Farrar-Breckenridge came over to her, wrapped his arms around her and started kissing her. 2/19/14RP 47. She said they went into the living

room, began "making out," and then had penile-vaginal sexual intercourse on the couch. 2/19/14RP 50-51.

C.L. said they then went upstairs to Mr. Farrar-Breckenridge's bedroom and had sexual intercourse.[1] 2/19/14RP 54-56. Again she could not state many details. 2/19/14RP 55. She claimed they had both penile-vaginal intercourse and anal intercourse. 2/19/14RP 56.

C.L. said she might have seen Mr. Farrar-Breckenridge's tattoo while they were having sex but she could not remember. 2/19/14RP 121. In any event, she had seen photos of the tattoo on Facebook before. 2/19/14RP 122.

C.L. did not tell anyone right away her story about having sexual intercourse with Mr. Farrar-Breckenridge. Sometime later, though, while visiting her cousin on Thanksgiving, she told her she had had sexual intercourse with Mr. Farrar-Breckenridge, without providing any details. 2/19/14RP 62, 64; 2/20/14RP 21-24. That same day, she also told her brother Jake. 2/19/14RP 65. About a month later, while C.L., Jake and their mother were talking, Jake hinted that C.L. was no

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[1] The State charged Mr. Farrar-Breckenridge with two separate counts of third degree rape of a child based on the alleged act of sexual intercourse with C.L. that occurred on the couch and the alleged act that occurred a short time later in Mr. Farrar-Breckenridge's bedroom. <u>See</u> 2/24/14RP 134 (prosecutor closing argument).

longer a virgin. 2/20/14RP 44, 71-72. Later, when C.L.'s mother asked her about it, C.L. said she had sex with Mr. Farrar-Breckenridge. 2/20/14RP 74-76. Her mother called the police. 2/20/14RP 78.

3. Verdict

Although the jury was instructed it must "decide each count separately,"[2] it was not instructed that evidence of one crime could not be used to decide guilt for a separate crime. In fact, no limiting instruction at all was provided regarding the other act evidence. The jury found Mr. Farrar-Breckenridge guilty as charged of all three counts of third degree rape of a child. CP 74, 91-93.

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[2] The jury was instructed: "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." CP 99.

E. ARGUMENT

MR. FARRAR-BRECKENRIDGE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY DID NOT MOVE TO SEVER UNRELATED CHARGES OF CHILD RAPE

1. A defense attorney provides ineffective assistance of counsel, requiring reversal, if he does not move to sever unrelated charges and the defendant is prejudiced as a result

Although CrR 4.3(a)[3] permits two or more offenses of similar character to be joined in a single charging document, "joinder must not be used in such a way as to prejudice a defendant." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). Washington courts recognize that "joinder is inherently prejudicial." Id. Even if multiple charges are properly joined in a single charging document, they must be severed for separate trials whenever "the court determines that severance will promote a fair determination of the defendant's guilt or innocence for each offense." CrR 4.4(b).

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[3] CrR 4.3(a) provides:

(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:

(a) 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.

"Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Severance is particularly important when the alleged crimes are sexual in nature. Id. at 884 (citing State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)). "In this context there is a recognized danger of prejudice to the defendant *even if the jury is properly instructed to consider the crimes separately*." Sutherby, 165 Wn.2d at 884. (emphasis added).

Under CrR 4.4(a)[4], an attorney's failure to make a timely motion for severance amounts to a waiver. But counsel's failure to move to sever may be addressed on appeal in the context of a claim of ineffective assistance of counsel. Sutherby, 165 Wn.2d at 883.

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[4] CrR 4.4(a) provides:

(a) Timeliness of Motion--Waiver.

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

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

To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); U.S. Const. amend. VI. The Court presumes counsel was effective and the defendant must show there was no legitimate strategic or tactical reason for counsel's action. McFarland, 127 Wn.2d at 335.

Counsel's failure to move to sever multiple charges amounts to ineffective assistance of counsel that requires reversal if there was no legitimate tactical reason for counsel's failure to act, and the defendant was prejudiced as a result. Sutherby, 165 Wn.2d at 884.

2. Mr. Farrar-Breckenridge's attorney had no legitimate tactical reason not to move to sever

Here, defense counsel had no legitimate tactical reason not to request that the charges involving C.L. be severed from the charge involving B.B. The two alleged incidents were more than a year apart and involved different complaining witnesses. The evidence offered to prove the unrelated charges would not have been admissible in separate trials. Also, the jury was much more likely to convict Mr. Farrar-

Breckenridge of each charge by relying on the other act evidence. Under these circumstances, there was no reasonable basis not to request that the charges be severed.

In Sutherby, the Washington Supreme Court explained that in a prosecution for a sex offense, there can be no legitimate tactical reason not to request severance of unrelated charges if it is possible that the jury will use the other act evidence to infer a general predisposition to commit sex offenses. Sutherby, 165 Wn.2d at 884. Sutherby was charged with first degree child rape and first degree child molestation based on allegations that he raped his young granddaughter, and also with possession of child pornography based on images found on his computer at the time of his arrest. Id. at 875-76. The Supreme Court held that counsel's failure to move for severance of the possession of child pornography counts from the other charges met the deficiency prong of the ineffective assistance of counsel claim because evidence of child pornography would not have been admissible at a separate trial on the other charges. Id. at 884. Moreover, there was no possible advantage to Sutherby in holding a joint trial on all of the charges given the prosecutor's stated intent to argue that the pornography counts showed Sutherby's predisposition to molest children. Id.

Similarly, here, there was no possible advantage to Mr. Farrar-Breckenridge in holding a single trial on all of the charges. If the charges were severed, the evidence of the unrelated acts would not have been admissible at separate trials. Evidence of a defendant's "other crimes, wrongs or acts" is categorically excluded from trial if the only relevance of the evidence is to prove the defendant's character and to show he acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012); ER 404(b).[5] Other act evidence is admissible only if it is logically relevant to a material issue other than propensity, and the probative value of the evidence outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). The rule is based on the fundamental notion that a defendant must be tried only for e offense charged. Sutherby, 165 Wn.2d at 886-87.

Here, the evidence of the unrelated acts would not have been admissible at a separate trial on the other charge because the evidence

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[5] ER 404(b) provides:
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.

was not relevant to any material issue other than propensity. The principal issue at trial for each charge was whether Mr. Farrar-Breckenridge actually had sexual intercourse with each girl, as the ages of the participants was not in dispute. CP 199-200; RCW 9A.44.079.[6] Evidence that Mr. Farrar-Breckenridge had sexual intercourse with a different girl of a similar age on a completely different occasion was not relevant to any material issue other than to show he had a general predisposition to have sex with under-age girls. Thus, if separate trials on each charge were held, the other act evidence would have been categorically excluded by ER 404(b). Gresham, 173 Wn.2d at 420-21.

Moreover, the jury was likely to infer from the other act evidence that Mr. Farrar-Breckenridge was predisposed to commit sex crimes. The Washington Supreme Court has repeatedly recognized that juries are particularly prone in sex offense cases to draw the impermissible inference from other act evidence that the defendant must be guilty because he has a predisposition toward criminality. See, e.g., Gresham, 173 Wn.2d at 433 (pointing out that the potential for

[6] The elements of the crime of third degree rape of a child are that a person has "sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." RCW 9A.44.079.

prejudice from admitting prior acts is "'at its highest'" in sex offense cases) (quoting Saltarelli, 98 Wn.2d at 363); Sutherby, 165 Wn.2d at 886-87; State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). That is because "[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." Saltarelli, 98 Wn.2d at 363 (internal quotation marks and citation omitted).

In sum, the other act evidence was inflammatory and prejudicial and would not have been admissible at a separate trial on the unrelated charge. Thus, counsel had no legitimate tactical reason not to request that the charges involving C.L. be severed from the charge involving B.B. The deficiency prong of the ineffective assistance of counsel claim is met. Sutherby, 165 Wn.2d at 884.

3. Reversal is required because there is a reasonable probability that, had counsel requested severance, the trial court would have granted the motion and the outcome of the trial would have been different

To meet the prejudice prong of the ineffective assistance of counsel claim, Mr. Farrar-Breckenridge must show that the trial court would likely have granted a motion for severance if one had been

made, and there is a reasonable probability that, had severance been granted, the outcome of the proceeding would have been different. Sutherby, 165 Wn.2d at 884.

As discussed in the previous section, the evidence of the unrelated acts would not have been admissible at a separate trial on the other charge, and the other act evidence carried a great potential for prejudice given that this was a prosecution for a sex offense. Thus, severance was important because there "[wa]s a risk that the jury w[ould] use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." Sutherby, 165 Wn.2d at 883. Thus, the trial court would likely have granted a severance motion if one had been made, in order to "promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

Moreover, there is a reasonable probability that, had a severance been granted, the result of the proceeding would have been different. The factors the Court considers in determining whether failure to sever prejudiced a defendant are: (1) the admissibility of evidence of the other charges even if not joined for trial; (2) the court's instructions to

the jury to consider each count separately; and (3) the strength of the State's evidence on each count.[7] Sutherby, 165 Wn.2d at 884-85.

a. The failure to sever prejudiced Mr. Farrar-Breckenridge because the jury heard inflammatory evidence of an unrelated sex offense that it would not have heard had the charges been severed

As discussed, evidence of the other acts would not have been admissible at a separate trial on the unrelated charge because the evidence was relevant only to show Mr. Farrar-Breckenridge had a general propensity to commit sexual crimes. Gresham, 173 Wn.2d at 420-21; ER 404(b). The jury undoubtedly used the evidence of the unrelated acts to infer guilt for the other crimes, and to infer that Mr. Farrar-Breckenridge had a predisposition to commit sex crimes. See Sutherby, 165 Wn.2d at 886-87; Saltarelli, 98 Wn.2d at 363-64. Thus, the other act evidence likely influenced the jury to find guilt for each charge, weighing in favor of a finding of prejudice.

[7] An additional factor the Court considers is the clarity of defenses as to each count. Sutherby, 165 Wn.2d at 884-85. That factor is not at issue in this case given that Mr. Farrar-Breckenridge's defense to each charge was the same—general denial.

b. The failure to sever prejudiced Mr. Farrar-Breckenridge because the jury was not instructed it could not use the other act evidence to decide guilt for a separate crime

In Sutherby, although the jury was instructed to decide each count separately,[8] it was not instructed that evidence of one crime could not be used to decide guilt for a separate crime. Sutherby, 165 Wn.2d at 885-86. The Supreme Court concluded this weighed in favor of finding that the failure to sever the unrelated charges prejudiced Sutherby. Id.

As in Sutherby, the jury in this case was not instructed it could not use evidence of one crime to decide guilt for a separate crime. The jury instruction provided was identical to the one provided in Sutherby, which stated:

> 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.

CP 99. The jury in this case was provided with no limiting instruction regarding the other act evidence. Thus, the jury instructions did not preclude the jury from using the other act evidence to infer guilt for a separate crime or from inferring a general criminal disposition. This

[8] The jury instruction in Sutherby provided: "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." Sutherby, 165 Wn.2d at 885 n.6.

factor weighs in favor of a finding of prejudice. Sutherby, 165 Wn.2d at 885-86.

c. The failure to sever prejudiced Mr. Farrar-Breckenridge because the untainted evidence in support of each charge was not strong

In determining whether a defendant was prejudiced by the admission of other misconduct evidence, the question is not whether the untainted evidence was sufficient for the jury to convict. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014) (citing Gresham, 173 Wn.2d at 433-34). Instead, the question is whether there is a reasonable probability that the outcome of the trial would have been different without the other misconduct evidence. Gower, 179 Wn.2d at 857. As stated, the Washington Supreme Court has repeatedly recognized that "the potential for prejudice from admitting prior acts is '"at its highest"' in sex offense cases." Id. (quoting Gresham, 173 Wn.2d at 433) (quoting Saltarelli, 98 Wn.2d at 363)).

A defendant may be prejudiced by defense counsel's failure to move to sever unrelated charges if the State's evidence on one of the counts was not strong. Sutherby, 165 Wn.2d at 885. In Sutherby, the court concluded that Sutherby was prejudiced by counsel's failure to request severance of the child rape and molestation charges from the

possession of child pornography charges in part because the evidence of molestation and rape was weaker than the evidence of possession of child pornography. Id. To prove the rape and molestation charges, the State offered only the trial testimony and out-of-court statements of the six-year-old complainant, as well as medical evidence that was consistent with abuse but did not alone support the conclusion that sexual abuse occurred. Id. In light of this evidence, it is likely the jury was influenced by the other misconduct evidence to find Sutherby guilty of rape and molestation. Id.

Consistent with Sutherby, courts generally hold that admission of other misconduct evidence in a sex offense case is prejudicial if the untainted evidence consists primarily of the complaining witness's statements. In Gower, for instance, the only evidence presented to corroborate the complaining witness's statements was a witness who corroborated details of the aftermath of one incident rather than the incident itself. Gower, 179 Wn.2d at 858. In other words, "'[t]here were no eyewitnesses to the alleged incidents of molestation,'" and "credibility was the main issue in this case." Id. (quoting Gresham, 173 Wn.2d at 433). Thus, the erroneous admission of other misconduct evidence was prejudicial. Gower, 179 Wn.2d at 858.

Likewise, in Gresham, the untainted evidence consisted of the alleged victim's testimony that Gresham molested her, her parents' corroboration that he had the opportunity to do so, and the investigating officer's testimony. Gresham, 173 Wn.2d at 433-34. This evidence was insufficient to overcome the prejudice caused by admission of the other misconduct evidence, and reversal was required. Id.; see also Saltarelli, 98 Wn.2d at 367 (reversing conviction for rape based on erroneous admission of other act evidence, where untainted evidence consisted of complaining witness's testimony).

Similarly, the erroneous admission of other misconduct evidence in a sex offense prosecution is prejudicial if the untainted evidence is conflicting. See State v. Slocum, __ Wn. App. __, 333 P.3d 541, 550-51 (2014). In Slocum, the 15-year-old complaining witness told her parents and investigators, and testified clearly at trial, that Slocum touched her inappropriately on several occasions several years earlier. Id. Slocum's theory of her motive in advancing the allegations was not strong. On the other hand, the complainant admitted she had been taught at school and in home about reporting inappropriate touching; she changed and enlarged upon her allegations; and she provided a date for one incident for which Slocum had an alibi. Id.

Also, Slocum presented evidence of his long-standing impotence and the testimony of his ex-wife, who said she had never left the child alone with him. Id. Given this conflicting evidence, the erroneous admission of other misconduct evidence was prejudicial because it bolstered the complaining witness's credibility while detracting from Slocum's credibility. Id.

Under these authorities, the failure to sever unrelated charges in this case was prejudicial because it is reasonably probable that the jury's verdict on each charge was materially affected by the other misconduct evidence. First, the untainted evidence presented to support each charge consisted primarily of the complaining witnesses' in-court and out-of-court statements. In other words, "[t]here were no eyewitnesses to the alleged incidents" and "credibility was the main issue in this case." Gower, 179 Wn.2d at 858. Second, the untainted evidence was conflicting, making it probable that the jury was influenced by the evidence of unrelated acts. See Slocum, 333 P.3d at 550-51.

In regard to the charge involving B.B., the untainted evidence consisted primarily of her statements to the school counselor, made more than a year after the alleged incident, her statements to the nurse

practitioner who examined her but found no physical evidence of abuse, and her testimony at trial. None of her statements were corroborated and in fact they were contradicted by the testimonies of other people who were present at Zach and Tyler's house that evening. For instance, B.B. said that, when she could not find a place to sleep downstairs, Zach told her to sleep in Tyler's room. 2/20/14RP 159, 194. But Zach testified he did not tell her to sleep in Tyler's room and never would have done so. 2/21/14(a.m.)RP 142. B.B. said she left some of her clothing, including her bra, in Tyler's room when she left, and then went downstairs, scantily clad, and told either Zach or Jake that she had been raped. 2/20/14RP 134, 172, 177. She said she had to borrow a bra from Savannah the next day. 2/20/14RP 177. But both Zach and Jake testified B.B. never told them she had been raped. 2/20/14RP 50; 2/21/14(a.m.)RP 142. If she had approached them without all of her clothes on, they would have remembered. Id. Likewise, Savannah testified she never loaned B.B. a bra, she did not carry an extra bra with her, and B.B. would not have been able to fit into one of her bras in any case. 2/21/14(a.m.)RP 25.

B.B.'s testimony was vague and she could say very little about what happened that evening. See 2/20/14RP 119, 128-29, 132-35, 160-

69. Also, her testimony was directly contradicted by Mr. Farrar-Breckenridge's testimony, as he denied having sexual intercourse with her. 2/24/14 RP 58-61. Under these circumstances, where the untainted evidence consisted primarily of B.B.'s statements, which were uncorroborated and in conflict with other testimony presented, the jury was likely influenced by the evidence of unrelated acts of sexual misconduct. Gower, 179 Wn.2d at 858; Gresham, 173 Wn.2d at 433-34; Sutherby, 165 Wn.2d at 885; Slocum, 333 P.3d at 550-51.

Similarly, the evidence presented to support the charges involving C.L. was not strong. That evidence consisted principally of C.L.'s statements to her family, made weeks after the alleged incident; her testimony at trial; and the Facebook conversation between her and Tyler that allegedly occurred that evening. But C.L.'s statements were not corroborated. There were no other eyewitnesses to the alleged incident and no one in C.L.'s household was even aware that she had supposedly gone to Tyler's house in the middle of the night. In addition, her statements were contradicted by Mr. Farrar-Breckenridge, who acknowledged talking to C.L. on Facebook that night and inviting her to come over to watch a movie, but testified she never actually did come over. 2/24/14RP 63-65. His testimony is consistent with the

content of the Facebook message, in which C.L. stated she did not feel well and was not going to come over. Exhibit 10.

Again, because C.L.'s statements were uncorroborated and in conflict with other evidence presented, the jury was undoubtedly influenced by the evidence of unrelated acts of sexual misconduct. Gower, 179 Wn.2d at 858; Gresham, 173 Wn.2d at 433-34; Sutherby, 165 Wn.2d at 885; Slocum, 333 P.3d at 550-51.

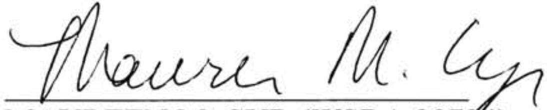
A jury faced with the uncorroborated statements of the complaining witnesses in this case, and the conflicting evidence, would naturally and not unreasonably turn to propensity reasoning to reach its verdicts. There is a reasonable probability that the outcome of the trial on all of the charges would have been different if the jury had not heard the unrelated and damaging evidence of other acts of sexual misconduct. Thus, counsel's failure to move to sever the charges involving C.L. from the charge involving B.B. was prejudicial. Sutherby, 165 Wn.2d at 884-85. The convictions must be reversed.

E. CONCLUSION

Because Mr. Farrar-Breckenridge received ineffective assistance of counsel due to his attorney's failure to move to sever unrelated

counts of third degree child rape, the convictions must be reversed and remanded for separate trials.

Respectfully submitted this 9th day of December, 2014.



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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71842-8-I
	)	
	)	
TYLER FARRAR-BRECKENRIDGE,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF DECEMBER, 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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SIGNED IN SEATTLE, WASHINGTON, THIS 9TH DAY OF DECEMBER, 2014.

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