No. 32587-3-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

BENJAMIN CHILDS, Appellant.

BRIEF OF RESPONDENT

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II. PROCEDURAL HISTORY

On November 8, 2013, the Defendant, Benjamin Childs, was charged by Information in Case No. 13-1-000182-1, with one count Burglary First Degree and one count Assault Second Degree. CP 1-2. These charges stemmed from an incident on November 5, 2013 between the Defendant and the victim, Rick Perrigo. CP 1-2.

On December 2, 2013, the State moved to amend the original Information to include an additional charge of Assault Second Degree for subsequent acts of the Defendant whereby he assaulted Michael Provost on November 11, 2013. CP 24-25.

On January 24, 2014, not being fully aware of the interconnection of the two cases, the State requested to separate the Rick Perrigo matter (13-1-000182-1) from the Michael Provost assault which was now charged as 14-1-00009-1. CP 34, 168-169.

On March 10, 2014, the State added one count of Witness Tampering to cause no. 14-1-00009-1 as the result of a phone call between the Defendant and his sister whereby the Defendant asked her to make contact with victim Michael Provost. CP 177-178.

On March 10, 2014, the State motioned the Court to consolidate the two matters for trial based. The Defendant objected to consolidation and requested the Court sever the two cases.

On March 17, 2014, a hearing was held regarding the

consolidation/severance of Defendant's cases. RP 5-16. Commissioner Scott Marinella ordered the two cases consolidated citing: 1) sufficient evidence in each case independent of the other which would allow each case to be tried separately; 2) the defense theory as to each case was the same; 3) the Court's ability to instruct the jury on the separate nature of the offenses; 4) the charges in each case involved similar conduct within a short timeframe; 5) many of the same witnesses would be involved in each case; and 6) evidence for each case was similar and may be cross admissible including the defense theory and rebuttal thereof. CP 30-31.

On March 27, 2014, the Defendant filed a Motion to Revise Commissioner's Ruling. CP 32-38. A hearing was held on April 7, 2014 regarding the Commissioner's Order to Consolidate the trials against the Defendant. Judge William Acey upheld the Commissioner's ruling, finding that the Commissioner did not make any errors of law, and that there was a sufficient basis for the consolidation. CP 42.

A jury trial was held May 27 – 29, 2014. RP generally. On May 29, 2014 the jury found the Defendant guilty of each of the offenses as charged. CP 103-104.

III. STATEMENT OF THE CASE

Rick Perrigo Assault -

In October 2013, the Defendant, Benjamin Childs, his girlfriend, Amber Haning and his sister, Cherokee Escallier, all lived together in an apartment in Lewiston, Idaho. RP 229-230, 260. The relationship between the Defendant and his girlfriend, Haning, was described as "on-again, off-again." RP 259-260. In the latter part of November, the Defendant's relationship with Haning and Escallier was deteriorating so he moved out of the apartment and into his mother's house. RP 233, 260-261.

In early November, Haning and Escallier were evicted from their apartment. RP 231, 261. Haning and Escallier were offered temporary housing at Rick Perrigo's house in Clarkston, Washington. RP 40, 231, 261. Perrigo is Haning's cousin. RP 262. Haning and Escallier began to move items to Perrigo's home, including some of the Defendant's belongings. RP 236, 262-263. The Defendant was angry that his belongings were not returned to him. RP 236, 263.

On November 5, 2013, the Defendant arrived at Perrigo's home and asked if Haning was there. RP 41. Defendant told Perrigo he wanted his property to be returned. RP 42. Perrigo knew the Defendant as he had previously met him through Haning. RP 40, 263. The Defendant became rude with Perrigo, so Perrigo attempted to

close the front door. RP 42. As Perrigo tried to close the door, the Defendant began spraying him with "Bear Spray." RP 42. Perrigo continued to try to close the door, but the defendant reached into the home, blocked the door and continued to spray the victim and the inside of the residence. RP 42-43. Perrigo was ultimately able to close the door and call police. RP 42-43. The Defendant left the scene. RP 42-43.

Officer Babino from the Clarkston Police Department arrived on scene, followed by paramedics. RP 45, 76-79. The Officer found Perrigo in his front yard acting frantic/animated and spraying himself in the face with a garden hose. RP 77. The Officer noted that Perrigo couldn't seem to open his eyes; his face was red; he had mucus strings coming from his mouth and nose; he was having a difficult time breathing and he had yellow/orange stains on his shirt. RP 79, 87. Perrigo told the Officer it was burning. RP 79. The Officer, who had personal experience and knowledge of the effects of pepper spray, opined that the signs of injury to Perrigo were consistent with the application of pepper spray. RP 80–85.

Perrigo told the Officer that Ben Childs had just sprayed him with bear spray. RP 78. The Officer noted a yellow/orange stain on the front door of the residence and noted that it had also been sprayed into the home. RP 84-85. The yellow stain on the front door

had a smear mark consistent with someone that may have tried to block the door from being closed. RP 93, 99. The Officer stated that he observed the smell of pepper spray in the air at the scene. RP 84-85. The Officer was unable to locate a can of bear spray. RP 88,94-95.

Officer Babino took photographs of the home as well as the victim. RP 85-89. Officers then tried unsuccessfully to locate the Defendant. RP 88.The next day, Officer Babino returned to the house and spoke with Perrigo. RP 88-89. At that time, the Officer noted Perrigo's eyes were still very watery, his face was still red, his nose was still running, and he was still suffering from the effects of the spray. RP 89.

The day after the assault, Haning and the Defendant were not 'together' or considered in a relationship, however, Haning did hangout with the Defendant later that night. RP 260-261, 295. The days after the assault, the Defendant was trying to 'get back with' Haning. RP 261.

Having been assaulted, Perrigo became paranoid and upset with the Defendant. RP 240, 267, 268, At one point Perrigo was walking down the street when he saw a car with Escallier, Haning and who he believed was the Defendant. RP 49-50, 252, 298. Perrigo pulled out and waved a BB-gun, which looked like a firearm, in an

attempt to 'scare off' the Defendant. RP 49-50, 252, 298. The vehicle fled the area. RP 299. (Perrigo was charged and convicted of felony harassment for this incident). RP 51.

Michael Provost Assault -

Less than six days after the assault on Perrigo, on November 11, 2013, Michael Provost was at his home in Clarkston, Washington. RP 103, 105. At approximately 2 a.m., Provost was woken by somebody knocking loudly on the door. RP 105. When Provost answered the door he found Amber Haning and the Defendant, Ben Childs. RP 105. Provost knew Haning, he had been friends with her and her ex-husband, and had also been their landlord.[1] RP 104. Provost knew the Defendant through Haning. RP 111, 275.

Provost allowed the two into his home. RP 105. The Defendant and Haning explained to Provost that they had run out of gas and needed a ride. RP 105, 118. Provost replied that he could not give them a ride but allowed them to stay a while to warm up. RP 105, 118. While Provost and the Defendant were in the living room, Haning went to the kitchen to make coffee. RP 105-106. The Defendant later

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1 Haning did not have the luxury of having stable housing inher recent past, having had to move a number of times in 2013. RP 277. At the time of the alleged assaults, Haning was being evicted from her apartment in Lewiston, which she was upset about. RP 261. A few months earlier, Haning had been evicted from the home she rented from Provost. RP 104, 273. Haning believed that Provost had 'trashed' and disposed of her belongings, and had also killed her dog. RP 273-274. Haning maintained

joined her in the kitchen. RP 106. Shortly thereafter, while Provost was sitting in his recliner, he was hit in the back of the head. RP 106. Provost immediately jumped up and turned to find the Defendant standing behind him with a machete. RP 106. It appeared as if the Defendant was maintaining an aggressive stance towards Provost. RP 107. It also appeared as if Haning was pushing the Defendant towards Provost. RP 129.

Provost started screaming and grabbed a lamp to defend himself. RP 107,122. The downstairs neighbor began to stir causing the Defendant and Haning to flee. RP 107. As the neighbor was coming out of his residence in response to Provost's yelling, he noted two individuals running away from the house. RP 136. When the neighbor entered Provost's home, he saw blood everywhere, Provost holding his head with a bloody rag and also noted the broken lamp on the ground. RP 137. Provost was yelling for someone to call the cops. RP 137. Provost also told the neighbor that the Defendant and Amber were just there and he had been struck in the head with a machete. RP 137.

Law enforcement was contacted and Asotin County Deputy Sheriff Jesse Carpenter arrived on scene. RP 160. Provost explained to the Deputy the events that had transpired and reported Ben Childs,

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a hostility towards Provost for these acts. RP 274275.

by name, as the individual who had assaulted him. RP 162.

The Deputy observed the injury to Provost and the broken lamp near the recliner. RP 160-163. The Deputy took photos of the victim at the scene. RP 161, 164-165. The Deputy then attempted to locate the Defendant, but was unable to do so. RP 166. The Deputy was also unsuccessful in locating the alleged weapon. RP 166.

Witness Tampering –

On February 20, 2014, while awaiting trial, the Defendant called his sister, Cherokee Escallier, on a recorded jail phone line. RP 191-220. During the conversation, the Defendant told Escallier that she needed to go party with "Michael Provost," "the guy that I supposedly hit over the head with a machete." RP 216-217. Defendant told Escallier "he needs to be high as f*ck on Monday"; "he needs to be high on Monday"; "all spun out"; "go get him high. That's all. Just get him high, so on Tuesday when he comes to court he's like [inaudible]." RP 217. Defendant continued telling Escallier: "somebody just needs to go and f*ckin' [inaudible] with him. You know? Get him f*ckin' lit." RP 218 "My trial starts on Tuesday." RP 218. When Escallier told the Defendant she wanted to put some money on his books at the jail, the Defendant responded with "you won't have to worry about it if somebody goes gets that motherf*cker all high." RP 220.

IV. ARGUMENT

A. Trial Counsel was not deficient in his representation of the Defendant, nor was Defendant unduly prejudiced by Counsel's performance.

Defendant argues that he was denied effective assistance of counsel at the trial court level. To prevail on his claim of ineffective assistance of counsel, the Defendant must meet both prongs of a two-prong test. *State v. McFarland,* 127 Wn. 2d 322, 334–35, 899 P.2d 1251 (1995). He must first establish that his counsel's representation was deficient. *State v. Hendrickson,* 129 Wn. 2d 61, 77, 917 P.2d 563 (1996). Second, the Defendant must show that the deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson,* 129 Wn. 2d at 78. This Court employs a strong presumption that counsel's representation was effective. *McFarland,* 127 Wn. 2d at 335. To show deficient representation, the defendant must show that it fell below an objective standard of reasonableness based on all the circumstances. *McFarland,* 127 Wn. 2d at 334–335. "In assessing performance, 'the court must make every effort to eliminate the distorting effects of hindsight.' " *State v. Nichols,* 161 Wn. 2d 1, 8, 162 P.3d 1122 (2007)

(quoting *In re Pers. Restraint of Rice,* 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)). "If an ineffective assistance claim can be resolved on one prong of this test, the court need not address the other prong." *State v. Staten,* 60 Wn.App. 163, 171, 802 P.2d 1384 (1991).

Defendant argues his lawyer was ineffective for two reasons: 1) counsel did not renew a motion to sever by close of evidence; and 2) counsel did not submit a jury instruction regarding multiple offenses charged against one defendant.

Motion to Sever

Trial Counsel's performance was not deficient. To show deficient performance, the Defendant has the "heavy burden of showing that his attorney 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Howland,* 66 Wn.App. 586, 594, 832 P.2d 1339 (1992) (quoting *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Deficient performance is not shown by matters that go to trial strategy or tactics. *Hendrickson,* 129 Wn. 2d at 77–78.

As stated earlier, there is a strong presumption of effective representation. This presumption requires the defendant bear the burden of showing a lack of a legitimate strategic or tactical reason for

failing to renew the motion to sever charges. In this case, the Defendant is unable to meet such a burden because there was a legitimate tactical reason for not renewing the motion to sever. The defendant would have a major benefit at sentencing based on a presumed concurrent sentence for the verdicts of one trial. Pursuant to RCW 9.94A.589, defendants who are sentenced for multiple convictions at the same proceeding must be given concurrent sentences unless the sentencing court determines that there are grounds for exceptional sentence. *State v. Smith,* 74 Wn.App. 844, 875 P.2d 1249 (1994), review denied 125 Wn.2d 1017, 890 P.2d 19. Convictions sentenced on the same date are deemed "other current offenses" within the meaning of RCW 9.94A.589. RCW 9.94A.525(1). Whereas, if the defendant were found guilty at two separate trials and sentenced on two separate dates, the sentences would likely run consecutive to one another, based on RCW 9.94A.589(3) and local custom.[2] As the Defendant had earned a large offender score, 13 (if sentenced separately) or 16 points (if all counts considered "other current offenses"), the presumption of a concurrent sentence would be welcomed.

At sentencing, Trial Counsel argued all counts should run concurrent: "Mr. Childs is looking at 87 to 116 and then even possibly

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2 Defense counsel was aware of such risk, as he argued this very issue during

the 12 more with the enhancement on top of that." RP 453. "[I]f this court does sentence within the standard range of the 87 to 116 and has the enhancement on top of that of the 12 months from the Assault 2, we're looking at a range from 99 to 128. The court does have discretion within the standard range. That's approximately a 30-month give or take the court can give him. The court can go as low as 99 and high as 128." RP 454. "[W]e do ask that you stay within the guidelines -- he'll be serving ten years, your Honor, with his score, even if you stay within the guidelines and go above that plus twelve." RP 456.

Had there been two separate trials, followed by two separate sentencing hearings, the Defendant would have received a sentence of 87 to 116 months for the Perrigo incident, and an additional 75 to 96 months for the Provost incident. If the court would have followed the statutory presumption, and defense counsel's request for concurrent sentencing for this one case (4 counts), the Defendant would have been spared the increased risk of 75 to 96 additional months in prison. This is a strong reason to not seek separate trials (and sentences). As stated by the sentencing Judge: "[t]here's benefits and risks to running cases consolidated or separate. --tried to take that into account and come up with a balanced sentenced in this

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the motion to sever prior to trial. RP 7.

case." RP 465.

Furthermore, it is hard to argue that Trial Counsel's conduct fell below a minimum objective standard, when the act complained of was permissive versus mandatory. Based on a plain reading of the court rules, a renewed motion to sever at the time of trial is discretionary. CrR 4.4(a)(2) states: "if a defendant's pretrial motion for severance was overruled he *may* renew the motion on the same ground before or after the close of all evidence." (emphasis mine). In contrast, CrR 4.4(a)(1) states a motion to sever offenses *must* be made before trial. (emphasis mine).

An objective standard of reasonableness based on all the circumstances should then consider related court rules. CrR 4.3(a)(1) states two or more offenses may be joined when the offenses are of the same or similar character, even if not part of a single scheme or plan. CrR 4.3.1(b)(2) states: "[w]hen a defendant has been charged with two or more related offenses, the timely motion to consolidate *should* be granted unless the court finds the prosecution does not have sufficient evidence to proceed on one or more offenses at that time." (emphasis mine). Failure to seek consolidation actually puts the State at risk as CrR4.3.1(b)(3) allows a defendant who has been tried on one offense, to seek dismissal of a related offense if the prosecution did not attempt to consolidate those offenses. The motion

to dismiss shall be granted unless the prosecution can prove that it was unaware of the facts constituting the related offense, or did not have sufficient evidence at the time of the first trial to warrant consolidation. *Id.*

Taking the above court rules in conjunction, it would be clear to Trial Counsel and the trial court that: 1) offenses of the same or similar character may be joined; 2) the Prosecution must seek consolidation on related matters in order to avoid dismissal of associated charges; 3) the court is encouraged to consolidate cases of two or more related charges; and 4) defense counsel *must* move to sever charges pre-trial, but is not so required to renew the motion to sever during trial.

Trial Counsel did argue the motion to sever multiple times prior to trial. Each time, the court ruled the matters should be consolidated. By the close of evidence, it was clear that the two cases were very much intertwined in timing, location, witnesses, motive and defenses. It would be difficult to argue that there was not a basis for the consolidation. It would be more difficult to find Trial Counsel deficient for being aware of the plain text of the court rules and failing to take a third run at severance.

When arguing ineffective assistance of counsel, the burden is on the defendant to show deficient performance. *Nichols,* 161 Wn. 2d

at 14. The Defendant has failed to meet such a burden. Because Trial Counsel was not deficient, the Court need not consider possible prejudice.

If, however, this Court does find the Defendant has met his burden of proving Trial Counsel was deficient for failing to make a permissive renewed motion to sever, the Defendant must also show that the deficient performance resulted in prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. The Defendant cannot show such prejudice.

Had Trial Counsel renewed his motion to sever, it would have been denied. A renewed motion to sever would not have been granted because it was properly denied in the first (and second) instance. CrR 4.3(a) permits two or more offenses to be joined when the offenses: "(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."

The courts of this state have held that it is the "better view" to permit a broad joinder policy. *State v. Hentz*, 32 Wn. App. 186, 189, 647 P.2d 39 (1982), reversed on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983). All that is required is that the different crimes have

similarities or connecting threads.[3] The policy to permit broad joinder is based on the important public policy of conserving judicial and prosecutorial resources. *Hentz*, 32 Wn. App. at 189, citing *United States v. Werner*, 620 F.2d 922 (2nd Cir. 1980).

A Defendant seeking severance has the burden of demonstrating that a trial involving both counts would be so *manifestly prejudicial* as to outweigh the concern for judicial economy. *State v. Bythrow*, 114 Wn. 2d 713, 717, 790 P.2d 154 (1990). If the trial court would not have granted the motion had counsel made it, there can be no prejudice. *Strickland,* 466 U.S. 668.

Prejudice may result from joinder if: 1) the defendant is embarrassed in the presentation of separate defenses, or 2) if use of

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3 *See e.g., State v. Smith*, 74 Wn. 2d 744, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934 (1972) (two counts of murder, four counts of robbery and an assault count, involving offenses that occurred over a period of 1 1/2 years were property joined because robbery was involved in all of them); *State v. Gatalski*, 40 Wn.App 601, 605, 699 P.2d 804, *review denied*, 104 Wn.2d 1019 (1985) (one count of attempted rape and one count of unlawful imprisonment committed 5 months apart were properly joined because both counts involved the use of force against female victims and both had sexual connotations); *State v. Hentz, supra* (joinder of robbery, rape and intimidating a witness involving one witness properly joined with counts of kidnapping and taking a motor vehicle without owner's permission was proper because all counts arose out of sexual assaults upon female victims kidnapped from the same general locality and both assaults involved use of an automobile and threatened use of a weapon); *State v. Townson*, 29 Wn.App. 430, 628 P.2d 857 (1981) (two counts of burglary, three counts of forgery, theft, possession of stolen property, rendering criminal assistance and communicating with a minor for immoral purposes were properly joined because they were all part of a series of events occurring over a single summer involving teenage boys that lived or worked with the defendant).

a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition. *State v. Russell,* 125 Wn. 2d 24, 62-63, 882 P.2d 747 (1994). In determining whether the potential for prejudice requires severance, the trial court must look at four mitigation factors, none of which is dispositive: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses as to each count; (3) court instructions to the jury; and (4) the admissibility of evidence of the other charges even if not joined for trial. *State v. Sutherby,* 165 Wn. 2d 870, at 884–85, 204 P.3d 916 (2009) (quoting *Russell,* 125 Wn. 2d at 63).

As to the first factor in the mitigation of prejudice, the State's evidence was strong as to each assault.[4] As to the Provost assault, the State presented the victim as an eye witness to the actual events. This eye witness was able to identify the Defendant by name as the assailant. The eye witness described the mechanism of the assault and the resulting injuries. Officer Babino testified as to his observations of the victim directly after the assault. The Officer was able to corroborate: the time, date and location of the assault; injuries to the victim; that the injuries were consistent with the type of assault; orange stains on the victim and doorway of the residence; smear

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4 Defendant is only challenging the consolidation of the two assaults, not the appurtenant burglary associated with the assault of Perrigo, or the witness tampering tied to the assault of Provost.

mark on door consistent with victim's claim that defendant was blocking door; and the smell of pepper spray in the air at the scene. The Officer was able to provide photographic evidence to the jury showing the state of the victim's injuries and the residence.

Defendant's girlfriend, Haning, confirmed that the victim would know the Defendant and would be able to ID him by name. Haning verified that the Defendant would have gone to the victim's home to retrieve his belongings, and that Defendant was upset that his belongings were being withheld. Haning testified that bear spray had been applied at the Perrigo residence. Haning also testified that after the assault, the victim acted paranoid and upset with the Defendant to the point that he went after the Defendant with a fake firearm (bb-gun), further corroborating the victim's belief that the Defendant was the individual that had assaulted him.

Cherokee Escallier testified as to: the Defendant's belongings at Perrigo's residence; that Defendant was upset that they had his belongings; bear spray had been sprayed at the residence on the date of the assault; that Perrigo acted paranoid and upset after the assault; and testified to the fake firearm (bb-gun) incident.

Jarryd Vontersch, younger brother to Defendant (and Escallier), was called as an alibi witness. Jarryd, testified that the Defendant was at his house (his mom's house) at the date and time

of the assault against Perrigo. Jarryd's testimony was not credible. While the teenager was very specific about his whereabouts, and the Defendant's whereabouts, at the time of the alleged assault, the witness did not have a very clear recollection of much anything else. RP 327-333. The jury was able to properly consider the witness's ability to recall that which he testified to; his demeanor on the stand; and potential biases. The alibi evidence was not strong.

Haning and Escallier testified that they believed Perrigo to have a romantic interest in Haning, and that this was the motivation for Perrigo to makeup the allegations against the Defendant. No specific conduct was introduced to bolster this allegation other than Perrigo's alleged general protective statements towards Haning. Haning admitted, and the State pointed out, that Perrigo and Haning were cousins. The State also argued that if Perrigo's intent was to have the Defendant arrested, why would he tell Escallier "your brother better hope the cops find him before I do"? RP 249. The evidence of motivation for a setup, was not strong.

Haning, Escallier, and Officer Babino testified that they each had personal experience with bear spray/pepper spray, and none would apply such a spray to themselves due to the strong effects. This evidence was properly considered in further defeating the argument that Perrigo had injured himself as part of a setup.

In short, the evidence implicating the Defendant in the assault of Rick Perrigo was strong.

The case against the Defendant for the assault on Michael Provost was equally strong. In fact, Defense concedes that the Provost assault case was strong.

Much like the Perrigo case, the State was able to provide: detailed eye-witness testimony from the victim; evidence the victim knew the Defendant and would be able to ID him by name; evidence the victim knew Haning and would be able to ID her by name; Officer testimony verifying the injuries sustained by the victim, and that the injuries could be consistent with the type of assault alleged; photo evidence of the injuries and the scene; independent witness testimony that two individuals (suspects) were seen running away from the scene consistent with the victim's version of events; Haning's admission that she was quite upset with Provost over a prior eviction; and a phone call between the Defendant and Escallier whereby Defendant requested Escallier to contact the victim and get him 'high' the night before trial so as to affect his ability to testify.

The defense introduced an alibi defense through Haning, and the Defendant's younger siblings (Jarryd and Esha). The alibi was that the Defendant was supposedly at his mother's house along with these three witnesses. The alibi was not strong as neither Esha nor Jarryd

was able to testify clearly as to the events of the night in question. Haning's testimony was not credible either, as she first testified that on the night in question she stayed at Perrigo's. But in response to Defense questioning, Haning claimed she stayed with the Defendant at his mother's. Escallier then testified that Haning had stayed with her, at Perrigo's, on the night of the Provost assault. The alibi evidence was not strong.

In conjunction with the alibi, the Defense argued Provost had a motive to frame the Defendant. Evidence was introduced by defense that the Defendant had previously stolen twenty dollars from the victim in a 'drug deal gone bad,' which occurred months prior to these allegations. RP 126-127. The State simply argued that such a motive was not reasonable as it was not likely that a person would create an elaborate setup over twenty dollars, including: an injury to the head; staging the scene with debris; and releasing two people to run away from the house at the precise moment the neighbor would be coming out of his home. In addition, the State highlighted the jail phone call as consciousness of guilt as to this assault.

The case against the Defendant for the assault on Michael Provost was strong.

Where the State's evidence is strong on each charge, the jury will be less inclined to use the strength of one count to convict on a

weaker count. *Bythrow,* 114 Wn. 2d at 721–22. (citing *Smith,* 74 Wn. 2d at 755). Because the State's cases were equally strong, the trial judge would have ruled against severance on this factor.

The next mitigation factor the court would have considered in determining severance, is the clarity of the defenses as to each count. As to the separate assaults in this case, the defenses were clear. The Defendant had the same defense for each assault: 1) alibi and 2) each victim had a motive to fabricate allegations against him. There is little likelihood of confusion where the defendant's defenses are identical on each charge. *Russell,* 125 Wn. 2d at 64. Even antagonistic defenses have been found to be insufficient to justify severance. In order for antagonistic defenses to result in prejudice, the defenses must be so mutually exclusive to the point that one must be believed if the other is disbelieved. *State v. McKinzy,* 72 Wn.App. 85, 90, 863 P.2d 594 (1993). The defenses in this case were clear and were not such that the jury would have to disbelieve one in order to believe the other. For these reasons, the trial court would have favored denial of the motion to sever based on this second factor.

A third factor the court would consider is the instructions to the jury. Typically, WPIC 3.01 would be appropriate in a case where one defendant is charged with multiple offenses. WPIC 3.01 reads: "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] [the]*other count." This jury instruction has been found to be sufficient to guard against possible prejudice to the defendant from the failure of the defendant's attorney to renew a motion to sever offenses. *State v. Standifer*, 48 Wn.App. 121, 737 P.2d 1308 (1987). Unfortunately, this instruction was omitted in this trial. (Because the defense did not propose such an instruction, they should not now complain that it was not given.)

This review is limited to how the court would have considered jury instructions as a way to reduce prejudice *had* the motion to sever been renewed. Had the motion to sever been renewed, the trial court would have undoubtedly found that WPIC 3.01 to be sufficient to reduce prejudice (pursuant to *Standifer*), and would have included said instruction to the jury. This presumption weighs on the side that the trial court would have denied the motion to sever.

In the alternative, the jury instructions as provided were sufficient. WPIC 3.01 merely requires the jury *deliberate* on each count separately. *State v. Bradford,* 60 Wn.App. 857, at 861, 808 P.2d 174 (1991). It does not instruct the jury how to compartmentalize evidence as to each count, or limit the use of evidence to specific allegations. There was no specific argument at or before trial as to limitation of evidence, and therefore no limiting instructions were

proposed. However, the general instructions provided to the jury were sufficient in mitigating any prejudice of the consolidated cases. The general instruction provided at the end of trial stated: "In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition." RP 369 referring to WPIC 1.02. Furthermore, the jury was given separate "to-convict" instructions for each count setting forth the specific elements the jury had to find beyond a reasonable doubt.

The Defendant's trial lasted only three days. The issues were simple, did the jury believe the Defendant assaulted the victims based on the testimony of the eyewitnesses. When a trial is short, and the issues simple, a jury can be reasonably expected to compartmentalize the evidence. *Bythrow,* 114 Wn. 2d at 721. It was not a particularly complicated task to keep the testimony and evidence separate. In closing argument, the prosecutor used each "to convict" instruction to associate the evidence with the specific criminal charge. In addition, the judge allowed the jurors to use notebooks to help them keep track of the evidence. Because the Defendant raised the same defenses to both assaults, the jurors would not be confused in that regard. See *State v. Hernandez,* 58 Wn.App. 793, 799, 794 P.2d 1327 (1990). *disapproved on other grounds by State v. Kjorsvik,* 117 Wn.2d 93, 812 P.2d 86 (1991). At no time did the prosecutor argue that the jury

should consider evidence from the Provost assault to convict the Defendant of the Perrigo assault, and vice versa.

The jury instructions given, in conjunction with the manner in which the evidence was argued, favor a mitigation of prejudice and the trial court's denial of a renewed motion to sever.

Finally, the trial court would consider whether the evidence presented at trial was cross-admissible on each count. *Russell,* 125 Wn. 2d at 63. A number of witnesses, who testified at trial, testified as to both the Perrigo and Provost incidents. Evidence that was relevant to both cases included testimony from: Amber Haning; Cherokee Escallier; Jarryd Vontersch; and Eshaniah Vontersch. The testimony from these witnesses' laid the framework for the relationships between the Defendant and the victims. The common witnesses developed one continuous timeline from prior to the assault on Perrigo through the day of the assault on Provost. The common witnesses completed the one story of the relationship between Amber Haning and the Defendant. A bulk of the cross-admissible evidence had to do with matters other than one assault being introduced in reference to a second assault. However, the evidence of misconduct or other crimes is admissible when it "complete[s] the crime story." ER 404(b); *State v. Hughes,* 118 Wn.App. 713, 725, 77 P.3d 681 (2003); *see State v. Mutchler,* 53 Wn.App. 898, 901, 771 P.2d 1168 (1989).

Combining the Rick Perrigo assault with the Michael Provost attack, was necessary to present the "complete crime story."

The assaults themselves were also cross-admissible as 'other bad acts' because such evidence was admissible for a purpose such as proof of motive. ER 404(b). One motive for the Defendant's assaults on these other men is the fact that the Defendant is the defender/protector of his girlfriend, Amber Haning. Haning, and Escallier testified that they believed Perrigo wanted to pursue Haning romantically. As a jealous boyfriend, the Defendant had motive to keep Perrigo from moving in on his love interest. In addition, Haning testified that the Defendant was trying to get back together with her. It could be inferred that he was doing acts to try to win her back. Haning was upset during this time that she was again being evicted. RP 261. One act of valor would be to punish the man that had previously evicted his love, trashed her belongings and killed her dog.

The similar defenses were also cross-admissible as they were used to question Haning's bias and credibility as a defense (alibi) witness.

ER 404(b) prohibits using evidence of other acts to prove the character of a person in order to show that he acted in conformity with that character. *Smith,* 106 Wn. 2d at 775. But, at no time during trial was it argued that the Defendant was a "bad guy"; nor that because

he committed one assault, he must have committed the second. While the joint trial allowed the jury to hear cases about two separate assaults, there was no cumulating of evidence as propensity was not argued. The two assaults were separated sufficiently in character that it would not be reasonable to argue that a person who would confront another face to face and spray that person with pepper spray, would be likely to sneak up behind a second person and hit them in the back of the head with a machete.

While it is clear that these two incidents were sufficiently linked, cross admissibility of the evidence is not required for joinder. *State v. Kalakosky,* 121 Wn. 2d 525, at 538, 852 P.2d 1064 (1993). *See also: Gatalski,* 40 Wn.App. at 609-10 (declining to hold or imply that severance is required in every case where evidence of one count would not be admissible in separate trial of other counts), *review denied,* 104 Wn.2d 1019 (1985); *State v. Markle,* 118 Wn. 2d 424, 439, 823 P.2d 1101 (1992) (the trial court need not sever counts just because evidence is not cross admissible); and *Bythrow,* 114 Wn. 2d at 720 (even if separate counts would not be cross-admissible in separate proceedings, this does not as a matter of law state sufficient basis for the requisite showing by the defense that undue prejudice would result from a joint trial). Pursuant to the liberal rule towards joinder, Washington's appellate courts have held that offenses that

only share some characteristics are properly joined even if the charges do not have any common witnesses and would not be cross-admissible in separate trials. *See e.g., Smith*, 74 Wn. 2d 744.

The fourth mitigating factor regarding mitigated prejudice would have also supported the trial court's denial of a renewed motion to sever.

On balance, severance was not necessary because any potential prejudice due to a consolidated trial, was significantly ameliorated. The strength of the State's cases was equally strong; the defenses were clear; the evidence was easy for a jury to compartmentalize along with the appropriate jury instructions; and the evidence was sufficiently cross admissible. Any residual prejudice cannot be said to have been so manifestly prejudicial so as to warrant severance of the cases.

The record as a whole demonstrates that counsel represented the defendant aggressively and effectively. Before trial, defense counsel argued the severance issue multiple times, and it was not likely that a third attempt would have changed the result of the trial. The Defendant has failed to show sufficient prejudice, that but for counsel's deficient performance, it is probable the results of trial would have been different.

Failure to Propose Jury Instruction

The Defendant also argues that his trial counsel was ineffective for failing to propose WPIC 3.01. To establish ineffective assistance based on counsel's failure to request a jury instruction, the defendant must show that he was entitled to the instruction, counsel was deficient in failing to request it, and failure to request the instruction caused prejudice. *Strickland,* 466 U.S. at 687; *State v. Johnston,* 143 Wn.App. 1, 21, 177 P.3d 1127 (2007). Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have differed. *McFarland,* 127 Wn.2d at 335. Again, this Court employs a strong presumption that counsel's representation was effective. *Id.*

Defendant's claim of ineffective assistance of counsel must fail because he cannot demonstrate prejudice. Although WPIC 3.01 was not provided, it simply would have informed the jury to *deliberate* on each count separately. *Bradford,* 60 Wn.App. at 861. The potential prejudice alleged, is speculation that the jury *could have* considered evidence from one case in deliberation of the joined case. WPIC 3.01 does not specifically tell the jury how it may use the evidence. However, the general instructions provided to the jury were sufficient to insure that each count was considered separately. The general instruction provided at the end of trial stated: "In order to decide

whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition." RP 369 referring to WPIC 1.02. CP 80-81. The jury was given separate "to convict" instructions for each count setting forth the specific elements the jury had to find beyond a reasonable doubt. CP 87, 87, 90, 93. In addition, the jury was provided a separate verdict form for each charge. CP 103-104, 182-184. These instructions sufficiently instructed the jury that the crimes were to be considered independently of one another. Thus, any error in failing to provide WPIC 3.01 was harmless.

As stated before, when a trial is short and the issues simple, a jury can be reasonably expected to compartmentalize the evidence. *Bythrow,* 114 Wn. 2d at 721. It was not difficult for the jury to keep the testimony and evidence separate. The prosecutor used the "to convict" instructions to organize the evidence as to each criminal charge. Jurors also used notebooks to help keep track of the evidence. Because the Defendant raised the same defense to both assaults, the jurors would not be confused in that regard. *See Hernandez,* 58 Wn.App. at 799. At no time did the prosecutor argue that the jury should consider evidence from the Provost assault to

convict the Defendant of the Perrigo assault, and vice versa.[5]

The jury instructions given, in conjunction with the manner in which the evidence was argued, sufficiently limited any prejudice towards the Defendant.

The Defendant cannot establish a reasonable probability that the outcome of the trial would have been different had the trial court given WPIC 3.01. Accordingly, his ineffective assistance of counsel claim must fail.

B. Defendant's challenge to imposition of legal financial obligations is not ripe for challenge.

For the first time on appeal, the Defendant contends that the trial court erred in finding that he had the ability to pay legal financial obligations without conducting any inquiry into his financial circumstances.

Whenever a person is convicted in superior court, the court may order the payment of legal financial obligations as part of the sentence. RCW 9.94A.760(1). Courts may impose costs as part of the legal financial obligations if a defendant has or will have the ability to pay. RCW 10.01.160(3). Before making such a finding, the trial court

5 In closing Defense agreed: "... as the state has gone through these

must "[take] into account the financial resources of the defendant and the nature of the burden" imposed by the LFOs. *State v. Baldwin,* 63 Wn.App. 303, 312, 818 P.2d 1116 (1991). This court reviews a trial court's determination of an offender's financial resources and ability to pay for clear error. *Id.*

Three of the LFOs at issue in the Defendant's sentence are mandatory. The $500 victim assessment is required by RCW 7.68.035, irrespective of ability to pay. *State v. Curry,* 62 Wn.App. 676, 681, 814 P.2d 1252 (1991), *aff'd,* 118 Wn.2d 911, 829 P.2d 166 (1992). The $100 DNA (deoxyribonucleic acid) collection fee is required by RCW 43.43.7541. And the $200 criminal filing fee is required by RCW 36.18.020(2)(h). Because these LFOs are mandatory, they do not require the trial court to consider the Defendant's ability to pay.

The only discretionary LFO's imposed in this case were the $1,500 appointed counsel recoupment fee and the $1,000 fine. However, the Defendant did not object at sentencing to the finding of his current or likely future ability to pay. Of these two figures, the only "cost" as referenced by RCW 10.01.160 and *Baldwin, supra,* is the court appointed attorney recoupment. The fine of $1,000 is authorized by RCW 9.94A.550, which states within all sentences under RCW

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cases individually I do believe that is an accurate way to do this."

9.94A, the court may impose a fine of up to $50,000 for a class A felony and $20,000 for a class B felony. There is no like requirement that the court make any specific findings of ability to pay, prior to imposing a fine.

Our Supreme Court has recently decided that each appellate court must make its own decision to accept discretionary review on unchallenged LFOs. *State v. Blazina,* ___Wn.2d. ___, (filed Mar. 12, 2015).

The State argues this Court should follow its previous decisions and decline to allow the Defendant to challenge for the first time on appeal, the finding regarding his ability to pay, *See: State v. Kuster,* 175 Wn.App. 420, 425, 306 P.3d 1022 (2013). *See also* RAP 2.5(a). The issue presented is not ripe for review. The Defendant may petition the court at any time for remission or modification of the payments on the basis of manifest hardship. RCW 10.01.160(4); *Baldwin,* 63 Wn.App. at 310–11, 818 P.2d 1116. The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3). Because this determination is somewhat "speculative," the time to examine a defendant's ability to pay is when the government seeks to collect the obligation. *State v. Smits,* 152 Wn.App. 514, 523–24, 216 P.3d 1097 (2009). The Defendant may

challenge the trial court's imposition of "costs" when the government seeks to collect them.

For these reasons, the Court should not consider the challenge to imposition of a public defender recoupment for the first time on appeal.

C. The No Contact Order provision of the Judgment & Sentence is not sufficiently clear and definite, and should be remanded for clarification.

The State concedes that the No-Contact Order pursuant to cause number 14-1-00009-1 is not sufficiently clear. The court failed to enter an expiration date for said order. Remand for this lone issue is necessary.

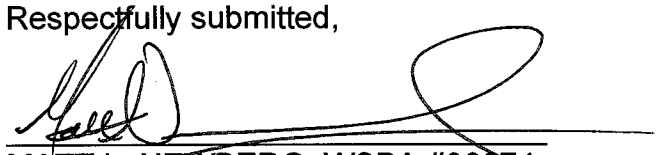
V. CONCLUSION

In conclusion, the Defendant's convictions should be affirmed. The Defendant was not denied effective assistance of trial counsel. While a Defendant is entitled to competent representation, he is not guaranteed a perfect lawyer. The trial court did not err in imposing legal financial obligations, and if it had, the challenge is not yet ripe for

challenge. Lastly, remand is appropriate for the lone purpose of correcting the No Contact Order imposed pursuant to sentence.

Dated this 16 day of March, 2015.

Respectfully submitted,



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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, PLAINTIFF/RESPONDENT,	)	NO. 32587-3-III
VS.	)	CERTIFICATE OF SERVICE
BENJAMIN CHILDS, DEFENDANT/APPELLANT.	)	

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT ON MARCH 16, 2015, I SERVED A COPY OF THE RESPONDENT'S BRIEF , TO:

ATTORNEY DANA NELSON (FOR ATTORNEY ERIS NIELSEN) VIA EMAIL AT NELSOND@NWATTORNEY.NET; AND

BENJAMIN CHILDS, DOC NO. 714574, COYOTE RIDGE CORRECTION CENTER, PO BOX 769, CONNELL, WA 99326, VIA FIRST CLASS MAIL, POSTAGE PREPAID.

SIGNED AT POMEROY, WASHINGTON ON MARCH 16, 2015.

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