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Division I  
State of Washington  
No. 73452-1-I

73452-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**DOMINGO MONTAR-MORALES,**  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan Cook, Judge

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**RESPONDENT'S BRIEF**

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## **I. SUMMARY OF ARGUMENT**

The charges occurred over the course of less than two hours on the same evening in apartment units in the same building. The defendant entered one unit where he digitally penetrated the anus of a twelve-year-old girl, who had been sleeping, following which he burglarized a nearby unit, taking a coin purse from a sleeping child's bedside and a wallet from a sleeping man, and after fleeing that unit, tried to reenter the first unit where he was stopped by the occupants, chased down, and caught.

When police arrived in response to a report of three men fighting and a possible rape they found two occupants of the residence at which the rape occurred restraining the defendant. Montar-Morales was noncompliant with officers and aid crew and was detained pending investigation of the offenses. He was transported to the hospital by officers for medical treatment. While at the hospital officers developed probable cause to arrest him for rape and got a fit for jail evaluation. After Montar-Morales got off the treatment table, a wallet was located that did not belong to Montar-Morales which had been left on the treatment table. Montar-Morales was booked into jail on the rape allegation,

Montar-Morales' person was searched and other property was recovered which was related to a burglary which occurred after the rape, but before the defendant was initially detained.

The trial court denied the motions to suppress the physical evidence, sever the counts, and dismiss the Rape of a Child in the Second Degree charge on a finding of insufficient evidence.

Domingo Montar-Morales was convicted by a jury of Rape of a Child in the Second Degree, Child Molestation in the Second Degree, Residential Burglary, Theft in the Second Degree, and Theft in the Third Degree.

The denial of the motion to suppress the evidence is supported by the totality of the circumstances accounting for the reasonableness of the detention. The defendant waived the severance claim by failing to renew the motion and cannot show manifest prejudice to outweigh the substantial interest in judicial economy to support severing the counts. The conviction for Rape of a Child in the Second Degree is supported by substantial evidence that the child was digitally penetrated such that a rational trier of fact could find sufficient evidence to conclude guilt of the defendant beyond a reasonable doubt.

## **II. ISSUES**

1. In the totality of the circumstances involving investigations of rape and burglary at two different units in an apartment complex, language barriers, medical treatment needs, and noncompliance from the defendant, was there a permissible *Terry* detention?
2. Can the defendant establish such manifest prejudice as to outweigh the concern for judicial economy where the charges are so connected in time and location as to qualify under the category as true res gestae?
3. Was there sufficient evidence of penetration such that there is any reasonable trier of fact who could find Montar-Morales guilty of Rape of a Child in the Second degree beyond a reasonable doubt?

## **III. STATEMENT OF THE CASE**

### **1. Statement of Procedural History**

On July 22, 2014, Domingo Montar-Morales was charged with Residential Burglary, Burglary in the First Degree with Sexual Motivation, Rape of a Child in the Second Degree alleged to have occurred on or about July 19, 2014. CP 151-52.

On October 8, 2014, an amended information was filed to include Rape in the Third Degree (Lack of Consent), Theft in the Second Degree, Theft in the Third Degree, and Attempted

Residential Burglary also alleged to have occurred on or about July 19, 2014. CP 6-9.

On December 17, 2014, the trial court heard defense motions to suppress evidence, to suppress statements, and to sever the counts. 12/17/2014 RP 4.<sup>1</sup> The trial court denied each motion. 12/17/2014 RP 79, 86. On January 8, 2015, the trial court entered written findings of fact and conclusions of law denying the motion to suppress evidence under CrR 3.6, CP 148-50, and the admissibility of statements under CrR 3.5. CP 1-2.

On January 16, 2015, a second amended information was filed removing the charge of Burglary in the First Degree with Sexual Motivation. CP 209-11.

On January 27, 2015, the trial court heard various motions, including a renewal of the defense motion to sever the Residential

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

12/17/2014 RP	3.5, 3.6, AND MOTION TO SUPPRESS HEARING
01/27/2015	MOTIONS HEARING
01/29/2015	TRIAL DAY 1
01/30/2015	TRIAL DAY 2
02/02/2015	TRIAL DAY 3
02/03/2015	TRIAL DAY 4
02/04/2015	JURY VERDICT
03/03/2015	DEFENSE MOTION TO ARREST JUDGMENT
04/30/2015	SENTENCING

Burglary, Theft in the Second Degree, and Theft in the Third Degree counts from the remaining counts. 01/27/2015 RP 88. Again, the trial court denied the motion. 01/27/2015 RP 89; CP 197-98.

On January 28, 2015, a third amended information was filed to remove the charge of Rape in the Third Degree (Lack of Consent) and include Child Molestation in the Second Degree also alleged to have occurred on or about July 19, 2014. CP 10-12. Thus, the final charges were Rape of a Child in the Second Degree, Count 1; Child Molestation in the Second Degree, Count 2; Residential Burglary, Count 3; Theft in the Second Degree, Count 4; Theft in the Third Degree, Count 5; and Attempted Residential Burglary, Count 6. CP 10-12.

On January 29, 2015, Montar-Morales proceeded to trial. 01/29/2015 RP 1. The jury returned a verdict of guilty on all counts except Count 6, Attempted Residential Burglary where they failed to reach a verdict. CP 231-36.

On April 30, 2015, the trial court vacated Count 2, Child Molestation in the Second Degree based on a finding of the same criminal conduct and double jeopardy with the conviction for

Count 1, Rape of a Child in the Second Degree. 04/30/2015 RP 117.

On May 8, 2015, Montar-Morales timely filed a notice of appeal. CP 177.

## **2. Statement of Facts**

On the evening of July 18, 2014, Montar-Morales was drinking beer with his acquaintance, Noel Lopez-Flores, outside of Lopez-Flores' residence, 1916 Harrison Street in Mount Vernon. 02/02/2015 RP 24. 1916 Harrison Street is a two-bedroom apartment where Lopez-Flores lived with his cousin, Elizabeth Ramirez-Flores, her two toddler children, and his cousin Nicodemo Lopez. 02/02/2015 RP 24. Ramirez-Flores and her two children shared the larger bedroom while Lopez-Flores and Nicodemo shared the smaller bedroom. 02/02/2015 RP 32-33, 38.

After drinking about four beers each outside of 1916 Harrison Street, Montar-Morales and Lopez-Flores went to a bar and had a fifth beer. 02/02/2015 RP 27. Montar-Morales then accompanied Lopez-Flores back to 1916 Harrison Street and entered the house. 02/02/2015 RP 28.

At the time, Lopez-Flores' extended family was visiting from California and sleeping in the living room of the apartment. 02/02/2015 RP 30-31, 39-40. The visiting family included Maria Flores-Garcia, her sixteen-year-old son René Jiminez-Flores, and her twelve-year-old daughter Y.J. 01/29/2015 RP 27, 39, 62; 02/02/2015 RP 30. Because it was late at night, around 11:00 p.m. or later, everyone in the house was asleep when Montar-Morales and Lopez-Flores entered the apartment. 02/02/2015 RP 28, 31-33. After getting Montar-Morales a sleeping bag, Lopez-Flores went to sleep alongside his cousin, Nicodemo, in the bedroom they shared. 02/02/2015 RP 32-33. When he fell asleep, Montar-Morales was lying on the floor of Lopez-Flores' room watching television. 02/02/2015 RP 32.

Just after midnight, Montar-Morales anally penetrated Y.J., a twelve-year-old-female child who was sleeping in the main room of the apartment. 01/29/2015 RP 32-33, 74, 106. Y.J. tried to alert her mother, who was sleeping on the floor next to Y.J., but was unable to rouse her from her sleep. 02/02/2015 RP 76. After the child got away from Montar-Morales, she went to the bathroom for a period of time until her mother asked her to come

out. 01/29/2015 RP 66, 71, 76. When Y.J. did not see Montar-Morales in the main room she returned to the floor of the living room where she had been sleeping, as did her mother. 01/29/2015 RP 77-78. Y.J. was not able to go back to sleep. 01/29/2015 77-78. Then Montar-Morales came out of Lopez-Flores' bedroom towards Y.J. and Y.J. pushed him away. 01/29/2015 RP 79. The child's mother and cousin, Elizabeth Ramirez-Flores, were awakened and confronted Montar-Morales. 01/29/2015 RP 64; 02/02/2015 RP 42. Montar-Morales was told to leave or the police would be contacted, which he did. 01/29/2015 RP 44, 64; 02/02/2015 42.

The occupants of the apartment unit at 1912 Harrison Street were asleep with the window open. 01/29/2015 RP 132. 1912 Harrison Street is in the same building and one unit away from 1916 Harrison Street. 12/17/2014 RP 9, 14, 27; 02/02/2015 RP 66-67, 73-74, 110. A husband and wife, Lucia Perez-Ventura and Margarito Lopez-Ramirez, were in bed together just after midnight on July 19, 2014. 01/29/2015 RP 135. The wife awoke at about 1:00 a.m. when someone was touching her. 01/29/2015 RP 123, 135. She woke her husband who chased after the man, catching up to him shortly after he opened and exited the door.

01/29/2015 RP 123, 135. The husband was able to catch up to the intruder, but he pulled out of his sweatshirt and got away. 01/29/2015 RP 135. The husband knew Montar-Morales for years and was confident the intruder was him. 01/29/2015 RP 136-37. The husband looked around and discovered his wallet was missing which included debit cards and over \$600 in cash. 01/29/2015 RP 123-24, 137, 139; 02/02/2015 RP 81.

Montar-Morales tried to enter back into the unit at 1916 Harrison Street through a bedroom window, but fled when Ramirez-Flores turned on the lights. 02/02/2015 RP 45. René and Nicodemo chased after him. 02/02/2015 RP 46, 48, 54. René told the neighbors, who had come out of their homes because of the events, to call the police after he and Nicodemo had restrained Montar-Morales. 01/29/2015 RP 48-49.

At about 1:06 a.m., a call was received by police about three males fighting in the street. 12/17/2014 RP 6, 39; 02/02/2015 RP 59-60, 89-90. The report also included an indication of a possible sexual assault. 12/17/2014 RP 6, 26, 39. Officers Chester Curry and Joel McCloud arrived on the scene with Officer McCloud arriving minutes before Officer Curry. 12/17/2014 RP 42;

02/02/2015 RP 60-61, 89-90. Sergeant Mike Moore arrived shortly after as supervisor. 12/17/2014 RP 25.

Officer McCloud approached the three men, two who were standing up restraining one who was down on the ground. 12/17/2014 RP 39; 02/02/2015 RP 90. When Officer McCloud approached the men he was the only officer on the scene. 12/17/2014 RP 40. The two standing men were René and Nicodemo, 02/02/2015 RP 60, and the seated man was Montar-Morales. 12/17/2014 RP 40; 02/02/2015 RP 91. Officer McCloud assessed that Montar-Morales had a head injury that was bleeding freely and called for aid and paramedic crews to provide medical assistance. 12/17/2014 RP 42 2014; 02/02/2015 RP 90-92. René and Nicodemo informed Officer McCloud that Montar-Morales was the man who was involved with the sexual assault of the child. 12/17/2014 RP 39.

René and Nicodemo remained where they had been directed by Officer McCloud to wait for Officer Curry to speak to them. 02/02/2015 RP 92. Officer McCloud had difficulty keeping Montar-Morales on the scene when Montar-Morales did not comply with Officer McCloud's instruction to remain seated.

12/17/2014 RP 39-40; 02/02/2015 RP 92. Officer McCloud instructed Montar-Morales to stay seated to ensure Officer McCloud's safety and Montar-Morales safety, because Officer McCloud did not want Montar-Morales to attempt to stand with his head injury and fall on the ground hurting himself more. 12/17/2014 RP 40-41. Because of Montar-Morales' refusal to cooperate, the nature of the allegation, the reported rape, and the brief comments of the individuals who were holding him, Officer McCloud detained Montar-Morales at about 1:09 a.m. and informed him he was being detained pending investigation of an assault. 12/17/2014 RP 40-41, 45; 02/02/2015 RP 92, 94. Officer McCloud did a patdown of Montar-Morales and looked in his pockets for weapons or sharp objects. 12/17/2014 RP 52. Finding none, Officer McCloud returned the property to Montar-Morales' pockets 12/17/2014 RP 52.

When Officer Curry arrived he approached Jiminez-Flores and Lopez to get initial statements. 12/17/2014 RP 8; 02/02/2015 RP 60. Officer Curry is fluent in Spanish having spoken Spanish his entire life. 12/17/2014 RP 7; 02/02/2015 RP 69. Officer Curry assessed that René and Nicodemo did not appear to be injured,

but Montar-Morales had a bloody face. 02/02/2015 RP 62. Because René and Nicodemo were emotional and distressed Officer Curry had difficulty getting them to focus on and answer his questions. 12/17/2014 RP 8, 26; 02/02/2015 RP 61. He was able to elicit from René that there was a possible sexual molestation of his sister. 12/17/2014 RP 8.

A medical aid crew arrived and examined Montar-Morales' head injury. 12/17/2014 RP 42-43; 02/02/2015 RP 93. Montar-Morales was not cooperative with the aid crew and expressed that he did not want to go to the hospital or receive medical aid. 12/17/2014 RP 43; 02/02/2015 RP 93. Officer Moore determined that Montar-Morales was in need of medical assistance and transported him to the hospital in Officer Moore's patrol car at 1:25 a.m. 12/17/2014 RP 45; 02/02/2015 RP 93. They arrived at Skagit Valley Hospital's emergency department at about 1:29 a.m. 12/17/2014 RP 46.

While Montar-Morales was being treated, other officers spoke with the victim of the alleged rape, other occupants of 1916 Harrison Street, and occupants of 1912 Harrison Street who had reported the burglary. 12/17/2014 RP 8-13, 25-31. Officer Curry

went to 1916 Harrison Street with René and Nicodemo and arrived at the front door at 1:28 a.m. 12/17/2014 RP 19-20; 02/02/2015 RP 67. By this time René and Nicodemo had calmed down considerably. 02/02/2015 RP 68. Officer Curry spoke with Flores-Garcia and Y.J., who kept her head down, was very quiet and embarrassed. 02/02/2015 RP 71. Officer Curry consulted with Officer Moore about his discussion with Y.J. and Officer Moore decided to call in Detective Ely for further investigation. 02/02/2015 RP 72. After briefing Detective Ely on what he had learned, Officer Curry went to 1912 Harrison Street to speak with the husband and wife who reported a the burglary. 02/02/2015 RP 73.

Det. Ely met with the child and her mother and interviewed the child at the police station where the interview was recorded. 02/02/2015 RP 122-126. Y.J. discussed the allegations with Det. Ely, but would not agree to a sexual assault examination. 02/02/2015 RP 127. The child was nervous and embarrassed throughout the interview. 02/02/2015 RP 124-27. After concluding the interview, Det. Ely continued his investigation t 1916 and 1912 Harrison Street. 02/02/2015 RP 128-

29. Det. Ely determined that there was no need for a photo montage for identification because the husband at 1912 Harrison Street knew Montar-Morales and had identified him. 02/02/2015 RP 143. René and Nicodemo had been found with Montar-Morales when the police arrived, so a photo montage was also unnecessary for their identification of the defendant. 02/02/2015 RP 143. While investigating, Det. Ely learned that Montar-Morales had washed his hands at the hospital as part of his medical treatment, so all DNA evidence that may have been there from the sexual assault would have been destroyed. 02/02/2015 RP 143.

At 1:36 a.m., Sergeant Moore radioed Officer McCloud that their investigation had yielded probable cause to arrest. 12/17/2014 RP 31, 48. Officer McCloud, still at the hospital, advised Montar-Morales of his constitutional rights and placed him under arrest at 1:37 a.m. 12/17/2014 RP 48. While being advised of his rights Montar-Morales spoke over Officer McCloud making statements about being too late and blah, blah, blah. 12/17/2014 RP 54.

Following being advised of his constitutional rights, Montar-Morales continued to receive additional medical

treatment at the hospital. 12/17/2014 RP 48. Officer McCloud requested the hospital evaluate Montar-Morales as fit for jail. 12/17/2014 RP 62. They did so and released Montar-Morales to Officer McCloud. 12/17/2014 RP 62. After Montar-Morales got up off the treatment table, the nurse noted a wallet was left and opened it showing identification of someone other than the defendant, later determined to be Margarito Lopez-Ramirez, the husband of 1912 Harrison Street. 12/17/2014 RP 49; 02/02/2015 RP 95, 109-110.

Upon booking Montar-Morales into jail on the alleged burglary and rape, additional property was located on Montar-Morales which belonged to the occupants of 1912 Harrison Street, including bank cards belonging to the husband and a coin purse with quarters that his daughter kept by her bed. 12/17/2014 RP 50; 01/29/2015 RP 123, 126; 02/02/2015 RP 102, 111.

#### **IV.ARGUMENT**

- 1. Because Montar-Morales's detention was permissible under *Terry* until the time of his arrest the evidence recovered at the hospital and all evidence seized at the jail should not be suppressed.**

Officer McCloud initially detained the defendant because he felt it was necessary in order to gather further information relating to the rape he had been called to investigate. The length of the detention was attributable to the defendant's noncompliance, the severity of the allegations being investigated, and the need to investigate in two separate units in the same apartment complex. These reasons, coupled with the officer's prioritizing the safety of himself and the defendant by ensuring he receive medical treatment for his wounds, make the length of detention prior to arrest permissible in the totality of the circumstances.

- i. The officers had an articulable suspicion of criminal activity to support the detention of Montar-Morales based upon the report of a fight and possible sexual assault as well as initial statements by witnesses.**

Both the federal and state constitutions permit a warrantless investigative detention, or *Terry* stop, whenever a law enforcement officer has a reasonable suspicion, based on “specific and articulable facts” and “rational inferences from those facts,” that the stopped person has been or is about to be involved in a crime. *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289

(2012) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)); see *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010); *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). The level of articulable suspicion necessary to support an investigative detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d (1999) quoting *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Probable cause is not required for a *Terry* stop because a stop is significantly less intrusive than an arrest. *Kennedy*, 107 Wn.2d at 6; *Brown v. Texas*, 443 U.S. 47, 50, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (same).

Here, the information available to Officer McCloud gave adequate suspicion of the rape allegation to authorize the detention of Montar-Morales. Police had received a call reporting three males fighting in the street with a supplemental report indicating a possible sexual assault. 12/17/2014 RP 6, 26, 39; 02/02/2015 RP 59-60, 89-90. Witness reports indicated that the man on the ground was involved in the rape. 12/17/2014 RP 39. Thus, a *Terry* detention was permissible.

**ii. The totality of the circumstances indicate the investigative stop of Montar-Morales was reasonable given the severity of the allegations, the defendant's noncompliance, and the circumstances requiring investigation at two different addresses.**

In evaluating the reasonableness of an investigative stop the Washington Supreme Court requires consideration of “the totality of the circumstances, including the officer’s training and experience, the location of the stop, and the conduct of the person detained.” *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594, 598 (2003). Courts may also consider “the purpose of the stop, the amount of physical intrusion upon the suspect’s liberty, and the length of time the suspect is detained.” *Acrey*, 148 Wn. 2d at 747 citing to *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987). With regard to length of time, the Supreme Court allows for a *Terry* stop to be extended and its duration prolonged if the officer’s initial suspicions are confirmed or further aroused. *Acrey*, 148 Wn.2d at 747.

*State v. Bray*, 143 Wn. App. 148, 177 P.3d 154 (2008), indicates that a stop by an officer did not exceed the scope of the *Terry* stop by handcuffing the defendant and investigating the

scene for thirty minutes before arresting him on suspicion of a burglary under the facts of the case. In *Bray*, the defendant was suspected of being involved in a burglary at a storage unit. *Id.* at 151. His explanation to police of what he was doing there did nothing to dispel the officers' suspicions that he was involved in a burglary. *Id.* at 154. This justified his continued detention while the officer's investigated whether other storage units had been broken into and reviewed Mr. Bray's criminal history. *Id.*

Here, police were called to the scene in response to allegations of a rape. 12/17/2014 RP 6, 26, 39. Witness reports that Montar-Morales was involved. 12/17/2014 RP 39. Because Officer McCloud arrived first and alone and because the defendant had an obvious head trauma, he directed the defendant to remain on seated where he was. 12/17/2014 RP 39-40. The defendant did not comply with the order and Officer McCloud detained the defendant in handcuffs at 1:09 or 1:10 a.m. 12/17/2014 RP 40-41, 45; 02/02/2015 RP 92, 94. McCloud informed the defendant that he was being detained pending investigation of an assault. 12/17/2014 RP 40-41, 45; 02/02/2015 RP 92, 94.

They arrived at the hospital by 1:29 a.m., after the defendant had been examined on scene by a medical aid crew and it was determined he needed further medical treatment. 12/17/2014 RP 45-46; 02/02/2015 RP 93. The defendant's subsequent demeanor towards the medical treatment providers and his continued noncompliance authorized prolonging the detention period. Although such detention would have authorized McCloud to take Montar-Morales to the scene of the alleged rape while other officers evaluated the information from the reporting parties, McCloud took the appropriate steps to treat Montar-Morales' obvious injuries. 12/17/2014 RP 45; 02/02/2015 RP 93.

Meanwhile, officers continued investigating the alleged rape at 1916 Harrison Street and were made aware of the burglary at 1912 Harrison Street which the defendant was also implicated in. 12/17/2014 RP 8-13, 25-31. This further aroused officers' suspicions as to criminal activity and investigating the newly discovered allegations at a neighboring unit justified prolonging the detention. Sometime between 1:28 and 1:36 in the morning police received direct information from the child that she had been raped. 02/02/2015 RP 71.

Sgt. Moore radioed Officer McCloud, who was still at the hospital with the defendant seeing to his medical needs, at 1:36 a.m. that probable cause existed for an arrest. 12/17/2014 RP 31, 48. By 1:37 a.m., Officer McCloud had advised a still resistive Montar-Morales of his constitutional rights and placed him under arrest. 12/17/2014 RP 48.

Similar to *Bray*, Montar-Morales did nothing to dispel the officers' suspicions that he was involved in a rape and a burglary. The defendant remained resistive and noncompliant throughout the detention. The length of his detention was the same as in *Bray*, twenty-seven minutes, but with significantly more factors that contributed to a prolonged detention here than in *Bray*. Here, officers were able to have the defendant treated for his injuries, investigate a child rape at one unit and a burglary in another, and interview over 8 witnesses whose native language was not English with only one Spanish-speaking police officer on-scene in twenty-seven minutes to establish probable cause for arrest. As the trial court noted, "[w]ith unique circumstances of confusion involving two different addresses, officers worked with due diligence to

attempt to find out the circumstances as soon as they could, in doing all that, within about 26 or 27 minutes.” CP 150.

Because the *Terry* stop was not unlawful the ruling of the trial court denying the motion to suppress the wallet recovered at the hospital and all evidence seized at the jail should be denied.

**2. Montar-Morales failed to renew the motion to sever at the close of the evidence and severance of the charges was within the court’s discretion because they occurred over the course of less than two hours on the same evening in apartment units in the same building.**

**i. Failure to renew the motion to sever waived the claim.**

Montar-Morales did not renew the pretrial motion to sever at the close of the State’s case, or at the close of all the evidence. After the State rested, the defense immediately rested. 2/2/15 RP 144. The defense moved to dismiss the rape charge and the child molestation charges, both of which were denied. 2/2/15 RP 146, 154, 155. The next morning although a reference to the motion to sever was mentioned in a motion to preclude a particular State’s argument, the motion to sever was not renewed. 2/3/15 RP 15.

A defendant who makes a motion to sever which is denied prior to trial, must renew the motion or make a new motion at the

close of the evidence. “Severance is waived by failure to renew the motion.” CrR 4.4(a)(2). Here, the motion was not renewed and thus pretrial claim of denial of severance must be denied.

Montar-Morales failed to claim in his brief that the motion was renewed or that his counsel was ineffective for failure to renew the motion.

Even if he had timely raised that argument in his appellant’s opening brief, his counsel’s failure to make a motion does not support an ineffective assistance of counsel claim unless the defendant can show that the motion would properly have been granted. *State v. Jamison*, 105 Wn. App. 572, 591, 20 P.3d 1010, rev. denied, 144 Wn.2d 1018 (2001). However, trial court was within its discretion to deny severance.

**ii. Where the offenses were interconnected, occurring within hours in the same building, the trial court was within its discretion to deny the motion to sever.**

The defendant has not established such manifest prejudice as to outweigh the concern for judicial economy. There is a strong preference against severance and in favor of judicial economy of one trial. Most pretrial rulings in criminal cases are

reviewed for abuse of discretion. *State v. Brown*, 45 Wn. App. 571, 577-78, 726 P.2d 60 (1986) (motion to sever under CrR 4.4(c)(2)); *State v. Larry*, 108 Wn. App. 894, 911, 34 P.3d 241 (2001), *review denied*, 146 Wn.2d 1022 (2002) (same); *State v. Wood*, 94 Wn. App. 636, 641, 972 P.2d 552 (1999) (same). The trial court's refusal under CrR 4.4(b) to sever offenses which are properly joined under CrR 4.3 is reviewed for manifest abuse of discretion. *State v. Cotten*, 75 Wn. pp. 669, 686-87, 879 P.2d 971, *rev. denied*, 126 Wn.2d 1004, 891 P.2d 38 (1994). The joinder rule (CrR 4.3) should be construed expansively to promote the public policy of conserving judicial and prosecution resources. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004, *rev. denied*, 137 Wn.2d 1017, 978 P.2d 1100 (1998). Separate trials are not favored. *State v. Grisby*, 97 Wn.2d 493, 647 P.2d (1982), *cert. denied*, 103 S.Ct. 120, 459 U.S. 1211, 75 L.Ed.2d 446. The defendant must show that being tried on all counts is so prejudicial that it outweighs concerns of judicial economy. *State v. Cotten*, 75 Wn. App. at 686-87. 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. *State v. Bythrow*, 114 Wn.2d 713, 720, 790 P.2d 154 (1990). The defendant has the burden of demonstrating the manifest abuse on appeal. *Id.*

Factors to be considered include:

(1) the strength of the State's evidence on each count; (2) the clarity of defenses to each count; (3) the court's instruction to the jury as to the limited purpose for which it was to consider the evidence of each crime; and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined. *State v. Eastabrook*, 58 Wn. App. 805, 811-12, 795 P.2d 151, review denied, 115 Wn.2d 1031(1990).

*State v. Herzog*, 73 Wn. App. 34, 51, 867 P.2d 648 (1994).

All of the factors from *Herzog* as applied here weigh against severance.

(1) Strength of the State's Evidence on Each Count

The evidence on each count is strong and comes from the same body of evidence occurring within hours on the same evening. Montar-Morales entered the first unit where he raped the child and was confronted. 01/29/2015 RP 32-33, 64, 74, 106; 02/02/2015 RP 42. The child testified to being digitally penetrated up to the knuckle. 01/29/2015 RP 106. The child testified that the defendant came out of her cousin's room and she pushed him

away. 01/29/2015 RP 79. The child's mother and cousin, Elizabeth Ramirez-Flores, were awakened and confronted Montar-Morales. 01/29/2015 RP 64; 02/02/2015 RP 42. Montar-Morales was told to leave or the police would be contacted, which he did. 01/29/2015 RP 44, 64; 02/02/2015 42.

He returned to the unit trying to enter again. 02/02/2015 RP 45. He was identified by individuals who had seen him upon his initial entry when he returned. 02/02/2015 RP 45. He was chased immediately after trying to enter by the male occupants and was caught. 02/02/2015 RP 46, 48, 54.

As to the burglary, Montar-Morales was caught in possession of stolen property from the burglary at the second unit, which was in the same building where he tried to re-enter the first unit. 12/17/2014 RP 49-50; 01/29/2015 RP 123, 126; 02/02/2015 RP 95, 102, 109-111. The husband in that unit chased him and recognized him, having known him for years. 01/29/2015 RP 135-37. As evidence for each offense is strong, this factor weighs against severance.

(2) Clarity of Defenses to Each Count

The defendant's claim as to all offenses is a general denial. The defendant contends that he would have been able to raise a defense to the property crimes based on the husband's belief that Montar-Morales was in jail, but couldn't because he would be prejudiced in his defense against the child rape. Brief of Appellant at page 25. This is still a defense based on general denial and any prejudice from being someone who goes to jail would be the same no matter what charge it was heard on. Because there are no inconsistencies in defenses so as to merit severance, the factor weighs against severance.

(3) Court's Instruction to Jury as to the Limited Purpose

The trial court provided the jury with the following instruction: "[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 40.

The jury is presumed to follow the trial court's instructions. *State v. Bourgeois*, 133 Wn.2d 389, 406, 954 P.2d 1120 (1997). Here, Montar-Morales was not convicted of the crime of attempted burglary, CP 36, although the State charged him and presented evidence against him on this count at trial. CP 12. This supports

the presumption that the jury did consider the counts separately, as instructed.

The ability to provide instructions the jury is presumed to follow weighs in favor of a joint trial.

#### (4) Cross Admissibility of the Evidence of the Crimes

The offenses occurred in essentially unbroken sequence over the period of an hour or two at most at apartment units in the same building at 1912 and 1916 Harrison Street in Mount Vernon. They are so connected in time and location to be part of the same series of events. This qualifies under the category as true *res gestae*.

In addition to the exceptions identified in ER 404(b), our courts have previously recognized a “*res gestae*” or “same transaction” exception, in which “evidence of other crimes is admissible ‘to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.’” *Tharp*, 27 Wn. App. at 204 (quoting McCormick’s Evidence § 190, at 448 (Edward W. Cleary gen. ed., 2d ed. 1972)).

ER 404(b) admissibility requires a 2-part analysis: (1) the evidence sought to be admitted must be relevant to a material issue; and (2) the probative value of the evidence must outweigh its potential for prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (citing *State v. Goebel*, 40 Wn.2d 18, 240 P.2d 251 (1952)). A trial court must identify, on the record, the purposes for which it admits evidence under an ER 404(b) analysis. *Saltarelli*. 98 Wn.2d at 362.

In *Tharp*, the defendant was charged with second degree murder. Over the defendant's objection, the trial court admitted evidence of a series of uncharged crimes committed prior to and after the alleged murder. The Court of Appeals held the admission of the collateral crimes was proper under a "res gestae" or "same transaction" exception. The court explained:

The jury was entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character. "(A) party cannot, by multiplying his crimes, diminish the volume of competent testimony against him." *State v. King*, 111 Kan. 140, 145, 206 P. 883, 885 (1922).

*Tharp*, 27 Wn. App. at 205.

*State v. Lane*, 125 Wn.2d 825, 831-32, 889 P.2d 929, 932 (1995).

Most cases applying the res gestae exception involve uncharged crimes that occur the same night or day as the charged crime. See, e.g. *Tharp*, 96 Wn.2d 591, 637 P.2d 961; *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584 (1987). In *Powell*, however, the Supreme Court found the res gestae exception appropriate where defendant's misconduct occurred two days before the charged murder because the misconduct tended to show the pattern of hostilities between the defendant and victim. *State v. Powell*, 126 Wn.2d 244, 263, 893 P.2d 615 (1995) *see also State*

*v. Lane*, 125 Wn.2d 825,889 P.2d 929 (1995) (two-day-long crime spree admissible as *res gestae*).

Here, the events occurred even over a shorter period of time. These events are so closely related in time as to be cross-admissible. They also involve offenses of the same character, the surreptitious entry in nearby apartment units to commit offenses against the persons or property of persons therein.

Thus cross-admissibility weighs against severance.

The defendant has not established that there would be such manifest prejudice as to outweigh the concern for judicial economy and require the offenses be heard in separate trials. Further, all of the *Herzog* factors weigh against severance of the charges. The Court should uphold the ruling of the trial court denying the motion to sever.

**3. The defendant's contentions regarding sufficiency of the evidence fail to give adequate deference to the jury determination.**

In assessing the child's credibility, demeanor, and determining the weight of her entire testimony, the jury found sufficient evidence to support a guilty verdict for Rape of a Child in the Second Degree. This conviction should be upheld.

**i. The jury determines the credibility and weight of witness testimony.**

To determine whether the evidence is sufficient to sustain a conviction, the court reviews the evidence in the light most favorable to the prosecution, and asks whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003) (finding evidence sufficient to uphold conviction); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 306, rev. denied, 108 Wn.2d 1033 (1987) (confirming conviction); *State v. Britten*, 46 Wn. App. 571, 731 P.2d 508 (1986) (affirming conviction); *State v. Summers*, 45 Wn. App. 761, 728 P.2d 613 (1986) (reversing conviction). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. *State v. O'Neal*, 159 Wn.2d 500, 506, 150 P.3d 1121 (2007). Circumstantial evidence is

accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) rev. denied, 119 Wn.2d 1011, 833 P.2d 386 (1992); *State v. Rooth*, 129 Wn. App. 761, 773, 121 P.3d 755 (2005).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), rev. denied, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. *Hutton*, 7 Wn. App. at 728, 502 P.2d 1037.

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011, 833 P.2d 386 (1992). The trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily. *State*

*v. Tocki*, 32 Wn. App. 457, 462, 648 P.2d 99, *rev. denied*, 98 Wn.2d 1004 (1982).

*State v. Prestegard*, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001).

And all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* The credibility of the witnesses is for the jury. See *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

*State v. Perez*, 166 Wn. App. 55, 60, 269 P.3d 372 (2012).

The trial court considered the defendant’s motion to dismiss for insufficient evidence of rape and the trial court found that a reasonable jury could find Montar-Morales guilty of Rape of a Child in the Second Degree, which they did. As the trial court noted in denying the defendant’s motion:

[T]he testimony that [the Prosecutor] elicited from her was that this incident, whatever it was, happened on the spot that she marked on the diagram, and that something went, quote, inside of her, halfway to the first knuckle. By my definition that amounts to penetration. It’s, I suppose, an inference that could be drawn the other way, but the words “inside of you,” to me, mean the same thing as penetration. Whether they mean the same thing to the jury or not is for them to decide. So based on this evidence, I think the jury could conclude that the defendant committed the crime of Rape of a Child in the Second Degree.

02/02/2015 RP 153-54.

The defendant relies upon *Slate v. A.M.*, 163 Wn. App. 414, 260 P.3d 229 (2011) in arguing that there is insufficient evidence to support a conviction of Rape of a Child in the Second Degree. Brief of Appellant at page 41. The defendant made the same argument using the *A.M.* case as support in his motion to dismiss for insufficient evidence at trial. 02/02/2015 RP 147. *A.M.* was a juvenile court case where the trial court found the juvenile to have committed Rape of a Child in the First Degree. Just as the judge in that case could make a factual determination and found only penetration of the butt cheeks as opposed to the anus, here the jury was free to make the determination of penetration and did so. As opposed to the judge's decision, the trial court must follow the presumption that the jury followed the Court's instructions on the elements.

**ii. Y.J. described the digital penetration as being by a finger halfway up to the knuckle.**

The child testified that the defendant had put his finger insider her halfway up to the knuckle and described a location on the diagram from which the jury could infer that the insertion was

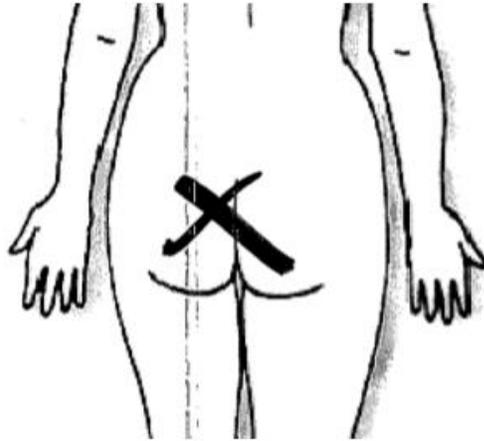
inside her anus. This is adequate to support a finding of penetration.

The only challenge raised by the defendant is the sufficiency of the evidence of penetration. Brief of Appellant at pages 10, 36-49. A person is guilty of rape of a child in the second degree when they have sexual intercourse with another who is at least twelve years old but less than fourteen years old, not married to the perpetrator, and the perpetrator is at least thirty-six months older than the victim. RCW 9A.44.076. The jury was instructed on the definition of sexual intercourse meaning “any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex.” CP 42.

Q: Y.J., can you show us on a diagram where the hand went on your body?

A: Yes

01/29/2015 RP 105. The child marked an “X” on the diagram:



Q: Can you show me—holding up my hand, can you show what portion of the hand went there?

...

A: Halfway. The knuckle, halfway the knuckle.

Q: Halfway up to the knuckle of a finger?

A: Yes

Q: And did that go inside of you or stay outside?

A: Inside.

01/29/2015 RP 106. The defendant argues the development of the child's testimony lacked clarity such that no rational trier of fact could find Y.J. had been raped by the defendant. Brief of Appellant at pages 36-41. The child had great difficulty in testifying and showed great hesitance in responding to questions:

Q. (Prosecutor) Do you remember where the hand went after it was on the front part of your body?

(Defense): And I will object. This has been asked and answered several times, your Honor.

THE COURT: Overruled. It's a do-you-remember question.

A (Witness): Yes.

Q. (Prosecutor) Was that to another place on your body?

(Defense): I will object, your Honor.

That has been asked and answered.

THE COURT: Overruled. You can answer.

Q. (Prosecutor) Can you answer that question?

A. No.

Q. And why can't you answer that question? Is there a reason why you can't answer that question?

Can you tell me why you can't answer that question?

Are you going to sit here and not answer the question?

A. No.

Q. What?

A. No.

Q. Can you tell me where on your body the hand went?

(Defense): Your Honor, I will object.

This has been asked many times.

THE COURT: **But not answered.** All right. We're going to take a break.

1/29/2015 RP 102-103 (emphasis added).The distress the child was

under in testifying to her rape was noted by the trial court:

(Defense) And also, as the court noted, she did testify clearly about what did occur and did not occur.

THE COURT: That's for the jury to decide what's credible...This witness is clearly having a difficult time. I don't know if the record reflects how many minutes we sat there with no answer to these questions, but it was enough to make me very uncomfortable.

01/29/2015 RP 104 (emphasis added). Any inconsistency here resulted from the stress and shame the child was suffering, not

wanting to describe what occurred. However, the child was able to mark the spot on the diagram where the defendant inserted his finger up to the knuckle inside her and describe that to the jury.

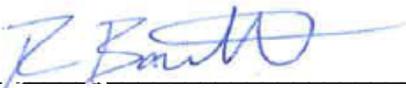
Reviewing the evidence in the light most favorable to the prosecution and giving proper deference to the jury determination to convict this Court should uphold the conviction.

## **V. CONCLUSION**

For the foregoing reasons, the trial court's rulings to deny the defendant's motions to suppress the evidence and sever the cases should be upheld. Further, there was sufficient evidence to support the conviction of Montar-Morales for Rape of a Child in the Second Degree and the conviction should be affirmed.

DATED this \_\_13th\_\_ day of July, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
REBECCA L. BARTLETT, WSBA#49846  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [  ]United States Postal Service; [  ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Mick Woynarowski, addressed as Washington Appellate Projec, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this \_\_13th\_\_ day of July, 2016.

  
KAREN R. WALLACE, DECLARANT