

No. 74103-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER XAVIER BECK,

Appellant.

FILED
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Court of Appeals
Division I
State of Washington

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

REPLY BRIEF

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A. ARGUMENT

1. MR. BECK HAS SHOWN THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO SEVER COUNTS, WHERE PREJUDICE TO THE DEFENDANT OUTWEIGHED CONCERNS FOR JUDICIAL ECONOMY.

a. Severance of counts shall be granted where multiple counts would prevent a fair trial.

Because defendants are entitled to due process, when joinder would prevent a fair trial, multiple counts “shall” be severed. U.S. Const. Amend. XIV; Const. art. I, sec. 3; CrR 4.4.¹ A mandatory duty is created by CrR 4.4(b); State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Severance is necessary where it prevents undue prejudice. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Undue prejudice includes the risk that a single trial invites the jury to cumulate evidence or to infer a guilty disposition. State v. Sanders, 66 Wn. App. 878, 885, 833 P.2d 452 (1992).

b. Mr. Beck was entitled to severance of the counts, because the multiple counts created undue prejudice.

Severance is warranted where the strength of one count bolsters a weaker count. Russell, 125 Wn.2d at 63-64. Here, the relative strength of certain counts bolstered the weaker accusations – precisely

¹ See also Opening Brief of Appellant at § I.

the situation meant to be prevented by severance. Despite the State's position, the three counts were not of equal strength. Brief of Respondent at 21-22.

Counts I and II (7th and James prostitution ring) depended on the credibility of the masseuse herself, C.Q., but also that of the erotic photographer, Carmen Garcia. RP 621-30, 1314.² By contrast, Count III (Georgetown heroin addict) relied exclusively on the credibility of admitted drug addicts and thieves. 9/1/15 RP 834-37, 925. Lastly, Counts IV and V (Westin Hotel dominatrix) involved a several-hour delay in reporting the alleged rape. During this delay, A.M. serviced additional clients, which diminished her credibility. 9/8/15 RP 27-30. In addition, A.M. made troubling racist comments in her defense interview, which she repeated during her testimony at trial. 9/8/15 RP 66-70; 9/9/15 RP 1396-98; 9/10/16 RP 1605-09.

In light of the comparative weakness of the evidence to establish each individual count, the failure of the trial court to sever counts invited the jury to cumulate the evidence and to infer criminal disposition, rather than to look closely at the lack of evidence as to each count and the lack of credibility of the individual alleged victims.

² The jury was denied additional background evidence about C.Q.'s madam, Rainbow Love, as discussed in Issue III.

Here, the trial court gave insufficient analysis to the issue of cross-admissibility, finding the counts cross-admissible, over Mr. Beck's repeated objection. 8/12/15 RP 5-8. This finding is not supported by the record. First, the court erred in its interpretation of what constitutes a common scheme or plan.

The State failed to prove the second type of plan, that Mr. Beck devised a plan and used it repeatedly. Lough, 125 Wn.2d at 855. Such a plan is found when the defendant's scheme creates the opportunity to commit the crimes. As previously discussed, despite the State's argument to the contrary, Lough and Gresham are clearly distinguishable. Brief of Respondent at 16-20.

Likewise, State v. DeVincentis presents an entirely different factual and legal scenario. Brief of Respondent at 17-18. Unlike here, where Mr. Beck was charged with three separate crimes and had three separate explanations and defenses, Mr. DeVincentis created an opportunity for his crimes by grooming his child victims over a period of weeks. 150 Wn.2d 11, 13, 74 P.3d 119 (2003). There, the Court found that "the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative." Id. at 17-18

(emphasis added). No such pattern was shown here, nor is one suggested by the State. DeVincentis, as well, is distinguishable.

Accordingly, the trial court misapplied the common scheme or plan test in Mr. Beck's case. 8/12/15 RP 12-17. The court specifically acknowledged that the ruling on cross-admissibility of multiple counts would be "very prejudicial." Id. at 16. However, the court ruled that the probative value of the multiple counts outweighed the risk of prejudice. Id.

This ruling was reversible error. In fact, for a common scheme or plan to be found in Mr. Beck's case in the same manner it was shown in Lough, Gresham, DeVincentis, and Kennealy, the court had to find Mr. Beck planned to meet alleged victims throughout Seattle, in order to commit crimes. A mere "similarity in results" is insufficient to prove a common scheme. Gresham, 173 Wn.2d at 422.

c. The court's abuse of discretion warrants reversal.

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

the inherent prejudice of joining unrelated charges, and jury difficulty in compartmentalizing the evidence relevant to each count, the error caused harm. The court abused its discretion and reversal is required.

2. MR. BECK WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO TRIAL BY AN UNBIASED JURY.

a. Juror 106, a seated juror, revealed his bias on the record.

It is well settled that a defendant has a constitutional right to trial by an impartial jury. U.S. Const. Amends. VI, XIV; Art. I, §§ 3, 22; Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061 (1988). These protections entitle a defendant to a jury of twelve jurors, free of bias, such that there are no “lingering doubts” as to the fairness of the trial. State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969), overruled on other grounds, State v. Fire, 142 Wn.2d 152, 165, 34 P.3d 1218 (2001).

b. Juror 106’s actual bias rendered the juror unfit; therefore, the trial court erred when it denied Mr. Beck’s for-cause challenge.

While the denial of a challenge for cause is within the trial court’s discretion, State v. Witherspoon, 82 Wn. App. 634, 637, 919

P.2d 99 (1996), if a potential juror demonstrates actual bias, the court must excuse the juror for cause. Otis v. Stevenson-Carson School Dist. No. 303, 61 Wn. App. 747, 754, 812 P.2d 133 (1991).

Actual bias is “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2). The State argues that actual bias was not established and suggests that Juror 106 was only “equivocal” in his answers. Brief of Respondent at 29. This is not the case here.

Juror 106 made a number of statements showing actual bias, including the following:

- He indicated that the number of accusations against Mr. Beck made him more likely to believe the defendant was guilty, by raising his hand in response to questioning. 8/24/15 449 (Brief of Respondent at 26).
- “What I believe I’m hearing is based on the accusations coming from the government or State that with the preponderance of that evidence, that those charges must be true in order for them to make an accusation.” 8/24/15 493-94.
- “So with the culmination of the amount of accusations, for me, it was shocking. So it’s overwhelming for me to be unbiased as to how I feel whether or not Mr. Beck is guilty or not but persuaded to be more so than if he is guilty based on those type of accusations.” 8/24/15 RP 493-94.

- [after being asked if the number of accusation made it more likely that he did what he was charged with] – “Correct. But I would still want to hear the proof that he has to be given in order for me to say that he is guilty.” 8/24/15 RP 494.

The State argues that upon further questioning from the prosecutor, Juror 106 “three times assured the trial court that he could give Beck an unbiased trial.” Brief of Respondent at 29. A closer examination of the record reveals that this is not the case. In fact, Juror 106’s responses to the court were hardly unbiased and far from assuring.

If one counts the times that Juror 106 spoke, following the above remarks, there are two, shown below. The deputy prosecutor asked Juror 106 whether his “bias” would prevent him from being open-minded and listening to the evidence in the case. Juror 106 replied, “No. I believe I could still make an unbiased decision.” 8/24/15 RP 497. The prosecutor kept speaking, and the court noted that he seemed to have interrupted Juror 106. Id. At that point, Juror 106 stated, “No, I agree with being able to make an unbiased decision based on the evidence.” Id. Neither of these remarks is an assurance that Juror 106 can be fair and impartial – nor is either statement a retraction of the juror’s earlier bias concerning the multiple counts, or his

misapprehension of the State's burden of proof.

This case resembles State v. Gonzales, where the Court found a prospective juror exhibited actual bias where a juror admitted she had a bias and indicated the bias would likely persist throughout the trial. 111 Wn. App. 276, 281, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). The State fails to successfully distinguish this case.

For these reasons, Mr. Beck's convictions should be reversed, and he should be granted a new trial with an unbiased jury.

**3. THE TRIAL COURT DENIED MR. BECK HIS
RIGHT TO PRESENT A DEFENSE BY
EXCLUDING RELEVANT EVIDENCE.**

- a. Mr. Beck properly attempted to offer evidence establishing the alleged victim's bias and motive to lie.

The bar for the admission of relevant evidence is low,⁴ and Mr. Beck made an extensive offer of proof, detailing the ongoing investigation of Rainbow Love, the madam of the prostitution ring for which C.Q. worked. Mr. Beck proffered how this evidence would undermine C.Q.'s credibility and provide a motive for C.Q. to fabricate the rape allegation, since C.Q. was an employee of Ms. Love's, facing criminal liability. 8/26/15 RP 724-30.

⁴ ER 401 (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable").

The court initially agreed with Mr. Beck, acknowledging that to limit further inquiry in this area would be reversible error. Id. at 742. The court then abruptly reversed itself, stating that the evidence related to Rainbow Love did not provide C.Q. sufficient motive to lie. Id. at 773. The court ruled the evidence was not sufficiently related to C.Q.'s credibility to be more probative than prejudicial, erroneously excluding evidence concerning the Rainbow Love investigation and improperly limiting cross examination of C.Q. Id. at 773-75; 9/8/15 (AM) RP 1320-21.

- b. The court's exclusion of relevant evidence was constitutional error – not "run of the mill" evidentiary error, as the State suggests.

A defendant has a constitutional right to the meaningful opportunity to present a defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct 1727, 164 L.Ed.2d 503 (2006); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); U.S. Const. Amends. VI, XIV; Article I, section 22.⁵ A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

⁵ See also Opening Brief for further discussion.

It was erroneous for the trial court to find that evidence of C.Q.'s involvement with a large prostitution ring, facing felony prosecution at the time of Mr. Beck's trial, was not relevant. Further, when the court excluded this area of examination from Mr. Beck's cross-examination of C.Q., this was not "run-of-the-mill application of ER 404(b), as suggested by the State. Brief of Respondent at 36. Nor was the evidence merely excluded in order to avoid confusion of issues and to prevent the waste of trial time. Id.

Rather, as even the State acknowledges, rules of evidence may abridge a defendant's constitutional right to "a meaningful opportunity to present a complete defense" when they infringe upon a weighty interest of the defendant and are arbitrary or disproportionate to the purpose they are designed to serve. Id. at 31-32 (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); Holmes, 547 U.S. at 324).⁶

⁶ The State relies upon cases which are quite different from Mr. Beck's. In State v. Donald, 178 Wn. App 250, 316 P.3d 1081 (2013), this Court properly held that ER 404(b) precludes the use of propensity evidence or mental health history, and does not result in a constitutional violation. Resp. Brief at 32-33. State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010) is a Rape Shield case, and is thus distinguishable. Resp Brief at 38.

c. The trial court's refusal to admit relevant evidence requires reversal of Mr. Beck's conviction.

Because the court's exclusion of relevant evidence denied Mr. Beck his Sixth Amendment right to present a defense, the error requires reversal of his convictions unless the State can prove beyond a reasonable doubt that it "did not contribute to the verdict obtained." Jones, 168 Wn.2d at 724 (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The State cannot meet this burden. This court must reverse Mr. Beck's convictions on Counts I and II.

B. CONCLUSION

For the above reasons, as well as those in the Opening Brief, Mr. Beck respectfully asks this Court to reverse his convictions and grant a new trial.

Respectfully submitted this 2nd day of November, 2016.

s/ Jan Trasen

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74103-9-I
v.)	
)	
CHRISTOPHER BECK,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF NOVEMBER, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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