

NO. 34827-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

RAFAEL RIVERA,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 05-1-01484-2

HONORABLE RICHARD D. HICKS, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUE

1. Whether the trial court exercised proper discretion in denying the defendant's motion to sever.

B. STATEMENT OF THE CASE

As of August 4, 2005, a female child referred to here as M.F.M. was 10 years old and lived with her brother and father. In the morning of August 4, 2005, on his way to work, M.F.M.'s father dropped off M.F.M. and her brother to spend the day at their mother's home. Trial RP 59-61. However, the children's mother had to be gone from the residence most of the day and so left the children in the care of the defendant, Rafael Rivera. Trial RP 242-243. The defendant was 38 years of age. Trial RP 121, 241.

At one point during the day, M.F.M. was alone in the house with the defendant. She was laying on a couch in the living room watching television. She was wearing a tank top and a skirt with attached shorts underneath. Trial RP 80, 83, 86.

The defendant sat down next to M.F.M. on the couch. The defendant proceeded to kiss the

vaginal area of M.F.M. over the skirt. He also placed his hand under her skirt and attempted to slip his hand inside her shorts, but was unsuccessful. Finally, the defendant placed M.F.M.'s legs between his legs and onto his lap while he was wearing pants. Trial RP 83-86, 90.

M.F.M. then got up and attempted to make a telephone call to her mother, but the defendant did not allow this to take place. She then took the cordless phone into another room to make the call, but the defendant followed her and insisted she come back into the living room. Therefore, M.F.M. did not make the call, and instead went to a neighbor's residence where her brother was at. Trial RP 87-89.

M.F.M.'s father picked up the children at about 4:30 that afternoon. It was then that he became aware that the defendant was at the residence, watching his children. Trial RP 66-68.

That evening, M.F.M. told her father that she did not want to go back to her mother's house the next day. Her father responded that he had no

choice since he could not afford to pay for day care. In response, M.F.M. offered to have her father sell her dirt bike so that she would not have to go back there. Knowing how much his daughter valued her dirt bike, her father questioned M.F.M to find out what the problem was, and based on what she said, he called police. Trial RP 62-64.

The next day, Lacey Police Detective Jeremy Knight contacted M.F.M.'s father and arranged for M.F.M. to be interviewed on August 8, 2005 by Lacey Police Detective Shannon Barnes. Trial RP 119-120. Based on the results of that interview, the defendant was arrested on August 8th. Trial RP 120. The defendant waived his Miranda rights and agreed to be interviewed by Detective Knight. Trial RP 120-121.

The defendant denied that he had intentionally touched M.F.M.'s vaginal area, including over her clothing. He also denied that he had touched M.F.M. for sexual purposes. Trial RP 139, 141, 144.

However, when told that M.F.M. had accused him of rubbing her vaginal area over her clothing, the defendant responded, "Well, I didn't -- I didn't think that was no. I don't think so. As to say maybe." Trial RP 128-129. When asked whether it was possible he had kissed M.F.M.'s vaginal area outside of her clothing, the defendant's answer was, "We were sweating like crazy and then . . .", and he stopped his answer at that point. Trial RP 133. The defendant stated at one point that M.F.M. was not necessarily lying, it was the way she saw things, and that he could understand why she would have thought that everything was "just way out of hand". Trial RP 135.

The defendant acknowledged that he had a problem with children and that while he had no malicious intent, perhaps he should talk with someone about that problem. Trial RP 137. At an earlier point in the interview, the defendant indicated a desire to talk with someone about what is appropriate and what is not, and where the line

is in such matters. Trial RP 131. The defendant also admitted that when he was with M.F.M. on August 4th, he was under the influence of both methamphetamine and marijuana, and that this drug use may have impaired his judgment on that day. Trial RP 134.

The defendant further admitted that his nickname for M.F.M. included the phrase "hottie". Trial RP 137. The defendant stated that if he were to say anything to M.F.M. or to her parents about what happened that day it would be to apologize. Trial RP 138.

Angela Rivera was the former wife of the defendant and the sister of M.F.M.'s mother. On August 5, 2005, the day after M.F.M. had disclosed sexual molestation by the defendant, Rivera contacted Norma Shelman. Knowing that the defendant had previously babysat Norma's two daughters, T.A.T. and T.M.T., Angela suggested that Norma question her daughters as to whether anything inappropriate had happened to them. Trial RP 165-170. T.A.T. was 9 years old at that

time, and T.M.T. was ten years old. Trial RP 181, 211.

Norma Shelman followed Angela Rivera's suggestion and spoke to her two daughters. As a result of the information provided by both T.A.T. and T.M.T., Shelman contacted police concerning the defendant. Trial RP 174-175, 232.

Between Christmas of 2004 and August of 2005, T.A.T, whose date of birth is 1-11-96, lived with her mom and her sister, T.M.T. On more than one occasion during that time period, when T.A.T. was at the residence of Angela Rivera, the defendant touched T.A.T's vaginal area, moving his hand around as he did so. Trial RP 181, 183, 185, 187, 197. There were no other adults present in the residence at the time, and on each occasion the defendant separated T.A.T. from other children in the residence in order to carry out the sexual abuse. Trial RP 186. Sometimes he did this touching over T.A.T.'s pants, and sometimes he inserted his hand between T.A.T.'s pants and underwear and touched the child's vaginal area in

that manner. Trial RP 188-189. The defendant also touched T.A.T. this way on one occasion when they were both at M.F.M.'s residence. Trial RP 208-209.

T.A.T. informed her mother, Norma Shelman, of this abuse in August 2005. Trial RP 199-200, 208-209. T.A.T. had never talked to M.F.M. about the abuse by the defendant, although her mother did mention something about what had happened to M.F.M. when she questioned T.A.T. about the defendant. Trial RP 202, 205.

T.M.T.'s date of birth is January 30, 1995. Trial RP 211. When she was 9 years of age, the defendant had sexual contact with her on several occasions. He touched her vaginal area both over her pants and by reaching under her pants and underwear. Trial RP 214-216, 220. On each occasion, there were no other adults present at the residence, and the defendant separated T.M.T. from other children in the residence in order to carry out the abuse or waited until other children were sleeping. Trial RP 214-218. This happened

one time at T.M.T.'s residence. Trial RP 214. It happened again at the defendant's house. Trial RP 217. T.M.T. also reported this abuse to her mother. Trial RP 222.

On August 11, 2005, an Information was filed in Thurston County Superior Court Cause No. 05-1-01484-2 charging the defendant with two counts of first-degree child molestation, alleging M.F.M to be the victim. CP 5-6. On September 15, 2005, a First Amended Information was filed which retained the original two counts and added three more counts of first-degree child molestation, two of which alleged T.A.T. to be the victim (Counts 3 and 4), and the final count alleged T.M.T. as the victim (Count 5). CP 8-9.

An arraignment on the First Amended Information took place on September 15, 2005. Defense counsel objected to the joinder of Counts 3-5 with Counts 1 and 2. Defense counsel did not provide any legal authority for this objection. The court allowed the State's joinder of offenses in the First Amended Information. 9-15-05 Hearing

RP 7-8, 10.

A Second Amended Information was filed on April 3, 2006, which simply clarified the time period alleged for the two counts concerning T.A.T. and the count concerning T.M.T. CP 33-34; Trial RP 14.

A jury trial in this matter began on April 3, 2006 and concluded on April 6, 2006. At the beginning of the trial, the defendant made a motion to sever the alleged offenses. The defense asked that there be three separate trials because there were three alleged victims, or that there be two separate trials, one for the offenses alleged to have been committed against M.F.M., and another trial for the counts alleging T.A.T. or T.M.T. as the victim. Trial RP 23, 28-29. The court denied the motion to sever. Trial RP 47. The motion was renewed at the end of the State's case-in-chief, and was again denied. Trial RP 238-239.

The defendant testified at the trial. He acknowledged that he had provided child care for each of the three girls on a few occasions, but

denied that he had ever touched any of the girls in the groin area. Trial RP 242, 245-248. The jury returned verdicts of guilty on all five counts. Trial RP at 336-339.

There was a sentencing hearing in this case on May 16, 2006. The defendant's standard sentence range for each count was determined to be 149 to 198 months in prison. Pursuant to RCW 9.94A.712, the defendant was sentenced to a maximum term of life in prison and a minimum term of 198 months on each count, to run concurrently. CP 155-169.

C. ARGUMENT

1. The trial court did not abuse its discretion in denying the defendant's motion to sever.

When the State filed the First Amended Information joining Counts 3, 4, and 5 with Counts 1 and 2 from the original Information, the defendant objected to this joinder. However, pursuant to CrR 4.3(a)(1), two or more counts may be joined in one charging document when they are of the same or similar character, regardless of

whether they are part of a single scheme or plan. Therefore, the counts in this case were properly joined. State v. Price, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005), *affirmed on separate grounds in* 158 Wn.2d 630, 146 P.3d 1183 (2006).

The defendant then made a motion to sever the counts at the beginning of the trial. CrR 4.4(b) provides for a severance of charges when the court determines that severance will promote a fair determination of a defendant's guilt or innocence of each charge. In seeking severance, the defendant had the burden of demonstrating that a single trial concerning the five counts in the Second Amended Information would be so manifestly prejudicial as to outweigh the concern for judicial economy. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). The trial court found that the defendant's burden had not been met in this case. A decision by the trial court denying a motion to sever will be upheld on appeal unless it constitutes an abuse of the trial court's discretion. Bythrow, 114 Wn.2d at 717.

Prejudice to the defendant can arise if the joinder of counts in a single trial invites the jury to cumulate evidence in order to find guilt or to infer a criminal disposition. State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994). Therefore, in evaluating whether a motion to sever is necessary to avoid such prejudice, a trial court should consider: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses to each count; (3) the court's instructions to the jury to consider each count separately; and (4) the admissibility of the other charges even if the counts were not joined for trial. Russell, 125 Wn.2d at 63. The trial court in the present case considered each of these factors before denying the defendant's motion to sever.

The trial court noted that the first two counts were somewhat stronger than the other ones. Trial RP 43-44. This is because of the defendant's responses to Detective Knight. While not admissions, the defendant's statements in

regard to M.F.M. and the incident were arguably inconsistent with the defendant's description of the incident at trial and his claim that nothing improper had happened.

The defendant characterizes the other counts as weak, describing them as nothing more than credibility contests. However, that is not accurate. There was no dispute the defendant had the opportunity to do the things T.A.T. and T.M.T. alleged. Both children reported what had occurred when questioned by their mother, and each did so without the other sister being present. The defense was not able to identify any significant inconsistency in the versions each child had previously told and what was testified to at trial. Neither child had any identified motive to make up such a claim against the defendant.

The defense had difficulty identifying any real weakness in the evidence concerning the counts concerning T.A.T. and T.M.T. as victims. In fact, as is discussed more extensively later, defense counsel's chief strategy in attacking the

allegations of T.A.T. and T.M.T. was to argue that they were the result of suggestion and prompting by their mother's references to what the defendant had allegedly done to M.F.M. Trial RP 319-320. This strategy would not have been available if the counts had been severed and evidence of M.F.M.'s allegations excluded from a trial on the counts involving T.A.T. or T.M.T.

As the defendant acknowledges on appeal, there was no problem with the clarity of the defense as to each count. In each instance, the defendant simply denied that he had ever done anything improper or similar to what was alleged.

The trial court properly instructed the jury as follows:

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.

Instruction No. 4 in Court's Instructions to Jury, CP 93-112. In regard to this instruction, an important consideration is the degree to which the evidence on the joined counts can be compartmentalized by the jury. State v.

Kalakosky, 121 Wn.2d 525, 537-539, 852 P.2d 1064 (1993). As the trial court found in the present case, the evidence on each count was straightforward, the issues relatively simple, and the trial was of short duration, and so the jury would not have had any difficulty in following the court's instruction and compartmentalizing the evidence. Trial RP 42. The one factor that the jury would likely have considered across the board was that all of these alleged offenses appeared to have been part of a common scheme, but the court ruled that it was appropriate for the jury to consider this aspect of the evidence in determining a verdict on each count. Trial RP 42-43.

However, because the charges in this case were sex offenses, the defendant argues on appeal that the jurors would have had feelings that would have caused them to ignore the court's instruction to consider each count separately, and instead the jury would have unfairly cumulated the evidence to find guilt. This argument ignores the fact that a

jury is presumed, in the absence of evidence to the contrary, to have followed the court's instructions in its deliberations. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). Mere speculation is insufficient to overcome that presumption. State v. Allen, 50 Wn. App. 412, 420-421, 749 P.2d 702 (1988).

As noted above, the trial court found that the evidence of the other charges would be admissible as to each count under ER 404(b), even if the counts were severed, because the evidence indicated that the offenses were part of a common scheme. Trial RP 45-47. Such cross-admissibility of the evidence is not a requirement for a denial of severance, including cases alleging multiple sex offenses. State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992). However, when there is such cross-admissibility, it substantially reduces any potential for prejudice from the denial of severance. Price, 127 Wn. App. at 204-205. To find cross-admissibility, the trial court must determine: (1) whether the counts were supported

by a preponderance of the evidence; (2) what legitimate factual issue the other alleged offenses would be relevant to in the case of each particular count; (3) what relevance the other offenses would provide as to that factual issue; and (4) whether the evidence of other offenses would be more probative than unfairly prejudicial. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

In the present case, the trial court determined that the multiple counts were supported by a preponderance of evidence based upon the State's offer of proof. Trial RP 45. As noted above, the court identified the existence of a common scheme as the legitimate issue in this case toward which the evidence of other offenses was relevant. Trial RP 47. The trial court also found that the evidence concerning other offenses showed substantial similarities and therefore constituted relevant evidence of a common scheme. Trial RP 46-47. Finally, the court ruled that this evidence was more probative than unfairly

prejudicial. Trial RP 46-47.

A common scheme exists when an offender devises a plan and uses it to perpetrate separate but very similar crimes. State v. Lough, 125 Wn.2d 847, 855, 889 P.2d 487 (1995). Therefore, the existence of a common scheme is indicated when a defendant's other conduct bears such similarity to his conduct in connection with a particular crime charged as naturally to be explained as the result of a general plan, rather than merely coincidental. Lough, 125 Wn.2d at 860.

To show a common scheme, the State must only show substantial similarities among the offenses alleged. The similarities do not need to be unique or atypical. DeVincentis, 150 Wn.2d at 13. In the present case, the evidence indicated the defendant had used his relationships with certain mothers of young daughters to gain their trust, with a focus on girls who were 9 to 10 years of age. He had then exploited that trust by gaining permission from each mother to care for her children while the mother was away. Once in such

a position of authority within a residence where the victim was also present, the defendant had looked for an opportunity to isolate the victim from other children present in the residence, and had then used the opportunity to touch the child's vaginal area for sexual purposes. This pattern displays substantial similarity from one offense to the next, and evinces a common scheme repeatedly carried out until reported by one of the victims.

The defendant contends that because the charges alleging that T.A.T. and T.M.T. were the victims encompassed a 19-month period (January 1, 2004 to August 1, 2005) and the counts regarding M.F.M. occurred outside that period (August 4, 2005), it is an unreasonable stretch to find a common scheme in the allegations against the defendant. However, this argument ignores the inferences that can reasonably be drawn from the evidence in this case.

M.F.M. was molested on August 4, 2005. She had become ten years of age on April 27, 2005.

Trial RP 73, 76. T.A.T. testified that she was subjected to multiple acts reflective of the common scheme described above during the period from Christmas in 2004 to her disclosure to her mother, which occurred on August 5, 2005, when she was nine years old. Trial RP 175, 181, 197. T.M.T. stated that she was nine years old when both instances of molestation occurred. Trial RP 220-221. She turned nine on January 30, 2004 and so became 10 years old in January, 2005. Trial RP 211.

A juror could have reasonably concluded that the defendant's scheme had initially been directed at T.M.T. in 2004, and that he had subsequently turned his focus onto T.A.T. using the same scheme during late 2004 and the first half of 2005, and then in August, 2005, the defendant had begun to turn his attentions to M.F.M., who he referred to as a "hottie", once again using the same method or scheme. Trial RP 137. Thus, the period of time during which these offenses occurred does not contradict the theory that they were part of a

common scheme.

The offenses were also related by the sequence of events leading to the disclosure of the defendant's offenses against T.A.T. and T.M.T. It was M.F.M.'s disclosure which led Angela Rivera to contact Norma Shelman, and which then caused Shelman to question her two daughters. Both T.A.T. and T.M.T. had delayed reporting the abuse until that questioning took place, at which point they were informed M.F.M. had been victimized by the defendant. Trial RP 200, 205, 222, 228.

The defendant agrees on appeal that the defense at trial challenged the credibility of both T.A.T. and T.M.T. Once the credibility of both T.A.T. and T.M.T. was at issue, including their delay in reporting the abuse, evidence explaining why that delay came to an end would be relevant to the issue of their credibility. See State v. Petrich, 101 Wn.2d 566, 574-575, 683 P.2d 173 (1984).

Here, the jury could reasonably infer that the girls chose to disclose their abuse because

they learned that another girl had been similarly victimized and because the truth was now being directly demanded from them by their mother. At the same time, the defense could argue, and in fact did argue, that the sequence of events leading to the disclosures of T.A.T. and T.M.T. showed that they were false claims prompted by the suggestive use of M.F.M.'s allegations by Norma Shelman. Trial RP 319-320. Intrinsic to this defense argument were the similarities between M.F.M.'s accusations and those of T.A.T. and T.M.T. Given this defense argument, it is now contradictory for the defendant to argue on appeal that the allegations concerning M.F.M. were not relevant to the counts involving T.A.T. and T.M.T. as victims.

Finally, the court found that evidence of other offenses was more probative than unfairly prejudicial. The evidence of a common scheme was highly probative that the charged offenses had occurred. Given the court's instructions that the jury must decide each count separately, requiring

in each instance that the State prove the charge beyond a reasonable doubt, the court did not abuse its discretion in finding that this probative value of the evidence outweighed any danger of unfair prejudice to the defendant.

D. CONCLUSION

For the reasons discussed above, the State respectfully requests that this court affirm the trial court's denial of the defendant's motion to sever and the defendant's subsequent convictions for five counts of child molestation in the first degree.

DATED this 16th day of January, 2007.

Respectfully submitted,



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Respondent) DECLARATION OF
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RAFAEL RIVERA,)
Appellant)

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the
Office of Prosecuting Attorney of Thurston
County; that on the 16th day of January, 2007, I
caused to be mailed to appellant's attorney,
THOMAS E. DOYLE, a copy of the Respondent's
Brief, addressing said envelope as follows:

Thomas E. Doyle,
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 16th day of January, 2007 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney