

NO. 37767-5-II

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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CASPER DIAS,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY [Signature] DEPUTY

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

The Honorable D. Gary Steiner, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by denying the appellant's motion to sever counts related from two incidents, for which the state had DNA identification evidence, from counts stemming from a third evidence, which lacked such powerful evidence.

Issue Pertaining to Assignment of Error

The state charged the appellant with 20 counts arising out of three early morning burglaries of dwellings with three occupants in each. The appellant wore a mask, dark clothing and gloves in each incident. None of the occupants in any of the incidents could identify the intruder. He restrained two of the three occupants in the second and third incident. In the first two incidents, the appellant raped one of the women occupants and left DNA evidence, which later became overwhelming evidence of his guilt. In the third incident, there was no sexual assault and no DNA identification evidence. The strength of the state's evidence was thus significantly stronger with respect to the counts arising from the first two incidents than the third. Moreover, the complicated 15-day jury trial, during which approximately 400 exhibits were discussed, made compartmentalization of the evidence difficult for the jurors. Finally, the danger was great that the DNA and other evidence presented with respect to the first two incidents

would have a prejudicial "spillover" effect such that the prejudice from joining the third incident with the first two outweighed the interest in judicial economy. Did the trial court abuse its discretion by denying the appellant's motion to sever the counts arising from the third incident from those resulting from the first two incidents, thereby depriving him of his constitutional rights to due process and to a fair jury trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The state charged the appellant, Anthony Casper Dias, with three counts of first degree burglary, seven counts of first degree kidnapping, seven counts of first degree rape, and three counts of first degree robbery. The state also alleged Dias committed each crime while armed with a gun. CP 22-32. A Pierce County jury found Dias guilty of each crime and found he committed each crime while armed with a gun. CP 110-150. The trial court imposed a combination of concurrent and consecutive standard range sentences totaling 2732 months with the gun enhancements. CP 169-87; RP 2017-18.¹

¹ "RP" refers to the 27-volume, sequentially paginated, verbatim report of proceedings.

2. Offense 1 -- "Fircrest incident"

Nineteen-year-old N.H. woke up at about 4:30 a.m. on August 31, 2005, and saw a masked man standing in her bedroom in her mother's Fircrest home. RP 205, 209-10, 236-38. When T.H. screamed, the man told her to shut up or he would shoot her and her family. RP 237. The man, clad in dark clothing, had a dark metal revolver in his hand. RP 237-39, 245-46, 257, 314-16, 440-42. Throughout the remainder of the incident, the gunman pointed the weapon at T.H.'s head. RP 243.

T.H.'s mother heard the scream and came into her daughter's bedroom but did not turn the light on. T.H. said she had a bad dream and everything was fine, so her mother left the room, closed the door, and returned to her own bedroom. RP 239-40, 373-76, 386-87. At the gunman's request, T.H. got out of her bed. RP 241. The gunman asked her several times where her phone was, but stopped asking when T.H. told her the phone was not in her room. RP 241-42. He also asked for her wallet, which T.H. gave him. He took the \$1 that was inside the wallet as well as her driver's license. RP 244-45.

Over a significant period of time that followed, the man forced T.H. to take ecstasy pills, struck and kicked T.H., forced her to fellate him several times, raped her vaginally several times with his penis and the gun,

and anally raped her with his penis. RP 247-65, 1656-62. The gunman eventually took T.H. outside into the backyard, then ran off. RP 272-73. Just before he left, he told T.H. to shower, clean her clothes, and not mention the incident. RP 284.

A medical examination revealed T.H. sustained vaginal injuries consistent with forced penetration. RP 538-44. The examining nurse took swabs from several parts of T.H.'s body and turned the evidence over to a detective. RP 444-45, 532-34, 545. A test of T.H.'s urine revealed evidence of substances consistent with ecstasy. RP 1656-65.

3. Offense 2 -- "Trafton" incident

G.C. rented a home on Trafton Street in Tacoma with her roommates, L.V. and C.N. RP 553-54. The three had met at and graduated from Pacific Lutheran University. RP 553-55, 624-27, 718-19. About six weeks after the Fircrest incident, G.C. saw her bedroom door open about 2 a.m. RP 565. Into her room walked a masked man wearing dark clothes and gloves, with a revolver in his hand. RP 555-56. The man directed her to kneel on the floor facing away from him. The man took G.C.'s cell phone, had her stand up, put a gun to her head, and led her into L.V.'s room. RP 570-71. G.C. awakened L.V., who saw the man and got out of bed. RP 580, 645-47. The man ordered the two to lie on

the floor. RP 646-47. He repeatedly asked them for money and wanted to know where L.V.'s phone was. RP 648-49.

At about that time, C.N. left her bedroom, saw the gunman, and ran down the stairs. RP 580-82, 649-50, 724-27. The masked intruder quickly ran downstairs, caught C.N., and brought her back upstairs where her roommates were. RP 582-83, 649-50, 728. He directed G.C. and C.N. to kneel and face the wall, then bound their hands behind their backs and their necks together with electric cords. RP 583-84, 650-52, 731-33. L.V. gave the intruder money from her wallet, and C.N. told him there was money in her desk drawer, which she later determined had been taken. RP 650-51, 746.

Over the next two hours, the masked man raped L.V. orally and anally several times. RP 660-70, 674-75. He once digitally raped L.V. in her vagina as well. RP 672-73. The man eventually ordered L.V. to shower and to brush her teeth only about one minute after he ejaculated in her mouth. RP 675-79. Once the intruder left, L.V. and her roommates went to the hospital, where a sexual assault nurse examined L.V. RP 610-12, 688-90, 747-48. The nurse collected swabs from several areas and observed significant swelling in L.V.'s anus. RP 825-32. L.V.'s injuries were consistent with recent forced penetration. RP 844-46.

4. Offense 3 -- "16th Street" incident

About three weeks after the Trafton incident, N.B. and her roommate, T.R., awoke in their 16th Street condominium early in the morning and immediately saw a masked man in dark clothing with a black revolver pointed at them. RP 1120-23, 1127-29, 1135-38, 1152-54. After N.B. got out of the bed, the intruder struck T.R. on the side of the head to awaken him. RP 1129-30. The man ordered T.R. to the floor and used duct tape to bind his hands and feet. RP 1131-32.

The man demanded money from N.B. N.B. emptied the contents of her wallet, which yielded only about \$2. RP 1132-33. The man also ordered her to disrobe so she would not run outside. RP 1134-35. At about that point, a second roommate, C.J., made noises in his bedroom. RP 1122, 1134. The intruder also used duct tape to bind C.J. RP 1074, 1079-80, 1134, 1158. He stole \$7 from C.J.'s wallet as well as C.J.'s cell phone, and struck him twice in the head. RP 1074-75, 1081-82.

Once N.B.'s roommates were bound, the masked man ordered N.B. to call someone to come to her home with money. RP 1158. N.B. heard the man cock the gun and said he would kill her if she found no one to call. RP 1158. N.B. called her sister with T.R.'s cell phone because the intruder

had broken her phone. RP 1083, 1160. Following the intruder's demands, N.B. told her sister to bring money and to come alone. RP 1161-62.

The masked man then ordered N.B. to put her clothes back on, duct taped her eyes and mouth, and dragged her outside. RP 1165-66. To this point and throughout the incident, the intruder made no sexual advances toward N.B. RP 1176.

N.B.'s sister arrived shortly thereafter. RP 1167-68. The man managed to get both women back into the condo. RP 1167-70. He took cash from the sister's wallet. RP 1170, 1197-98.

Meanwhile, C.J. wiggled loose from his bounds and also freed T.R. RP 1085-89. N.B. heard shuffling in the back of the condo and one of her roommates said he had a cell phone and had called police. RP 1089-91, 1170-71. C.J. and T.R. escaped out of a bedroom window. RP 1090-92, 1198-1202, 1204. They were heard pounding on doors outside the condo and yelling for people to call the police. RP 1092-93, 1171, 1201, 1218-19. The intruder panicked and fled the condo before police arrived. RP 1171-72, 1202-03. Police arrived almost immediately but the intruder was not apprehended. RP 1203, 1221-24, 1295-98

5. Similarities in offenses

Detective Gene Miller, a trained crime analyst, developed a modus operandi (MO) for Dias based on his review of the reports in the three cases and the similarities used in each crime. RP 1031, 1034-37, 1820-25. Among the commonalities of each incident was home invasion, multiple occupants, early morning entries, an unusually long time period in which Dias stayed in the homes, desire to control phones, demands for money, consistently vile and demeaning language, narrow age range and common physical features of the victims, demands to disrobe, similar sexual acts, attempts to remove DNA evidence, description of the suspect, and use of a revolver. RP 1827-32.

6. Dias's arrest

About one week later, police were dispatched to a crime in progress at a Federal Way apartment complex. RP 1399-400, 1439-40. A man armed with a black revolver and wearing a dark mask emerged from an apartment. After a short standoff during which the man refused to obey police commands, he ran off. Officers caught him after a short chase and arrested the man, Anthony Dias. RP 1419, 1423-24, 1455-56.

7. DNA evidence

DNA left at the scenes of the Fircrest and Trafton homes matched Dias's DNA. RP 1698-1705, 1776-1803. Jurors were told there was a one in 1 quadrillion chance of finding another person in the United States with the same DNA profile. RP 1786, 1802. In contrast, police found neither DNA nor any other biological samples to identify Dias as the intruder in the 16th Street incident.

8. Motion to sever counts

The state charged seven counts of various crimes resulting from the Fircrest incident, eight counts for the Trafton incident, and five resulting from the 16th street incident. CP 22-32.

Dias's defense to each charge was general denial. RP 31. He moved pretrial to have the counts associated with the first two offenses (Fircrest and Trafton) severed from the third incident (16th Street). Supp. CP (Motion for Severance of Counts, 9/4/2007). Dias argued the first two incidents involved rapes supported by DNA evidence, while the 16th Street offense was not a sex case. RP 21. The DNA evidence, as well as the emotionally charged nature of rape cases, would spillover to the third incident and invite improper verdicts. RP 21. Dias also asserted home invasion cases were often generic and that the similarities the state relied

on to show identity were not sufficiently distinctive as to constitute a signature. RP 22, 45-47. Finally, Dias argued, the state needed the evidence of offenses one and two to prove identity through the modus operandi exception, which meant it was inviting jurors to not compartmentalize the evidence. RP 22-23.

The trial court denied Dias's motion to sever. The court held each of the incidents could be proved by a preponderance of the evidence, were cross-admissible to show a common scheme and modus operandi, were relevant to prove an element of the offense, and were more probative than prejudicial. RP 50. Finally, the court reasoned, jurors would be able to compartmentalize the evidence and would be instructed to limit their use of the other offense evidence to common scheme and MO. RP 50-51.

The trial judge gave the following limiting instruction:

Evidence which has been admitted regarding the circumstances of how the crimes charged in Counts I through XV were committed may be considered with regard to Counts XVI through XX only for the limited purpose of determining the existence of a modus operandi. Evidence which has been admitted to establish the identity of the perpetrator of the crimes charged in Counts I through XV may be considered with regard to Counts XVI through XX only for the limited purpose of determining the identity of the

perpetrator of the crimes charged in Counts XVI through XX.²

CP 99 (instruction 39).

In accord with CrR 4.4(a)(2), Dias moved to renew his severance motion at the close of the state's case. RP 1849. The trial court summarily denied the motion. RP 1849.

In a written order in support of the denial, the trial court found (1) the evidence of the three incidents "can easily be compartmentalized" because of the different victims, locations, dates and acts; (2) the state's evidence on each count was sufficiently strong and that even the 16th Street counts, which lacked DNA evidence, were linked to the others by a common scheme or plan and modus operandi; (3) joinder did not improperly prejudice Dias because his defense as to all counts was general denial; (4) the evidence was cross-admissible under ER 404(b) to establish a common scheme and was relevant to prove each element of the offense; (5) any danger the jury might cumulate the evidence to show propensity was cured by a limiting instruction; (6) the evidence established Dias committed markedly similar acts of misconduct against similar victims under similar circumstances such that it demonstrates a single plan; (7) the

² The court also instructed the jurors to decide each count separately. CP 66 (instruction 6).

distinctive methods employed by the Dias while committing the offenses demonstrated a modus operandi and constituted signature crimes; (8) the evidence of the other incidents was more probative than prejudicial to prove common scheme and identity of the perpetrator; and (9) Dias failed to show joinder would be so manifestly prejudicial as to outweigh the interest in judicial economy. Supp. CP (Order Regarding Denial of Severance, filed June 27, 2008).³

C. ARGUMENT

THE TRIAL COURT ERRED BY DENYING DIAS'S MOTION TO SEVER.

Jurors found Dias was the masked man in the third incident, on 16th Street, after being told there was a 1 in 1 quadrillion chance a person in the United States other than Dias could have left the same DNA at the Fircrest and Trafton incidents. RP 1802-1808. The jury also learned the population of the entire world was only six billion. RP 1787. In other words, no one in the world other than Dias could have left the DNA. It is unreasonable to assume jurors would be able to ignore, or "compartmenten-

³ The trial court's order is attached as an appendix. Although in its order the trial court found the evidence cross-admissible under the common scheme or plan exception to ER 404(b), the court instructed the jury to limit its use of the evidence to determining the existence of a modus operandi and identity of the perpetrator. Dias therefore does not analyze the trial court's finding that the evidence was admissible to establish a common scheme or plan.

talize," this overwhelmingly prejudicial evidence when considering whether Dias committed the 16th Street offenses. The trial court violated Dias's constitutional rights to due process and to a fair jury trial, as well as CrR 4.4(b) and ERs 404(b) and 403, by denying his motion to sever the 16th Street counts.⁴

CrR 4.3(a) allows joinder of two or more offenses only when the charges are "of the same or similar character" or where the charges are "based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.3 is a liberal joinder rule. *State v. Eastabrook*, 58 Wn. App. 805, 811, 795 P.2d 151, *review denied*, 115 Wn.2d 1031 (1990). Dias acknowledges his crimes were of a similar character and thus does not challenge the trial court's joinder. *See, e.g., State v. Price*, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005) (four counts of child molestation involving two children properly joined), *aff'd. on other grounds*, 158 Wn.2d 630 (2006).

Having said this, courts must be mindful that joinder is inherently prejudicial. *State v. Vermillion*, 66 Wn. App. 332, 341, 832 P.2d 95 (1992), *review denied*, 120 Wn.2d 1030 (1993); *State v. Ramirez*, 46 Wn.

⁴ The Fifth and Fourteenth Amendments and article I, section 3 of the Washington Constitution guarantee due process, while the Sixth Amendment and article 1, sections 21 and 22 guarantee the right to a fair jury trial.

App. 223, 226, 730 P.2d 98 (1986). A motion to sever addresses the issue of prejudice notwithstanding proper joinder. *State v. Gatalski*, 40 Wn. App. 601, 606, *review denied*, 104 Wn.2d 1019 (1985). CrR 4.4(b) requires a trial court to sever properly joined offenses where "severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). An accused seeking severance must show a trial involving multiple counts 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). A trial court's ruling on a motion to sever charges is reviewed for abuse of discretion. *State v. Nation*, 110 Wn. App. 651, 659, 41 P.3d 1204 (2002), 148 Wn.2d 1001 (2003).

Prejudice may be shown where (1) a defendant could become embarrassed or confounded in presenting separate defenses; (2) the jury might use the evidence of one or more of the crimes charged to infer a criminal disposition from which to find the defendant guilty of other crimes charged; (3) the jury might cumulate the evidence of multiple crimes charged and find guilt when it would not have done so had it considered the charges separately; or (4) joinder results in a "latent feeling of hostility engendered by the charging of several crimes as distinct from only one."

State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) (quoting *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964)).

On the other hand, factors that may mitigate this inherent prejudice are (1) the strength of the state's proof on each count, (2) clarity of defenses to each count, (3) a proper instruction directing jurors separately consider the evidence of each crime, and (4) whether the evidence of other crimes would be admissible in separate trials. *State v. Cotten*, 75 Wn. App. 669, 687, 879 P.2d 971 (1994).

Although Dias's defense was the same as to each set of charges, the evidence as to the Fircrest and Trafton was so strong as to cause a prejudicial "spillover" of evidence to bolster the significantly weaker state's case as to the 16th Street incident. To conclude otherwise is to ignore the inherent power of DNA statistical evidence.

Courts have cautiously treated admission of DNA statistical probabilities, acknowledging "jurors may well be overwhelmed by" evidence of the "extraordinarily high numbers used in the statistics quoted in court[.]" *Dubose v. State*, 662 So.2d 1189, 1196 (Ala. 1995). "The danger of misleading a jury, confusing the issues, or of creating undue prejudice to the defendant is extremely great when probabilities in the

nature of 1 in 100 billion are expressed." *State v. Pennell*, 584 A.2d 513, 519 (Del. Super. Ct. 1989).

The Arizona Supreme Court found that even if the state's evidence was very strong, "it would be impossible to say beyond a reasonable doubt that the inadmissible DNA evidence did not affect the verdict. Evidence of odds even as 'low' as one in sixty million that the blood on Defendant's shirt was not the victim's blood is, to say the least, powerful." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152 (Ariz. 1993). The Minnesota Supreme Court held DNA statistical frequency evidence was categorically inadmissible, holding it remained "convinced that juries in criminal cases may give undue weight and deference to presented statistical evidence[.]" *State v. Schwartz*, 447 N.W.2d 422, 428 (Minn. 1989)

Nebraska's highest court, noting similar worries from courts in other states, expressed its concern "that juries may receive [DNA] probability testimony as infallible evidence." *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168, 183-184 (Neb. 1992). In *Houser*, DNA evidence showed to a 99.9999995 percentage of probability that the blood in the trunk of the murder victim's car was the victim's blood. *Houser*, 490 N.W.2d at 184. The court held the erroneous admission of the unsound probability evidence

was not harmless despite the fact the remaining evidence was sufficient to sustain the conviction. *Houser*, 490 N.W.2d at 184.

The Washington Supreme Court has also recognized the boundless power generated by mind-boggling DNA probability statistics. In *Russell*, the Court concluded that the relative strengths of counts 1 and 3 were not sufficiently dissimilar to require severance, "especially given the relatively low power of discrimination inherent in PCR testing. The trial court specifically indicated that had the DNA testing been with RFLP, severance would have been warranted because of its high power of discrimination." *State v. Russell*, 125 Wn.2d 24, 64, 882 P.2d 747 (1994), *cert denied*, 514 U.S. 1129 (1995).⁵

With this backdrop in mind, this Court should be reluctant to sanction joinder of two cases in which otherworldly numbers essentially give jurors no choice but to find guilt with a third case in which the state presents mere generalized similarities with the overwhelming cases. Under such circumstances, there is a great danger jurors used evidence from the

⁵ PCR, as opposed to its predecessor RFLP, was a relatively new DNA identification technique at the time it was used in *Russell*'s case. *Russell*, 125 Wn.2d at 36-41. State's witnesses using PCR statistical data testified "90 to 95 percent of the population (but not *Russell*) could be excluded as sources of the sperm in the victim's body." *Russell*, 125 Wn.2d at 40. As set forth by the experts in *Dias*'s case, the discriminatory power of PCR statistical analysis has increased significantly since being used in *Russell*. RP 1780-86.

Fircrest and Trafton incidents -- specifically the DNA evidence -- to find one or more of the crimes charged to infer a criminal disposition, cumulated the evidence of the first two incidents to find Dias guilty of the 16th Street crimes when it would not have done so had it considered the 16th Street crimes in a separate trial, and/or became hostile toward Dias because of the graphic and violent nature of forced sex as set forth in the first two incidents, despite the lack of any sex offenses during the 16th Street incident.

Further, the generalized similarities of the entries, clothing, use of a gun and restraint, demeaning language, volume of evidence, and length of the trial would have made it more difficult for jurors to compartmentalize the evidence and limit its use for the admissible purpose of establishing a modus operandi. *See State v. Kintz*, 144 Wn. App. 515, 523, 191 P.3d 62 (2008); ("incidents were factually distinct enough to allow the jury to compartmentalize them"); *State v. Bythrow*, 114 Wn.2d 713, 723, 790 P.2d 154 (1990) (acknowledging that joinder of counts similar in nature creates "greater danger of prejudice than the joinder of two defendants charged with the same crime[.]" but finding no error "because of the short trial [two days], the relatively simple issues, the jury instructions, and the strength of the State's evidence[.]"); *State v. Perrett*, 86 Wn. App. 312, 319-20,

936 P.2d 426 (1997) (greatest danger of unfair prejudice from propensity inference occurs where the other misconduct evidence is similar to the charged conduct), *review denied*, 133 Wn.2d 1019 (1997).

Dias's crimes were similar enough in certain general respects to make juror compartmentalization difficult. But the similarities did not rise to the level of signature crimes. Signature crimes have been found in the following instances: 1) where two crimes were committed three weeks apart, both involved forcible entry into family residences by three persons dressed in army fatigues, and both involved firearms and similar use of a shotgun;⁶ 2) where two prior robberies and the charged crime all involved wearing a brown wig, similar time of day, a red 10-speed bicycle, display of a gun tucked in a waistband, and theft of car keys from victims;⁷ and 3) where each of three women were killed in a similar manner, were elaborately posed after their deaths, and where the time and place of the murders were near each other.⁸

⁶ *State v. Laureano*, 101 Wn.2d 745, 765, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

⁷ *State v. Lynch*, 58 Wn. App. 83, 89, 792 P.2d 167, *review denied*, 115 Wn.2d 1020 (1990).

⁸ *Russell*, 125 Wn.2d at 67.

In contrast, no signature existed where robberies occurred in three similar stores, the robber entered the store, pulled a knife, asked for the money and fled upon receiving it.⁹

The similarities in Dias's cases were that each constituted early morning armed burglaries/robberies in homes with multiple occupants, repeated threats to injure, dark clothing and mask, demand for telephones and money, and rather lengthy stays in each home. But in the Fircrest incident, Dias entered the home even though T.N.'s mother was home, while in the Trafton Street matter the occupants were three older female college graduates.

In the 16th Street incident, Dias entered a condominium occupied by a woman considerably younger than the women in the Trafton home.¹⁰ The presence of two males distinguished the 16th Street incident from the other two, as did the absence of any older occupants. At no point during the 16th Street encounter did the assailant make sexual advances toward N.B. despite successfully restraining T.R. and C.J. RP 1176. And only in the 16th Street incident did the intruder order an occupant, N.B., to

⁹ *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, 99 n.5, 101-02, 812 P.2d 86 (1991).

¹⁰ N.B., who owned the 16th Street condo, was 23 when she testified nearly two and one-half years after the incident. RP 1121.

summon a friend or family member for money. RP 1186-91. Thus while the first two sets of offenses clearly had a sexual component, the 16th Street incident seemed driven by a desire for money.

There were other differences. Only in the Fircrest incident did Dias compel the sexual assault victim to consume the drug ecstasy, and only in that incident did he take a driver's license. And only in the Trafton offenses did Dias apparently disable the telephone land line. RP 887-92.

Washington courts have set a high bar for determining whether two or more crimes are admissible as "signature" offenses. The methods used to commit multiple crimes must be so rare that proof the accused committed one of the crimes creates a high probability that he also committed the others with which he is charged. *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). Mere resemblances between the crimes are not enough; there must be something unique about the methods employed in both crimes. *State v. Colvin*, 50 Wn. App. 293, 297, 748 P.2d 657 (1988). The more distinctive the crimes are, the higher the probability the defendant committed the crime. *State v. Smith*, 106 Wn.2d 772, 778, 725 P.2d 951 (1986). Stated another way, "A prior or subsequent crime or other incident is not admissible for this purpose merely because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of

the accused." *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) (quoting *United States v. Goodwin*, 492 F.2d 1141, 1154 (5th Cir. 1974)).

The 16th Street incident did not share the similarities necessary to qualify as a "signature crime" when compared with the Fircrest and Trafton offenses, and therefore evidence from the latter two incidents would not have been admissible to prove identity in the third incident.

The manifest prejudice from the wrongful joinder here was the likelihood the jury would cumulate the much stronger evidence of the Fircrest and Trafton incidents to find Dias guilty of the more dubious 16th Street offenses. The sheer power of DNA evidence could have caused this "spillover" effect.

Dias acknowledges the trial court instructed the jury to consider each count separately and to limit its consideration of the "other crimes" evidence for the purposes of determining the existence of modus operandi and identity. He is also aware of the well-worn maxim that jurors are presumed to follow the instructions. *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008).

But the circumstances of Dias's case animate Justice Jackson's oft-quoted remark: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to

be unmitigated fiction." *See Krulewitch v. United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring). That fiction is present here.

For all the above reasons, the trial court abused its discretion by failing to grant Dias's severance motion. The denial caused reversible prejudice. This Court should therefore reverse the convictions for counts 16 through 20, all of which pertain to the 16th Street incident, and remand for a new trial absent evidence of the Fircrest or Trafton offenses.

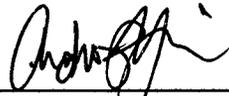
D. CONCLUSION

The trial court abused its discretion by failing to sever the trials of the Fircrest and Trafton incidents from the 16th Street incidents. Dias respectfully requests this Court reverse the trial courts denial of his motion to sever and remand counts 16 through 20 for a new trial.

DATED this 21 day of November, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZINNER

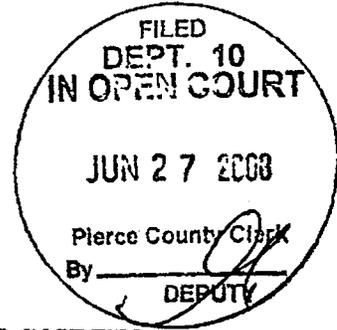
WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

APPENDIX

06-1-01652-3 30049876 ORRE 06-30-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-01652-3

vs.

ORDER REGARDING DENIAL OF SEVERANCE, AND GRANTING THE ADMISSIBILITY OF EVIDENCE OF COMMON SCHEME OR PLAN AND MODUS OPERANDI

ANTHONY CASPER DIAS,

Defendant.

On the 3rd of January, 2008, the parties appeared before the court for the defendant's motion for severance of counts, the cross admissibility of evidence of common scheme or plan, and introduction of evidence of *modus operandi*. The defendant ANTHONY CASPER DIAS was represented by his attorney John Chin and the STATE OF WASHINGTON was represented by PIERCE COUNTY PROSECUTING ATTORNEY GERALD A. HORNE through his deputies Lori A. Kooiman and Bryce R. Nelson.

The court, having considered the written materials and oral arguments, now enters the following order:

I.

The court finds the incidents are currently properly joined for trial as the court makes the following findings after considering the necessary factors as outlined in State v. Bythrow, 114

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2 2d 713, 790 P.2d 154 (1990), State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993), State v.
3 Russell, 125 Wn.2d 24, 882 P.2d 747 (1994):
4

5 II.

6 For the purposes of this motion without dispute from defense, the court accepts
7 the facts as outlined in the "State's Response To Defense Motion For Severance Of Counts".
8 The court finds the facts as outlined have been proven by a preponderance of the evidence.
9

10 III.

11 The evidence of the three incidents, Fircrest, Trafton, and N. 16th Street, can easily be
12 compartmentalized by the jury as every incident is detailed and distinguishable based on the
13 victims, location, date of incident and acts of the defendant. The physical evidence and
14 testimony is not particularly complicated. The mere fact that there are multiple incidents does not
15 warrant severance. State v. Kalakosky, 121 Wn. 2d 525, 852 P.2d 1064 (1993).
16

17 IV.

18 The State's evidence on each count is sufficiently strong to insure there is not a necessity
19 for the jury to base its findings of guilt on any one count on the strength of another count. DNA
20 evidence links the defendant to two of the three incidents. The third incident (N.16th) is also
21 linked by the common scheme or plan and *modus operandi*. All three incidents are sufficiently
22 supported by the evidence. In Russell, the court considered the relative strength of counts in
23 determining whether the counts should be severed. The court noted that one count was not as
24 strong as the others, but upheld the joinder as necessary. Russell, 125 Wn. 2d 24, 882 P.2d 747
25 (1994).
26
27
28

V.

The court finds joinder of the offenses will not improperly prejudice the defendant by causing him to present compounded or separate defenses. The defense maintains a general denial defense for all three incidents, all 20 counts. His defense is clear and identical on each charge. The defendant is not prejudiced by joinder as he is not presenting conflicting defenses.

VI.

The evidence the State seeks to introduce will establish the charged offenses are cross-admissible as part of a common scheme or plan under 404(b). The State has provided an offer of proof regarding the other charged acts and has proven them by a preponderance of the evidence. The other acts are offered and are relevant for the purpose of proving the defendant engaged in a common plan or scheme. The other acts are also relevant to prove every element of the crimes charged and to rebut the defendant's general denial defense, which puts every element at issue. Evidence of the three incidents possesses probative value which exceeds any unfair prejudicial effect. This is so even if the evidence is admitted for only one of the stated purposes. Further, the only potential unfair prejudicial effect of the admission of the evidence is that the jury might incorrectly consider the evidence as proof of the defendant's propensity to commit the charged incidents. This issue is cured by giving a limiting instruction. State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

VII.

The evidence the State seeks to introduce will establish the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances. He targeted homes with multiple occupants, including young females with similar physical characteristics. He was familiar with the occupants in the home. He entered the homes after

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2 darkness to avoid detection. He was armed with a revolver and initially demanded only money.
3 The defendant's other charged crimes demonstrate a single plan used repeatedly to commit
4 separate, but very similar crimes.
5

6 VIII.

7 Evidence of the other crimes is admissible to prove the identity of the perpetrator because
8 the method used in the commission of each crime is so unique that proof the defendant
9 committed one of the crimes creates a high probability that he also committed the other charged
10 crimes. State v. Russell, 125 Wn.2d at 67. The unusual and distinctive methods employed by the
11 defendant while committing the string of stranger home invasion robberies satisfies the *modus*
12 *operandi* test. See State's Exhibit #1. When evaluating all the similarities employed by the
13 defendant in all three incidents, the similarities are more than mere coincidence. While
14 investigating the three incidents, a multi-agency law enforcement task force conducted extensive
15 investigations searching through all local pending reported home invasion robberies and rapes,
16 out of many crimes, these three incidents were linked. The three incidents were linked by the
17 agencies due to the signature as outlined in State's Exhibit #1. When viewed as a whole, the
18 specific methods employed by the defendant are significantly "so unique" that proof he
19 committed one of the crimes creates a high probability he also committed the other crimes
20 charged. The similarities compel the conclusion that during the two month period a single serial
21 home invasion rapist committed all three incidents.
22
23

24 IX.

25 The evidence the State seeks to introduce is admissible because the highly probative
26 value outweighs any undue prejudicial effect. The purpose of 404(b) evidence is to prevent use
27 of evidence designed to prove bad character. The purpose is not to deprive the State of relevant
28

1
 2 essential evidence necessary to establish essential elements. The State is offering the evidence to
 3 prove common scheme or plan and identity of the perpetrator. Exclusion of the evidence would
 4 unfairly limit the State's ability to prove the identity of the defendant in the N.16th incident.
 5 Furthermore, the defendant created the situation due to the means in which he committed the
 6 crimes, masked at all times, taping over the victim's faces, eyes, and drugging a victim. As
 7 proving identity of the offender is crucial, the evidence is highly probative. The probative value
 8 outweighs any *unfair* prejudice of the defendant. To the extent there is any potential of the
 9 evidence being unfairly prejudicial to the defendant the issue will be cured by giving limiting
 10 instruction(s). The jury is presumed to follow the instructions of the court.
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X.

The defendant has failed to carry the burden and demonstrate one trial on all counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. Washington favors judicial economy and single trials. If the court were to grant separate trials dozens of witnesses would overlap and be required to testify in all three trials. The trial is expected to be completed in four to five weeks, granting separate trials would result in 15-20 weeks of tying up jurors, judicial staff, defense, prosecutors, jail staff and the judge. Judicial economy favors a single trial on all three incidents.

DONE IN OPEN COURT this 27 day of June 2008.

JUDGE
GARY STEINER

FILED
DEPT. 10
IN OPEN COURT
JUN 27 2008
Pierce County Clerk
By [Signature] DEPUTY

Presented by:

[Signature]
Lori A. Kooiman
Deputy Prosecuting Attorney
WSB# 30370

[Signature]
Bryce Nelson 33142
Deputy Prosecuting Attorney
WSB# 33142

Approved as to Form:

[Signature]
Attorney for Defendant
WSB# 7160

lak

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

FILED
COURT OF APPEALS DIV. II
STATE OF WASHINGTON
2008 NOV 21 PM 4:44

STATE OF WASHINGTON)
)
 Respondent,)
)
 vs.)
)
 ANTHONY CASPER DIAS,)
)
 Appellant.)

COA NO. 37767-5-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF NOVEMBER 2008, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402
- ANTHONY CASPER DIAS
DOC NO. 316640
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

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DIVISION II
08 NOV 25 AM 11:15
STATE OF WASHINGTON
BY Patrick Mayovsky
DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF NOVEMBER 2008.

x Patrick Mayovsky