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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY DIAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner

No. 06-1-01652-3

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the trial court abused its discretion in denying the motion to sever counts XVI through XX from Counts I through XV, when the evidence was cross-admissible and all factors weighed in favor of joint trial?

B. STATEMENT OF THE CASE.

1. Procedure

On April 14, 2006, the Pierce County Prosecutor's office charged appellant, Anthony Casper Dias, (defendant) with twenty crimes. CP 1-14. The crimes pertained to three different incidents: 1) the Fircrest incident that occurred on August 31, 2005; 2) the Trafton incident that occurred on October 9, 2005; and, 3) the 16th Street incident that occurred on October 31, 2005. *Id.* He ultimately went to trial on an amended information that charge the following crimes with respect to each incident. CP 22-32. Counts I through VII pertained to the Fircrest incident and charged defendant with burglary in the first degree, kidnapping in the first degree, four counts of rape in the first degree, and robbery in the first degree; the State alleged a firearm enhancement on each of these charges. *Id.* Counts VIII through XV pertained to the Trafton incident and charged

defendant with burglary in the first degree, three counts of kidnapping in the first degree, three counts of rape in the first degree, and robbery in the first degree; the State alleged a firearm enhancement on each of these charges. *Id.* Counts XVI through XX pertained to the 16th Street incident and charged defendant with burglary in the first degree, three counts of kidnapping in the first degree, and robbery in the first degree; the State alleged a firearm enhancement on each of these charges. *Id.*

Defendant moved to sever the counts pertaining to the 16th Street incident from trial of the other counts. CP 203-211. The court denied the motion. RP 212-217.

After hearing the evidence the jury convicted the defendant as charged. The court sentenced defendant to a standard range sentence; this resulted in a total confinement period of 2732 months. CP 169-187.

Defendant filed a timely note of appeal from entry of this judgment. CP 188.

2. Facts

Fircrest Incident

On August 31, 2005, T.H.¹, who was then 19 years old, finished her shift at the Tacoma Mall and took the bus to her mother's home at 720 Pasadena Ave., Fircrest, Pierce County, Washington. RP 204-205, 289,

¹ Initials will be used in the brief rather than the victim's full name for privacy reasons.

297. She was home by 9:30-10:00; after taking some pictures of her room and cat to take back to school with her, she went to sleep in her loft bed. RP 215-216, 229-231. The house was a split level; her mother's and brother's bedrooms were on the same level as her bedroom. RP 216. She went to bed around 11:00 p.m.; she woke up at one point hearing noises downstairs, but went back to sleep after concluding it was her mom doing laundry. RP 231-234. After some passage of time, she woke up around 4:15 a.m. because her bed was shaking. RP 232-234. She saw that there was a man in her room, wearing a ski mask with holes cut for the mouth and eyes, standing in the space between her loft bed and the wall; he stated "This is a robbery." RP 236-237, 309. When she screamed, the intruder told her to "shut up" or he would shoot her in the head; he also threatened to shoot her family and to shoot her mom if she came into the room. RP 237. T.H. could see that the intruder had a dark metal gun in his hand; he pointed it at her then held it against her head. RP 237-238. She could feel that the metal was cold and that the gun was heavy as he jabbed her with it. RP 239, 293-294.

T.H. testified that her mom came to her room asking about the scream. RP 239. The intruder whispered to T.H. telling her to tell her mom that everything was fine - that it was a bad dream. RP 239. T.H. complied with his instructions and her mom left. RP 239. Her mother testified that her daughter did not sound right, but her mother did not see anything wrong and went back to her room. RP 375-376. The intruder

instructed T.H. to climb down from her loft bed; he asked her about the location of her cell phone, telling her that he knew she had one and that he wanted to know where it was. RP 242. T.H. lied and told him that she didn't know its location. RP 242. The intruder then asked for her wallet, which she gave to him. RP 242-244. It only contained a dollar, which he took; he also took her license and some other identification cards. RP 244-245. He also took some pictures she had in her room. RP 303. T.H. saw that the intruder also had a cylindrical flashlight and a long bar –like a crow bar- in his possession. RP 240, 282-283. The intruder wore black pants, boots and a jacket, a khaki button up shirt with two breast pockets, a ski mask, and dark gloves. RP 246. She could also discern that the intruder was African- American, with full lips and a mustache. RP 246. At one point in the evening, she felt his hair through the ski mask and felt that it was braided or in corn rows. RP 266. He smelled strongly of cigarette smoke. RP 266. T.H. estimated his height as 5'9" or so and described him as a medium build with a pot belly. RP 246-247. He threatened to come back and seek revenge if she went to the police. RP 247.

The intruder told T.H. to strip and to dance for him. RP 247. T.H. took off all her clothing but did not begin to dance. RP 247. The intruder got mad at T.H.'s non-compliance and kicked her and hit her in the head with his gun causing her to fall. RP 248. The intruder then demanded that she perform oral sex on him, telling her to unzip his pants. RP 248. She

complied, noting that he wore boxers. RP 249. As she fellated him, the intruder called her a bitch and other derogatory names. RP 250. He threatened to stick her in the trunk of his car and let his “homies” have her. RP 250. He also threatened to kill her family if she screamed. RP 250. The intruder also instructed her to empty his pockets, which she did; in his pockets were condoms and some pills. RP 251. He directed her to take two of the pills – which he said were Ecstasy- then checked her mouth with the flashlight and gun to make sure that she has swallowed them. RP 251-252.

T.H. testified that she was forced to perform oral sex three times – both before and after she was forced to take the pills. RP 259. She was also forced to engage in penile/vaginal intercourse while she was on her back on the floor and while he held the gun to her head or pointed it into her mouth. RP 259. She testified that she was too scared to struggle and thought that she was going to die. RP 259-260. T.H. testified that the intruder raped her vaginally three or four times. RP 260. During this time, the intruder threatened: 1) to kill her if she kept crying; 2) to come back for her if she went to the police; and, that he would send his friends back to kill her if he got caught. RP 260-261. The intruder made her say that she liked what was happening to her and that she “loved black guys.” RP 261. If she hesitated making any of these statements, he got angry. RP 261. At one point he stuck the gun in her vagina and threatened to “blow her pussy up.” RP 261,323. He also stuck the gun and his penis in

her anus. RP 261-263. The intruder kissed T.H.'s face, neck, and breasts and bit her breasts. RP 263. Between various acts of intercourse, the intruder would force her into new positions, make continued threats and relate stories about himself. RP 264.

T.H. begged not to be killed. RP 267. T.H. testified that she knew the intruder ejaculated once in her mouth and another time on her inner thigh. RP 269. She spit on a bra on her floor at one point hoping to preserve some of this DNA evidence. RP 269. Finally the intruder told her to put some clothes on; when she did, he took her to the backyard in a headlock. RP 272, 287. He then let her go and ran off; she ran back inside, grabbed one of her brother's hockey sticks then ran to her mother to tell her what happened. RP 272-273, 278-280. T.H.'s mother testified that her daughter was screaming hysterically when she came into her room. RP 376. It took a bit for her mother to understand what she was saying and thought, at first, that she had had a bad dream. RP 376. She had never seen her daughter in such a distraught emotional state as she was that night. RP 376. After hugging her daughter for a while to calm her down, T.H.'s mother called the police - about fifteen minutes after the intruder left. RP 280-281, 377, 389-390.

T.H. testified that she does not know the defendant. RP 278. She never saw the intruder without his mask. RP 302. T.H. felt that the intruder must have been watching her because of the things he said to her and what he seemed to know about her. RP 283.

Several police officers arrived within a short time. RP 325-332, 343-347,393-396. The officers made sure the intruder was no longer in the house and, after learning T.H.'s bedroom was the primary crime scene, secured it until it could be processed. RP 332-336. One officer described T.H. as being "as scared as anyone as he had ever seen" in his twenty five years as a law enforcement officer. RP 332. An officer verified that the main garage door was unlocked as well as a side door leading into the residence from the garage; this was expected after speaking with T.H's mother. RP 401-402. There were no signs of forced entry. RP 427. A forensic officer photographed the scene and collected evidence. RP 467-496.

An officer took T.H. to Tacoma General Hospital for a rape examination. RP 284-285, 347-349. T.H. was careful not to go to the bathroom or brush her teeth prior to the collection of possible evidence. RP 286. A nurse trained in performing sexual assault exams examined T.H and collected swabs and other evidence. RP 497-516, 532-535, 545-. At the hospital T.H. gave detailed information to the examining nurse and to Pierce County Detective Michael Portmann. RP 287-288, 349-350, 517- 532. The town of Fircrest contracts with the Pierce County Sheriff's Department for assistance with investigation on major crimes. RP 397, 423. T.H. suffered bruises and scratches to her back and face and her whole body was sore for a couple of days. RP 288, 536-544. The rape examination revealed some injuries consistent with forced penetration. RP

536-544. Subsequent analysis of T.H.'s urine sample revealed drugs consistent with the ingestion of ecstasy. RP 1649-1666.

Trafton Incident

G.C., C.N. and L.V., three college friends, decided to live together after graduation and eventually moved in to a house at 640 S. Trafton Street, Tacoma, Washington; they were still living there on October 9, 2005. RP 552-554, 556, 623-626, 718-720. Just after 2:00 a.m., G.C. was awakened by someone opening her door; at first she thought it was her housemate L.V., but when the person came into her room she realized that it was not. RP 565. The intruder wore dark clothes, gloves, and a ski hat that he had made into a kind of a ski mask by cutting eyeholes; he was also carrying a revolver with wooden handles. RP 565-566. G.C. grabbed a baseball bat she had near her bed; the intruder told her "You better put that down, bitch." RP 567. Because he had a gun, she put the bat down. RP 567-568. The intruder directed her to kneel on the floor facing away from him; G.C. heard him disconnect her cell phone from the power supply. RP 570. He put the gun to the back of her head and told her to get up. RP 570. He walked her down the hallway and in to L.V.'s room and directed G.C. to wake her up. RP 571, 580. L.V. awoke and saw the intruder. RP 580, 645-646. The intruder had them kneel on the ground and demanded money. RP 646-648. He also asked L.V. if she had a cell phone. RP 648-649. They could hear that C.N. was up in another part of

the house and the intruder signaled the two women to be quiet. RP 580-581, 649, 724-725. The intruder had G.C. stand in the doorway to catch C.N.'s attention as she came up the stairs. RP 582, 649, 725-726. When C.N. saw the intruder, she ran back down the stairs but the intruder chased her and brought her back up to L.V.'s room. RP 582, 649-650, 726-727. C.N. testified that she went for their cordless phone but that it wasn't where it was supposed to be. RP 726-727. The intruder put the gun to her head and called her "a stupid bitch." RP 727.

Once everyone was in L.V.'s room, the intruder again asked for money; L.V. gave him about twenty dollars from her wallet. RP 650, 729. The intruder insisted that the women had more money and demanded to know where it was. RP 651. L.V. later gave him some money from C.N.'s room. RP 684. He had G.C. and C.N. kneel facing the wall and he bound them with a TV cord with their hands behind their backs. RP 583-584, 652, 728. L.V. described the intruder's dark clothing and shoes and wearing a dark mask that had holes cut for the eyes and mouth. RP 653. L.V. and C.N. could tell that the intruder was black and that he had a "stubble mustache." RP 653, 729. He smelled of cigarette smoke. RP 657. He was carrying a revolver that had a tan or brown handle. RP 655. L.V. and C.N. testified that the mask recovered from the defendant's home looked very similar to the one the intruder was wearing that night and L.V. testified that the gun recovered from the bushes just after defendant's arrest, could be the one the intruder had that night as it looks "almost

identical.” RP 654-656, 711, 729, 1432-1436, 1531-1532. C.N. testified that the intruder’s clothing was all dark and that there was a “Dickies” insignia on the pants. RP 751. She identified pants recovered from the defendant at the time of his arrest as being like the ones the intruder wore. RP 751-752, 1488.

The intruder had G.C. and C.N. move together to the bathroom. RP 587, 658, 730. At one point when he saw that some of the restraints had loosened, he took hairdryers and other small appliances in the bathroom and used the cords to bind G.C.’s and C.N.’s feet. RP 589, 731-732. The intruder left the two bound women in the bathroom and took L.V. with him. RP 588. G.C. and C.N. could hear the intruder rummaging in other parts of the house. RP 588, 733. The intruder took L.V. into G.C.’s room and had her take her clothes off. RP 658-659. At one point he came back into the bathroom with L.V., who was now naked. RP 588. The intruder made L.V. perform oral sex on him; when she started to choke on his penis, he told her not to. RP 591, 660-661, 734-735. The intruder stated “Shut up, bitch. You have done this before” and later “Oh, you’re good at that. Keep going.” RP 664-665, 734-735. The intruder used the word “bitch” frequently throughout the night. RP 665. G.C. also saw the intruder bend L.V. over the bathroom sink and push his body into her, but she could not tell if there was penetration into L.V.’s rear. RP 595. L.V. testified that the intruder had an erection at this time, but he was unable to penetrate her at this time. RP 661. L.V. told her friends to close their

eyes. RP 595. They heard sirens outside and the intruder became angry and agitated that one of them had called for help; he had L.V. search her friends for cell phones. RP 662-663, 733-734.

The intruder took L.V. into C.N.'s bedroom; he used some lotion in the room to lubricate his penis then penetrated L.V.'s anus while she was on C.N.'s bed. RP 668-669, 670. L.V. testified that she was anally raped about four or five times over the course of the incident. RP 669, 673. He also forced her to perform oral sex on him in C.N.'s bedroom. RP 669. L.V. testified that he forced her to perform oral sex on him several times that night-so many that she lost count. RP 669, 673. While they were in the bedroom the intruder inserted his gloved fingers into her vagina. RP 671-672. He also did this several times throughout the evening, but never inserted his penis into her vagina although he did try to on one occasion. RP 672-673, 698. Several times, he would put the gun up against L.V.'s head while he was raping her. RP 674. L.V. testified that while the intruder never lost his erection that sometimes he seemed to have difficulty maintaining it; he would rub his penis to keep it erect. RP 669-670. In between these various acts of rape, the intruder would go check on the women tied up in the bathroom. RP 671.

After this the intruder moved G.C. and C.N. into C.N.'s bedroom and had them sit in her walk-in closet. RP 595, 665, 736. C.N. challenged the intruder hoping to get him to leave, but he hit C.N. on the head, pointed the gun at her head and told them that he would "smash" their

faces in and “beat the crap out of you until you can’t move.” RP 595-596, 665-668, 737-738. At some point, the intruder put pillowcases over the G.C.’s and C.N.’s heads. RP 593, 664, 738. G.C. recalled that he made them go back to the bathroom at some point because he threw C.N. up against the wall and then made them sit in the bathtub and closed the curtain. RP 597-598, 738-739. They could hear the intruder come in periodically to check on them and they could also hear sexual sounds and the sound of the bedsprings of C.N. bed going up and down. RP 598-599, 739-740.

L.V. testified that the intruder ejaculated while she was being forced to perform oral sex; the ejaculate went in her mouth, on her face and onto the floor. RP 675-676. Immediately after he ejaculated, he told L.V. to get up and he took her into the bathroom. RP 676

When the intruder came back into the bathroom with L.V. he had C.N. and G.C. get out of the tub. RP 599-600, 676, 740. While he was doing that, L.V. took the semen that was still on her face and wiped it onto the floor under the towel rack trying to preserve this evidence. RP 679. He then had L.V. get into the tub and turn on the shower; he also handed her a toothbrush and told her to brush her teeth. RP 600-601, 676-678, 740-741. The intruder put soap on his gloved hand and rubbed L.V.’s anus and vaginal area; he stuck his fingers into her anus several times in order to wash out that cavity. RP 677, 742. The intruder left L.V. in the shower. RP 679. He had put G.C. and C.N. into the room with the toilet.

RP 601-602, 744. They heard the intruder go down the back stairs; C.N. and G.C. pulled off their bindings and went into the bathroom to check on L.V., who was still in the shower. RP 603-605, 744. C.N. testified that she thought the entire incident lasted about two hours. RP 765. Over the course of the incident, the intruder made one sexual comment or threat to C.N., but none to G.C. RP 602-603, 734. The entire time the intruder asked for cash and not any other financial items. RP 617, 697, 729-730. G.C. thought the intruder had stolen her cell phone but she found out later it was on the floor of her closet; the battery was on the top shelf. RP 621, 962. L.V., C.N., and G.C. did not know the defendant. RP 620, 654, 751.

The women found that their phone was not working although it was plugged in. RP 606, 745. G.C. found her wallet, it still had money in it and all of her bank cards. RP 606. The three housemates gathered a few belongings and drove to a home of a friend of L.V.'s.² RP 606-607, 685-686, 746-747, 769-772. Once there, they called the police. RP 609, 686, 747, 772. The police arrived and medical aid, then all three women went to Tacoma General Hospital. RP 611, 688-689, 747-748, 772-774, 787-793, 869. They were at the hospital most of the day. RP 774. L.V. had a sexual assault examination where she explained to the nurse what had happened; she also spoke with Detectives Wade and Graham at the

² L.V. was married to this man at the time of trial so the State will not use his last name for privacy reasons. RP 623-624, 683.

hospital. RP 689-690, 803-827. The examining nurse collected many swabs and other samples that might have evidentiary value and transferred them to police custody. RP 827-832, 845-847, 876-880. When taking swabs, the nurse realized that L.V.'s anus was bloody and swollen and that this meant she probably need further medical attention and had another doctor re-examine her. RP 827-829. L.V. had small hemorrhages in her cheek, consistent with forced oral sex. RP 833-834. She also had many contusions and bruises, and a five centimeter tear on her rectum, also consistent with forced anal intercourse. RP 836- 843. L.V.'s vaginal examination also showed signs of forced penetration. RP 841-844.

Once police learned that the primary crime scene was at 640 S. Trafton, they had other officer secure that scene. RP 792, 869. Once at the house, police discovered a pane of glass that had been removed from one of the basement windows. RP 886-887, 892. They also discovered that wires had been disconnected – pulled from their contacts- in an outside electrical junction box. RP 886-891. By pulling these wires, the inside phone had been disabled. RP 891. A detective went through the house noting its condition and locating items of possible evidentiary value. RP 894-907. In particular, police took swabs of the location where L.V. had indicated that she wiped the intruder's semen and collected the toothbrush she had used in the shower. RP 905-907, 955-958. The officers at the house were being relayed information by Detectives Wade and Miller, who were at the hospital. RP 907. A forensic officer arrived

to photograph and process the crime scene. RP 917-918, 920-929.

Included in these photographs were several of shoe prints found inside the house, in the yard, on the deck, and in a nearby alley; she also lifted some impressions of these shoe prints using fingerprint powder. RP 932-945, 959-960.

16th Street Incident

On October 31, 2005, Charles Jeffries, Timothy Ray and N.H. shared a two bedroom condo at 6105 N.16th Street, Building N, in Tacoma. RP 1050-1051, 1058, 1121-1123. Mr. Jeffries had one bedroom and Mr. Ray and N.H. shared the other. RP 1060. There was no “landline” telephone in the condo but Mr. Jeffries and N.H. each had a cell phone. RP 1062. Mr. Jeffries testified that just after 4:00 a.m. on October 31, 2005, he was awakened when an intruder entered his bedroom; the intruder turned on the light and told him to lay face down. RP 1065-1068. The intruder was wearing a ski mask, with holes cut for the mouth and eyes, ski gloves, and was armed with a handgun. RP 1068-1070. The intruder was an African –American with protruding lips and glassy distinctive eyes. RP 1071. Mr. Jeffries testified that the defendant’s lips, eyes, and skin tone were similar to the intruder’s but that he did not see enough of the intruder’s face to make a positive identification. RP 1071, 1118 . The intruder was wearing dark, nondescript clothing and white tennis shoes. RP 1072. Mr. Jefferies thought that he was about to be

killed. RP 1074. The intruder took a roll of duct tape and bound Mr. Jeffries arms and legs behind his back. RP 1075. The intruder went to Mr. Jeffries's wallet and removed seven dollars in cash. RP 1075. The intruder did not take the credit cards that were also in the wallet. RP 1075-1077. The intruder picked up Mr. Jeffries cell phone and scrolled through the phone list; he became hostile when he realized that it was a prepaid cell phone and that there were no minutes left on the phone. RP 1076. After that the intruder left, Mr. Jeffries room and went into N.H.'s and Mr. Ray's. RP 1077. Mr. Jeffries heard a gasp from N.H. and the intruder ask "Why are you sleeping in bed with a faggot?" RP 1077. N.H. awoke that night with a feeling that someone was standing over her. RP 1127. She testified that she opened her eyes to discover a man pointing a gun at her face. RP 1127. She thought she was about to die. RP 1128. The intruder signaled her to remain quiet and got her out of bed. RP 1128-1129. The intruder went to Mr. Ray and struck him twice. RP 1078, 1129. He then pulled him out of bed and told him to lay down; he bound Mr. Ray with duct tape and put him into the bedroom closet. RP 1078-1079, 1130-1132. The intruder demanded money. N.H. dumped the contents of her purse to show that she did not have but a couple of dollars, which he took. RP 1132-1133. She offered him credit cards and PIN numbers and the keys to her car, but he was not interested in those. RP 1133. The only other thing that N.H. knew the intruder stole was a pack of cigarettes – a blue pack of Marlboro 72s. RP 1164-1165. At one point

the intruder told N.H. to take off her clothes because he did not want her to run off; he made her take off all of her clothes. RP 1135. The intruder returned to Mr. Jeffries room, bringing N.H. with him; she was naked. RP 1079, 1134-1135. The intruder grabbed a tube sock and placed it on Mr. Jeffries face and duct taped it to his head. RP 1079-1080. Mr. Jeffries was kicked twice in the head. RP 1091. The intruder then took N.H. into the living room. RP 1081. N.H. described the intruder's clothing as black nylon jacket, black jeans, boxers, and black and white high tops. RP 1136. He was wearing a ski mask and gloves. RP 1137. He was African American. RP 1138. She testified that the defendant's skin tone was similar to the intruder's. RP 1138. She identified a ski mask found stuffed behind the dryer in the laundry room of defendant's house and boxers found on defendant's living room floor as being similar to the one used by the intruder. RP 1139, 1177-1178, 1559-1561, 1730. The intruder used derogatory language calling N.H a "bitch" and referring to her roommates as "niggas³" and "faggots." RP 1157.

The intruder told N.H. that she needed to call someone to bring over some money and she have five minutes to do it or she would be shot. RP 1133, 1158. The intruder cocked his gun and put it to the back of N.H.'s head; she thought she was going to die. RP 1158. N.H. decided that she would call her younger sister, Noelle. RP 1160-1161. N.H called

³ Both Mr. Jeffries and Mr. Ray were black. RP 1218.

her sister, and her mom answered the phone; when she spoke to her sister, she told her to bring some money over. RP 1084, 1161-1162. While she was talking to her mother, who wanted to know what was going on, N.H. mentioned the name Amber; the intruder became angry that N.H. was trying to signal that something was wrong. RP 1163. The intruder dragged her out of the room, threw some clothes at her and told her to put them on. RP 1163. He then pulled N.H. into the living room by her hair and put duct tape over her mouth and eyes, making it difficult for her to breathe. RP 1165- 1167. He then dragged her outside through the back sliding glass door. RP 1166. The intruder told N.H. that she would be killed if anyone came with her sister. RP 1167. A few minutes later, Noelle arrived; she knocked on the front door of the condo but got no response; she turned and saw the intruder, with a gun approaching her from the side; she could see her sister wrapped in duct tape just behind him. RP 1168, 1191- 1194, 1205. Noelle also recalls the intruder as being a black man with a flat nose and big lips that popped out of the holes in the ski mask; he was wearing dark gloves and clothing. RP 1194-1195. He took both sisters inside and demanded money from Noelle; he also wanted to know if she had a cell phone. RP 1196-1197. He took the money that she had brought in her wallet. RP 1198.

Mr. Jeffries then heard the intruder and N.H. go outside to the patio; once they were outside he managed to loosen his bindings and free himself. RP 1085. He went into the other bedroom and found Mr. Ray

face down in the closet hogtied with duct tape. RP 1085-1086. In the process of cutting the duct tape off, he accidentally gouged Mr. Ray's hands with the scissors causing him to bleed profusely. RP 1086-1089. The intruder heard noise and realized that the roommates had escaped. RP 1171, 1200. The two men barricaded themselves in the bathroom then escaped out a window. RP 1087-1092. The men began banging on the doors of neighbors, screaming for them to call 911; Noelle could hear them yelling from inside the condo. RP 1092-1096, 1201-1202. The intruder ran out the back sliding glass door. RP 1201-1202. Mr. Jeffries saw the intruder run from the condo as he was sounding the alarm. RP 1092-1093. One of the neighbors called 911. RP 1217-1220. Mr. Jeffries returned to the condo, N.H. was naked with duct tape around her eyes and face. RP 1100. The police arrived a short time later. RP 1203. Statements were taken from the victims and a forensic officer came out to photograph the crime scene and collect evidence. RP 1221-1235, 1250-1276, 1302-1309.

A canine unit was brought to the scene in an effort to track the assailant, but the track ended west of the apartment complex without locating a suspect. RP 1362.

Police Agencies linking of cases

The same sexual assault nurse that had conducted the rape examination on T.H. in the Fircrest incident was the supervisor of the

nurse performing the rape examination on L.V. in the Trafton incident. RP 545-546. As a supervisor she reviewed the report written on L.V.'s rape examination; she immediately thought that the two cases had numerous similarities and felt the cases were connected. RP 546-547. She contacted Detective Brad Graham of the Tacoma Police Department, whom she worked with regularly, to convey her concerns. RP 546.

Detective Wade while investigating the Trafton incident heard about the Fircrest incident. RP 999-1000. Detective Wade obtained copies of the police reports regarding the Fircrest incident and found many similarities between the Trafton and Fircrest incidents. RP 1000. She then contacted the primary detective on the Fircrest incident and went to the crime scene to get a better understanding of what had occurred there. RP 1000-1001. Detective Wade came to the conclusion that she was looking for a serial rapist as the perpetrator of these crimes. RP 1002. She indicated that whenever the police conclude that a serial rapist is involved then the cases become a top priority as crimes involving serial rapists capture the community's attention and can invoke fear and panic within a community. RP 1002. Local law enforcement agencies try to combine efforts and more investigative resources and tools are used to solve these cases. RP 1002.

Detective Wade testified that in late October 2005, she had put bulletins out and was receiving numerous leads via Crimestoppers which were assigned to detectives for follow-up. RP 1003. She also would review other police reports looking for any information that might lead to a suspect. RP 1004. She contacted a man in the Attorney General's Office in charge of the "HITS Unit," which assists law enforcement agencies in tracking serial crimes and homicides, to see if he had heard of any similar cases. RP 1009.

Detective Wade testified that stranger rapes are uncommon and that home invasion stranger rapes are even more uncommon. RP 1015. She described that home invasion rapes are "pretty rare." RP 1019. Detective Graham looked to see if there were any other similar crimes in Tacoma, found none and began expanding the search to other jurisdictions, which brought up the Fircrest case. RP 1330. Detective Wade researched and found that no other home invasion rapes in Pierce County had been reported between August 31 and October 9, 2005. RP 1027-1028. Those uncommon aspects were then combined with numerous similarities between the two cases such as: the suspect cut phone lines and tried to control cell phones; he covertly entered a residence known to be occupied by multiple people; he demanded money; he was armed with a handgun; he was a lone black male who wore gloves and a black ski mask;

he spent a considerable amount of time with the victims; he would make the victim disrobe; he raped the victims vaginally, orally, and anally. RP 1000, 1014-1015. Looking at all of these factors together made the manner in which these crimes were committed unique. RP 1015, 1345.

Detective Gene Miller who had specialized training in crime analysis on pattern offenses, reviewed all of the reports from the Fircrest, Trafton, and 16th Street incidents. RP 1036-1037, 1820-1825. Looking at these crimes he developed an MO that the perpetrator used that consisted of over 20 factors. RP 1825-1832. Some of the factors were unusual on their own- in particular, the amount of time the intruder spent inside each of the residences. Another unusual factor was the single assailant entering homes with multiple occupants. RP 1833. Adding a sexual assault component to the multiple occupants/single assailant scenario made it a rare occurrence. RP 1833. Detective Miller testified that all of the factors taken together made the MO unique. RP 1832, 1838.

Ultimately a multiple agency task force was formed. RP 1013. It met to discuss whether these incidents that had occurred with similar fact patterns might all be connected to the same perpetrator and for information gathering purposes. RP 352, 359, 1330-1331, 1543-1544. Law enforcement officers from Fircrest Police Department, Tacoma Police Department, Pierce County Police Department, King County Police

Department, Federal Way Police Department, Des Moines Police Department, the Department of Corrections, the Washington State Patrol Crime Lab, King County Prosecutor's office, and the Attorney General's office were involved in this task force. RP 1013.

When the 16th Street incident occurred on October 31, 2005, Tacoma Detective Graham noticed that it had the same "MO" as used in the Fircrest and Trafton incidents and decided to look closely at this crime even though it did not involve or had not progressed to- a sexual assault. RP 1321-1323, 1344, 1350-1351. The 16th Street incident had many aspects that tied it to the other two incidents including: covert means of entry; multiple occupants in the residence; it occurred in the early morning hours; the perpetrator spent a lengthy period of time was spent with the victim; the perpetrator used derogatory language; the perpetrator demanded money; the perpetrator tried to locate or disable all phones/cell phones; the primary female victim was between 19-24 years of age and light skinned; the primary victims was forced to strip; the perpetrator wore nondescript dark clothing, gloves and a ski mask; the perpetrator wore boxer shorts; he was armed with a firearm. RP 1351-1355, 1395. Detective Graham, an experienced detective who has handled approximately 200 sexual assault cases a year for the last ten to eleven years, considered this a very distinctive "MO" which linked the crimes

together. RP 1316-1318, 1354-1355. Detective Wade, the primary detective on the Trafton incident, was notified of the home invasion robbery at 16th Street as she drove to work on October 31, 2005. RP 1355-1356. After becoming familiar with the details of that incident, it was apparent to her that this case should be linked with the Fircrest and Trafton incidents as it appeared that they were all committed by the same person using the same "MO." RP 1360, 1378-1382. All three incidents occurred within a six mile radius. RP 1379.

Arrest of Defendant.

Defendant was arrested on November 8, 2005, in Federal Way, King County and his car, was seized and later searched. RP 1331-1335, 1366-1369. Officer Novak of the Federal Way police testified that on that date he was dispatched to a crime in progress at the Heights Apartments in Federal Way at 5:15 in the morning. RP 1398-1399. He and Officer Smith were directed to station themselves at the back of an apartment building for containment and to maintain a perimeter so that no one went in or out of the building. RP 1398- 1403, 1440. At approximately 7:15 a.m., the officers saw a man wearing a ski mask and dark clothing, with a revolver in his hand, come out from a sliding glass door on the second floor and put his hand on the balcony railing as if he was preparing to

jump over. RP 1403-1404, 1442-1443. Just as he was about to push himself over, the man made eye contact with Officer Novak below; he turned and ran back inside the apartment. RP 1404. Officer Novak advised the other officers as to what he had seen. RP 1401. A short time later, Officer Novak saw an object being thrown from the apartment and landing in a brushy/wooded area. RP 1406 -1407. The man then came back out onto the balcony and yelled that he did not have weapon. RP 1407, 1444. The man was no longer wearing the ski mask; Officer Novak identified the defendant as being the same man that was on the balcony. RP 1408, 1419. Officer Smith recalled that the defendant had been wearing gloves. RP 1458. The officers began yelling commands at him but he did not comply and started to take off his clothing until he was bare-chested. RP 1407- 1409, 1444-1446. Officer Smith attempted to use his taser, but was unsuccessful in subduing the defendant. RP 1409-1411, 1444-1447. The defendant ran back inside the apartment at that point and Officer Novak could hear him shouting that he was armed with a weapon. RP 1412. Within a few seconds after that, the defendant ran back out the sliding glass door, jumped the railing, and took off running with Officers Novak and Smith in pursuit. RP 1412-1413, 1448- 1450. The pursuit lasted for some distance until Officer Smith shot and hit the defendant in the arm. RP 1413-1424, 1450-1455, 1461. Defendant was taken into

custody and transported to a hospital for treatment. RP 1424-1426, 1432, 1456. Defendant had duct tape in the back pocket of his pants. RP 1456, 1498. The defendant's clothes were taken into evidence. RP 1487-1489. A short distance from where defendant was taken into custody, officers located the defendant's Cadillac in a parking lot. RP 1429-1430. Police ran a canine track from the apartment and the dog tracked to where the defendant had been shot and taken into custody. RP 1525-1530. Police then conducted an evidence search with the dog in the area where Officer Novak had seen the object land. RP 1530-1531. The dog went into the bushes and came out with a ski mask that had been wrapped around a loaded revolver, a latex fingered glove and a screwdriver. RP 1432-1436, 1531-1532, 1540-1542, 1605-1610. This revolver was tested and found to be fully operable. RP 1583. The mask and revolver were the same ones Officer Novak had seen in defendant's possession earlier. RP 1435-1437.

Defendant was taken to Harborview for his gunshot wound; while he was there, King County detectives served a search warrant to collect debris from his body as well as DNA swabs from his mouth. RP 1549-1550, 1589-1591.

The arrest was made on a King County case so the King County Sheriff's Department became the primary investigating agency, but detectives on the Pierce County cases were contacted and allowed to

observe the searches of defendant's residence and car; the Pierce detectives could ask for items to be seized if they appeared to be connected to a case in Pierce County. RP 1366-1369, 1550-1555. There were Kool cigarettes in defendant's car and a wad of cash in his glove box. RP 1615, 1620-1621. In the trunk police located, among other items, work gloves, a steak knife, dark clothing, duct tape packaging, and two flashlights. RP 1636-1643. Defendant's house was also searched with a warrant. RP 1335-1340. Officers found rolls of duct tape, pairs of black/dark gloves, a pack of Marlboro Blue 72 cigarettes just like the pack that had been stolen in the 16th Street incident was on the nightstand in the bedroom. RP 1340, 1376, 136-1378, 1556-1557, 1563. Included in the eight black gloves found in the residences were ski gloves; there were also gloves of other colors. RP 1737, 1755-1757. A pair of boxer shorts were found on the living room floor. RP 1730. There were multiple packs of cigarettes in defendant's bedroom, but all of the other packs were Kool brand. RP 1377, 1569. A wadded up ski mask was found behind the dryer in the laundry room of his residence. RP 1559-1561.

Defendant was booked into the Pierce County Jail on November 12, 2005. RP 451. His booking information lists a height of 5'10" and a weight of 165 pounds. RP 451.

On November 27, 2005, while defendant was incarcerated in the Pierce County Jail, he was caught writing some notes to his wife during a visitation, which he was not supposed to do. RP 1382-1383, 1839-1842. The notes were seized and placed into evidence. RP 1383, 1842-1843.1844-1846. Included in these notes was a reference that he made them strip so they wouldn't run out. EX. 80-A, B, and C.

The defense did not put on any evidence. RP 1849.

DNA Evidence

In November, 2005, Nathan Brueschoff, a forensic DNA scientist employed by the Washington State Patrol Crime Lab, took biological samples taken from the defendant and prepared a DNA profile for him; he completed this profile on December 1, 2005. RP 1685-1703.

Jeremy Sanderson, a forensic DNA scientist employed by the Washington State Patrol Crime Lab, received the defendant's DNA profile from Nathan Brusehoff and compared it to a swab taken off T.H.'s neck that was in the rape kit taken at the hospital. RP 1763-1779. The swab revealed a mixed sample containing DNA from more than one source. RP 1780. The mixed sample contained T.H.'s DNA and also DNA from a male contributor. RP 1780-1782. Defendant could not be excluded as the contributor of the male DNA. RP 1782-1785. He also compared

defendant's DNA profile to the swab taken from T.H.'s right breast. RP 1787. Again it was a mixed sample containing T.H.'s DNA and male DNA; defendant could not be excluded as the contributor of the male DNA. RP 1787-1790. The random match probability for the male component of these swabs was 1 in 28 quadrillion people. RP 1786, 1790-1792. Mr. Sanderson labeled it a "very unique profile." RP 1786.

Mr. Sanderson also compared defendant's DNA profile to evidence gathered in the Trafton incident. RP 1792-1797. Mr. Sanderson was able to detect semen on the toothbrush collected in that case; he extracted a mixed DNA sample from the toothbrush. RP 1798. L.V. was the contributor of the female DNA; defendant could not be eliminated as the contributor of the male DNA. RP 1798-1802. The random match probability for the male component of this DNA was 1 in 28 quadrillion people. RP 1802. That number reflects an estimate that a person taken from random from the United States population would have an identical profile. RP 1808. Mr. Sanderson had begun working on a DNA analysis of the evidence in the Trafton incident in the middle of October 2005, before there was a suspect and prior to the defendant's arrest. RP 1813-1814. Mr. Sanderson had developed his mixed DNA profile from the tooth brush prior to receiving the defendant's DNA profile from Nathan Brusehoff. RP 1815.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO SEVER COUNTS.

CrR 4.3(a) allows for the joinder of two or more offenses in a single information if they “are of the same or similar character.” CrR 4.3(a). Severance of properly joined offenses is governed by CrR 4.4, which provides, in part:

The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence on each offense.

CrR 4.4(b). Washington has a liberal joinder rule and a trial court has considerable discretion in joining offenses. *State v. Thompson*, 88 Wn.2d 518, 525, 564 P.2d 315 (1977). Separate trials are not favored in Washington. *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 103 S. Ct. 1205 (1982). The policy was developed in order to minimize the potential burdens on the administration of justice, particularly those burdens placed on the courts and witnesses. *State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), *review denied*, 78 Wn.2d 996 (1991).

A defendant seeking severance of offenses has the burden of demonstrating that 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, 790 P.2d 154 (1990). A trial court's ruling on a motion for severance will be reversed only for manifest abuse of discretion. *Id.* at 717. Severance is not required absent a showing of specific prejudice in which denial of a severance motion would constitute a manifest abuse of discretion. *Grisby*, 97 Wn.2d at 507.

Severance is proper where the defendant will be prejudiced in his ability to present separate defenses on the several counts, or if a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition. *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *modified by*, 408 U.S. 934, 33 L.Ed.2d 747, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1969).

The Washington Supreme Court clarified the factors to be considered in determining whether the potential for prejudice requires severance in *State v. Bythrow*, 114 Wn.2d 713, 717-718, 790 P.2d 154 (1990). The trial court is to consider the jury's ability to compartmentalize the evidence, the strength of the State's evidence on each count; the clarity of defense as to each count; the issue of cross admissibility of the counts; whether the court can instruct the jury to consider each count separately, and the concern for judicial economy. *Bythrow*, at 723; *see also State v. Russell*, 125 Wn.2d 24, at 63, 882 P.2d 747 (1994); *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). Even if evidence is not cross-admissible, however, severance is

not mandated. *Bythrow*, 114 Wn.2d at 720. The defendant must be able to point to “specific prejudice” resulting from the joint trial. *Id.* Given the jury’s ability to compartmentalize the evidence of the separate counts, the strength of the State’s evidence, and the strong public policy of judicial economy, a trial court can deny a motion for severance even if the evidence of the individual counts is not cross admissible.

In the instant case, defendant sought to sever the counts pertaining to the 16th Street incident (Counts XVI-XX) from trial on the counts pertaining to the Fircrest incident (Counts I-VII) and the Trafton Street incident (Counts VIII -XV). CP 22-32. Defendant acknowledges that all of these counts were properly joined in a single information. *See* Appellant’s Opening Brief at p 13. The court found that application of the relevant law weighed in favor of a single trial for all offenses. 1/3/08 RP 47-51; CP 212-217. Defendant now assigns error to this ruling. Appellant’s Opening Brief at p. 1. The severance issue was properly preserved below by a pretrial motion and renewal of the motion during trial as required by CrR 4.4. CP 203-211; RP 1849. The court denied defendant’s renewed motion to sever made at the close of the State’s case. RP 1849. Defendant properly assigned error to this denial of severance of Counts XVI –XX, pertaining to the 16th Street incident, from the other counts pertaining to the Fircrest and Trafton incidents. Appellant’s brief at p. 1.

This court should find that the trial court properly exercised its discretion in denying the motion for severance of Counts XVI through XX from the remainder of the counts.

- a. The court properly found that the jury would be able to compartmentalize the evidence.

As the three incidents occurred on different dates, at different locations, and involved three different sets of victims. CP 22-32. The jury would be able to compartmentalize what occurred in all three incidents based on the date of the incident, the location, the particular victim, and the victim's experience. Defendant's argues that the "generalized similarities of the entries, clothing, use of a gun and restraint, demeaning language, volume of evidence and length of trial" would have made it difficult for the jury to compartmentalize the evidence from one incident from the other two. *See* Appellant's Brief at p 18. This type of argument was rejected in *State v. Kalakosky*, 121 Wn.2d at 525.

Kalakosky involved a defendant charged with four counts of rape and one count of attempted rape. All counts involved different victims, different dates of violation and different locations. On appeal, Kalakosky challenged the trial court's denial of his motion to sever all five offenses from one another. The facts of that case show that the five charged incidents occurred during a six week period. The first victim, 13 year old S.H. was kidnapped by a masked male and taken to a small trailer where

she was raped. The second victim, 16 year old K.W. was kidnapped and raped. The third victim, 20 year old C.F. was raped in her home. The fourth victim, 26 year old L.S. was kidnapped, taken to an abandoned house and raped. The fifth victim, 17 year old K.L. was kidnapped and a rape was attempted in an alley. None of the victims were able to identify the defendant. DNA testing linked the defendant to only the rape of one victim, C.F. The Supreme Court found that under these facts “it was not a particularly complicated task to keep the testimony and evidence of the five crimes separate,” as each victim described a different episode “even though there was much in the rapist’s methods that was the same.” *Id.* at 537.

In the present case, the jury had to compartmentalize only three incidents rather than the five in *Kalakosky*. Each victim described a different episode even though the defendant’s methods were the same. To aid the jury, the State presented its evidence in a compartmentalized manner, grouping witnesses pertaining to a single incident together rather than jumping back and forth from incident to incident. *See* RP 859. The court correctly found that this factor weighed in favor of a joint trial.

- b. The court properly found that any differences in the strength of the State's evidence on the 16th street incident did not preclude a joint trial.

The second factor the court considered was the strength of the State's evidence on each count. If the State's evidence is strong for each count, then there is less potential prejudice to the defendant from a single trial as there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another count. *See Bythrow*, at 721-722. The State's evidence on all three incidents was sufficiently strong to insure that the jury did not base its finding of guilt on the counts associated with one incident on the strength of the evidence pertaining to another incident. Defendant focuses on the fact that there was DNA evidence linking the defendant to the counts involving the Fircrest and Trafton incidents, but not the 16th Street incident. He argues that due to the compelling nature of DNA evidence that this mandated the severance of the counts pertaining to the 16th Street incident from the other counts.

The mere fact that evidence on one or more count may be stronger or of a different nature than evidence on other counts does not, by itself, demonstrate undue prejudice so as to require severance. In *Kalakosky*, DNA evidence linked the defendant to only one of the five victims, but the Supreme Court still found State's evidence was strong on each count based on other physical evidence. Specifically, evidence was found in Kalakosky's possession that linked him to the crimes such as a western-

style shirt missing a sleeve where a sleeve had been used to tie up a victim, duct tape, a white pick up truck, a bandana, hair evidence, and clothes similar to ones described by the victim. *Kalaskosky*, 121 Wn.2d at 538-539. The Supreme Court upheld the denial of severance in *Kalaskosky* despite DNA evidence being involved in only one of the five counts. Defendant's reliance on *Russell* for the proposition that DNA results with high power of discrimination on one count will necessitate a severance of that count from others is misplaced. He misreads *Russell*. That opinion reflects that the "trial court concluded that the relative strengths of counts 1 and 3 were not sufficiently dissimilar to merit severance, especially given the relatively low power of discrimination inherent in PCR testing" and that it "specifically indicated that had the DNA testing been with RFLP, severance would have been warranted because of its high power of discrimination." *Russell*, 125 Wn.2d at 64. The Supreme Court upheld the trial court's denial of severance, but did not address whether a severance would be required under the circumstances outlined by the trial court. Moreover, even if the Supreme Court had addressed this contingency, it would have been dicta.

In the present case the DNA evidence linking the defendant to the Fircrest and Trafton incidents increases the strength of those counts. However, similar to the defendant in *Kalaskosky* the physical evidence located at the defendant's residence increase the strength of the counts pertaining to the 16th Street incident. Particularly, the victim of the 16th

Street incident, N.H. described the defendant as wearing a dark, heavy wool ski mask with cut out holes and identified a ski mask found in the search of defendant's residence as being similar. RP 1139, 1177-1178, 1559-1561, 1730. N.H. described the defendant as wearing dark gloves and several pairs of dark gloves were located at the defendant's residence. RP 1556-1557, 1563. She also identified a pair of boxer shorts recovered from defendant's residence as being similar to the ones that her assailant was wearing. RP 1177-1178, 1730. The victims at the 16th Street residence were tied up with duct tape that was brought by the defendant; (numerous) rolls of duct tape were found in a search of the defendant's residence and defendant had duct tape in his back pocket at the time of his arrest. RP 1456, 1498, 1556-1557. Cigarettes of the same brand taken during the 16th Street incident - a new, blue pack of Marlboro 72's- were found in defendant's possession even though the numerous other packs of cigarettes in his apartment were Kool brand. RP 1164-1165, 1377, 1569. Both N.H. and Mr. Jeffries testified that the defendant's skin tone was consistent with that of the 16th Street intruder and Mr. Jeffries testified that defendant had the same distinctive eyes and protruding lips that the intruder had. RP 1138, 1071, 1118.

Furthermore, the defendant's own statements strengthen the State's evidence on the 16th Street incident. N.H. described the defendant as pointing a gun at her and ordering her to remove all of her clothes so she could not runaway. RP 1135. The jury also heard that when defendant

was in custody, during a visitation with his wife, he held up a note for her to read that stated “Just strip so they don’t run out.” Exhibit 80-A, B, and C.

In addition to the above evidence that shows the defendant’s involvement in the counts regarding the N. 16th incident, the evidence showing a modus operandi used in all three of the incidents further demonstrates that the evidence on all counts against the defendant were strong. The law enforcement officers investigating these crimes linked them together long before defendant was identified as a suspect. The cross admissibility of the evidence will be more fully discussed below. The jury did not have to improperly rely on evidence of one count in order to convict on another. The defendant has failed to meet the burden of demonstrating undue prejudice requiring severance on this factor.

- c. As defendant raised the same defense on all charges this supports the trial court’s ruling for a joint trial.

“The likelihood that joinder will cause a jury to be confused as to the accused’s defenses is very small where the defense is identical on each charge.” *State v. Russell*, 125 Wn.2d at 64-65. Defendant acknowledges that his defense did not differ from one count to the next. Appellant’s Brief at p. 15. This factor supports the trial court ruling denying severance.

- d. The trial court properly found that the evidence would be cross admissible on all counts.

As previously noted, the defendant was charged with multiple counts involving three separate incidents in a single information. The issue in this case is not whether evidence of an uncharged act would be admissible in defendant's trial, but whether the evidence pertaining to one incident was cross-admissible for the purpose of proving another charged incident. Evidence of other crimes or unlawful acts of the defendant are admissible where their probative value outweighs the danger of unfair prejudice against the defendant. ER 403. ER 404(b) governs resolution of the issue and provides:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b) specifically provides that evidence of prior bad acts or wrongs is admissible to prove identity (modus operandi) or a "common

scheme or plan.”⁴ The Washington Supreme Court has explained the different requirements for admission of other crimes under the exception of “common plan” as compared with “*modus operandi*.” *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). Evidence of unique *modus operandi* is relevant when the focus of the inquiry is the identity of the perpetrator, not whether the charged crime occurred. *DeVincentis*, 150 Wn.2d at 21. When admitted to show identity, “the degree of similarity [between the prior act and the present one] must be at the highest level and the commonalities must be unique because the crimes must have been committed in a manner to serve as an identifiable signature.” *DeVincentis*, 150 Wn.2d at 21 (citing *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002)).

The more distinctive the defendant’s prior acts, “the higher the probability that the defendant committed the crime, and thus the greater the relevance.” *Thang*, 145 Wn.2d at 643. Whether the prior acts were similar enough to the charged crime to warrant admission is generally left to the discretion of the trial court. *State v. Foxhoven*, 161 Wn.2d 168,

⁴ There are two different types of “common scheme or plan” for purposes of admitting evidence under the common scheme or plan exception to ER 404(b). *State v. Lough*, 125 Wn.2d at 854-855. The first is where several crimes constitute parts of a plan in which each crime is but a piece of a larger plan, such as committing one crime in order to accomplish a subsequent crime. *Id.*, 125 Wn.2d at 854-855. The second type occurs when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. *Id.* at 855.

177, 163 P.3d 786 (2007)(quoting *State v. Jenkins*, 53 Wn. App. 228, 236, 766 P.2d 499, *review denied*, 112 Wn.2d 1016 (1989)). In cases where there is no dispute that a crime occurred, but there is an issue as to who did it, the State may seek to introduce *modus operandi* evidence to show that the crime bears the defendant's "signature."

Proving a *modus operandi* generally requires that the prior acts and the charged conduct bear "atypical" or "unique" similarities, whereas proving a common scheme or plan requires proof of "a single plan used repeatedly to commit separate, but very similar crimes." *DeVincentis*, *supra*, at 13; *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

In this case the court initially ruled that the evidence was admitted to prove both common scheme and plan and *modus operandi*. 1/3/08 RP 47-51; CP 212-217. However, the jury was instructed that it could use the evidence pertaining to the Fircrest and Trafton incidents only to prove *modus operandi* and identity with regard to the 16th Street incident. Instruction No. 39, CP 58-109. Consequently, the State will address only the *modus operandi* theory as that is the only use the jury was allowed to make of this evidence.

Cases where the court has found sufficient uniqueness to admit evidence under the *modus operandi* include *State v. Laureano*, 101 Wn.2d 745, 765, 682 P.2d 889 (1984), *State v. Russell*, 125 Wn.2d 24, 882 P.2d

747 (1994), *State v. Herzog*, 73 Wn. App. 34, 867 P.2d 648 (1994) and *State v. Lynch*, 58 Wn. App. 83, 89, 792 P.2d 167, *review denied*, 115 Wn.2d 1020 (1990). Russell was charged with three counts of murder; the court found the evidence on the three counts was cross admissible due to these similarities: the victims were all killed by violent means and then sexually assaulted; the bodies were left naked and posed in similar positions; and, all murders occurred within a few weeks of one another in a small geographic area. *Russell*, 125 Wn.2d at 67-68.

State v. Laureano approved the admission of evidence of a prior robbery under the modus operandi provision of ER 404(b) in a robbery/homicide prosecution where the crimes had these similarities: “(1) that they occurred only approximately three weeks apart; (2) that they both involved the forcible entry of family residences; (3) that both crimes occurred after dark; (4) that both crimes involved three perpetrators, although not the same three in each instance; (5) that both crimes involved the presence of firearms by each of the persons entering the residence; (6) that in both cases one of the perpetrators was armed with a [20 gauge, 6 shot] shotgun, and said shotgun was used in a similar manner in each crime; (7) that both crimes involved perpetrators dressed in Army fatigues; and that the above list of similarities is illustrative in nature but is not exhaustive[.]” *Laureano*, 101 Wn.2d at 765.

In *Herzog*, which concerned a prosecution for rape, the trial court admitted evidence of an earlier rape where the description of the rapist by that victim matched the description given by the current victim in many details: a white, blond man, about 30, with a mustache and a two heart tattoo on his left arm, who smoked cigarettes and talked about cocaine and drove a distinctive pickup truck. *Herzog*, 73 Wn. App at 45-50.

Finally in *State v. Lynch* evidence of two uncharged robberies was admissible in a prosecution for robbery where the defendant's modus operandi in all three crimes involved: wearing a brown wig; having a gun tucked in his waistband; tampering with a bank deposit box; taking the victim's car keys; using of a red ten speed bicycle; and, committing all crimes late on a Saturday afternoon. 58 Wn. App. at 89.

In the case now before the court, the unique characteristics present in all three incidents clearly meet the standard set by *Laureano*, *Russell*, *Herzog*, and *Lynch*. All three incidents involved a home invasion in the early morning hours by a African American male wearing a black ski mask, gloves, boxer shorts, and dark clothing and wielding a handgun; the intruder either smelled of cigarettes or stole cigarettes from the home; the intruder demanded money and did not take credit cards or car keys; he took care that cell phones were under his control; all of the residences had multiple occupants at the time he entered; he entered the residences using stealth so that the occupants were not aware of his presence until he awoke them from sleep; he spent considerable time inside the residence and

seemed to have knowledge about his victims; all three residences had a young, light-skinned female resident who seemed to be the primary focus of defendant's attention; two of these victims were raped vaginally, orally and anally; the third incident was interrupted when the roommates of the third victim escaped from the duct tape that the intruder had bound them with and sounded the alarm with neighbors; all the incidents occurred within a six mile radius and within a two month period of one another.

The evidence adduced a trial shows that after two of the incidents – Fircrest and Trafton- that local law enforcement agencies recognized the unique aspects of these crimes and formed a multi-agency task force to investigate and share information regarding the apparent serial rapist who was at large. At the point that this task force was formed, defendant had not been arrested or linked to any of the incidents by DNA. It was the unique modus operandi used that attracted the attention of law enforcement and others who came into contact with the cases. RP 546-547, 999-1002, 1014-1015, 1316-1318, 1321-1323, 1330-1331, 1344-1345, 1350-1355, 1360, 1378-1382, 1820-1833.

The trial court properly exercised its discretion in finding that this was a significantly unique modus operandi to render the evidence cross-admissible to prove the identity of the perpetrator of the crimes arising from the 16th Street incident.

- e. The trial court properly instructed the jury to consider each count separately and gave a proper limiting instruction.

The court included the following in its instructions to the jury:

Instruction 6

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 39

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.

CP 58-109. These instructions properly informed the jury of the need to consider each count on its own and informed them that the evidence regarding Counts I through XV could only be used to prove modus operandi or identity of the perpetrator of Counts XVI through XX.

- f. Defendant has failed to show an abuse of discretion and the trial court's ruling should be affirmed.

This record does not show any abuse of discretion in the court's ruling. The trial court properly considered the applicable law and assessed whether the State had made the necessary showing to establish that a

unique modus operandi had been used in the commission of all three incidents. The trial court's determination of cross admissibility was correct and all other factors weighed in favor of a joint trial. The denial of the severance should be affirmed.

D. CONCLUSION.

For the foregoing reasons this Court should affirm the judgment and sentence entered below.

DATED: April 23, 2009

GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/23/09 
Date Signature

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