

Court of Appeals No. 39595-9-II  
Thurston County No. 05-1-01484-2

COURT OF APPEALS  
STATE OF WASHINGTON  
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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**RAFAEL RIVERA**

**Appellant.**

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENT OF ERROR**

**I. THE TRIAL COURT ERRED IN DENYING MR. RIVERA'S MOTION FOR VACATION OF JUDGMENT AND SENTENCE.**

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

**I. THE TRIAL COURT ERRED IN DENYING MR. RIVERA'S MOTION FOR VACATION OF JUDGMENT AND SENTENCE WITHOUT CONSIDERING IT AS A MOTION UNDER CrR 7.8 (b) (5) BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.**

**C. STATEMENT OF THE CASE**

Mr. Rafael Rivera was convicted of five counts of child molestation in the first degree. CP 6. He filed a motion to vacate his judgment and sentence, alleging that he was entitled to relief based on CrR 7.8 (b) (2) (3) (4) and (5), based on newly discovered evidence, fraud, that the judgment is void, and any other reason justifying relief from the operation of the judgment. CP 73-74. The motion did not explicitly state that he was claiming relief based upon ineffective assistance of counsel. CP 70-135. The trial court denied the motion. CP 42. This timely appeal followed. CP 43-69.

**D. ARGUMENT**

**I. THE TRIAL COURT ERRED IN DENYING MR. RIVERA'S MOTION FOR VACATION OF JUDGMENT AND SENTENCE WITHOUT CONSIDERING IT AS A MOTION UNDER CrR 7.8 (b) (5) BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Rivera was forced to represent himself in presenting his CrR 7.8 motion to vacate his judgment. His memorandum to the trial court was inartfully worded and argued, but it was clear from what he wrote that he was arguing that he was entitled to have his judgment vacated under CrR 7.8 (b) (5), authorizing relief for “any other reason justifying relief from operation of the judgment,” the so-called catch-all provision, and that he was asserting that he received ineffective assistance of counsel of which he wasn’t aware, or could not have been aware, at the time the judgment was entered (see *State v. Klump*, 80 Wash.App. 391, 909 P.2d 317 (1996), which holds that rule authorizing trial court to grant motion for relief from operation of judgment for any reason justifying relief does not apply when the circumstances alleged to justify relief existed at time judgment was entered). Clearly, the evidence Mr. Rivera referred to in his motion was not newly discovered (defense counsel and the deputy prosecutor discussed it on the record during motions in limine), and the investigating detective’s choice to ask Mr. Rivera certain questions and not others, and the State’s choice to ask certain questions during direct examination and not others, did not constitute fraud as contemplated by CrR 7.8.

Although the trial court concluded that the Court of Appeals had previously ruled upon Mr. Rivera's claim of ineffective assistance of counsel, a review of the opinion shows that the Court of Appeals did not actually rule upon that issue, holding that Mr. Rivera must bring this claim via collateral attack because in bringing the claim, Mr. Rivera referenced matters that were outside the record. See Unpublished Opinion of the Court of Appeals, p. 8, found in Appendix "A." The trial court erred in holding that this claim had already been ruled upon. The trial court further erred in not considering Mr. Rivera's motion as a motion for relief from judgment under CrR 7.8 (b) (5) based on ineffective counsel, of which Mr. Rivera was either not aware or could not have been aware. Although inartfully drafted, as pro se pleadings tend to be, his true claim was obvious.

This Court should remand Mr. Rivera's case to the trial court, and order the trial court to reconsider his motion under CrR 7.8 (b) (5) based upon his claim of ineffective assistance of counsel.

**E. CONCLUSION**

This Court should remand Mr. Rivera's case to the trial court and order the trial court to consider the motion pursuant to CrR 7.8 (b) (5) on the claim of ineffective assistance of counsel.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of December, 2009.

  
ANNE M. CRUSER, WSBA No. 27944  
Attorney for Mr. Rivera

**APPENDIX A**



bike to raise the money, Maninger became concerned and took MM indoors to talk, where she disclosed that Rivera had touched her inappropriately<sup>2</sup> RP 63

Maninger called the Thurston County Sheriff, who turned the matter over to the Lacey Police Department, which interviewed MM a few days later. MM explained that she was at her mother's home that day with her brother, Victor, her half-brother, River, and her half-sister, Ruby. When Rivera arrived, her mother left the children with him. That day Ruby went to the library, the three children went swimming at the neighbors, and Rivera left on an errand. MM came home before her brothers and was lying on the living room couch when Rivera returned. Rivera sat down next to her, began kissing her between her legs over her skirt, and tried to put his hand up her skirt. MM kept pushing her skirt down to keep Rivera's hands out. MM also disclosed that after Rivera sat down, he picked up her legs and placed her feet over his lap, touching his groin area.

Lacey Police Detective Jeremy Knight interviewed Rivera on August 8, 2005. When Detective Knight disclosed MM's allegation about Rivera kissing the outside of her skirt and trying to get his hands inside, Rivera responded "Okay. Well, I didn't -- I didn't think that was no. I don't think so. As to say maybe." 2 Report of Proceedings (Apr 4, 2006) (RP) at 129. When Detective Knight asked Rivera if he felt he needed professional help, Rivera responded "Probably, because this is -- this is very -- you know, this is very embarrassing for one thing, and

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<sup>2</sup> Rivera had previously been married to Maninger's ex-wife's sister, Angela Rivera. Maninger knew Rivera but was not a friend of his and did not know that Rivera would be babysitting for Maninger's ex-wife that day.

it doesn't add to the -- it doesn't make things any better for me I mean it's been very, very crappy for me" 2 RP (Apr 4, 2006) at 131 Detective Knight asked Rivera if he could explain why these events frightened MM and Rivera responded "I do see I do see your point of view, and I see her point of view too" 2 RP (Apr 4, 2006) at 132 Rivera also admitted that he was under the influence of methamphetamine and marijuana that day and that this could have impaired his judgment When Detective Knight asked Rivera whether MM was lying, he responded "I see her point of view God, I do see her point of view" 2 RP (Apr 4, 2006) at 136 Rivera told Detective Knight that he was not being malicious but that maybe he did need to talk to someone about his behavior Finally, he said that he wished he could apologize to MM and her family

When Angela Rivera learned about MM's allegations, she spoke with Norma Shelman, Rivera's ex-girlfriend and the mother of his five-year old son Shelman had two other daughters, TAT and TMT, ten and eleven years old respectively Angela Rivera knew that Rivera frequently watched Shelman's children so she told Shelman to talk to her daughters to see if anything inappropriate had happened between them and Rivera Shelman's daughters did disclose sexual abuse and Shelman reported it to the Olympia Police Department Both girls disclosed that Rivera had touched their vagina on top of and under their clothes Both girls also disclosed that Rivera touched them when he was alone with them and no other adults were around

Based on these events, the State charged Rivera with five counts of first degree child molestation two counts for his conduct with MM, two counts for his conduct with TAT, and one count for his conduct with TMT Rivera moved to sever the counts, asking for a separate

trial on the counts involving MM. The court denied the motion, ruling that Rivera failed to meet his burden of proving that severance was necessary. The court found that the jury could compartmentalize the evidence, that the evidence was cross-admissible to show a common scheme or plan, and that it would be unnecessarily expensive to hold separate trials. The court applied the considerations set out in *State v. Bythrow*, 114 Wn 2d 713, 718, 790 P 2d 154 (1990), which we discuss below. The court also held that in admitting the evidence of a common scheme or plan, this evidence's probative value outweighed any undue prejudice.

After the State rested, Rivera renewed his motion to sever, and again the trial court denied the motion. Rivera then testified on his own behalf. He acknowledged being alone with MM for a brief time in the afternoon and that they were seated on the couch eating chips. He denied touching or kissing MM and denied that he placed her feet on his groin. As to TAT and TMT, he acknowledged having babysat them but denied that he ever touched either girl over or under her underwear or pants. After the State questioned him extensively about his statements to Detective Knight, Rivera indicated that the statement also showed that he consistently denied having intentionally or maliciously touched MM and denied having sexual intentions.

The jury found him guilty on all five counts. At a subsequent sentencing hearing, the trial court imposed concurrent 198 months-to-life sentences under RCW 9A.712. Rivera appeals.

#### ANALYSIS

##### I SEVERANCE

Rivera raises a single issue on appeal, claiming that the trial court abused its discretion in denying his motions to sever the offenses. He argues that the jury could not easily have

compartmentalized the charges, the State's proof was limited to "he said she said" evidence and thus was not strong, and while his defenses were clear denials and the court instructed the jury to consider each charge separately, there was a strong possibility that the jury cumulated the evidence. He argues that the evidence of his statements to Detective Knight as to counts I and II strengthened the evidence against him as to counts III-V, for which he did not make a statement to the police.

He also argues undue prejudice, considering the nature of the charges and the hostility engendered by charging three victims rather than just one. *See State v Hernandez*, 58 Wn App 793, 801, 794 P 2d 1237 (1990) ("It is apparent that where the prosecution tries a weak case or cases, together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case.")

CrR 4 4(b) governs severance of offenses. It provides

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 of each offense.

A defendant seeking severance bears the burden of demonstrating that a trial on multiple counts "would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Bythrow*, 114 Wn 2d at 718. The trial court's refusal to sever counts is reversible only upon a showing that the trial court's decision constituted a manifest abuse of discretion. *Bythrow*, 114 Wn 2d at 717.

A trial court's refusal to sever counts may prejudice a defendant because

(1) he may become confounded in presenting separate defenses, (2) the jury may use the evidence of one crime[] charged to infer guilt [on another] crime or crimes charged, or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find

*Bythrow*, 114 Wn 2d at 718 Factors that tend to mitigate prejudice that may arise from a refusal to sever offenses at trial include "(1) the strength of the State's evidence on each count, (2) the clarity of defenses as to each count, (3) court instructions to the jury to consider each count separately, and (4) the admissibility of evidence of the other charges even if not joined for trial" *State v Russell*, 125 Wn 2d 24, 63, 882 P 2d 747 (1994) Applying these factors, we do not find an abuse of discretion

First, the State's evidence was equally strong in both the situation where Rivera gave a statement (MM) and the situation in which he did not (TAT and TMT) All three victims gave testimony consistent with their original statements All three victims disclosed the sexual abuse when alone with a parent While a jury could infer some guilty knowledge from his statements, defense counsel aptly showed that throughout his dialogue with Detective Knight, Rivera never admitted molesting MM and insisted that if he touched her it was not malicious or with sexual intent In both instances, the relative strength of the evidence was not "sufficiently dissimilar to merit severance" *Russell*, 125 Wn 2d at 64

Second, in both situations, Rivera's defense was a straight denial Rivera appears to concede that the clarity of his defense was not an issue "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” *Russell*, 125 Wn 2d at 64-65 Because Rivera’s general denial was the same for all counts, the likelihood of jury confusion was slight

Third, the trial court properly instructed the jury to decide each count separately<sup>3</sup> Because we presume that a jury will follow the trial court’s instructions, this instruction to decide each count separately mitigated any prejudice *State v Lough*, 125 Wn 2d 847, 864, 889 P 2d 487 (1995)

As to cross-admissibility, the trial court ruled that similarities in the evidence on the separate counts were sufficient to establish that Rivera acted with a common scheme All five molestations took place in the privacy of the children’s or their relatives’ homes In all five situations, Rivera was alone with his victims and in a position of authority In all five situations, he had a familial relationship with his victim In all five situations, he committed similar acts of molestation by either touching the girls over or under their underpants The trial court found these facts sufficient to show a common scheme or plan *State v DeVincentis*, 150 Wn 2d 11, 17, 74 P 3d 119 (2003) (common scheme or plan requires only showing substantial similarities not unique or atypical similarities) This cross-admissibility reduced any potential for prejudice from the denial of the motion to sever *State v Price*, 127 Wn App 193, 204-05, 110 P 3d 1171 (2005), *affirmed on other grounds*, 158 Wn 2d 630 (2006)

Finally, we agree with the trial court that concerns for judicial economy outweigh any prejudice Rivera may have experienced *Bythrow*, 114 Wn 2d at 723 The trial court did not abuse its discretion in denying Rivera’s motion to sever the charges

II STATEMENT OF ADDITIONAL GROUNDS

1 Effective Assistance of Counsel

In his pro se Statement of Additional Grounds (SAG), Rivera claims that he was denied his right to effective assistance of counsel because (1) counsel would not share discovery with him, (2) counsel failed to ask for a CrR 3.6 hearing, (3) counsel did not allow him to be present during the omnibus hearing, (4) he wanted to fire counsel because of an irreconcilable conflict, and (5) counsel failed to call witnesses that could have impeached his accuser

The record before this court does not support any of these allegations. If a defendant wishes to bring a claim of ineffective assistance based on matters that are outside the appellate record, he must do so by means of a personal restraint petition. *See State v McFarland*, 127 Wn 2d 322, 338 n 5, 899 P 2d 1251 (1995) (“[A] personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record”), RAP 16.3 et seq

2 Right to Discovery

Rivera also claims that he was denied his right to discovery and to be informed of all the information against him. He claims that the court, the prosecution, and defense counsel failed to provide him with all discovery, witnesses, and police reports before trial began.

Again, Rivera presents no evidence or citations to the record to support this claim and as such we cannot address it.

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<sup>3</sup> The court instructed the jury: “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.” Clerk’s Papers (CP) at 99, Instr 4.

3 Right to Unanimous Jury Verdicts

Rivera claims that he was denied his right to unanimous jury verdicts. This is so, he argues, because “each was Charged for a Different Day, Different Times, and involved different questions of validity” SAG at 2

The record does not support this claim. First, the trial court instructed the jury “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.” Clerk’s Papers (CP) at 99, Instr 4. Second, the court gave separate to-convict instructions on each count in which it distinguished that count from the others.<sup>4</sup> Finally, each verdict form referred to a different count.

The trial court’s instructions protected Rivera’s right to a unanimous jury

4 Adequacy of Information

He claims that the information charging him with these offenses was deficient because “it Charged him with Different Crimes, and Alternative Crimes that allegedly happened on Different Days, Times, and Validity of the Charged Crimes” SAG at 2

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<sup>4</sup> As to Count I, in part, it required the jury to find that “on or about August 4, 2005, the defendant had sexual contact with [MM]” CP at 105, Instr 10. As to Count II, in part, it required the jury to find that “on or about August 4, 2005, the defendant had sexual contact with MFM *at a time other than alleged in count I*” CP at 106, Instr 11 (emphasis added). As to Count III, in part, it required the jury to find that “on or about between January 1, 2004 and August 1, 2005, the defendant had sexual contact with TAT” CP at 107, Instr 12. As to Count IV, in part, it required the jury to find that “on or about between January 1, 2004 and August 1, 2005, the defendant had sexual contact with TAT *at a time other than alleged in count III*” CP at 108, Instr 13 (emphasis added). Finally, as to Count V, in part, it required the jury to find that “on or about between January 1, 2004 and August 1, 2005, the defendant had sexual contact with TMT” CP at 109, Instr 14.

This argument is meritless. The second amended information alleged five separate counts, distinguished the behavior constituting each count, named each victim, and specified the offense date. The State gave Rivera adequate notice of the charges against him so that he could present a defense against them. See *State v Kjosrvik*, 117 Wn 2d 93, 101, 812 P 2d 86 (1991) (citing 2 W LaFave & J Israel, *Criminal Procedure* § 19 2, at 446 (1984), 1 C Wright, *Federal Practice* § 125, at 365 (2d ed 1982)) (articulating “essential elements” rule)

5 Right to Present Impeachment Evidence

He claims that he was denied a fair trial because he was not allowed to show that MM had accused two other people of the same crime. He also claims that he would have called MM's mother to the stand to show that she had a pattern of calling the police on these same charges.

Again, Rivera presents no evidence or citations to the record to support this claim and as such we cannot address it.

6 Right to Meaningful Appeal

Finally, he claims that he is being denied his right to an adequate appeal because he was not provided a copy of the trial transcripts as RAP 9 2 requires. The record shows that we mailed him ten volumes of the record on November 22, 2006, making his SAG due 30 days later RAP 10 10(e). We received Rivera's SAG on November 27, 2006. Yet it was not until January 24, 2007, that we received Rivera's motion for an extension of time to file a supplement to his SAG. A commissioner of this court denied the motion as untimely. Rivera did not seek to modify that decision. In this procedural posture, Rivera cannot claim that he was denied his opportunity to mount a meaningful appeal.

34827-6-II

We affirm

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2 06 040, it is so ordered

  
PENOYAR, J

We concur

  
HOUGHTON, C J

  
QUINN-BRINTNALL, J

COURT OF APPEALS  
DIVISION II  
05 DEC 26 AM 11:01  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,	)	Court of Appeals No. 39595-9-II
	)	Thurston County No. 05-1-01484-2
Respondent,	)	
	)	
vs.	)	AFFIDAVIT OF MAILING
	)	
RAFAEL RIVERA,	)	
	)	
Appellant.	)	
_____	)	

ANNE M. CRUSER, being sworn on oath, states that on the 21<sup>st</sup> day of December 2009, affiant placed a properly stamped envelope in the mails of the United States

addressed to:

Carol La Verne  
Thurston County Deputy Prosecuting Attorney  
2000 Lakeridge Dr. S.W.  
Olympia, WA 98502

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
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AND

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4 Mr. Rafael Rivera  
5 DOC# 893330  
6 Washington Corrections Center  
7 P.O. Box 900  
8 Shelton, WA 98584

9 and that said envelope contained the following:

- 10  
11 (1) BRIEF OF APPELLANT  
12 (2) SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS  
13 (3) VRP (TO MS. LAVERNE)  
14 (4) AFFIDAVIT OF MAILING

15 Affiant further declares that she placed a properly stamped envelope in the mails of the  
16 United States addressed to:

17  
18 Betty Gould, Clerk  
19 Thurston County Clerk's Office  
20 2000 Lakeridge Dr. S.W., Bldg. 2  
21 Olympia, WA 98502

22 and that said envelope contained the following:

- 23  
24 (1) SUPPELEMENTAL DESIGNATION OF CLERK'S PAPERS  
25 (2) AFFIDAVIT OF MAILING

Dated this 21<sup>ST</sup> day of December, 2009.

  
ANNE M. CRUSER, WSBA #27944  
Attorney for Appellant

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I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place:

*Dec. 21, 2009, Kalama, WA*

Signature:

*Anne M. Cruser*