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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON	)	
	)	
Respondent,	)	No. 49245-8-II
	)	
v.	)	STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW
	)	
	)	
Daniel G. Ramirez	)	
(your name)	)	
Appellant	)	

I, Daniel G. Ramirez have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

MY RIGHT TO A FAIR TRIAL WAS UNFAIRLY PREJUDICED WHEN MY CASE WAS JOINED FOR TRIAL WITH THE CO-DEFENDANTS. The trial court erred in joining my case with that of Russell and Ramirez's in a single criminal trial. A proper balancing of the requisite factors shows joinder presented an undue risk of prejudice to my right to a fair trial. For the same reasons, the trial court also erred in subsequently denying my motion to sever my case from that of Russell and Ramirez. My convictions should be reversed for this reason.

Additional Ground 2

MY RIGHT TO A FAIR TRIAL WAS UNFAIRLY PREJUDICED WHEN I WAS ESCORTED WITH THE CO-DEFENDANTS PAST JURORS. this may have violated my right to due process by eroding the presumption of innocence. My convictions should be reversed and remanded for a new trial, for this reason.

If there are additional grounds, a brief summary is attached to this statement.

Date: 06/21/17 Signature: Daniel Galeana

Additional Ground 1.

a. Procedural History and Issue Preservation.

Before trial, the state moved to join my case with Russell's and Ramirez's in a single criminal trial. Supp. CP ___ (Sub no. 13, Motion and Declaration for Joinder of Defendants, filed 12/8/15); 1RP 5-6. The State argued that although I was not charged for the Robbery's, the evidence for both separate incidents "overlap(ed)" and was relevant to establishing motive. 1RP 5-6

Defense Counsel objected to the joinder. Notice of Defense objection to Joinder of Defendants and Continuance of Trial Date, filed 12/30/15. Defense counsel stated, "In the present case, there is no evidence that Mr. Galeana was involved in the earlier incident. There is no evidence that the Co-defendant, Mr. Ramirez, was involved in the later incident. The evidence against Mr. Galeana is weak since the Alleged victims each selected a different person as the shooter. Joining the defendants will lead to prejudice because there is a gross disparity in the weight of evidence against each defendant. What the state essentially seeks to do is to boot strap each of the case's to create a "guilt by association" scenario - where each case is weak on its own but the overall effect is to make the defendant look guilty. As the prosecuting attorney said at the recent hearing, there would be a question whether evidence of each incident would be even admissible at separate trials. Joining the defendants would essentially be a means to sidestep this potential limitation and therefore is prejudicial. Thus, the joinder of these defendants will be prejudicial, and in order to obtain a fair determination of the guilt or innocence of the defendant there must be separate trials."

I joined in a motion to sever, with Mr. Ramirez, on, filed 1/4/16. PG. 16 on line 16 through 25 and PG. 17 line 1 through 10; explaining, "Your Honor, I submitted a short brief last week. And the court rules in the case is just the bottom line on that is with joinder of the defendants, can that make a fair determination of the guilt or innocence That was really the overriding rule. And whether or not there would be prejudice. And as I stated, there's no evidence that my client had anything to do with the robbery/assault that happened earlier - a couple of hours earlier. On the next-next event there's two different identifications of people that was the shooter. one guy said it was my client and the other one said it was a different

person, some unknown person thats not involved here as far as I know as far as being charged with anything or.... So I think that by joining the cases together they're basically piggybacking it all together and trying to make a strong case out of a very weak one."

The trial court denied my motion to sever the case from Russell's and Ramirez's. The trial court concluded that there was not a gross disparity of evidence against each defendant, and that "whole story was tied together" and would be told regardless of whether the cases were severed.

b. Joinder and Severance Generally.

Although separate doctrines, joinder and severance are closely related. State v. Bluford _Wn.2d_, 393 P.3d 1219, 1223-25 (2017). Because joinder and severance are based on the same underlying principle that the defendant must recieve a fair trial untainted by undue prejudice, the legal issues of joinder and severance cannot be decided in a vacuum without considering prejudice. State v. Bryant, 89 Wn. App. 857, 865 950 P.2d 1004 (1998), rev. denied, 137 Wn.2d 1017, 978 P.2d 1100 (1999). After identifying whether joinder is allowable, the trial court should balance the likelihood of prejudice to the defendant against the benefits of joinder in light of the particular offenses and evidence at issues and carefully articulate the reasoning underlying its decision. Bluford, 393 P.3d at 1226. "If joinder will cause clear, undue prejudice to the defendant's substantial rights, no amount of judicial economy can justify requiring a defendant to endure an unfair trial." Bluford, 393 P.3d at 1226 (Quoting State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968).

c. Consideration of the Relevant Factors Shows Joinder Prejudiced the Fairness of the Trial.

CrR 4.3(b) provides when two or more defendants may be joined in the same charging document. The rule provides in pertinent part, that defendants may be joined when:
When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several

offenses charged: (i) were part of a common scheme or plan; or (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others. CrR 4.3 (b)(3).

Joinder is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). A defendant may be prejudiced by having to present separate defenses, the jury may use evidence of one or more of the charged crimes to infer a criminal disposition, or the jury may cumulate evidence of the charges and find guilt when, if considered separately, it would not. State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984). A more subtle prejudicial effect may be present in a "'latent feeling of hostility engendered by the charging of several crimes as distinct from only one." Harris, 36 Wn. App. at 750 (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)).

Precedent and fundamental principles dictate that "the joinder of counts should never be utilized in such a way as to unduly embarrass or prejudice one charged with a crime, or deny him a substantial right." Bluford, 393 P.3d at 1225 (quoting Smith, 74 Wn.2d 754-55). "Thus, even if joinder is legally permissible, the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant." Bluford, 393 P.3d at 1225 (quoting Bryant, 89 Wn. App. at 865).

There are four factors courts must consider when determining whether joinder causes undue prejudice: (1) the strength of the states evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the trial courts instruction to the jury regarding the consideration of evidence of each count separately; and (4) admissibility of the evidence of the other crimes. Bluford, 393 P.3d at 1226. The central dispute in my case, Mr. Galeana, turns on the disparity of the strength of the state's evidence in my case compared with Russell and Ramirez, whether the evidence was cross-admissible, and whether the jury could be expected to compartmentalize the evidence. Factors which may mitigate the prejudicial effect are not sufficient in this case.

i. strength of evidence and clarity of defenses.

By the prosecutor's own admission, stated the case against co-defendant Mr Ramirez, was "... a circumstantial one, and thats why I joined these cases." 11RP 3; see also 4RP 64; 10RP 501-02. The relative strength of evidence against me and the other two co-defendants was not equal. I was not charged or involved in the Robbery incident that Russell and Ramirez were convicted of. I also was never once at all in posession of any firearm at all, nor could I even be pointed/Identified in court and yes I was Identified in a photo montage, but I also was never Identified by the other victim at all, he Identified some "unknown Male".

Identity and general denial was a defense for each defendant on all the counts. Courts have found the same defense to weight against severance. See, e.g., State v. McDaniel, 155 Wn. App. 829, 861, 230 P.3d 245, Rev. denied, 169 Wn.2d 1027, 241 P.3d 413 (2010). The supreme court, however, has found distinct defenses to weight against severance. State v. Bythrow, 114 Wn.2d 713, 721, 790 P.2d 154 (1990) (defense of alibi for one Robbery, defense of ignorance that companion was going to commit Robbery for the other). So either this factor is a no-win scenario for me or there is a conflict in the case law. In any event, no one factor is dispositive. McDaniel, 155 Wn. App. at 860.

ii. effect of instruction to decide each count separately.

The third factor supports separate trials despite instruction informing the jury it must "separately decide each count charged against each defendant." CP 73 (instruction 4). The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. Bythrow, 114 Wn.2d at 721. In Bythrow, the court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence, different witnesses testified as to the different counts, and the issues and defenses were distinct. Id. at 723. On that basis, the reviewing court concluded the jury was likely not influenced by evidence of multiple crimes and refusal to sever was not error. Id. unlike in Bythrow, the jury in this case was unlikely to compartmentalize the evidence of the different counts pertaining to the different defendants. First, the trial spanned one week, during which the state called 20 different witnesses, including the complaining witnesses, several of their neighbors,

eight police officers, and number of expert witnesses. Moreover, testimony on the different counts was not presented in sequence, with testimony of various witnesses jumping from incident to incident. Several of the officers were called to the stand to testify about one incident or piece of evidence, excused, and then after several days recalled to testify about different incidents or evidence. Given the length of trial, non-sequential testimony, multiple witnesses, and two separate incidents involving 12 criminal counts and three different defendants, the jury was likely to infer myself that I had a criminal disposition. At the very least, trying multiple charges committed by separate defendants together necessarily engendered a latent feeling of hostility toward myself. Further, even where the jury is instructed to consider each count separately, the jury is still free to consider evidence from one count in deciding another count. State v. Bradford, 60 Wn. App. 857, 860-62, 808 P.2d 174 (1991) (instruction that "The jury is free to determine the use to which it will put evidence presented during trial" was consistent with instruction that jury was to consider each count separately), rev. denied, 117 Wn. 2d 1003, 815 P.2d 266 (1991). The boilerplate instruction does not actually require the jury to compartmentalize the evidence. CP 73 (instruction 4.) The jury, meanwhile, was also instructed that in deciding whether any proposition has been proved, "you must consider all of the evidence" admitted "that relates to the proposition." CP 71 (instruction 1). Such instruction gives jurors nearly limitless discretion in deciding whether evidence on one count, against one defendant, bears on another count, against another defendant. The jury was not instructed that it must not consider the evidence on any given count as evidence of a propensity to commit the other charged crimes involving different victims. See State v. Gresham, 173 Wn. 2d 405, 423-24, 269 P.3d 207 (2012) ("An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.") By joining the charges, the trial court gave the benefit of ER 404(b) evidence to the State without any protection against jurors using the different crimes for an improper propensity purpose. See Bean, 163 F.3d at 1084 (9th cir. 1998) (in holding joinder resulted in unfair trial, pointing out jury instructions, including instruction to consider each count separately, "did not specifically admonish the jurors that

they could not consider evidence of one set of offenses as evidence establishing the other)." The instruction to weigh each count separately does not weigh in favor of joinder due to the length and complexity of the trial, and the lack of a limiting instruction preventing the jury from using the multiple counts for propensity purposes. [redacted] iii. cross-admissibility of evidence. The fourth factor cross-admissibility of evidence-favored separate trials. Here, the trial court determined that much of the evidence would be cross-admissible to prove motive. 1 RP 21-22. The trial courts reasoning demonstrates precisely why I was unfairly prejudiced by joinder in this case. All the evidence stemming from the Robbery that happened before the fact, and for events for which I was not charged, was not relevant to my case because it did not make the existence of any fact of consequence more or less probable as it related to [redacted] my specific charges. Put another way, the unfair prejudice to myself stems from the fact that at a separate trial, all the evidence of the Robbery incident could have been entirely omitted, and the jury would still have heard all the evidence relating to my specific charges. By combining my trial with Russell's and Ramirez's, and therefore permitting the introduction of evidence which would otherwise be irrelevant to my charges, the trial court created a great danger that the jury may have cumulated evidence of all the crimes of all the defendants to find myself guilty. Even assuming evidence of the separate crimes involving separate defendants would be relevant, other acts evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. ER 403; State v. Hanson, 46 Wn. App. 656, 661, 731 P.2d 1140 (1987), rev. denied, 108 Wn.2d 1003 (1987). Evidence is unfairly prejudicial when it is "likely to arouse an emotional response rather than a rational decision among the jurors." State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987); accord State v. Castellanos, 132 Wn.2d 94, 100, 935 P.2d 1353 (1997). For the reasons discussed above, a separate trial for myself may very well have necessitated a finding that any evidence pertaining to the Robbery was irrelevant, unfairly prejudicial, and therefore not cross-admissible, in my case.

under the circumstances, I, myself meet the burden of demonstrating a single trial involving Russell and Ramirez was so manifestly prejudicial as to outweigh the concern for judicial economy. Bythrow, 114 Wn.2d at 718. To ensure a fair trial, the charges should not have been joined. my convictions should be reversed.

d. Consideration of the Relevant Factors shows the Denial of my Motion to Sever Prejudiced the Fairness of the trial. Even if properly joined for trial, a court should nonetheless sever the trials of joined defendants where severance is necessary to promote a fair determination of guilt. State v. Moses, 193 Wn. App. 341, 360, 372 P.3d 147 (quoting State v. Gatalski, 40 Wn. App. 601, 606, 699 P.2d 804 (1985), rev. denied, 186 Wn.2d 1007, 380 P.3d 440 (2016). under CrR 4.4 (c)(2): The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever: (i) if before trial, it is deemed necessary to protect a defendants rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant. A defendants motion to sever "must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require." CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed up until the close of all the evidence. CrR 4.4(a)(2).

A trial court's denial of a motion to sever is reviewed under

the abuse of discretion standard. State v. Phillips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). Where a defendant is prejudiced by a joint trial, it is an abuse of discretion to deny a severance motion. State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994). On appeal, an appellant must show manifest prejudice resulting from a joint trial outweighed judicial economy concerns. The appellant must point to specific prejudice. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982), cert. denied sub nom., Frazier v. Washington, 459 U.S. 1211 (1983). Specific prejudice may be demonstrated by: (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendants statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants. State v. Canedo-Astarga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting United States v. Oglesby, 764 F.2d 1273, 1276 (7th Cir. 1985), rev. denied, 128 Wn.2d 1025 (1996). The trial court's reasoning for denying my request for a severance largely mirrored its reasoning for joining the cases for trial. 4RP 101-04. Thus, the same factored analysis articulated above applies with equal force to the trial court's denial of my severance motion. For all of the reasons discussed above, there is a great disparity of strength of evidence between my case and that of my co-defendants. There was a very real danger that the jury cumulated all the evidence of crimes to find guilt, or at the very least, infer that I, myself, had a criminal disposition based on my association with Russell and Ramirez. At the very least, trying the charges together necessarily

engendered a latent feeling of hostility toward myself, Any single factor favoring joinder was insufficient to mitigate the prejudice inherent in trying these counts together. Because the unfair prejudice to myself outweighed the judicial economy of joint trials, severance should have been granted. The court abused its discretion in denying severance and my convictions must be reversed. Bythrow, 114 Wn.2d at 717.

Additional Ground 2.

I might have been seen being escorted in and gaurded as if I was in custody by jail staff, past jurors and asked the court to start with a new jury panel on a different day. pg. 18 line 22 through 25 pg. 19. and pg. 20 line 1 through 4 on june 28, 2016.

"Mr. Karlsvik, you had an issue? Mr. Karlsvik: It sort of relates to the courtroom security, your Honor, and the way that the defendants are going to be brought in and out of court. In the years that Ive been doing trials, we always bring my client in with me through the side door where theres not a chance of the jurors seeing him. And the way they were brought in this morning not to pass any negativity on the jail staff, but the way they were brought in this morning is that the three gentlemen here were brought in down the side hallway there. They were brought past that other room where all the other jurors were sitting, and they were flanked by at least three of the jail staff. I dont know if they saw them or not, but that to me was very concerning, that situation. I was going to ask for, I know its a tall order, but I was going to ask the court to declare that we should start again with a new jury panel. I dont know what they saw, but I know they were paraded by there or whisked past there

Flanked by these gentlemen, and it was clear from what I saw that they were in custody and were being gaurded." The court: "Well, you can ask about that during voire dire. I dont think we need to start on a different day." The court denied my request to start with a new jury panel on a different day, when it should have been granted, because I think it violated my right to be brought before the court with the appearance, dignity, and self respect of a free and innocent man. See; Supreme court of washington, State v. Jaime 168 wn. 2d 857 may 14, (2009) (quoting - "as well as general concerns that would be applicable to any defendant who is in custody during trial, namely the risk that jurors might see defendant being transported in handcuffs from the jail to the court house". Jaime, 168 wn. 2d 857 may 14, (2009). The presumption of innocence, although not articulated in the constitution, is a basic component of a fair trial under our system of criminal justice. in order to preserve a defendants presumption of innocence before a jury, the defendant is entitled to the physical indicia of innocence wich includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man or woman. Measures which single out a defendant as a particularly dangerous or guilty person threaten the defendants right to a fair trial because they erode his or her presumption of innocence, these types of courtroom practices are inherently prejudicial. and for that I am asking the court for my convictions to be reversed and remanded for a new trial.