

NO. 49719-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

HUGO RUIZ,

Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Mr. Ruiz was charged in two separate cases with child molestation in the first degree involving different victims – RCZ and PCZ. The State moved to join the cases pursuant to CrR 4.3. Trial counsel agreed to the joinder. As a result of trial counsel acquiescences to the consolidation of charges, the trial court never examined the likelihood of undue prejudice to Mr. Ruiz.

During trial, the evidence the State presented to support its charge that Mr. Ruiz molested PCZ was significantly weaker than the charged counts involving RCZ. Before resting, the State, *sua sponte*, dismissed three counts of child molestation. Trial counsel never moved for severance under CrR 4.4.

The Washington Supreme Court has held “joinder should not be allowed in the first place if it will clearly cause undue prejudice to the defendant.” *State v. Bluford*, 188 Wn.2d 298, 307, 393 P.3d 1219 (2017). Joinder in sex offense cases is inherently prejudicial. *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1987). There was no legitimate tactical basis to agree to join cases when it would result in the jury being presented with two victims alleging multiple counts of sexual misconduct by Mr. Ruiz. Trial counsel’s failure to object to joinder constituted deficient performance. Furthermore, given the testimony at trial, counsel should

have moved for severance under CrR 4.4. The failure to do so was deficient. Mr. Ruiz was prejudiced by his trial counsel's acquiescence to the joinder and failure to seek severance and, therefore, is entitled to reversal of his convictions.

Additionally, the trial court abused its discretion in allowing the expert testimony of child interviewer, Keri Arnold. Ms. Arnold was not qualified to testify as an expert regarding child memory or recantation. Furthermore, her testimony was not beyond the understanding of the average juror and, therefore, was not helpful to the trier of fact under ER 702. Lastly, Ms. Arnold's testimony constituted impermissible profiling testimony and, as such, was inadmissible.

II. ASSIGNMENTS OF ERROR

A. Mr. Ruiz was denied effective assistance of counsel when trial counsel agreed to join the separate cases involving RCZ and PCZ resulting in undue prejudice.

B. The trial court erred in permitting the expert testimony of child interviewer, Keri Arnold, on the topics of delayed disclosure, child memory and recantation.

III. ISSUES PRESENTED

A. Was trial counsel's performance deficient when he failed to object to the State's motion to join charges? Should counsel have moved for severance during trial given the testimony presented in the State's case-in-chief? Did trial counsel's deficient performance prejudice Mr. Ruiz and undermine confidence in the outcome of the trial?

B. Did the trial court err in allowing the expert testimony of child interviewer, Keri Arnold? Was Ms. Arnold qualified to testify in an expert capacity regarding child memory and recantation? Was the expert testimony helpful to the trier of fact? Did the testimony constitute impermissible profiling evidence?

IV. STATEMENT OF THE CASE

A. Procedural History

On June 27, 2011, Mr. Ruiz was charged in Pierce County Superior Court No. 11-1-02399-2 with three counts of child molestation in the first degree for conduct alleged to have occurred between August 7, 2009 and January 25, 2011. His step-daughter, RCZ was the named victim in all counts. CP 4-5. The case was dismissed by the State in October of 2011 after RCZ recanted. CP 5.

In 2015, Mr. Ruiz was charged with four counts of child molestation in the first degree for conduct alleged to have occurred between January 1,

2010 and September 29, 2011. CP 1-2. PCZ, RCZ's sister, was the named victim in all four counts. CP 5-6. Cause No. 11-1-02399-2 was refiled and Mr. Ruiz was arraigned on both cases in October of 2015. CP 6.

The State filed a motion to join the two cases on February 10, 2016. CP 4-10. A hearing was held on February 12, 2016. RP 3¹. At the hearing, trial counsel agreed to join the cases. "Yes, Mr. Ruiz has agreed to join the cases. It makes sense, and the evidence probably would have come in under 404(b) regardless." RP 3. The trial court granted the unopposed motion and signed an order joining the two matters. CP 11. The State then moved to dismiss Cause No. 11-1-02399-2 and filed an amended information in Cause No. 15-1-01869-0 charging six separate counts of child molestation in the first degree. RP 7-8; CP 17-19. RCZ was the named victim in the first three counts. PCZ was the named victim in the remaining three (3) counts. CP 17-19. For all counts, the conduct was alleged to have occurred between August 7, 2009 and September 29, 2011. CP 17-19.

Trial commenced in this matter on September 29, 2016. CP 156. The State called RCZ and PCZ as its first witnesses. CP 164-65. After the testimony of PCZ, the State informed the trial court it intended to file an amended information. "I just informed [defense counsel] that . . . given the

¹ The record in this case includes twelve volumes of verbatim reports. All volumes are consecutively numbered. Accordingly, this brief only refers to page numbers.

testimony, that there will likely be an amendment.” RP 528-529. A Second Amended Information was filed alleging a total of three counts – two counts of child molestation in the first degree involving RCZ and one count of child molestation in the first degree involving PCZ. CP 88-89.

[S]o Mr. Ruiz was originally charged with six counts, as the Court’s aware, and based upon the testimony of the victims in the case, the State feels that there are three specific acts of molestation that can be proceeded forward on. The new Information amends to two counts of [RCZ] and one count concerning [PCZ].

[PCZ] struggled during her testimony. I think it was obvious and evidence, and that’s the reason why two of the counts have ultimately been lowered down and dismissed.

RP 741-743. The jury returned verdicts of guilty for all three counts on October 17, 2016. CP 173-178.

B. State’s Motion to Admit Expert Testimony

The State moved to admit expert testimony of forensic child interviewer, Keri Arnold, regarding delayed disclosure, the difference between script and episodic memory, and recantation. CP 42-50; RP 382-85. The defense objected and argued the information was “well within the purview of your average juror”, Ms. Arnold lacked the expertise to testify as an expert on these topics, and her testimony would amount to vouching. CP 12-16; RP 385-87.

After hearing argument, the trial court allowed the testimony and found Ms. Arnold to be qualified as an expert “by training and experience”.

RP 387. The court ruled:

[T]he things she can talk about are reasons for delayed disclosure, not in this case, but generally based on her experience. She can talk about episodic and script memory and what is meant by that, and how children do one or the other or both without specifically discussing these particular witnesses. I think she can answer questions generally as to the ways that children verbalize or communicate in her child interviews, which I assume is sometimes they talk about it, sometimes they write it down, sometimes . . . she gathers information based on demeanor or failure to answer or change in demeanor, that type of thing. But without specifically relating it to these particular witnesses.

RP 387-88. The court asked for further information regarding the admissibility of recantation testimony through Ms. Arnold. RP 388.

Ms. Arnold later testified outside the presence of the jury regarding her qualifications to testify as an expert on recantation. RP 610. She was questioned by the prosecution. RP 610-19. Defense counsel asked no questions. RP 619.

During the testimony, Ms. Arnold stated she had been employed as a child interviewer with the Pierce County Prosecuting Attorney’s Office for over thirteen years. RP 610-11. Before becoming an interviewer, she worked as a victim advocate for over seven years. RP 611. She testified regarding her training and experience.

[T]he training began by attending the Washington state child interviewer training. I then observed other interviewers conducting other interviews while reviewing other research and training materials that they provided to me related to dynamics of abuse, suggestibility, recantation, child memory development, linguistics, things like that. I then started conducting interviews, and those interviews were observed by other interviewers and critiqued until such time as I was on my own. And then I have continued to attend conferences such as Children's Justice Conference, child fatality investigations, training on sex offenders. Child sexual abuse and exploitation conferences. Those are the only conferences I can think of. I also attended the – I've gone back through the Washington state training to observe to then facilitate, but I've also gone to the APSAC interviewer training, which is the American Professional Society for the Abuse of Children. I've attended trainings by Tom Lyons, who has a ten-step interview protocol, and then also Dr. John Yuille. My education background is I have a bachelor's degree. I majored in sociology with a concentration in criminology and a minor in psychology, and my experience in that 13 years, aside from the trainings and conferences that I've talked about, I have conducted over 2,200 interviews.

RP 611-12. Exhibit 8 was then identified as “a list of trainings and conferences and things I have attended that I have put together to provide when needed” and admitted without objection for purposes of the motion².

RP 613. Ms. Arnold also testified she was trained in recantation.

It's something that is discussed in most all of the child abuse conferences and trainings that I've attended as being something that is a common occurrence. Specifically as it relates to interviewing it is something that they discuss in the state training . . . as something that can occur and may have some likelihood of occurring, and . . . so there are things that they talk to us about, looking for and asking kids in interviews to help assess the likelihood of recantation, and

² On the same day as the Appellant's Opening Brief, a Supplemental Designation of Clerk's Papers and Exhibits was filed pursuant to RAP 9.6(a) requesting the Pierce County Superior Court Clerk prepare and transmit a copy of Exhibit No. 8 to this Court.

also just to gather some background information about risk factors and thinks like that.

So looking for things that will provide insight into the stresses and concerns that the child has, some of which may directly relate to factors of their safety, but some of it also is to maybe factors that could play a role in if the child later recants their statements.

RP 614-616. While she had experienced children recanting, it was “not something that, as an interviewer, I always have a lot of involvement with.”

RP 616.

We don’t usually go back and do another interview of a child who is recanting. I can think of – I think there has been maybe two interviews that I have done where the child was actively recanting, and I was asked to speak with them about why they were recanting, what that meant . . . what really did or didn’t happen.”

RP 616. Ms. Arnold testified she interviewed RCZ after she recanted to find out why she recanted. RP 618. After the testimony, the trial court ordered:

So without saying anything with respect to [RCZ] and the actual circumstance of her interview, this witness does have the expertise to talk about, in general, the universe of reasons for recantation, but she can’t be asked if they were the reasons [RCZ] did or did not . . . give.

RP 619.

C. State’s Case-in-Chief

i. Direct Examination of RCZ

RCZ was the first witness to be called by the State at trial. RP 405. She was sixteen years of age at the time of her testimony. RP 406. When asked why she was testifying, RCZ responded, “Because . . . I was being touched inappropriately.” RP 425

When she was a student at Sheridan Elementary School in Tacoma, RCZ disclosed to two friends that she was being touched by Mr. Ruiz. RP 426. She made this disclosure in 2011. RP 443. RCZ testified Mr. Ruiz would touch her private area. RP 426. When asked to describe how he touched her, RCZ responded, “It was . . . dry humping, pretty much.” RP 427. According to RCZ, Mr. Ruiz would stand behind her when he did this. RP 427.

RCZ didn’t remember the first time this occurred but testified it happened more than once when she was living in Graham. RP 428. “From what I remember, it was mostly during third grade.” RP 428. She was attending Graham Elementary School at the time. RP 442.

RCZ testified the incidents would happen outside near their garage. RP 428. They lived in a two bedroom trailer in Graham. RP 428. The garage was in front of the trailer “to the right.” RP 429. Mr. Ruiz would ask her “to help him get things from the garage and things like that.” RP 430. RCZ did not remember anyone else being around when she would go outside with him. RP 430.

RCZ described Mr. Ruiz lifting her up in the air with his body touching hers. RP 430. She testified that she could feel his “private” when this would happen and his body would move in a thrusting motion. RP 431. According to RCZ, this happened more than five times. RP 431. RCZ testified the incidents happened at night when the sun was down. RP 432. She did not remember if it was warm or cold outside at the time of the incidents. She also did not remember how long the incidents lasted. RP 432.

RCZ testified Mr. Ruiz also touched her when she was living in Tacoma and attending Sheridan Elementary School. RP 432. “In that place, I only remember it once happening.” RP 432. According to RCZ, she was sick that day and in her bedroom sleeping with her sisters. RP 433. She then described the incident.

All I remember is I saw someone walk in, and so I kind of opened my eyes a little bit but I shut them because I thought I was going to get in trouble that I was awake. But at first he was just . . . putting something on my forehead so . . . fever can go away, but after that, he, he – sorry.

I don’t know if he thought I was still sleeping or not, but I felt that he . . . spread my legs apart and he . . . positioned himself in between my legs.

He . . . got on the bed and was . . . in between . . . both of my legs, like both of my legs were . . . on the sides of him.

I remember that he started moving but I was still pretending that I was asleep.

He started dry humping me again.

I opened my eyes for a little bit again, and I could see him just . . . moving again in a thrusting motion. It felt really weird.

RP 434-35. According to RCZ, her sisters were sleeping in the bed with her at the time this occurred. RP 433. She testified she was wearing pajamas and Mr. Ruiz was clothed. RP 435. RCZ didn't remember how long the incident lasted. RP 435.

When asked, RCZ admitted she previously recanted and said the incidents did not happen when interviewed for the case. RP 437. RCZ then explained why she recanted.

At the time, the thing with my uncle was happening, too, and him, so it was bringing a lot of stress to our family and it was breaking us apart, so the thing I remember he told me is that it's up to me to decide what happens to the family or not.

RP 437-38. She testified Mr. Ruiz told her this before she did the interview.
RP 438-39.

ii. Cross Examination of RCZ

RCZ testified she told her friends Mr. Ruiz was touching her in 2011. RP 443. She denied she was playing truth or dare with her friends at

the time she disclosed. “[W]e were just talking amongst friends, and we were telling each other secrets that we haven’t told anyone, and that was what I told them.” RP 443. RCZ denied previously stating Mr. Ruiz touched her under her clothing. “I did not say it was under.” RP 444. She agreed that she did not previously say Mr. Ruiz had dry-humped her. “I didn’t because at the time I didn’t know what was happening.” RP 444.

RCZ testified she did not remember previously reporting Mr. Ruiz touched her sixteen (16) times at the trailer in Graham. RP 445. She remembered being interviewed in 2011 and was shown Plaintiff’s Exhibit 1 – her written responses during the child forensic interview. RP 445. She agreed that during the interview she reported Mr. Ruiz touched her with his hands and rubbed her. RP 445-46. She did not report he dry humped her outside the trailer in Graham. RP 446. RCZ also admitted that she did not tell anyone in 2011 that Mr. Ruiz came into her bedroom when they lived in Tacoma. RP 447.

Defense counsel then inquired into the reasons why RCZ didn’t include these descriptions in her 2011 interview.

DEFENSE COUNSEL: The reason you didn’t report the incidents in Graham when you now tell us that he was dry humping you and the incident in Tacoma where he came into your bedroom at night and you pretended to be asleep and he got between your legs and you say humped you up and down is because you didn’t think it was of a sexual nature. Is that correct?

RCZ: At that time, I didn't know.

DEFENSE COUNSEL: Well, but you knew it was inappropriate; isn't that correct?

RCZ: Yes, after.

DEFENSE COUNSEL: Well, you pretended to be asleep, so obviously you thought something was, you know, not right about it.

RCZ: Yes.

DEFENSE COUNSEL: Is that a fair statement?

RCZ: Yes.

DEFENSE COUNSEL: And you report that you were touched three times with his hands on your genitals, and I – I apologize, [RCZ]. I realize how hard this must be for you, and you thought that that was inappropriate and you reported that, correct?

RCZ: Yes.

DEFENSE COUNSEL: But you didn't think it was inappropriate when he came in and he rubbed his groin on your groin?

RCZ: No.

RP 447-48.

RCZ testified that she was never touched inappropriately inside the trailer in Graham and did not remember saying that when she was interviewed in 2011. RP 450. When asked if Mr. Ruiz ever touched her "anywhere else in an inappropriate way, either inside or outside the trailer", RCZ responded, "I don't know." RP 450. RCZ testified that she was certain it was Mr. Ruiz who came into her room that night in Tacoma. RP 451.

RCZ agreed she recanted her allegations in 2011. RP 449. During her recantation, she stated no one had ever touched her in a bad way or done anything to make her feel uncomfortable. RP 449. RCZ also testified Mr. Ruiz was not permitted to live in the house with her after she made her initial disclosure. RP 451. She did not see him again until after the charges were dismissed. “Not that I remember, no.” RP 451-52. RCZ was asked, “[W]asn’t it your grandma, Bricia’s mom, who talked to you about the allegations that you had made?” She responded, “I don’t know.” RP 452.

RCZ testified that her parents would help bathe her and her sister, PCZ. RP 453-54. She did not remember seeing Mr. Ruiz doing anything inappropriate during those times. RP 454. If she had seen anything inappropriate being done to her sister, PCZ, she would have reported it. RP 454.

iii. Re-Direct and Re-Cross Examination of RCZ

On re-direct, RCZ testified that she did not know what dry humping was when she was ten years of age. RP 455. She described how it occurred. Mr. Ruiz would stand behind her with her facing forward and “go forward and back, just keep going like that.” RP 455. RCZ agreed the actions could also be characterized as rubbing. RP 455.

RCZ testified that Mr. Ruiz talked to her in person before she recanted in the interview. “I remember because, during the interview, the

only thing I would think about is him telling me that.” RP 456. She appeared confused when asked whether Mr. Ruiz was living with her before the interview. She first indicated he was living with her but then stated she did not remember. RP 456. RCZ did not remember anyone else from her family talking to her about her allegations. RP 457.

During re-cross examination, RCZ was asked about the relationship between her mother and Mr. Ruiz. “Well, they were always happy together. That was until he would cheat on her.” RP 458. RCZ recounted that her mother went through Mr. Ruiz’s phone and showed her the messages he was sending to another woman. RP 458. According to RCZ, this was when she was in the sixth grade. RP 458. The case had already been dismissed at that point. RP 460.

RCZ described Mr. Ruiz as a strict. RP 458-59. She did not remember him ever striking her. RP 459. She agreed that she did not like Mr. Ruiz. RP 459.

iv. Direct Examination of PCZ

The State called PCZ next. RP 467. She was fourteen years of age when she testified. RP 468. PCZ testified she met Mr. Ruiz when she was “really young”. RP 474. He was a father figure to her and they got along “pretty good.” RP 474. When asked what she and Mr. Ruiz would do together, she responded, “Play soccer and we would play some kind of judo

games, also.” RP 474. PCZ did not remember when Mr. Ruiz and her mother stopped being married. RP 474. She didn’t remember what school she was attending when she stopped seeing Mr. Ruiz. RP 474.

She lived in an apartment when she was attending Sheridan Elementary School. RP 480. Mr. Ruiz, her mom, her sisters, her brother and “for a little bit it was my aunt and uncle” lived in the apartment with her. RP 480. PCZ did not remember what grade she was in at Sheridan Elementary when they lived in the apartment. RP 489.

PCZ testified that she was in court to say what happened with “Hugo”. RP 490. “He was touching my sister and me inappropriately.” RP 490. According to PCZ, the first time she remembered Mr. Ruiz touching her was “when we were little, and I can’t remember exactly . . . when or where, but it was when we were young and we lived in a . . . different house with my family members.” RP 490. She then recounted an incident where she saw Mr. Ruiz touch her sister. RP 491. “Where he was taking – all of us shower, and he was just touching her.” RP 491. PCZ testified she did not remember being touched in the shower. “In the shower, I don’t – no.” RP 491. She was not asked which sister she saw Mr. Ruiz touch. RP 491.

PCZ could not remember where they were living when she was first touched. RP 491-92. “Well, I just remember that, usually . . . when we’d

be . . . outside, or when . . . we would be in the car.” RP 492. PCZ further testified, “Well, he just . . . in the car, he just kept . . . putting his hands on me.” RP 492. She did not remember how old she was when this occurred. “I can’t remember what age I was, but I was . . . older. I wasn’t . . . that young.” RP 492.

PCZ was pressed for more details about the incident in the car. RP 492-93. She stated, “I think it was when I lived . . . in the duplex, I think, and we were going somewhere. Yeah, I was going somewhere with him in the car.” RP 493. According to PCZ, there was no one else in the car with them. RP 493. “Yeah, because we were . . . taking some stuff to a place or we were moving out.” RP 493. PCZ testified that she remembered it was at the duplex because “I remember . . . that we were . . . getting out of the garage and then we were just . . . talking about some things.” RP 493. While in the car, he “just . . . kept . . . putting . . . his hands . . . on my legs . . . where I didn’t want him to.” RP 494. She did not remember him putting his hands anywhere other than her leg. RP 494. PCZ testified that she did not remember anything else from the car incident. RP 494.

The prosecutor asked PCZ if she remembered any other incidents where she was touched.

[W]hen we would . . . go to places, and he would . . . tell me to . . . pretend – told me to . . . drive. He would be stepping on the gas and

then I'd just be moving the wheel, and at first, I thought it was . . . normal, but then I started noticing that . . . it wasn't.

Because . . . he would just . . . start . . . moving more . . . around while I was sitting on him.

RP 494-95. She did not remember what she felt. "Not really. I just remember being . . . moved around and feeling uncomfortable." RP 495. PCZ testified that Mr. Ruiz would put her in the "certain spot". RP 495. When asked to explain, she responded, "Like, if I would be . . . you know, sliding down or something . . . he would . . . pick me back up to sit down . . . right on him." RP 495. PCZ confirmed she was sitting on Mr. Ruiz's lap when this occurred. RP 495. She was asked why it made her uncomfortable and responded, "Just like, it was just – it just didn't feel right, what he was doing, because . . . he would . . . want me to be in a specific place." RP 495.

PCZ was asked if there were any other times she felt uncomfortable with Mr. Ruiz. RP 496. She recounted the following:

I remember this one time at a trailer, I was . . . I went to . . . you know, to – I don't remember, but I was . . . tired, and then after . . . I remember if I went to his room to go to sleep or he told me to just sleep there. . . in his bed.

....

But he was . . . kind of doing the same thing that he did . . . in the car, but instead of . . . you know . . . laying down . . .

RP 497-98. PCZ testified that she did not have a specific memory of this incident “but I remember, like, most of it.” RP 497. She was then asked to give details about what she remembered Mr. Ruiz doing to her. “Just the same thing that he always does . . . just, like, puts him . . . closer. He puts me closer to him and, just, like, move me around.” RP 497. PCZ stated she was laying on her side and he was “laying down the same.” RP 497. She said he touched her body. “It was, like, my legs and so, like, my bottom.” RP 497. PCZ testified Mr. Ruiz’s hands were touching her on the outside of her clothes. RP 498; 499. “He was just, like . . . rubbing me.” RP 498. She did not remember any other part of Mr. Ruiz’s body touching her. RP 499. According to PCZ, this happened when they were living in a blue trailer with three bedrooms. RP 498. She was in fourth grade. RP 498.

PCZ recounted another incident from when she was living in an apartment and attending Sheridan Elementary School. RP 500. She did not remember what grade she was in when this incident occurred. RP 500. She was sleeping in her room with her two sisters. They were all in the same bed. RP 500-501. “Hugo always got up early to go to work, and then this one day, like, I always wake up early and this one time, he, like, was on top of me, and I didn’t know what to do, so I just, like, fake sleep instead.” RP 500. According to PCZ, the incident occurred in the morning. RP 503. PCZ continued, “I just remember . . . opening my eyes a little bit, but . . . I

couldn't see anything, but I remember . . . Hugo being on top of me, and . . . I can . . . hear breathing, and . . . that's about it." RP 503. She testified that she knew it was Mr. Ruiz because "when he was leaving, I saw who it was." RP 503. PCZ slept up against the wall. Her "younger sister in the middle and my older sister at the other end." RP 503. Both her sisters were asleep. RP 506.

PCZ was sleeping on her stomach. RP 503. "His stomach was . . . on my back." RP 504. According to PCZ, Mr. Ruiz's "stomach and down" were touching her body. RP 504. She did not remember feeling anything other than his stomach and down. RP 505.

PCZ reported Mr. Ruiz's body was moving but she did not remember how. RP 504. The prosecutor asked, "Can you expand on that a little bit? Was it moving right to left, left to right, up and down?" RP 504. PCZ responded, "It was . . . up and down." RP 504. The prosecutor then asked, "Towards your feet and towards your head or towards the floor and towards the ceiling?" PCZ testified, "Towards my feet and my head." RP 504.

PCZ did not know how long the incident lasted. "I don't know because when I . . . open my eyes, he was already there, so I don't know when he got there." RP 505. She did not know if this happened just once or more than once. RP 505. The first time she told someone what was

happening to her was after her mother and Mr. Ruiz were no longer together. RP 509. She and her mother had an argument. Her mother left the room and her mother's boyfriend came in to speak with her. "I ended up telling him . . . stuff that happened, and that was . . . the first time I told anyone." RP 506-507.

v. Cross Examination of PCZ

Defense counsel elicited that PCZ was being sexually assaulted by her uncle, Edwin. RP 511. PCZ knew Edwin was charged with a crime for what he did to her. RP 514. Her mother told her Edwin was going to do treatment. RP 514. Defense counsel then inquired:

DEFENSE COUNSEL: And the fact of the matter is that you never mentioned Hugo to your – to Jose or your mom, did you?

PCZ: I did.

DEFENSE COUNSEL: Okay. Are you quite certain about whether or not you shared information about Hugo at the same time, the very same time now . . . it's important – that you did about Edwin?

PCZ: Wait. Like, what do you mean?

DEFENSE COUNSEL: Okay. Well, you get interviewed, and I'm sure this has been a very difficult process for you, but you've been interviewed a lot, and a lot of people want to talk to you about what happened. And it seems that you first talked about Edwin, okay, and then later talked about Hugo?

PCZ: Yes.

RP 515. Later in the cross examination, defense counsel inquired again:

DEFENSE COUNSEL: And I know this is going back a long time, but they spoke with you about having inappropriate contact when – with anybody, but when they discovered that Edwin had been sexually assaulting you, they spoke with you way back when . . . and you were asked, “Does your dad grab you,” and you said that you forgot. And my question . . . I don’t doubt that these things happened to you, but do you think you might be confused about who it was that was doing this stuff to you?

PCZ: No.

RP 518.

Mr. Ruiz was no longer living in the home with her when PCZ made her allegations against him. RP 521. Her mother was dating Jose. RP 521. When she made the disclosure, she was in trouble with her mother. RP 511. Her mother saw a Facebook conversation she had with a boy named Jacob. RP 511. Jacob was older than her and the Facebook conversation was about sex. RP 511-12. Her mother was very upset when she saw the conversation. RP 512. “[S]he just started yelling at me.” RP 513. PCZ also agreed she was having problems going to school and was coming home late. RP 513.

PCZ testified that she did not remember when asked if Mr. Ruiz and Edwin were about the same size. RP 516. PCZ agreed that Edwin would have heavy breathing when he sexually assaulted her. RP 516-517.

Defense counsel then asked, “And you indicated that you saw Hugo touch your sister, [RCZ], in the shower; isn’t that correct? PCZ responded

in the affirmative. RP 515. She answered “no” when asked if she may have misinterpreted what she saw. RP 515-16.

Defense counsel then questioned PCZ about the incident in which she claimed Mr. Ruiz came into her room. RP 516. “[D]o you think that you could have been mistaken about who it was in your room that morning?” RP 516. PCZ responded, “No, because . . . the only time I opened my eyes was when he was leaving . . . out of the room.” RP 516. She testified that it was “already . . . getting light, but it wasn’t . . . fully light there.” RP 516. PCZ testified that her sisters never woke up during the incident. “They were really heavy sleepers.” RP 518.

Defense counsel pointed out that PCZ never indicated any inappropriate contact in a car when she was initially interviewed. “And that’s relatively recent, during this last set of interviews that you guys have had to undergo. Is that new information?” RP 519. PCZ responded, “Well, everything is just coming back to me, like, I’m starting to remember. Like, what happens when I talk about something, I remember about something else.” RP 519. PCZ agreed that before she disclosed Hugo molested her, she spoke with her sister, RCZ, about her experience. RP 520.

PCZ described Mr. Ruiz as strict. RP 520. She thought he was mean. RP 520-21. When asked if she liked him, PCZ responded, “Not really, because of the things he has done, but I will have forgiven him about it.”

RP 521. PCZ testified that she loved her sister but that they were only close “in stuff like this, nothing else.” RP 511.

PCZ testified that her mother would let Mr. Ruiz back in the house because she loved him. RP 521-22. She was asked how it made her feel when Mr. Ruiz came back to the house. “I would get really mad. Like, there was this one point where I just, me and my older sister stayed with my grandma because we didn’t want anything to do with them being back together.” RP 522.

vi. Re-Direct Examination of PCZ

During re-direct, PCZ testified that her uncle, Edwin, was not living with them when she lived in the apartment and attended Sheridan Elementary School. RP 524. The person she saw walking out of the room was wearing a “T-shirt and, like, this working vest.” RP 524-25. “It was orange or yellow.” RP 525. She knew Mr. Ruiz “build things” for work. RP 525. PCZ testified that when she talked to Jose, she talked about Edwin and Mr. Ruiz. RP 525.

vii. Testimony of Ms. Keri Arnold

After testifying outside the presence of the jury, Ms. Arnold was permitted to testify as an expert witness. RP 619. She detailed her training and experience including having conducted over 2,200 forensic interviews. RP 629-30. She testified the goal of the interview is to “obtain a statement

from the child using appropriate practices to do so” not to obtain a disclosure. RP 631. Ms. Arnold then explained dynamics of abuse to the jury.

It’s kind of a . . . little bit of a catch-all that refers to a bunch of different things, but some of what it can talk about is the . . . fact that it’s more likely to be an offender who is close to the child rather than a stranger or that it’s somebody who maybe within the family that has more involvement with the child and with the family, close access to the child, and in some of the ways in which the abuse may occur, that situational things such as it may occur when others are sleeping. It may occur under a blanket with people in the room. The – there may be threats made. There may be gifts offered or given, kind of how abuse situations kind of can take place.

RP 631-32. She was asked about delayed disclosure.

Delayed disclosure is the term that they use that refers to the point from when the first alleged incident of abuse occur and when the child then discloses with the abuse, and it refers to the lapse of time between those two events.

RP 632. Ms. Arnold testified delayed disclosure was accepted as being a common occurrence. “It’s something that occurs in the majority of the cases that I interview on.” RP 633. She explained how the relationship between the alleged perpetrator and the victim may cause delayed reporting. “[T]hey frequently will report fears of what’s going to happen to the offender because this is someone who’s known and often somebody who’s loved as well as other fears related to what may happen to the family and to their home. . . .” RP 634. She testified children may delay disclosure because

of what is happening in their life. “[M]ore transient kind of living, that they’re moving a lot and there’s constant change going on. . . .” RP 635.

Ms. Arnold discussed child memory and the difference between script and episodic memory. RP 637-40. She testified about disclosure process. “The children have a tendency to disclose more and more as we go along.” RP 640-41. She testified about recantation. “Recantation is when someone has made a disclosure of some alleged abuse and then they take it back and they said it wasn’t true or it was a lie.” RP 641-42. Ms. Arnold testified further:

It’s something that is . . . commonly discussed in trainings and conferences related to child sexual abuse, particularly because, more often than not, the offender is someone who’s close to the child. It’s somebody who may even be within the family.

It may disrupt their family. They may lose their home, there may be all these factors that can occur, or certainly if they have a parent that – the non-offender parent does not believe them, all of these factors can play a role in the child then later recanting or taking back their initial statement of abuse.

RP 641-62. After testifying generally about these topics, Ms. Arnold testified she conducted a forensic interview of RCZ in 2011 and in 2015. RP 646-47.

During cross-examination, Ms. Arnold agreed a child may recant because the abuse never occurred. RP 650. She testified she did not

interview PCZ. PCZ was interviewed by Stacia Adams. RP 651-52. On re-direct, Ms. Arnold testified she did not ask RCZ details about her previous disclosures during the 2015 interview. “I was talking to her about what had transpired after that initial forensic interview.” RP 654.

viii. Other State Witnesses

The State called Jose Sanchez Figueroa. RP 540. Mr. Sanchez testified he was married to RCZ and PCZ’s mother, Bricia. RP 541. They began dating in February of 2014 and married in July of 2015. RP 542.

Mr. Sanchez testified PCZ had an argument with her mom before disclosing the abuse to him. RP 548-550. After the argument, he went to PCZ’s room. RP 550-51. It was during that conversation PCZ told him about Edwin and Hugo. RP 551.

During cross-examination, Mr. Sanchez agreed he did not mention Mr. Ruiz in his statement to the police after PCZ disclosed. RP 552. He only included information about her uncle molesting her. RP 552. When asked if that was because PCZ never said anything to him about Mr. Ruiz, Mr. Sanchez responded, “No. That’s not correct.” RP 552.

The girls’ mother, Bricia Chavez, testified as well. RP 554. She was previously married to Mr. Ruiz. RP 556. They were married for almost eleven years. RP 557. She had two daughters when she married Mr. Ruiz – RCZ and PCZ. RP 558.

During the time they were together, Mr. Ruiz worked. RP 565-66. He would get up before her for work. “[I]t was mostly 4:30, 5:00.” RP 566. No one else would be awake when Mr. Ruiz would get up for work. RP 566.

When RCZ made her allegations, she was in the third or fourth grade. RP 567. PCZ was two years behind her. RP 567. They both attended Sheridan Elementary School at that time. RP 567. The family was living in an apartment in Tacoma. RP 568. Ms. Chavez testified that her brother, Edwin, did not live with them in Tacoma. RP 569. He would stay with them on the weekends occasionally, though. RP 569.

According to Ms. Chavez, RCZ did not approve of Mr. Ruiz.

She was really close with my mom, so when I met him, she wasn’t as close as I would have wished with me because I was working most of the time. So she was mostly with my mom, and she got used to my mom. And when I got with him, I stopped working, and she wasn’t happy about it.

RP 570. Ms. Chavez testified that RCZ still respected Mr. Ruiz as a father figure. RP 571. PCZ was “like a daddy’s girl” with Mr. Ruiz. RP 571. “She grew up thinking that he was her father, and she was mostly with him at all times.” RP 571.

After RCZ made her allegations, Mr. Ruiz moved out of the home and lived with his brother. RP 571-72. He moved back in after RCZ “said that it wasn’t true.” RP 572. According to Ms. Chavez, Mr. Ruiz did not

have contact with the children again until after RCZ “said it wasn’t truth”. RP 575. During cross examination, Ms. Chavez agreed that RCZ told her she made up the allegation because she was playing truth or dare with her friends and wanted to impress them. RP 590-91.

Ms. Chavez testified she was upset when she read the Facebook messages between PCZ and the boy. RP 580. Mr. Sanchez went to speak with PCZ after the argument. RP 581. Based on what PCZ disclosed to Mr. Sanchez, they had a follow up conversation with her. RP 583-84. In that conversation, PCZ disclosed sexual abuse by her uncle, Edwin, and Mr. Ruiz. RP 584-85. Ms. Chavez testified she was aware that Edwin pled guilty to sexually assaulting PCZ. RP 585.

When Ms. Chavez was married to Mr. Ruiz, they moved a lot. “I can’t actually think of a number, but it was a lot of times. It was constantly moving.” RP 560. They lived in Graham for about eight months. RP 585. Ms. Chavez believed that was before they lived in the apartment in Tacoma. RP 585.

In Graham, they lived in a mobile home with a detached garage. RP 586. They never lived in another home with a detached garage like the one in Graham. RP 586. According to Ms. Chavez, the girls were “probably like six and seven, six and eight” when they lived in the trailer in Graham.

RP 586. During cross examination, Ms. Chavez testified Edwin lived with her and the girls in the trailer in Graham. RP 587-88.

The State called Elizabeth Nyland. Ms. Nyland was the school counselor at Sheridan Elementary School in 2011 who reported the disclosure made by RCZ. RP 600-605. RCZ was in the fifth grade at the time. RP 606. Joanne Mettler was also called as a witness. She was the nurse practitioner who examined both RCZ and PCZ in February of 2011 for possible sexual abuse. RP 659-688.

Several law enforcement officers were called by the State. Officer Aaron Quinn testified he responded to Sheridan Elementary School in 2011 after receiving a report of child sexual abuse. RP 725-730. Detective Christie Yglesias testified she was assigned to investigate the allegations made by RCZ in 2011. RP 698-719. Finally, Detective Don Bourbon testified he observed the forensic interview of PCZ in 2015. RP 734-738.

D. Defense Case-in-Chief

The defense presented the testimony of three witnesses – Nancy Austring, Ana Chavez Zuniga, and Mr. Ruiz. Nancy Austring was the investigator assisting the defense in this case. RP 758-59. She testified regarding statements made by RCZ and PCZ in their defense interviews and how those statements were inconsistent with prior statements. RP 760-63. Defense counsel elicited from the investigator that the girls reported Mr.

Ruiz physically abusing their mother. “They said they heard it, and one time they saw a black eye on their mother. That was, I believe [PCZ] that said that.” RP 764-65. Defense counsel also elicited that PCZ stated she saw Mr. Ruiz touch RCZ on the “butt” when they were outside. RP 765.

Defense counsel re-called Ms. Austring after realizing she was mistaken in some of her testimony. RP 780. She testified she listened to the recording from PCZ’s interview after her testimony. After listening to the interview, she realized she made errors in her testimony regarding what PCZ reported in her defense interview. RP 799-800.

Ava Chavez Zuniga testified RCZ and PCZ were her granddaughters. RP 786. She lived in the trailer in Graham with the girls and never saw anything that caused her concern. RP 788-89. On cross-examination, Ms. Chavez testified she would sometimes be inside when the girls were playing outside. RP 797.

Mr. Ruiz was the last witness for the defense. He testified he never touched RCZ inappropriately when they lived in Graham. RP 811. He further testified he never touched RCZ or PCZ for his sexual gratification. RP 811-12. During cross-examination, Mr. Ruiz testified he never spent time alone with RCZ. RP 817. He spent time alone with PCZ when he would take her to soccer games. RP 816-17.

Mr. Ruiz testified he got up early for work when they lived in the apartment in Tacoma but there was never a time when he was the first person to wake up. RP 819. He never went into the girls' room when they were sleeping either at night or in the morning. RP 820. Mr. Ruiz said he did not spend much time with the girls because he was always working. RP 820. On re-direct, Mr. Ruiz testified he would see PCZ after the divorce when he would pick up his children for visitation. She would "come and give me a hug." RP826-27.

V. ARGUMENT AND AUTHORITIES

A. MR. RUIZ WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL AGREED TO JOIN THE SEPARATE CASES INVOLVING RCZ AND PCZ RESULTING IN UNDUE PREDUDICE.

A defendant is guaranteed the right to effective assistance of counsel. U.S. Amend. 6 & 14; Wash. Const. Art. 1 Sect. 22. Courts presume counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*,

there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d at 334-35; *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052 (1984). "Competency of counsel is determined based upon the entire record below." *State v. McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Trial counsel's failure to properly execute a trial strategy may constitute ineffective assistance of counsel. *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003). This includes the failure to object to the admission of impermissible evidence.

[W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted.

State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (Internal citations omitted).

To establish prejudice based on an improper joint trial, a defendant must show that a competent attorney would have moved for severance, that the motion likely would have been granted, and that there is a reasonable probability he would have been acquitted at a separate trial.

State v. Emery, 174 Wn.2d 741, 755, 278 P.3d 653 (2012) (citing *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004)).

i. Trial Counsel’s Failure to Object to Joinder Constituted Deficient Performance.

Washington courts “have recognized that joinder is inherently prejudicial.” *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1986) (citing *State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968)). This risk is especially pronounced in cases where multiple sex offenses are charged. *State v. Bythrow*, 114 Wn.2d 713, 718-19, 790 P.2d 154 (1990). The potential for hostility-based prejudice is highest in sex cases. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

Joinder of charges can impact a defendant’s right to a fair trial in many ways. For example:

(1) a defendant may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other 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. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration.

State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) (quoting *Drew v. United States*, 331 F.2d 85, 88 (D.C.Cir.1964)); *State v. Watkins*, 53 Wn. App. 264, 268, 766 P.2d 484 (1989).

The Washington Supreme Court recently reaffirmed its precedent and held trial courts must consider whether joinder of charges will result in undue prejudice to a defendant.

Ever since Washington first allowed for the joinder of offenses, our courts have recognized the close relation of joinder and severance, and have held that joinder should not be allowed in the first place if it will clearly cause undue prejudice to the defendant.

State v. Bluford, 188 Wn.2d 298, 307, 393 P.3d 1219 (2017). “[B]oth prejudice to the defendant and judicial economy are relevant factors in joinder decisions, but judicial economy can never outweigh a defendant’s right to a fair trial[.]” *Id.* at 305.

After identifying whether joinder is allowable in accordance with CrR 4.3(a)(1) or CrR 4.3(a)(2), the court should balance the likelihood of prejudice to the defendant against the benefits of joinder in light of the particular offenses and evidence at issue and carefully articulate the reasoning underlying its decision.

Id. at 311. Because trial counsel *agreed* to consolidate the cases, the trial court never balanced the likelihood of prejudice to Mr. Ruiz against the benefits of joinder.

There is no fathomable reason why trial counsel would strategically agree to join the cases when it would result in the jury being presented with

two victims alleging multiple counts of sexual misconduct by Mr. Ruiz. Joinder in sex offense cases is inherently prejudicial. *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1987). Further, joinder creates the risk that the jury will cumulate evidence and find guilt when it might not find it if the cases are tried separately.

Trial counsel's failure to object to the State's motion to join was deficient. No strategic or tactical basis can justify counsel's acquiescence to joinder. Had trial counsel objected to the State's motion to join the two cases involving RCZ and PCZ, the trial court likely would have denied joinder to avoid undue prejudice.

Four factors are considered to determine whether joinder would cause undue prejudice: (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); *State v. Bluford*, 188 Wn.2d 298, 393 P.3d 1219 (2017). Each factor is considered separately, because the absence of even one mitigating factor may require separate trials. *See, e.g., State v. Ramirez*, 46 Wn. App. 223, 228, 730 P.2d 98 (1987) (prejudice not mitigated because one factor absent, abuse of discretion not to sever); *State v. Harris*, 36 Wn. App. 746, 752, 677 P.2d 202 (1984).

When reviewing pretrial joinder, appellate courts review “only the facts known to the trial judge at the time, rather than the events that develop later at trial.” *State v. Bluford*, 188 Wn.2d at 310. Here, the record lacks sufficient information to analyze the first factor – the strength of the State’s evidence for each case. The motion to join filed by the State provided little information regarding the strength of the its evidence. The motion simply argues:

[T]he evidence in the State’s case is that which it almost always is in sex offenses against children, and it is the same for each count and each victim: the victims’ statements that it occurred, and their testimony at trial. The strength of the State’s case as to each count is identical.

CP 9. Because trial counsel did not object to the State’s motion to join, there is no information to indicate the arguments defense would have made to dispute this assertion.

With respect to the second factor, it appears from the record the defense for all counts was the same – general denial. While conflicting defenses increase the prejudice flowing from a joint trial, incompatible defenses are not a requirement for severance. For instance, although denial was the defense for two counts of indecent liberties, it was nevertheless an abuse of discretion not to sever the charges in *State v. Ramirez*, 46 Wn. App. 223, 225-26, 730 P.2d 98 (1987). Similarly, the Court of Appeals reversed for failure to sever in *State v. Harris*, where the

defense to both rape charges was consent. 36 Wn. App. 746, 748-49, 677 P.2d 202 (1984).

The third factor relates to whether the jury can be instructed to consider each count separately. Under this factor, the trial court should: (1) instruct the jury that evidence of each count is to be considered for that count only, and (2) consider the extent to which the jury could be expected to compartmentalize such evidence across the different charges. *State v. Bythrow*, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). “When the issues are relatively simple and the trial lasts only a couple of days, the jury can be reasonably expected to compartmentalize the evidence.” *Id.* at 721 (citing *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978)).

However, in this case, the issues were not simple because of the lengthy charging period and the emotionally-charged nature of the sexual assault allegations. It was unreasonable to expect a jury to separate the evidence corresponding to each charge. Cross-contamination was inevitable under such circumstances. Accordingly, this factor weighed strongly in favor of separate trials.

Finally, the fourth factor required the motion for joinder be denied. The evidence in this case was not cross-admissible under ER 404(b). ER 404(b) provides that evidence of other crimes, wrongs, or acts “may be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” However, under ER 404(b), evidence from the other alleged incidents would not be admissible against Mr. Ruiz to prove character or criminal propensity. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court must “begin with the presumption that evidence of prior bad acts is inadmissible.” *Id.* “In doubtful cases, the evidence should be excluded.” *State v. Bluford*, 188 Wn.2d at 312 (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

The State may argue evidence regarding the allegations of RCZ and PCZ was cross-admissible to show common scheme or plan. To be admissible as a common scheme or plan the State must establish a sufficiently high-level of similarity between the prior bad act and the current charge:

To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan to which the charged crime and the prior misconduct are the individual manifestations.

State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). The need for a high degree of similarity was reaffirmed in *State v. DeVincentis*. “We emphasize that the degree of similarity for the

admission of evidence of a common scheme or plan must be substantial.” *State v. DeVincentis*, 150 Wn.2d at 20.

The allegations made by RCZ and PCZ were not similar enough to be cross-admissible under ER 404(b). RCZ initially made her allegations in 2011. CP 4-5. PCZ did not make her allegations until 2015 – four years after RCZ’s allegations. CP 5. The charging periods for each victim were different. Mr. Ruiz was alleged to have molested RCZ between August 7, 2009 and January 25, 2011. CP 5. The charging period for the counts involving PCZ was between January 1, 2010 and September 29, 2011. CP 6. Additionally, the allegations differed. RCZ alleged Mr. Ruiz touched the lower part of her body with his hands over and under her clothing. CP 4. PCZ accused Mr. Ruiz of touching her private parts over her pajamas when he woke up for work and everyone was still sleeping. CP 5. RCZ recanted her allegations. CP 5. PCZ did not.

Additionally, the State faced a steeper hurdle when seeking to admit sex offense evidence under ER 404(b). An ER 403 analysis was required. *See State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 745 (1984) (403 analysis required before 404(b) evidence may be admitted). ER 403 states:

Although relevant, evidence may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This inquiry is vital where sex offenses are involved. ER 403 application must be “careful and methodical” because “an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.” *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). The Washington Supreme Court emphasized several times throughout the *Saltarelli* opinion that prejudice reaches its “loftiest peak” when evidence of prior sexual offenses is introduced. *Id.* at 364 (citation omitted). Separate trials are required when prejudice stands unmitigated. *State v. Bluford*, 188 Wn.2d 298, 393 P.3d 1219 (2017); *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1987); *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

The final step in the analysis required the trial court to weigh the prejudice against the need for judicial economy. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). In this case, judicial economy was not significantly furthered by a joint trial. Each purported claim was distinct and victim testimony could easily have been divided between separate trials.

The testimony of Jose Sanchez Figueroa and Detective Bourbon only related to the charges involving PCZ. Elizabeth Nyland, Detective Yglesias, and Officer Quinn's testimony was only relevant to RCZ. Likewise, Keri Arnold did not interview PCZ and her testimony, therefore, was only relevant in a trial for RCZ. The girls would not have been permitted to testify in the trial involving the other's allegation as the evidence was not cross-admissible. Neither testified they witnessed the charged abuse perpetrated upon the other by Mr. Ruiz. The *only* witnesses who may have testified during the State's case for both allegations were Bricia Chavez, the girls' mother, and Joanne Mettler, the nurse practitioner. Judicial economy is not significantly furthered by combining trials into one large spectacle.

[B]ecause the evidence was not cross admissible, the interest in judicial economy loses much of its force because the State would not have been required (or allowed) to call all of its witnesses in each separate trial.

State v. Bluford, 188 Wn.2d at 315-16.

ii. Counsel's Deficient Performance was further shown by the failure to move for severance of charges.

Even if the trial court had granted the State's motion to join over defense objection, trial counsel should have moved for severance. Because the extent of prejudice resulting from joinder of offenses may not be

apparent until trial unfolds, CrR 4.4 provides that a motion to sever may be made during trial.

A defendant's motion for severance of offenses or defendants 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*. Severance is waived if the motion is not made at the appropriate time.

CrR 4.4(a)(1) (emphasis added). Given how the testimony at trial unfolded, severance would have been granted if counsel had made such a motion. A request to sever the charges would *only* have been to Mr. Ruiz's benefit. Accordingly, counsel's failure to make such a motion cannot amount to strategy or tactic designed to further his interests.

During trial, the evidence the State presented to support its charge that Mr. Ruiz molested PCZ was significantly weaker than the charged counts involving RCZ. This was evident from the State's *sue sponte* dismissal of two of the three counts involving PCZ. Additionally, RCZ and PCZ's accounts of abuse differed significantly in manner, time and frequency. There was no physical evidence implicating Mr. Ruiz committed sexual assaults against either RCZ or PCZ. There were no eyewitnesses who corroborated the testimony of RCZ or PCZ. Neither girl testified she saw the charged abuse perpetrated on the other. The entirety of the State's case was based on the word of the two alleged victims.

Where the strength of the evidence is "sufficiently dissimilar"

between counts, the trial court should sever the charges. *State v. Russell*, 125 Wn.2d 24, 64, 882 P.2d 747 (1994). The *Russell* court reasoned severance avoids conviction on the weaker count merely because of strong evidence on a different charge. *Id.* Severance should be granted when the State's evidence on one count is strong and weak on another. *State v. Hernandez*, 58 Wn. App. 793, 794 P.2d 1327 (1990).

Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer a general criminal disposition. The joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature. In this context there is a recognized danger of prejudice to the defendant even if the jury is properly instructed to consider the crimes separately.

State v. Sutherby, 165 Wn.2d 870, 883-83, 204 P.3d 916 (2009) (internal citations omitted).

“Representation of a criminal defendant entails certain basic duties.” *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). Counsel must use “such skill and knowledge as will render the trial a reliable adversarial testing process.” *Id.* However, where no possible advantage could flow to the defendant, and counsel's actions cannot be attributed to “improvident trial strategy or misguided tactics,” representation is deficient. *State v. Lopez*, 107 Wn. App. 270, 277, 27 P.3d 237 (2001). Trial counsel should have moved to sever the cases. There was no possible advantage to Mr. Ruiz in agreeing to a consolidated trial.

His failure to do so constituted deficient performance.

iii. Counsel's Deficient Performance Prejudiced Mr. Ruiz.

Counsel's performance fell below an objective standard of reasonableness and resulted in prejudice to Mr. Ruiz. His failure to object to joinder and, later, move for severance was clearly detrimental to Mr. Ruiz. There is no legitimate justification for trial counsel's failure to act. There is no reasonable argument that allowing all counts to be tried together could have furthered Mr. Ruiz's interests.

Mr. Ruiz's right to a fair trial was adversely affected by his trial counsel's deficient performance. It undermined the confidence in the outcome of his trial. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984). As such, Mr. Ruiz's convictions must be reversed and his case remanded for a new trial.

B. THE TRIAL COURT ERRED IN ALLOWING EXPERT TESTIMONY OF CHILD INTERVIEWER, KERI ARNOLD.

The Washington Rules of Evidence provide for the admission of expert testimony.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. To constitute admissible evidence, the expert must possess qualifications to testify regarding the topics offered and the testimony must be helpful to the trier of fact. “Practical experience is sufficient to qualify a witness as an expert.” *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). However, “expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness’s area of expertise.” *State v. Weaville*, 162 Wn. App. 801, 256 P.3d 426 (2011) (citing *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999)). “Expert testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading.” *State v. Morales*, 196 Wn. App. 106, 122-23, 383 P.3d 539 (2016) (citing *State v. Groth*, 163 Wn. App. 548, 564, 261 P.3d 183 (2011)).

Here, the trial court erred in allowing child interviewer, Keri Arnold to testify as an expert regarding delayed disclosure, child memory and recantation. First, Ms. Arnold was not qualified to testify as an expert on these topics. Secondly, the content of her testimony was not outside the common-understanding of the average juror and, therefore, was not helpful. Lastly, her testimony amounted to profiling evidence particularly given the fact the jury was informed she conducted the child interview of RCZ both in 2011 and after she recanted in 2015.

A trial court's evidentiary rulings under ER 702 are reviewed for abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993). A court abuses its discretion when it bases its decision on untenable grounds or acts for an untenable reason. *State v. Runquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citing *State v. Blackwell*, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993)).

i. Ms. Arnold was not qualified under ER 702 to testify as an expert on child memory or recantation.

Ms. Arnold was not qualified as an expert under ER 702 to testify regarding child memory or recantation. The State presented Ms. Arnold as an expert on how children retain and recall memories. RP 383. Her experience was based solely on trainings she attended and her experience as a child interviewer. While she testified she had conducted over 2,200 child interviews, there was no evidence she had expertise beyond her trainings and interviews of children. Further, no evidence was presented that her theories on child memories were generally accepted in the scientific community.

While Washington courts have held expert testimony may be based on "training, experience, professional observations, and acquired knowledge", testimony regarding the imprinting of childhood memories amounts to scientific testimony and, therefore, must be based upon an

explanatory theory generally accepted in the scientific community. *State v. Black*, 109 Wn.2d 336, 341, 745 P.2d 12 (1987); *State v. Jones*, 71 Wn. App. 798, 814-15, 863 P.2d 85 (1993).

Further, Ms. Arnold was not qualified to provide expert testimony regarding recantation. The record shows she had limited experience with children who recant. Her knowledge was based largely on information she learned in trainings over the years. Her trainings were described only generally and lacked specificity regarding when the trainings occurred, the number of hours spent training, and any certifications or achievements earned. Notably, none of the trainings listed on Exhibit No. 8 referenced recantation.

“[I]f expert testimony does not concern novel theories of sophisticated or technical matters, it need not meet the stringent requirements for general scientific acceptance.” *State v. Jones*, 71 Wn. App. at 815. The testimony must still be based on experience, training and acquired knowledge. *Id.* Because Ms. Arnold was not shown to have sufficient expertise in the areas of child memories and recantation, the trial court erred in allowing her testimony.

- ii. **The testimony of Keri Arnold was not outside the common understanding of the jury and, therefore, not helpful under ER 702.**

Ms. Arnold's testimony regarding delayed disclosures and recantation were not based on specialized knowledge and conveyed basic notions well within the purview of the average juror. During her testimony, when asked to describe delayed disclosure, Ms. Arnold testified

Delayed disclosure is the term that they use that refers to the point from when the first alleged incident of abuse occur and when the child then discloses the abuse, and it refers to the lapse of time between those two events.

RP 632. When asked about recantation, Ms. Arnold testified, "Recantation is when someone had made a disclosure of some alleged abuse and then they take it back and they said that it wasn't true or it was a lie." RP 641. Neither of these explanations require specialized knowledge. The testimony was unnecessary and did not amount to expert testimony under ER 702.

iii. The testimony of Keri Arnold constituted "profile" testimony and, therefore, was inadmissible.

Washington courts have repeatedly held that expert testimony implying guilt based on characteristics of known offenders is unduly prejudicial and, therefore, inadmissible. *State v. Braham*, 67 Wn. App. 930, 936, 841 P.2d 785 (1993).

As a general rule, profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its lack of probative value compared to the danger of its unfair prejudice.

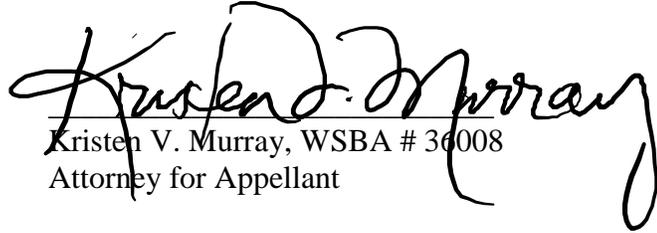
Id. (internal citations omitted). *See also State v. Maule*, 35 Wn. App. 287, 667 P.2d 96 (1983); *State v. Claflin*, 38 Wn. App. 847, 690 P.2d 1186 (1984).

Because many of the factors related to delayed disclosure and recantation mentioned by Ms. Arnold resembled the family dynamics between Mr. Ruiz and his accusers, it is likely the jury drew an unwarranted inference of guilt from the testimony. While Ms. Arnold never offered an opinion as to the reasons for delayed disclosure or recantation in this case, the jury was informed she interviewed RCZ in this case both before and after her recantation. This suggested to the jury that the testimony provided by Ms. Arnold was directly applicable to the facts of this case and explained the behaviors of RCZ. “Washington’s general prohibition on expert “profile” testimony is premised precisely on this element of unfair prejudice and the ensuing false impression the jury might derive about the value of the expert’s ostensible inference.” *State v. Braham*, 67 Wn.App. at 935. Her testimony should have been excluded.

VI. CONCLUSION

Mr. Ruiz respectfully requests this Court reverse his convictions and remand his case for new trials.

Respectfully submitted this 4th day of August, 2017.



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DECLARATION OF SERVICE

I hereby declare that on August 4, 2017, I filed the Appellant's Brief via Electronic Filing for the Court of Appeals for Division II and delivered via E-mail the same to:

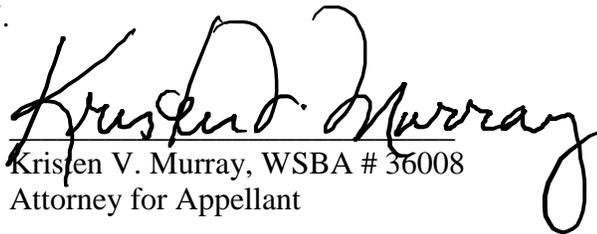
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I further declare that I delivered via United States Postal Service the same to:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated August 4, 2017.


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³ Per my client's request, I am serving Mr. Ruiz by sending the brief to his wife at her address listed above.

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