

FILED  
Court of Appeals  
Division II  
State of Washington  
11/28/2017 4:28 PM  
NO. 49719-1

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

Hugo Ruiz, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kathryn J. Nelson

No. 15-1-01869-0

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**Brief of Respondent**

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. DID APPELLANT SUFFER ANY PREJUDICE FROM DEFENSE COUNSEL’S ACCEDING TO THE STATE’S PRETRIAL JOINDER MOTION?..... 1

2. DID APPELLANT WAIVE ANY SEVERANCE MOTION?..... 1

3. HAS APPELLANT DEMONSTRATED THAT HIS WAIVER OF SEVERANCE WAS DEFICIENT PERFORMANCE BY TRIAL COUNSEL? ..... 1

4. HAS APPELLANT PRESENTED A RECORD SUFFICIENT TO ESTABLISH THAT HIS ACCEEDING TO THE STATE’S PRETRIAL JOINDER MOTION WAS DEFICIENT PERFORMANCE? ..... 1

5. HAS APPELLANT PRESENTED A RECORD SUFFICIENT TO ESTABLISH THAT DEFENSE COUNSEL’S WAIVER OF SEVERANCE WAS DEFICIENT PERFORMANCE? ..... 1

6. HAS APPELLANT PROVEN, WITH EVIDENCE, THAT THE TRIAL COURT WOULD HAVE LIKELY GRANTED A SEVERANCE MOTION, IF MADE? ..... 1

7. HAS APPELLANT PROVEN THAT IF HE WERE TRIED SEPARATELY THERE WAS A REASONABLE PROBABILITY HE WOULD HAVE BEEN ACQUITTED?..... 1

8. HAS APPELLANT PRESERVED HIS ER 702 CLAIM FOR REVIEW? ..... 1

9. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT ADMITTED KERI ARNOLD’S TESTIMONY RELATING TO RECANTATION? ..... 1

10.	IS THERE A REASONABLE PROBABILITY THAT THE OUTCOME OF THIS TRIAL WOULD HAVE BEEN DIFFERENT HAD MS. ARNOLD NOT TESTIFIED? .....	1
B.	STATEMENT OF THE CASE.....	2
1.	PROCEDURE.....	2
2.	FACTS .....	2
C.	ARGUMENT.....	8
1.	THE STANDARD FOR EVALUATING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED ON FAILURE TO MOVE FOR SEVERANCE. . .	8
2.	DEFENDANT’S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM CANNOT BE FOUNDED UPON HIS TRIAL COUNSEL’S AGREEMENT WITH THE STATE’S PRETRIAL JOINDER MOTION.....	9
3.	BY FAILING TO MAKE A SEVERANCE MOTION, DEFENDANT WAIVED HIS SEVERANCE OBJECTION. DEFENDANT HAS NOT ESTABLISHED THAT THIS WAIVER WAS DEFICIENT PERFORMANCE.....	10
4.	DEFENDANT HAS FAILED TO PROVE THAT THE TRIAL COURT WOULD LIKELY HAVE GRANTED A MOTION TO SEVER.....	18
5.	ALTERNATIVELY, DEFENDANT HAS NOT DEMONSTRATED THAT IF HE WERE TRIED SEPARATELY THERE WAS A REASONABLE PROBABILITY HE WOULD HAVE BEEN ACQUITTED.....	25
6.	DEFENDANT’S ER 702 ARGUMENT PERTAINING TO THE TESTIMONY OF MS. ARNOLD IS NOT WELL TAKEN.....	25
D.	CONCLUSION.....	34

## Table of Authorities

### State Cases

<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993) ...	29, 30
<i>In re Crace</i> , 174 Wn.2d 835, 846, 280 P.3d 1102 (2012).....	8
<i>In re Davis</i> , 152 Wn.2d 647, 711, 101 P.3d 1 (2004) .....	8, 22
<i>In re Stenson</i> , 142 Wn.2d 710, 732-36, 16 P.3d 1 (2001) .....	15
<i>Schwindt v. Underwriters at Lloyd’s of London</i> , 81 Wn. App. 293, 299, 914 P.3d 119 (1996).....	19
<i>State v. Allery</i> , 101 Wn.2d 591, 596, 682 P.2d 312 (1984).....	31
<i>State v. Barry</i> , 183 Wn.2d 297, 317, 352 P.3d 161 (2015) .....	33
<i>State v. Black</i> , 109 Wn.2d 336, 348, 745 P.2d 12 (1987) .....	29
<i>State v. Bluford</i> , 188 Wn.2d 298, 393 P.3d 1219 (2017).....	18
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).....	33
<i>State v. Bythrow</i> , 114 Wn.2d 713, 720, 790 P.2d 154 (1990).....	22
<i>State v. Carlson</i> , 61 Wn. App. 865, 875, 812 P.2d 536 (1991).....	28
<i>State v. Demery</i> , 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001).....	29
<i>State v. Dent</i> , 123 Wn.2d 467, 484, 869 P.2d 392 (1994).....	21
<i>State v. Dowell</i> , 16 Wn. App. 583, 557 P.2d 857 (1976) .....	20
<i>State v. Dye</i> , 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013) .....	20
<i>State v. Elmore</i> , 139 Wn.2d 250, 283, 985 P.2d 289 (1999).....	21
<i>State v. Graham</i> , 59 Wn. App. 418, 798 P.2d 314 (1990) .....	28, 30, 31, 32

<i>State v. Grisby</i> , 97 Wn.2d 493, 506, 647 P.2d 6 (1982), <i>cert. denied</i> , 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983).....	21
<i>State v. Groth</i> , 163 Wn. App. 548, 564, 261 P.3d 183 (2011) .....	31
<i>State v. Harris</i> , 36 Wn. App. 746, 750, 677 P.2d 202 (1984) .....	21, 23
<i>State v. Holland</i> , 77 Wn. App. 420, 427, 891 P.2d 49, <i>review denied</i> , 127 Wn.2d 1008 (1995) .....	32
<i>State v. Huddleston</i> , 80 Wn. App. 916, 912 P.2d 1068 (1996).....	12, 13
<i>State v. Huntley</i> , 45 Wn. App. 658, 726 P.2d 1254 (1986).....	15
<i>State v. Kalakosky</i> , 121 Wn.2d 525, 852 P.2d 1064 (1993).....	21, 24
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125, 130 (2007) .....	28
<i>State v. Linderman</i> , 54 Wn. App. 137, 772 P.2d 1025 (1989).....	15
<i>State v. Linville</i> , 199 Wn. App. 461, 400 P.3d 333 (2017) .....	17
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989) .....	28, 30, 32
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	10, 11, 12
<i>State v. Neal</i> , 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), <i>as amended</i> (2002).....	34
<i>State v. Ng</i> , 110 Wn.2d 32, 39, 750 P.2d 632 (1988).....	20
<i>State v. Petrich</i> , 101 Wn.2d 566, 575, 683 P.2d 173 (1984), <i>overruled in part on other grounds by State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	31, 32
<i>State v. Powell</i> , 126 Wn.2d 244, 256, 893 P.2d 615, 623 (1995).....	27
<i>State v. Rafay</i> , 168 Wn. App. 734, 784, 285 P.3d 83 (2012) .....	31
<i>State v. Ramirez</i> , 46 Wn. App. 223, 730 P.2d 98 (1986) .....	23

<i>State v. Riker</i> , 123 Wn.2d 351, 369, 869 P.2d 43, 53 (1994).....	28
<i>State v. Russell</i> , 125 Wn.2d 24, 63, 882 P.2d 747, 773 (1994).....	22
<i>State v. Smith</i> , 106 Wn.2d 772, 780, 725 P.2d 951 (1986).....	34
<i>State v. Stevens</i> , 58 Wn. App. 478, 497-98, 794 P.2d 38 (1990).....	32
<i>State v. Sutherby</i> , 165 Wn.2d 870, 883, 204 P.3d 916 (2009).....	8, 22, 25
<i>State v. Thomas</i> , 150 Wn.2d 821, 871, 83 P.3d 970 (2004).....	33
<i>State v. Wade</i> , 138 Wn.2d 460, 464, 979 P.2d 850 (1999).....	31
<i>State v. Warren</i> , 55 Wn. App. 645, 654, 779 P.2d 1159 (1989).....	23
Federal and Other Jurisdictions	
<i>People v. Fields</i> , 75 N.E.3d 503, 509-511 (Ill. App. 2017).....	13
<i>People v. Johnson</i> , 32 A.D.3d 761, 820 N.Y.S.2d 800 (N.Y. App. Div. 2006).....	13
<i>Strickland v. Washington</i> , 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	12, 13
Statutes	
RCW 9.94A.400(3).....	15
RCW 9.94A.510.....	14
RCW 9.94A.525.....	14
RCW 9.94A.525(17).....	14
RCW 9.94A.589(1)(a).....	14
RCW 9.94A.589(3).....	15

Rules and Regulations

CrR 4.3(a) .....	9, 20
CrR 4.3(a)(1).....	9
CrR 4.4.....	10
CrR 4.4(a) .....	10, 11, 18
CrR 4.4(a)(1).....	9, 21
CrR 4.4(a)(2).....	21
ER 104 .....	26
ER 702 .....	1, 25, 26, 30, 32, 33, 35
RPC 1.2(a).....	15

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

1. Did appellant suffer any prejudice from defense counsel's acceding to the state's pretrial joinder motion?
2. Did appellant waive any severance motion?
3. Has appellant demonstrated that his waiver of severance was deficient performance by trial counsel?
4. Has appellant presented a record sufficient to establish that his acceding to the state's pretrial joinder motion was deficient performance?
5. Has appellant presented a record sufficient to establish that defense counsel's waiver of severance was deficient performance?
6. Has appellant proven, with evidence, that the trial court would have likely granted a severance motion, if made?
7. Has appellant proven that if he were tried separately there was a reasonable probability he would have been acquitted?
8. Has appellant preserved his ER 702 claim for review?
9. Did the trial court abuse its discretion when it admitted Keri Arnold's testimony relating to recantation?
10. Is there a reasonable probability that the outcome of this trial would have been different had Ms. Arnold not testified?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Appellant Hugo Ruiz (hereinafter defendant) timely appeals a judgment and sentence finding him guilty of three counts of child molestation in the first degree. (CP 219)

2. FACTS

a. Chronological Outline

2003 Defendant married Bricia Sanchez in 2003. 7 VRP 809.

Ms. Sanchez brought two children to the marriage: P. C.-Z. and R. C.-Z.. *Id.*; 6 VRP 558. P. C.-Z. was fourteen years old at the time of trial, R. C.-Z. was sixteen years old at the time of trial. 6 VRP 541; 6 VRP 558. pre-Tacoma Ms. Sanchez testified that she lived in Graham with a place that had acres and acres of land. 6 VRP 585.

The place was a mobile home. 6 VRP 586. R. C.-Z. and P. C.-Z. went to Franklin Elementary School at that time. 6 VRP 586. This place had a garage. 6 VRP 586. The family did not live at another location with a detached garage. 5 VRP 586. R. C.-Z. and P. C.-Z. were “probably like six and seven, six and eight around there” in age at that time. 5 VRP 586.

Ms. Sanchez described a bathroom incident when they were living in Graham where she and defendant were giving a bath to R. C.-Z. and P. C.-Z. 6 VRP 572-73. Ms. Sanchez said that she stepped outside of the

bathroom to get a towel, then walked back in and noticed that defendant was “scrubbing them on their private parts.” 6 VRP 572-73.

Ms. Sanchez testified that defendant always awakened before anyone else in the household to go to work. 6 VRP 566.

2010 Ms. Sanchez testified that R. C.-Z. was in the “third or fourth” grade at Sheridan Elementary School. 6 VRP 567  
P. C.-Z. was two years behind her at the same school. *Id.*

Ms. Sanchez testifies that while P. C.-Z. and R. C.-Z. went to Sheridan Elementary, the family lived in a three bedroom apartment with Ms. Sanchez’ twin brother and his wife. 6 VRP 567-68.

1/25/2011 Tacoma Police Officer Quinn responds to Sheridan Elementary School and initiates a CPS process involving defendant as step-parent. 7 VRP 729.

1/25/2011 Detective Yglesias contacted the mother in this case. Her address was 1928 E. 56th St., Apt. 64. 6 VRP 704-06.

Elizabeth Nyland, a mandatory reporter at Sheridan Elementary, testifies to the circumstances behind R. C.-Z.’s disclosures. 6 VRP 603.  
R. C.-Z. disclosed in the course of a “truth or dare” game. 6 VRP 590-91.  
Ms. Sanchez described learning about R. C.-Z.’s disclosures. 6 VRP 569-70. Ms. Sanchez said that “a short period of time” after R. C.-Z.’s disclosures, R. C.-Z. said that they were not true. 6 VRP 572. After R. C.-Z. says that the disclosures were not true, defendant had contact with her children. 6 VRP 575.

- 2/1/2011 ARNP Joanne Mettler meets with R. C.-Z. and P. C.-Z. 6 VRP 668.
- 9/30/2011 Deputy Yglesias contacts Ms. Sanchez at 9403 125th Street Court East, Number 16, in Puyallup, Washington, her home. 6 VRP 711-12. The girls were now attending Zeiger Elementary School. 6 VRP 712.
- 12/2014 Ms. Sanchez finally breaks up with defendant. 6 VRP 574.
- 2/5/2015 Jose Sanchez Figueroa, stepfather of P. C.-Z. and R. C.-Z., contacts law enforcement. 6 VRP 545-47.

Jose Sanchez Figueroa related that P. C.-Z. told Ms. Sanchez that her uncle had raped her when she was younger and that defendant had not only molested R. C.-Z. but also her (P. C.-Z.). 6 VRP 548.

Mr. Sanchez Figueroa testified to the circumstances surrounding P. C.-Z.'s disclosure to him. 6 VRP 548-51. Ms. Sanchez also testified to those circumstances. 6 VRP 580-85.

- 2/2015 Puyallup Police Officer Bourbon is present at P. C.-Z.'s forensic interview. 7 VRP 736-37.

b. R. C.-Z.'s disclosures

R. C.-Z. testified that defendant would "touch my private area." 5 VRP 426.<sup>1</sup> R. C.-Z. said the touching was "dry humping, pretty much." 5 VRP 427. R. C.-Z. said that she was standing behind her most of the time it happened. 5 VRP 427. It happened more than one time. 5 VRP 428. It happened outside, near the garage." 5 VRP 428. This behavior happened

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<sup>1</sup> R. C.-Z. clarified that she used her private area to "pee." 5 VRP 426. R. C.-Z. described the sexual contact with more detail. 5 VRP 430-31.

while they were living in the trailer in Graham. 5 VRP 428-29. It happened more than five times. 5 VRP 431. It happened at night. 5 VRP 432. This happened mostly while R. C.-Z. was in third grade. 5 VRP 428.

R. C.-Z. described another incident when she was in her bedroom, sick, and sleeping with her sisters at night. 5 VRP 433. R. C.-Z. said that she was sleeping on the edge of the bed she shared with P. C.-Z. and her other sister. *Id.* R. C.-Z. said that defendant initially put something on her forehead, but then spread her legs apart, positioned himself between her legs, and started dry humping her again. 5 VRP 434. R. C.-Z. said that she pretended she was asleep during this incident. *Id.* R. C.-Z. said that she opened her eyes and saw that it was Mr. Ruiz dry humping her. 5 VRP 436. R. C.-Z.'s private area was touched "the same private area she used to pee." 5 VRP 435. This happened while R. C.-Z. was in Sheridan School in the third or fourth grade.<sup>2</sup> 5 VRP 432.

R. C.-Z. stated that her first disclosure was to two schoolmates at Sheridan School. 5 VRP 425

c. P. C.-Z.'s disclosures

P. C.-Z. was fourteen years old when she testified. 5 VRP 468.

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<sup>2</sup> R. C.-Z.'s mother testified that R. C.-Z. was at Sheridan Elementary School in the third or fourth grade when she began speaking to law enforcement. 3 VRP 567.

P. C.-Z. testified that when she was older (she couldn't remember what age she was) she was in a car with defendant and defendant "just kept, like, putting his hands on me." 5 VRP 492. P. C.-Z. could only remember that he touched her legs. 5 VRP 494. She thought maybe she was living in the duplex then. 5 VRP 493. There was a garage at the place she was living then. 5 VRP 493.

P. C.-Z. also testified about other instances when they were driving when she would move the steering wheel and the defendant (stepping on the gas) would "like, start, like moving more, like, around while I was sitting on him." 5 VRP 495-496.

P. C.-Z. also testified about an instance when defendant had her lay down on his bed to sleep. 5 VRP 496. P. C.-Z. said that defendant laid down on the bed with her. 5 VRP 497. P. C.-Z. said that defendant "puts me closer to him and, just, like, move me around." *Id.* P. C.-Z. said that her legs and her bottom were touched when defendant did this. *Id.* P. C.-Z. said that defendant's hands touched her. 5 VRP 498. P. C.-Z. said that this happened when she was going to Zeiger when she was in the fourth grade. 5 VRP 498.

P. C.-Z. testified about an incident that happened while she was in Sheridan [Elementary School] and while her family lived in the three bedroom apartment 5 VRP 500. P. C.-Z. testified that she and her two

sisters were sleeping in the bedroom. 5 VRP 500. P. C.-Z. woke up early and defendant “then this one day, like, was on top of me, and I didn’t know what to do, so I just, like, fake sleep instead.” 5 VRP 500. P. C.-Z. said she was sleeping on her stomach. 5 VRP 503. P. C.-Z. remembered defendant being on top of her. 5 VRP 503. Defendant’s stomach was on P. C.-Z.’s back. 5 VRP 504. Defendant’s body was moving up and down. 5 VRP 504. P. C.-Z. did not feel defendant’s chest on top of her—only his stomach and down. 5 VRP 504. P. C.-Z. saw that it was defendant when he was leaving the room. 5 VRP 503. It didn’t go on for very long because defendant had to go to work. 5 VRP 504.

P. C.-Z. directly related her delayed disclosure to R. C.-Z.’s disclosure of her sexual molestation:

Q. . . . how much time passed from when these incidents happened with Hugo until you first told your mom about it?

A. Oh, I don't know. It was -- it was in, like -- wasn't, like, that long, because then -- because when my mom and him, like, broke up and stuff, like, they kept getting back together. So, you see, I wouldn't tell my mom because she kept getting back with him, so I just wouldn't say anything.

Q. Why would that matter in you not saying something?

A. Because, like, she wouldn't -- I knew she wouldn't understand and she wouldn't believe me or my older sister, so me and my older sister just, like, kept quiet about it, and I never told my sister about, you know, but me and her would talk about her.

5 VRP 508.

d. Defendant's testimony

Defendant testified that he was the disciplinarian in the household. 7 VRP 810. Defendant spanked the two girls for discipline. 7 VRP 810-11. Defendant was only alone with P. C.-Z. when he went to P. C.-Z.'s soccer games. 7 VRP 815-16; 817. Defendant didn't recall ever being alone with R. C.-Z. in the course of their eleven year relationship. 7 VRP 816-17.

C. ARGUMENT.

1. THE STANDARD FOR EVALUATING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED ON FAILURE TO MOVE FOR SEVERANCE.

“A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo.” *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). In an ineffective assistance of counsel claim based on a failure to move for severance, the proponent must demonstrate “that a competent attorney would have moved for severance, that the motion likely would have been granted, and that if he were tried separately there was a reasonable probability he would have been acquitted.” *In re Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004);<sup>3</sup> *Sutherby*, 165 Wn.2d at 884.

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<sup>3</sup> The personal restraint petition standard is the same as the direct appeal standard. *In re Crace*, 174 Wn.2d 835, 846, 280 P.3d 1102 (2012).

2. DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM CANNOT BE FOUNDED UPON HIS TRIAL COUNSEL'S AGREEMENT WITH THE STATE'S PRETRIAL JOINDER MOTION.

Pretrial joinder is not a final and irrevocable act. A motion to sever may still be made at trial "before or at the close of all the evidence if the interests of justice require." CrR 4.4(a)(1).<sup>4</sup> Defendant can demonstrate neither deficient performance nor prejudice from his counsel's pretrial agreement to join offenses. It is entirely reasonable for a lawyer to agree to joinder of offenses pretrial, then to wait and see how the evidence turns out at trial. No prejudice resulted from defendant's counsel's agreement to joinder because the issue remained open into the trial.

Evaluation of defendant's ineffective assistance of counsel claim must focus on whether defense counsel's failure to move for severance at trial constituted ineffective assistance of counsel.

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<sup>4</sup> Defendant was charged with six counts of child molestation in the first degree in the first amended information (CP 17-19), later amended down to three counts of child molestation in the first degree (CP 88-89). There is no question that six counts of the same offense are "offenses . . . of the same or similar character, even if not part of a common scheme or plan." CrR 4.3(a)(1). Permissive joinder was clearly authorized under CrR 4.3(a).

3. BY FAILING TO MAKE A SEVERANCE MOTION, DEFENDANT WAIVED HIS SEVERANCE OBJECTION. DEFENDANT HAS NOT ESTABLISHED THAT THIS WAIVER WAS DEFICIENT PERFORMANCE.

CrR 4.4(a) provides:

(1) 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.**

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. **Severance is waived by failure to renew the motion.**

(emphasis added) CrR 4.4. Defendant never moved for severance. That issue has been waived. Defendant has failed to present a sufficient record to this court to demonstrate that that waiver was deficient performance by trial counsel.

Defendant's attempt to avoid waiver by recasting the issue as ineffective assistance of counsel based on trial counsel's alleged joinder and severance failures should be rejected because so many of the vital decisions which feed into any waiver of joinder happen off-the-record, and an appellate court constrained by "the record developed in the trial court"<sup>5</sup>

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<sup>5</sup> "The defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." *State v. McFarland*, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

is incapable of even approaching those decisions. If misjoinder causes problems, then those problems need to be evaluated in the context of the actual prejudice they cause within the actual case those problems arise in.

The requirement of a motion to sever is not harsh. The rule permits a defendant to commence a trial, see how the evidence actually breaks, get a sense of the jury's responsiveness, and then make a severance motion.

CrR 4.4(a)'s waiver provisions are a vital protection against excessive sandbagging. There is a wide array of substantial reasons why a defendant would be inclined to agree to a prejudicial joinder: A defendant may not want to testify twice, a defendant may not want to risk trial twice, a defendant might not desire to expose himself to the risk of a significantly higher sentence that two separate sentencings presents, defense counsel might not want the defendant to testify twice for tactical reasons, and defense counsel might seek to exploit a situation where the state has compromised its case on one count in order to facilitate joinder of the other count. Each of these very good reasons for acceding to joinder, even in the face of some prejudice, are off the record and cannot be evaluated by this Court on direct appeal.<sup>6</sup>

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<sup>6</sup> *State v. McFarland*, 127 Wn.2d at 337-38.

“The one asserting ineffective assistance has the burden of showing it.” *State v. Huddleston*, 80 Wn. App. 916, 926, 912 P.2d 1068, 1073 (1996) (citing *McFarland*, 127 Wn.2d at 337). “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. Defendant’s claim of trial counsel’s deficient performance founders upon the rock of reconstruction. This Court does not have a record sufficient to reconstruct the circumstances of defense counsel’s decision to try these cases together, and is therefore incapable of evaluating defense counsel’s decision from defense counsel’s perspective at the time he made that decision.

In *Huddleston*, the Court of Appeals rejected an ineffective assistance of counsel claim on direct appeal:

The present record fails to provide an adequate basis for resolving these arguments, for it shows only what occurred during trial. It does not show why defense counsel opted not to argue self defense or defense of others. It does not show Huddleston's version of events. Counsel's choice of defenses may have been tactical, as the State contends. On the other hand, it may have been negligent, as Huddleston

contends. Given only the present record, it would be speculative to pick one assertion over the other, and speculation is not a proper basis for decision. Accordingly, resolution of these arguments must await the development of a full and complete record.

*Huddleston*, 80 Wn. App. at 927-28. In this case, defense counsel indisputably made an affirmative decision to agree to pretrial joinder. 1 VRP 3-4. The presumption is that *something* went into that decision. The record on this direct appeal is insufficient to even approach the circumstances that surrounded that decision. See *People v. Johnson*, 32 A.D.3d 761, 820 N.Y.S.2d 800 (N.Y. App. Div. 2006).<sup>7</sup>

Without careful evaluation of “defense counsel’s decision from defense counsel’s perspective at the time he made that decision,”<sup>8</sup> joinder of offenses will often be (a) just what defendant wants; and at the same time (b) the basis of an argument for a new trial on appeal.

The off-the-record considerations described above are real. Some of them defense counsel must address with their client every time the severance question arises.

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<sup>7</sup> But see *People v. Fields*, 75 N.E.3d 503, 509-511 (Ill. App. 2017), appeal pending (Sep Term 2017) where the Illinois Court of Appeals concluded that “[h]ere, defense counsel may have believed that the odds of getting two acquittals were greater in one proceeding, rather than two proceedings. Accordingly, defendant has failed to overcome the strong presumption that defense counsel’s action or inaction “might have been the product of sound trial strategy.” *People v. Fields*, 75 N.E.3d at 511. This Court could, quite reasonably, adopt the Fields approach in this case and deny defendant’s ineffective assistance of counsel claim for the same reason.

<sup>8</sup> *Strickland*, 466 U.S. at 689.

The sentencing risk presented by severance is plain. The amended information which joined the offenses against P. C.-Z. with the offenses against R. C.-Z. charged six counts of child molestation in the first degree (three counts per alleged victim). CP 17-19. Defendant, if convicted of all charges joined together, faced a standard range of 149-198 months on each count, with a standard range concurrent sentence on each.<sup>9</sup> If the counts against P. C.-Z. and R. C.-Z. were tried separately and were sentenced on separate days (with separate judges always a possibility), then defendant would have faced 98-130 months when he was sentenced for the first three cases,<sup>10</sup> and would have faced 149-198 months when sentenced for the remaining three cases.<sup>11</sup> At the second sentencing, the judge would have the unfettered discretion to run the sentence imposed in the second sentencing either consecutively or concurrently with the first

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<sup>9</sup> For each child molestation count there were five other current offenses which would be scored as prior offenses. RCW 9.94A.589(1)(a). Each of those child molestation prior offenses scored as three points. RCW 9.94A.525(17). This scores as 9+ and results in a standard range of 149-198 months. RCW 9.94A.525, RCW 9.94A.510.

<sup>10</sup> For each child molestation, there would be two other current offenses which would be scored as prior offenses. RCW 9.94A.589(1)(a). Each of those child molestation prior offenses scored as three points. RCW 9.94A.525(17). This scores as 6 and results in a standard range of 98-130 months. RCW 9.94A.525, RCW 9.94A.510.

<sup>11</sup> For each child molestation, there would be three prior offenses and two other current offenses which would be scored as prior offenses. RCW 9.94A.589(1)(a). Each of those child molestation prior offenses scored as three points. RCW 9.94A.525(17). This scores as 9+ and results in a standard range of 149-198 months. RCW 9.94A.525, RCW 9.94A.510.

sentence. RCW 9.94A.589(3)<sup>12</sup>. The risk is stark: A combined sentence somewhere between of 149-198 months at a joint trial versus the possibility of a combined sentence somewhere between of 247-320 months.

The decision whether to testify once, or twice, can be dichotomized into two components, each of which in this case<sup>13</sup> had to be addressed by defense counsel. The first component was defendant's personal wish. The decision to testify or not testify reposes alone with the defendant, not his lawyer. See *In re Stenson*, 142 Wn.2d 710, 732-36, 16 P.3d 1 (2001). While it is fairly debatable whether a defendant who desired to testify only one time could be overridden by his lawyer with a severance motion decision,<sup>14</sup> it is beyond question that a competent defense lawyer must consult with his client in the course of the severance decision-making process.<sup>15</sup> The second component is tactical: How will the defendant bear up under successive cross-examinations if he testifies

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<sup>12</sup> "Under RCW 9.94A.400(3) [now RCW 9.94A.589(3)], the trial court is granted total discretion to choose whether to impose a consecutive sentence. It requires only that the judge "expressly orders that they be served consecutively." *State v. Linderman*, 54 Wn. App. 137, 772 P.2d 1025 (1989) (citing *State v. Huntley*, 45 Wn. App. 658, 726 P.2d 1254 (1986)).

<sup>13</sup> Defendant testified to his relationships with both P. C.-Z. and R. C.-Z. at trial. See 7 VRP 810-12.

<sup>14</sup> No cases could be found addressing this or analogous issues.

<sup>15</sup> RPC 1.2(a). Either the client makes the severance call (in which case the lawyer must consult with his client about severance issues) or the lawyer makes the severance call after consultation with his client. The record is devoid of the circumstances surrounding this consultation in this case.

in two successive trials? This is a human factor obvious to any lawyer who has ever tried a case. The problem with this case, on direct appeal, is that this court is unaware of the off-the-record considerations relating to the decision-making process.

The decision whether to try the cases together or whether to try them separately undeniably has both a risk tolerance component (the defendant's perspective) and a risk balancing component (defense counsel's perspective). All we know from the record is that Mr. Ruiz' trial counsel consulted with defendant and that defendant personally wanted to try the cases together.<sup>16</sup>

The record does not disclose whether or not the State withheld any evidence relevant to the offenses where P. C.-Z. was the victim in order facilitate joinder of offenses where R. C.-Z. was the victim, or vice versa. This potentially vital factor, and defense counsel's response to it cannot be addressed on direct appeal.

A hypothetical demonstrates the fault in defendant's deficient performance argument. Assume the facts of this case, except that the defense lawyer in this hypothetical embraced Appellant's Brief and concluded that "there is no legitimate justification for trial counsel's

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<sup>16</sup> "Mr. Ruiz has agreed to join the cases." 1 VRP 3.

failure to act.<sup>17</sup> Following that guidance, trial counsel (ignoring his client's expressed wish for one trial) vigorously fights for severance, and wins. Following the reasoning of Appellant's Brief, this is a desirable outcome, period. Next, factor in an adverse consequence: Assume that the defendant is found guilty in two separate trials before two separate judges, with two separate sentencings, the second sentence results in a consecutive sentence, and the defendant gets a years-longer, non-appealable sentence. Did a mistake happen here? Was there ineffective assistance of counsel? How can an appellate court even weigh this with so much off the record? This hypothetical demonstrates that defendant presents a "heads I win, tails you lose" argument and this Court should reject it. The record below comes nowhere near rebutting the presumed competence of defendant's trial counsel. The waiver rule is the product of years of experience and should not be overridden without due consideration of all the factors that influenced trial counsel's decision to knowingly waive joinder.<sup>18</sup>

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<sup>17</sup> Appellant's Brief at 45.

<sup>18</sup> There are exceptions. Joinder was also clearly inappropriate in *State v. Linville*, 199 Wn. App. 461, 400 P.3d 333 (2017) because, even though the defendant did not object, the record was clear: The plain language of 9A.82.085 barred joinder. *State v. Linville*, 199 Wn. App. at 465.

4. DEFENDANT HAS FAILED TO PROVE THAT THE TRIAL COURT WOULD LIKELY HAVE GRANTED A MOTION TO SEVER.

- a. Defendant's complete failure to present evidence dooms his claim that the trial court would have either sustained an objection to joinder or granted a motion to sever.

*State v. Bluford* addressed a properly preserved objection to joinder—not an ineffective assistance of counsel claim predicated upon a failure to make an objection to joinder. *State v. Bluford*, 188 Wn.2d 298, 393 P.3d 1219 (2017). In *State v. Bluford*, a factual record was developed which clearly demonstrated that joinder was inappropriate. *State v. Bluford*, 188 Wn.2d at 308.<sup>19</sup> In this case, no factual record whatsoever was developed because defense counsel acceded to the State's joinder motion. In an attempt to fill this evidentiary void, defendant selectively presents citations from the state's pretrial joinder motion. The first problem with defendant's selective presentation of the state's joinder motion as evidence is that the state's joinder motion is not evidence.

*Schwindt v. Underwriters at Lloyd's of London*, 81 Wn. App. 293, 299,

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<sup>19</sup> In *Bluford* trial counsel made a meritorious pretrial objection to joinder accompanied by a sufficient factual predicate. *State v. Bluford*, 188 Wn.2d at 305-16. The Supreme Court held that error was preserved in that case, notwithstanding the fact that the objection was not renewed at the close of all the evidence. *State v. Bluford*, 188 Wn.2d at 309-10. But, as noted above, the Supreme Court was clear: Prejudice resulting from a pretrial joinder motion is evaluated only by examining the evidence presented at that joinder motion. *State v. Bluford*, 188 Wn.2d at 310. Prejudice emerging over the course of the trial is evaluated using the severance standard of CrR 4.4(a).

914 P.3d 119 (1996) (holding that citation to a brief is not evidence). The second problem with defendant's selective presentation of the state's joinder motion as evidence is the selectivity of defendant's presentation. If defendant wants this Court to consider some of the state's motion as evidence, this Court ought to take all of it—especially the resolution of the mixed questions of fact and law discussed on page 6. CP 9. That part of the brief conclusively supports joinder. The third problem with defendant's selective presentation of the state's joinder motion as evidence is that there is nothing in the record that indicates that the trial court ever considered the motion as anything other than the argument it was intended to be. 1 VRP 4.<sup>20</sup> Finally, selective reliance upon the state's joinder motion as evidence ignores the procedural posture of the motion as it appeared in this case. It would be unfair to constrain the state to facts and evidence presented in the written motion to join when the joinder motion itself was agreed. 1 VRP 3. Defendant never raised the issue of unfair prejudice resulting from joinder in the trial court. 1 VRP 3. Absent a conflict on the issue, there was no need to develop a full factual predicate relating to the possibility of unfair prejudice because no objection was

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<sup>20</sup> The extent of the trial court's expression on the joinder issue are "All right" when defense counsel informed the Court that his client agreed to joinder (1 VRP 3) and "That's fine." when the prosecuting attorney proposed details pertaining to rearraignment. 1 VRP 3-4.

before the court and joinder was clearly authorized by CrR 4.3(a)—and because (as discussed above) the matter of severance could always be addressed at trial, in the context of real evidence, actually presented.

In presenting its claim that a motion to sever would likely have been granted by the trial court at trial, defendant presents no citations to the trial record. *See* Appellant’s Brief at 42-45. A review of R. C.-Z.’s testimony (5 VRP 406-467) and P. C.-Z.’s testimony (5 VRP 468-526) reveals no substantial objections. The cross-admissibility of the testimony of these two victims was limited by neither oral instruction (*id.*) nor jury instruction (CP 115-152).<sup>21</sup> Had defense counsel made or renewed a motion to sever the offenses at trial, the judge would have been compelled to conclude that all the evidence presented in this case was cross-admissible because it was cross-admitted.<sup>22</sup> Defendant makes no claim on appeal that the trial court abused its broad discretion in evidentiary matters. *See State v. Dye*, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013). Nevertheless, defendant argues that “the evidence in this case was not

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<sup>21</sup> Defendant does not raise an ineffective assistance of counsel claim based upon failure to object to, or otherwise limit, the testimony of either of the two victims. Appellant’s Brief. The unchallenged jury instructions are law of the case. *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988).

<sup>22</sup> This case presents multiple possible justifications for cross-admissibility (had an objection been raised): lustful disposition toward juvenile household members, absence of accident or mistake, common scheme or plan, and explanation of delayed disclosure, for example. But these justifications remain in reserve for objections which were not made. *See State v. Dowell*, 16 Wn. App. 583, 586–87, 557 P.2d 857, 859–60 (1976) and the cases cited therein.

cross admissible.” Appellant’s Brief at 38. The state must reply: But the evidence was cross-admitted—without objection. *State v. Elmore*, 139 Wn.2d 250, 283, 985 P.2d 289 (1999).<sup>23</sup>

- b. Defendant cannot demonstrate that it is likely that the trial court would have granted a severance motion had a severance motion been made.

A severance motion is not made unless and until it is either presented at the close of all the evidence (CrR 4.4(a)(1)<sup>24</sup>) or it is renewed at the close of all the evidence (CrR 4.4(a)(2)). This requirement provides the trial court with a sufficient facts and opportunity to evaluate the severance motion. “Defendants seeking severance must not only establish that prejudicial effects of joinder have been produced, but they must also demonstrate that a joint trial would be so prejudicial as to outweigh concern for judicial economy.” *State v. Kalakosky*, 121 Wn.2d 525, 539, 852 P.2d 1064, 1071 (1993). Separate trials are not favored. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994) (citing *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983)). Severance is required only where the

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<sup>23</sup> Defendant does not claim ineffective assistance of counsel based upon failure to object to the admission of any evidence at trial, or failure to seek a limiting instruction pertaining to the admission of any evidence at trial. See Appellant’s Brief.

<sup>24</sup> The standard for evaluating a motion to sever made at the close of the evidence is “if the interests of justice require.” CrR 4.4(a)(1). That standard requires that the moving party demonstrate actual prejudice. *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

defendant can demonstrate specific prejudice resulting from joinder. *State v. Bythrow*, 114 Wn.2d 713, 720, 790 P.2d 154 (1990).

The evaluation of prejudice on review when a severance motion is presented necessarily involves examination of the evidence presented at the joint trial. See *Bythrow*, 114 Wn.2d at 723; *Sutherby*, 165 Wn.2d at 884-85; and *Davis*, 152 Wn.2d at 712-13.

In determining whether the potential for prejudice requires severance, a trial court must consider (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. In addition, any residual prejudice must be weighed against the need for judicial economy.

(citations omitted) *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747, 773 (1994).

- i. Had the trial court considered a severance motion in this case, it would have found that the evidence for each count in this case was sufficiently strong.

The evidence in this case was neither particularly strong nor particularly weak. Two teenagers told the court what had happened to them when they were younger. The case, as sex offenses often do, hinged upon the credibility of their testimony.

Defendant argues that the evidence of his child molestation of P. C.-Z. was weak because the State on its own motion dismissed two of the

three counts relating to P. C.-Z. at trial. Appellant's Brief at 43. While dismissal of the charges certainly indicates the weakness of those charges, it also obliterates any potential prejudice as to those charges. The evidence (admitted without objection) in aid of those dismissed charges remains.

- ii. Had the trial court considered a severance motion in this case, it would have found that the clarity of the defenses were not impaired in this case.

Joinder did not complicate the straight denial defense in this case—the defense for each victim was the same: Defendant was never alone with R. C.-Z. or P. C.-Z. (except for taking P. C.-Z. to soccer) (7 VRP 815-17), that he had never “dry humped” with anyone (7 VRP 813-15), that he was never the first one to rise in the house (7 VRP 819), that he never paid attention to how the girls slept in the bed (7 VRP 820), and that he never went into the girls' room to say good night or good morning. 7 VRP 820. As noted above, this case presented no evidentiary complications relating to cross-admissibility.<sup>25</sup>

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<sup>25</sup> *State v. Harris*, 36 Wn. App. 746, 749, 677 P.2d 202 (1984), and *State v. Ramirez*, 46 Wn. App. 223, 730 P.2d 98 (1986), cases relied upon by defendant, take a much too restrictive approach to cross-admissibility and joinder. See *State v. Warren*, 55 Wn. App. 645, 654, 779 P.2d 1159 (1989). However, as noted above, this case presented no issues of cross-admissibility.

- iii. The trial court instructed the jury to consider each count separately.

The jury in this case was charged to decide each count separately. Jury Instruction 5 (CP 122). See *Kalakosky*, 121 Wn.2d at 539. The three charges involved two victims (5 VRP) and three counts. CP 124, CP 133, 136. The case was tried over the course of three days. 3-7 VRP.<sup>26</sup> No challenging problems of compartmentalization were present. This case is considerably less complex than *Kalakosky*. See *Kalakosky*, 121 Wn.2d at 537.

- iv. Had the trial court considered a severance motion in this case, the trial court would have found that any residual prejudice remaining in this case was outweighed by policy favoring joinder and judicial economy.

The *only* prejudicial factor in this case is the inherent prejudice occurring when cases involving two sex offense victims are tried together in one case. That factor, by itself, is not enough to warrant severance. See *State v. Kalakosky*, 121 Wn.2d 525, 538-539, 852 P.2d (1993).

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<sup>26</sup> Five days if jury voir dire is counted.

5. ALTERNATIVELY, DEFENDANT HAS NOT DEMONSTRATED THAT IF HE WERE TRIED SEPARATELY THERE WAS A REASONABLE PROBABILITY HE WOULD HAVE BEEN ACQUITTED.

To prevail on an ineffective assistance of counsel claim predicated upon failure to make a severance motion, defendant must demonstrate that if he were tried separately, there is a reasonable probability he would have been acquitted. *State v. Sutherby*, 165 Wn.2d 870, 884, 204 P.3d 916 (2009).<sup>27</sup> Defendant has not even attempted this burden and his claim of ineffective assistance of counsel should be rejected because of this alternative reason.

6. DEFENDANT'S ER 702 ARGUMENT PERTAINING TO THE TESTIMONY OF MS. ARNOLD IS NOT WELL TAKEN.

- a. Defendant's failure to present a timely objection to the trial court precludes review.

The prosecutor raised the question of Ms. Arnold's testimony pretrial. 4 VRP 387. The trial court ruled on the state's motion:

Okay. So first of all, I do believe that Ms. Arnold qualifies as an expert by training and experience and the things that 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

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<sup>27</sup> "Sutherby must also demonstrate prejudice, first by showing that a severance motion would likely have been granted. And second, he must show that, had a severance been granted, there is a reasonable probability that the jury would not have found him guilty of child rape and molestation beyond a reasonable doubt." *State v. Sutherby*, 165 Wn.2d at 884.

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 they -- 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.

I don't -- I don't know what her experience or expertise is in recantations or how she would have any basis to know that because she interviews the children, and I suppose sometimes she interviewed them again.

4 VRP 387-88. Defense counsel, invited to address the trial court, interposed no objection to the trial court. 4 VRP 389. The trial court explicitly stressed the need for a timely objection to any evidence that Ms. Arnold might present:

You can certainly object as we go along if you feel that it's gone outside her expertise and the things she's qualified to give opinions on.

4 VRP 389.

Just prior to Ms. Arnold's testimony the trial court held an ER 104 hearing pertaining to the admissibility Ms. Arnold's testimony pursuant to ER 702. 610-627. During that hearing, defense counsel interposed an objection:

Yes, Your Honor. I'd like to do that, and Your Honor, just for the record, would be objecting to her testimony. We don't think she qualifies as an expert under 702 and we think it amounts to vouching.

6 VRP 619-20. This objection happened between the prosecuting attorney's voir dire and defense counsel's voir dire of the witness. *Id.* The trial court did not rule on that objection at the time it was made. Defendant immediately proceeded to voir dire Ms. Arnold outside of the presence of the jury. 6 VRP 620-623. Other than a tentative reference to a prior consistent statement issue, the trial court made no ruling on defense counsel's ER 702 and vouching objections. 6 VRP 626. The prosecutor's direct examination of Ms. Arnold proceeded without objection. 6 VRP 627-647. The prosecutor's redirect examination of Ms. Arnold proceeded without objection. 6 VRP 653-654. The prosecutor's further redirect examination of Ms. Arnold proceeded without objection. 6 VRP 655.

Defendant waived his objection to Ms. Arnold's testimony.

If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.

When a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.

(internal quotation marks, braces, and citations omitted) *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615, 623 (1995). "A defendant who does not seek a final ruling on a motion in limine after a court issues a tentative

ruling waives any objection to the exclusion of the evidence.” *State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43, 53 (1994) (citing *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991)). See *State v. Madison*, 53 Wn. App. 754, 770 P.2d 662 (1989) for application of this rule to expert testimony regarding recantation by a rape victim.<sup>28</sup>

b. Ms. Arnold’s testimony was properly admitted.

Ms. Arnold was asked on direct examination to describe her training and explain to the jury what recantation means. 6 VRP 641. The focus of her testimony was not on whether the crime was committed (defendant’s “propensity” argument), “but rather to explain that failure to . . . report does not necessarily demonstrate that the crime did not occur.” See *State v. Madison*, 53 Wn. App. at 765 and *State v. Graham*, 59 Wn. App. 418, 421-25, 798 P.2d 314, 317 (1990). Her testimony on this point was that recantation “is so common that it’s taught in our interviewer trainings as this is something that you—you need to look for factors of and you need to ask questions about...” 6 VRP 642. Ms. Arnold did not seek to infer guilt, however. On cross-examination she was asked:

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<sup>28</sup> Defendant has not asserted manifest constitutional error. See e.g., *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125, 130 (2007). Defendant has not asserted that Ms. Arnold’s testimony included “an explicit or almost explicit witness statement on an ultimate issue of fact.” *Id.*, 159 Wn.2d at 938.

Q. And you would agree that sometimes when a child later recants, and you've had a lot of explanations as to why that might happen, but sometimes it's because it never happened. Isn't that correct?

A. It can be, yes.

6 VRP 650.

Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant “because it invades the exclusive province of the jury.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). “Opinion testimony” means evidence that is given at trial while the witness is under oath and is based on one’s belief or idea rather than on direct knowledge of facts at issue. *State v. Demery*, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001).

Washington courts have “expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” *Demery*, 144 Wn.2d at 760 (quoting *Heatley*, 70 Wn. App. at 579). In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 758-59.

“[T]estimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness, is otherwise helpful to the jury and is based on inferences from the evidence is not improper opinion testimony.”

*Heatley*, 70 Wn. App. at 578.

The State, in this case sought to use Ms. Arnold’s testimony to neutralize a commonly recognized concern:

To an average juror, it may appear that a delay in reporting sexual abuse by either an adult or a child, or a recantation of previous allegations, strongly indicates that the alleged event never happened. The testimony approved in . . . *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), and that presented in this case, will assist the trier of fact to understand the evidence or to determine a fact in issue.  
ER 702.

*State v. Graham*, 59 Wn. App. 418, 425, 798 P.2d 314, 317 (1990) (citing *Madison*, 53 Wn. App. at 765). Ms. Arnold was competent to render that opinion.

ER 702 governs the admissibility of expert testimony and provides: “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.” Under this rule, expert testimony is admissible when (1) the witness qualifies as an expert, (2) the expert’s opinion is based on a theory generally accepted in the scientific community, and (3) the testimony is

helpful to the trier of fact. *State v. Graham*, 59 Wn. App. 418, 423, 798 P.2d 314 (1990) (citing *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984)). Testimony is helpful when it concerns issues outside common knowledge and is not otherwise misleading. See *State v. Groth*, 163 Wn. App. 548, 564, 261 P.3d 183 (2011); *State v. Rafay*, 168 Wn. App. 734, 784, 285 P.3d 83 (2012). Courts should interpret helpfulness broadly and in favor of admissibility. *Groth*, 163 Wn. App. at 564. The trial court enjoys broad discretion in determining whether to allow expert testimony, and appellate courts do not disturb this discretion absent manifest abuse. *Graham*, 59 Wn. App. at 425. The burden is on the appellant to prove abuse of discretion. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

Once the credibility of a witness is at issue, evidence tending to corroborate the testimony may be obtained from an expert witness. *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). “Cases involving crimes against children generally put in issue the credibility of the complaining witness, especially if defendant denies the acts charged and the child asserts their commission. An attack on the credibility of these witnesses, however slight, may justify corroborating evidence.” *Petrich*, 101 Wn.2d at 575.

In cases involving sexual misconduct, expert testimony about the recognized characteristics of delayed reporting common to sexually abused children is admissible to help jurors assess the victim's credibility. *Petrich*, 101 Wn.2d at 575-76; *Graham*, 59 Wn. App. 424-25; ER 702. Such evidence is helpful to the trier of fact because, “[t]o an average juror, it may appear...a delay in reporting [sexual abuse] by either an adult or a child...strongly indicates...the alleged event never happened....” *Graham*, 59 Wn. App. at 425 (quoting *State v. Madison*, 53 Wn. App. 754, 765, 770 P.2d 662 (1989)). For that reason, courts have recognized that expert testimony is “expressly permit[ted]” to rebut an attack on a victim's credibility. *Graham*, 59 Wn. App. at 425.

It is thus generally permissible for a jury to hear expert testimony explaining why delayed disclosure does not necessarily mean the victim lacks credibility. *Petrich*, 101 Wn.2d at 575–76; *State v. Holland*, 77 Wn. App. 420, 427, 891 P.2d 49, *review denied*, 127 Wn.2d 1008 (1995). Moreover, it is well established that expert testimony about delayed disclosure is admissible if it is limited to an opinion that delayed reporting is not unusual. *Petrich*, 101 Wn.2d at 575-76. The admission of delayed reporting expert testimony under ER 702 should be affirmed absent a manifest abuse of discretion. *Petrich*, 101 Wn.2d at 575; *State v. Stevens*, 58 Wn. App. 478, 497-98, 794 P.2d 38 (1990).

Ms. Arnold had twelve years experience as a child interviewer. 6 VRC 611. She has a bachelor's degree and has attended many relevant trainings. 6 VRC 611-12. She has conducted over 2,200 interviews. She was sufficiently qualified to present opinion testimony on the fact that recantation is a common occurrence in child sex abuse cases. The trial court did not abuse its broad discretion when it allowed her (without timely objection) to voice that opinion to address concerns relating to recantation and delayed reporting.

- c. Any error in the admission of Ms. Arnold's testimony was harmless.

Defendant's ER 702 argument can be summed up in one sentence: "The testimony was unnecessary and did not amount to expert testimony under ER 702." Appellant's Brief at 49. The fault in defendant's argument is that "error without prejudice is not reversible." *State v. Barry*, 183 Wn.2d 297, 317, 352 P.3d 161 (2015). When the party challenging an evidentiary ruling meets its burden to show that the trial court abused its discretion, the appellate court will not reverse a conviction unless the evidentiary ruling prejudiced the outcome. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004); *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (evidentiary error is grounds for reversal only if the error is prejudicial). "An error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the

trial would have been materially affected.” *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), *as amended* (2002) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

A review of Appellant’s Brief (at pages 45-30) reveals no citation to prejudicial testimony in the argument presented.<sup>29</sup> Defendant claims, without citation to the record, that “[b]ecause 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.” Appellant’s Brief at 50. Appellant identifies neither the “family dynamics” nor the “factors related disclosure and recantation,” nor how the combination of the two prejudiced defendant.

Ms. Arnold’s testimony did not probably change the outcome of this trial. It merely expressed something particularly well known to child interviewers: that recantation is common among sex abuse victims.

D. CONCLUSION.

Defendant has not presented a record sufficient to evaluate whether or not defense counsel’s performance was deficient when he acceded to the state’s joinder motion. Defendant has not demonstrated that the trial

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<sup>29</sup> At page 49, appellant quotes routine and unobjectionable definitions of delayed disclosure and recantation. 6 VRP 632; 6 VRP 641.

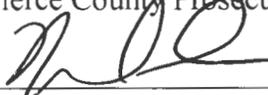
court would likely have granted a severance motion or sustained an objection to joinder. Defendant has not attempted to demonstrate that there was a reasonable probability that he would have been found not guilty in separate trials, or that any prejudice resulted when defense counsel acceded to the state's joinder motion. For each of these alternative reasons, defendant's ineffective assistance of counsel claims should be rejected.

Defendant waived an ER 702 objection. Alternatively, the testimony of Ms. Arnold was properly admitted under ER 702. Alternatively, any admission of Ms. Arnold's testimony was harmless evidentiary error.

The trial court should be affirmed.

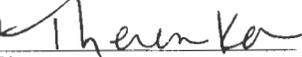
DATED: November 28, 2017

MARK LINDQUIST  
Pierce County Prosecuting Attorney

  
\_\_\_\_\_  
Mark von Wahlde  
Deputy Prosecuting Attorney  
WSB # 18373

Certificate of Service:

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

11.28.17   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**November 28, 2017 - 4:28 PM**

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**Appellate Court Case Title:** State of Washington, Respondent v Hugo Ruiz, Appellant  
**Superior Court Case Number:** 15-1-01869-0

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