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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SHAWN DEE MORGAN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 16-1-01561-3
The Honorable John Hickman, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred in granting the State's motion to join all 10 child rape/molestation counts for trial.
2. Shawn Morgan received ineffective assistance of counsel where trial counsel failed to challenge venue for two charges related to one of the alleged victims.
3. Shawn Morgan's Judgment and Sentence contains cost provisions that are no longer authorized after enactment of House Bill 1783.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in joining 10 counts of child rape/molestation for trial because consideration of the requisite factors showed prejudice outweighed the desire for judicial economy? (Assignment of Error 1)
2. Did the trial court abuse its discretion when it found that 10 counts of child rape/molestation should be joined for trial because evidence of each offense would be admissible at trial for the other offenses? (Assignment of Error 1)
3. Did the trial court abuse its discretion when it found that evidence of each offense would be admissible at a trial for the other offenses in order to show a common scheme or

plan? (Assignment of Error 1)

4. Did the trial court abuse its discretion when it found that evidence of each offense would be admissible at trial for the other offenses in order to show sexual motivation and that the contact was for the purpose of sexual gratification? (Assignment of Error 1)
5. Did Shawn Morgan's trial counsel provide ineffective assistance by failing to object to improper venue in Pierce County for two charges that occurred in Thurston County, which would have precluded those charges being joined for trial with the remaining Pierce County offenses? (Assignment of Error 2)
6. Should Sean Morgan's case be remanded to the trial court to amend the Judgement and Sentence to strike cost provisions that are no longer authorized after enactment of House Bill 1783? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State originally charged Shawn Dee Morgan with two counts of first degree rape of a child and two counts of first degree child molestation. (CP 3-5) The charges, filed under cause

number 16-1-01561-3, alleged that Morgan committed these acts against A.D., and alleged that the crimes were domestic violence incidents and were aggravated by several factors.¹ (CP 3-5) The State subsequently filed an Amended Information adding aggravating factors to each count. (CP 6-9)

The State filed similar charges against Morgan's girlfriend, Kierra Hall, based on the same incidents but under a separate cause number (16-1-01560-5). (CP 25)

Under a third cause number, 16-1-04929-1, the State charged Morgan with one count of child molestation pertaining to S.D.-F., and two counts of child molestation pertaining to R.C. (CP 26) The State alleged aggravators on these counts as well. (CP 29)

The State moved to join the three cause numbers for a single trial. (CP 17-46; 06/12/17 RP 38-54)² Over Morgan's objection, the trial court granted the motion and ordered the three cases joined. (06/12/17 RP 54-73, 87-90; CP 60-72) The State

¹ The alleged victim for these counts was originally referred to as A.M. (CP 3-5) But A.M. changed his last name so subsequent pleadings refer to him as A.D. (RP11 1505; CP 179-83) That is how he will be referred to in this brief as well.

² The transcripts of pretrial hearings will be referred to by the date of the proceeding. The transcripts of trial beginning on October 23, 2017, and labeled volumes 1 thru 24, will be referred to by volume number (RP##).

then filed a second and final amended information charging Morgan with five counts of first degree rape of a child and two counts of first degree child molestation for A.D., one count of first degree child molestation for S.D.-F., and two counts of first degree child molestation for R.C. (CP 179-83) The State alleged that each of these incidents was aggravated because Morgan used his “position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense[.]” (CP 179-83) The State also alleged that the crimes against A.D. were domestic violence incidents, and that S.D.-F. was particularly vulnerable. (CP 179-83)

Before the start of trial, Hall reached a plea bargain with the State and agreed to testify against Morgan. (10/03/17 RP 128; RP16 2355-62) Also before trial, the court heard and ruled on pretrial motions relating to child hearsay and competency of S.D.-F., admissibility of ER 404(b) material, withdrawal and substitution of defense counsel, and other motions in limine. (09/15/17 RP 116-22; 10/10/17 RP 34-41, 11/07/17 RP 1124-73, 1177-1230, 1231-42; 11/08/17 RP 1254-56)

A jury found Morgan guilty of all of the substantive charges and aggravators. (CP 298-317; RP23 3362-64) The trial court imposed an exceptional sentence above Morgan’s standard range,

totaling 720 months to life in prison. (RP24 3412-13; CP 342, 345-46, 429-31) Morgan filed a timely Notice of Appeal. (CP 386)

B. SUBSTANTIVE FACTS

1. *Background Facts*

Shawn Morgan and Kierra Hall dated for about eight years. (RP15 2244) During their time together they frequently used illegal substances, including heroin and methamphetamine. (RP15 2249-50, 2254, 2255; RP162439-40 2426-27) But Hall's history of drug use and addiction began long before she met Morgan, and her extensive drug use has impacted her memory and affected her perception of past events. (RP9 1357; RP15 2245, 2246, 2247, 2265-66)

Morgan and Hall began living together almost immediately after they met. (RP15 2250, 2251) They lived in Morgan's trailer most of the time, but occasionally stayed with Morgan's parents in their home in Spanaway, Pierce County. (RP12 1723; RP15 2255, 2256, 2257) For a time they lived in the trailer when it was parked at an RV campground near Black Lake in Thurston County. (RP14 2092-93, 2100-01; RP15 2258) For several years they lived in the trailer when it was parked in the driveway of Morgan's parent's house. (RP12 1736; RP15 2256-57)

In 2014, Hall gave birth to a baby girl fathered by Morgan. (RP15 2286-87) But within a few months the baby was removed and placed with Hall's mother. (RP9 1316; RP15 2287) As part of her efforts to regain custody of her daughter, Hall entered an in-patient treatment program at Isabella House in Spokane. (RP9 1309, 1316, 1318; RP15 2288-90)

While in treatment, Child Protective Services (CPS) contacted Hall's counselor asking to interview Hall about allegations of child molestation that had been made against Morgan. (9RP 1321) Hall initially refused the interview, but she eventually disclosed to her counselor several incidents where she and Morgan engaged in sexual acts with minor children. (RP9 1322, 1323, 1324-27; RP15 2291-92) The counselor, a mandatory reporter, contacted law enforcement. (RP9 1324) An FBI agent went to Isabella House and interviewed Hall. (9RP 1381-83) Hall also provided law enforcement with DVDs containing images and videos of child pornography that she said belonged to Morgan. (RP12 1726, 1727, 1730; RP15 2309; Exh. 93, 94)

The Pierce County Sheriff's Department began investigating Morgan and Hall after receiving the information gathered by CPS and the FBI. (RP12 1718-19) Detectives executed a warrant and

searched Morgan's trailer and his parent's home. (RP12 1733)
They recovered several computers, DVDs and thumb drives.
(RP12 1762-70, 1778, 1784, 1787) A forensic examination of these
items revealed video and still photos containing images of both
adult and child pornography. (RP9 1401, 1403; RP12 1780-81;
RP13 1912, 1914-15, 1930, 1933)

The State eventually filed charges against Morgan for
allegations relating to three different children, R.C., S.D.-F., and
A.D. (CP 179-83)

2. Evidence pertaining to R.C.

Vickie Carrington met Morgan in 2005 or 2006 because he
was friends with her daughter. (RP13 1947, 2003) Morgan visited
the Carrington home frequently and became like part of the family.
(RP13 1947, 1949) Carrington also met Hall a few times. (RP13
1950)

Carrington's granddaughter, R.C., lived with Carrington
during that time. (RP13 1945-46) R.C. was between the ages of
six and ten during the time that Morgan was involved in their family
life. (RP13 1950) Morgan and R.C. seemed to get along well and
R.C. liked spending time with Morgan. (RP13 1948, 1950)

Carrington recalled two occasions when R.C. and Morgan

went somewhere together alone. (RP13 1951) Once they spent the day shopping at Goodwill, and once they spent the night at Morgan's trailer by Black Lake. (RP13 1951-52) After the Black Lake excursion, R.C. told Carrington she did not want to go out with Morgan again. (RP13 1953-54)

R.C. testified that she saw Morgan frequently when he spent time at the Carrington house. (RP13 2003-04) She also met and liked Hall. (RP13 2005) The three talked about going shopping or watching movies in their trailer. (RP13 2007)

Hall also testified that she met R.C. approximately three times. (RP16 2413) They got along well, and at one point made plans to ride horses at Hall's mother's home. (RP16 2414, 2416) That plan never materialized, but R.C. did visit Hall and Morgan and stay in the trailer by Black Lake. (RP16 2414, 2416, 2417)

When R.C. was nine or ten years old, in 2010 or 2011, she agreed to spend the weekend with Morgan at Black Lake. (RP13 2007-08) Morgan picked her up in his SUV. (RP13 2008) Hall was not with him. (RP13 2009) Along the way, Morgan told R.C. that he was tired, and he pulled into a parking lot and took a nap. (RP13 200) R.C. got bored and eventually tried to wake up Morgan. (RP13 2009)

According to R.C., Morgan told her that she would need to play with his arm to keep him awake. (RP13 2009) He told R.C. to look away, then placed her hand on his penis and began moving it up and down.³ (RP13 2010-11) Morgan continued to do this until they arrived at the trailer. (RP13 2011) R.C. testified that Morgan placed her hand on his penis and rubbed up and down another two times that weekend, both times while they were in the trailer.⁴ (RP13 2013-14; RP14 2035-36, 2036, 2037-38) He also ingested drugs and watched pornography. (RP14 2038-39, 2049)

R.C. did not initially tell her grandmother about these incidents because she was scared. (RP14 2049) But she finally told her what happened a few years later, when she was 11 years old. (RP13 1955-56; RP14 2050; RP15 2203) R.C. was interviewed by a child forensic interviewer and she described the incidents. (RP15 2201, 2210-11)

3. *Evidence pertaining to S.D.-F.*

Hall's brother, Andrew Hall, dated a woman named Sera Lujan beginning in 2012. (RP16 2420; RP18 2833) Lujan had a five-year-old daughter, S.D.-F. (RP18 2821, 2824, 2843). Lujan

³ The State elected this incident as the factual basis for count 9. (RP22 3292)

⁴ The State elected the incidents in the trailer as the factual basis for count 10. (RP22 3292)

met Hall and Morgan, and would spend time with them at Morgan's parent's house. (RP18 2835-37; RP16 2422-23) Occasionally Lujan would bring S.D.-F. along, and Hall would play with her. (RP18 2837, 2841-42)

Kierra Hall seemed to have a good relationship with S.D.-F., so Lujan and Andrew Hall asked her to babysit a few times. (RP16 2423, 2423, 2425; RP18 2842-43) One time they left S.D.-F. with Hall overnight. (RP16 2425; RP18 2843) S.D.-F. seemed fine the next day when Lujan picked her up, but she soon started acting out. (RP18 2846) S.D.-F. subsequently told Lujan that "the visitor" had done something to her. (RP19 2861, 2870-71)

Lujan made a police report soon after, in May of 2012. (RP19 2861, 2944, 2945-46) But Lujan was confused about who the perpetrator was. (RP19 2862) She assumed it was S.D.-F.'s biological father, who had recently reentered S.D.-F.'s life. (RP19 2863) S.D.-F. did not enjoy spending time with him and often cried when she had to visit him. (RP19 2863) Lujan did not think of Morgan, because Hall was always present when he was there. (RP19 2868)

But S.D.-F. told a child forensic interviewer that Shawn Morgan put his penis on her face and that later there was

something sticky on her face. (RP192985-86, 2990, 2997-98; Exh. 178) S.D.-F. had trouble remembering the incident before trial, but was able to recall that she fell asleep in one bedroom and woke up in another. (RP18 2747) She remembered screaming and running out of the room. (RP18 2747-48) She remembered something wet on her face, and someone asking if she was ok and handing her a washcloth. (RP18 2748) She does not remember Hall or Morgan, but she remembers that there was a man there. (RP18 2744, 2783)

Hall testified about this incident. According to Hall, she left the apartment to go buy drugs and when she came back Morgan and S.D.-F. were in a bedroom together. (RP16 2433) She could hear S.D.-F. crying and screaming. (RP16 2433-34) Eventually they came out. (RP16 2434) S.D.-F. was scared and crying, and was naked from the waist down.⁵ (RP16 2434)

Another time, Morgan asked Hall to lay S.D.-F. in the bed between them. (RP16 2426) Morgan played a video showing child pornography. (RP16 2426) Morgan told Hall to show S.D.-F. how to masturbate him. (RP16 2428) So Hall placed S.D.-F.'s hand on

⁵ The State elected this incident as the factual basis for count 8. (RP22 3290)

Morgan's penis and rubbed up and down. (RP6 2426) Another time, Morgan wanted to engage in sexual activities with S.D.-F. in his car, but S.D.-F. refused. (RP16 2430, 2432)

4. *Evidence pertaining to A.D.*

A.D. is Morgan's son with ex-girlfriend Lindsey Dearfield. (RP 11 1511, 1513) A.D. and Morgan saw each other on Christmas Day and Father's Day pursuant to the parenting plan put in place after Morgan and Dearfield split up. (RP11 1513-14) Eventually Morgan asked to see more of A.D., and Dearfield agreed. (RP11 1515) So A.D. began spending more time at Morgan's home when he was around eight to 10 years old, in 2012-2015. (RP11 1511, 1515-16, 1518; RP16 2364)

A.D. testified that he found pornography in the bathroom of Morgan's trailer during one visit. (RP11 1574, 1605) He asked Morgan about it, and Morgan asked A.D. if he wanted to try what he had seen. (RP11 1574) According to A.D., Morgan started stroking A.D.'s penis, then A.D. stroked Morgan's penis.⁶ (RP11 1571-74)

A.D. and Hall's testimony varied about certain details, but

⁶ The State elected these two acts as the factual basis for counts 6 and 7. (RP22 3289)

the essentials were the same. Morgan encouraged A.D. to have vaginal intercourse with Hall, and encouraged Hall to help A.D. learn how to do it correctly. (RP11 1575, 1581-82; RP16 2373-74, 2380, 2381, 2387) Hall and A.D. had vaginal intercourse two times.⁷ (RP11 1575, 1576-77, 1581-82; RP16 2373-74, 2380) Another time, Morgan and A.D. took turns performing oral sex on each other.⁸ (RP11 1572-73, 1579-81, 1589; RP16 2378, 2379) Hall also performed oral sex on A.D., and another time Morgan put his finger into A.D.'s rectum.⁹ (RP11 1581, 1591; RP16 2385-86) Morgan played pornographic videos during these incidents. (RP11 1594, 1664; RP16 2398-99, 2340)

A.D. did not tell any other adults about these activities because he did not want to be a "snitch." (RP11 1596-97) The first time he was questioned by CPS about Morgan, he did not disclose the abuse because he did not know the questioner and did not want to talk to her about it. (RP11 1632, 1636, 1677, 1684, 1693) But eventually A.D. disclosed the behavior to a child forensic

⁷ The State elected these two acts as the factual basis for counts 4 and 5, and maintained that Morgan acted as an accomplice because he directed Hall to have intercourse with A.D. (RP22 3286-88)

⁸ The State elected these two acts as the factual basis for counts 1 and 2. (RP22 3285-86)

⁹ The State elected this oral sex incident as the factual basis for count 3, again alleging that Morgan acted as an accomplice to Hall. (RP22 3289)

interviewer. (RP10 1418, 1447, 1456-57, 1459, 1460-61)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED IN JOINING THE COUNTS FOR TRIAL BECAUSE JOINDER PREJUDICED MORGAN'S RIGHT TO A FAIR TRIAL.

The trial court erred in joining 10 counts from two different cause numbers for one trial.¹⁰ A proper balancing of the requisite factors shows joinder presented an undue risk of prejudice to Morgan's right to a fair trial. His convictions should be reversed for this reason.

CrR 4.3(a) provides that two or more offenses may be joined when they "(1) [a]re of the same or similar character, even if not part of a single scheme or plan; or (2) [a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." The joinder rule under CrR 4.3(a) is construed expansively to promote the public policy of conserving judicial and prosecution resources. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Joinder that results in a fundamentally unfair trial violates due process. Bean v. Calderon, 163 F.3d 1073, 1084 (9th Cir. 1998); U.S. Const. amend. XIV.

¹⁰ The third joined cause number related to charges against Hall only, and were subsequently removed when Hall pleaded guilty.

Thus, “both 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[.]” State v. Bluford, 188 Wn.2d 298, 305, 311, 393 P.3d 1219 (2017).

Four factors help determine whether prejudice results from joinder. State v. Williams, 156 Wn. App. 482, 500-01, 234 P.3d 1174 (2010). These factors are: “(1) the strength of the State’s evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court’s instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime.” State v. Cotten, 75 Wn. App. 669, 687, 879 P.2d 971 (1994).

Here, the trial court considered the four factors and found that they supported joinder. (06/12/17 RP 87-89; CP 70) However, the court noted that, ultimately, the question of whether or not to order joinder in Morgan’s case “comes down to admissibility of evidence of other charges even if these cases were not joined for trial.” (06/12/17 RP 90) The court found that the offenses would be cross-admissible because they showed a “common scheme or plan” and “sexual motivation and intent to sexually abuse children for the purposes of sexual gratification.” (06/12/17 RP 90-93; CP

69-71) Therefore, the trial court found that “there is no compelling reason not to join these offenses[.]” (CP 71; 06/12/17 RP 93)

The court’s decision is reviewed for abuse of discretion. State v. Weddel, 29 Wn. App. 461, 464, 629 P.2d 912 (1981). The first two factors do not necessarily disfavor joinder—the strength of the evidence on each charge was similar and the defense to all of the charges was a general denial. But no one factor is dispositive. State v. McDaniel, 155 Wn. App. 829, 860, 230 P.3d 245 (2010). And a review of the third and fourth factors show that joinder prejudiced the fairness of Morgan’s trial.

1. *Effect of Instruction to Decide Each Count Separately*

The third factor supports separate trials despite instruction informing the jury it must “decide each count separately.” (CP 254) The jury’s ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. State v. Bythrow, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). In Bythrow, the court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence, different witnesses testified as to the different counts, and the issues and defenses were distinct. 114 Wn.2d at 721. On that basis, the

reviewing court concluded the jury was likely not influenced by evidence of multiple crimes and refusal to sever was not error. 114 Wn.2d at 721.

Unlike in Bythrow, the jury in this case was unlikely to compartmentalize the evidence of the different counts. First, Morgan's trial spanned four weeks, with 14 days of testimony. (RP9-RP22) Testimony on the different counts was presented in sequence, but was interrupted by various law enforcement and other non-participant witnesses. Given the length of trial, non-sequential testimony, and 10 counts involving three different victims, the jury was likely to infer that Morgan had a criminal disposition.

Furthermore, "[t]he joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature." State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009). "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." Sutherby, 165 Wn.2d at 884. The unique nature of sex offenses can often lead jurors to disregard the trial court's instructions. Sutherby, 165 Wn.2d at 884, 886-87; State v. Harris, 36 Wn. App. 746, 752, 677 P.2d 202 (1984) (quoting State v.

Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982)).

The jury here was instructed that it “must decide each count separately.” (CP 254) But even where the jury is instructed to consider each count separately, the jury is still free to consider evidence from one count in deciding another count. State v. Bradford, 60 Wn. App. 857, 860-62, 808 P.2d 174 (1991) (instruction that “The jury is free to determine the use to which it will put evidence presented during trial” was consistent with instruction that jury was to consider each count separately). The boilerplate instruction does not actually require the jury to compartmentalize the evidence. (CP 254) The jury, meanwhile, was also instructed that in deciding whether any proposition has been proved, “you must consider all of the evidence” admitted “that relates to the proposition.” (CP 248) Such instruction gives jurors nearly limitless discretion in deciding whether evidence on one count bears on another count.

The jury was not instructed that it must not consider the evidence on any given count as evidence of a propensity to commit the other charged crimes involving different victims. See State v. Gresham, 173 Wn.2d 405, 423-24, 269 P.3d 207 (2012) (“An adequate ER 404(b) limiting instruction must, at a minimum, inform

the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.”). By joining the charges, the trial court gave the benefit of ER 404(b) evidence to the State without any protection against jurors using the different crimes for an improper propensity purpose. See Bean, 163 F.3d at 1084 (9th Cir. 1998) (in holding joinder resulted in unfair trial, pointing out jury instructions, including instruction to consider each count separately, “did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other”).

The instruction to weigh each count separately does not weigh in favor of joinder due to the length and complexity of the trial, the presence of sex offenses, and the lack of a limiting instruction preventing the jury from using the multiple counts for propensity purposes.

2. Cross-admissibility of Evidence

The fourth factor—cross-admissibility of evidence—also favored separate trials. When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred

by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The court relied on the following in support of its ruling that the offenses involving A.D., S.D.-F., and R.C. constitute a common scheme or plan:

all involve young children under age 12, all involve a trusting relationship between the victims' parents and Morgan and Hall, all incidents happened under the control of Morgan and Hall, all of the children knew Morgan, and Hall's involvement in the offenses was considerably unique as she assisted in the grooming process of the children, added an additional element of trust to the caretaking relationship between Hall and Morgan and the children's parents, and she demonstrated sexual acts in front of the children and instructed the children as to how to perform sexual acts.

(CP 68)

The court wrongly concluded the evidence was cross-admissible under the common scheme or plan rationale. Evidence that a "[d]efendant committed markedly similar acts of misconduct against similar victims under similar circumstances" is admissible to show a common scheme or plan. State v. Lough, 125 Wn.2d 847,

852, 889 P.2d 487 (1995).

The State must establish “[a] high level of similarity... ‘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 of which the charged crime and the prior misconduct are the individual manifestations.’ . . . [T]he degree of similarity for the admission of evidence of a common scheme or plan must be substantial.” State v. DeVincentis, 150 Wn.2d 11, 19-20, 74 P.3d 119 (2003) (quoting Lough, 125 Wn.2d at 860).

But propensity evidence is never admissible in criminal cases. ER 404(b). Where the charged crime and the prior acts aren’t substantially similar (beyond mere similarity of outcome), the prior acts serve no purpose other than to show that the accused person is a bad person, and thus likely committed the charged crime. Such evidence is “clearly inadmissible.” State v. Acosta, 123 Wn. App. 424, 433, 98 P.3d 503 (2004).

The court wrongly concluded the evidence was cross-admissible under the common scheme or plan rationale. Morgan’s charged offenses against the three minors in this case show a similarity in results, but not a substantial enough similarity in

implementation to establish a “common scheme or plan.” S.D.-F. and R.C. were pre-pubescent females, while A.D. was a pubescent male. Morgan did not use Hall to gain access to A.D. or to gain the trust of A.D.’s parent; Morgan was A.D.’s father and had approved visits with him as part of a parenting plan. (RP11 1511, 1513-15) Morgan also did not use Hall to gain access to R.C.; Morgan was a close friend of the Carrington family, and R.C.’s grandmother only met Hall a few times. (RP13 1949, 1950) Hall did not “demonstrate sexual acts” to R.C. In fact, Hall was not involved in planning the visit to the trailer when the incidents with R.C. occurred, and was not present either because she was in jail at the time. (RP13 2009; RP16 2418)

The prosecution overstated Hall’s involvement in Morgan’s development of relationships with the three minors, and overgeneralized her participation in the different offenses. If the offenses against A.D. had been tried separately, the evidence of the other charges would not have been cross admissible for showing a common scheme or plan.

The trial court also found that the other offenses would be cross-admissible to show Morgan’s “sexual motivation and intent to sexually abuse children for the purposes of sexual gratification for

the purpose of proving the offense of child molestation[.]” (CP 69)
But that is also incorrect.

A person is guilty of child molestation in the first degree when the person has “sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.083(1). “Sexual contact” is “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2). “Sexual gratification” is not an essential element of child molestation in the first degree; rather, it clarifies the meaning of “sexual contact” to exclude inadvertent touching or contact from being condemned as criminal. State v. Lorenz, 152 Wn.2d 22, 34, 93 P.3d 133 (2004).

A jury may infer sexual gratification from the circumstances of the touching itself, where those circumstances are unequivocal and not susceptible to innocent explanation. See State v. Whisenhunt, 96 Wn. App. 18, 24, 980 P.2d 232 (1999).

For example, in State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986), the defendant was charged with one count of indecent liberties against one child and another count of indecent

liberties against a different child. The trial court denied the defense's motion to sever. 46 Wn. App. at 224. On appeal, this Court held it was an abuse of discretion to deny the motion to sever because evidence of each crime would not have been admissible in a separate trial for the other. 46 Wn. App. at 226. The State claimed the evidence would have been cross-admissible at separate trials to show the touching was done for the purpose of gratifying sexual desire. 46 Wn. App. at 227. This Court rejected the argument, stating:

this is a case where the mere doing of the act conclusively demonstrates the accompanying criminal intent. Here, once the act of touching is proven, it follows that the defendant touched for purposes of sexual gratification.

If Ramirez did not deny touching the sexual or intimate parts of the victim, but rather admitted the touching while claiming it was for a purpose other than his sexual gratification, evidence of other indecent liberties would be relevant to the issue of his intent. Here, to the contrary, because the intent follows from the act itself, intent is not a material issue, and evidence of other misconduct asserted to prove his intent is inadmissible[.]

In short, the jury would certainly be within its province to infer that any touching was for the purpose of gratifying sexual desire without the State resorting to evidence that creates strongly the impression of a general propensity for pedophilia.

46 Wn. App. at 227 (citing State v. Goebel, 40 Wn.2d 18, 240 P.2d 251 (1952); COMMENT, ADMISSION OF EVIDENCE OF OTHER

MISCONDUCT IN WASHINGTON TO PROVE INTENT OR ABSENCE OF MISTAKE OR ACCIDENT: THE LOGICAL INCONSISTENCIES OF EVIDENCE RULE 404(B), 61 Wash.L.Rev. 1213 (1986)).

Likewise, evidence that Morgan had engaged in sexual conduct with R.C. or S.D.-F. would not have been relevant to show that any touching of A.D. was done for the purpose of gratifying sexual desire. The other alleged offenses simply could not have been properly admitted for this purpose in separate trials either.

3. *Joinder Prejudiced the Fairness of the Trial*

Misapplication of ER 404(b) in severance cases compels a new trial where there is a reasonable probability that the error affected the outcome. State v. Watkins, 53 Wn. App. 264, 273, 766 P.2d 484 (1989). Evidence of other misconduct is prejudicial because jurors may convict based on the belief that the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence “inevitably shifts the jury’s attention to the defendant’s general propensity for criminality, the forbidden inference; thus, the normal ‘presumption of innocence’ is stripped away.” Bowen, 48 Wn. App. at 195. The potential for prejudice “is at its highest” in sex cases. Ramirez, 46 Wn. App. at 227 (citing Saltarelli, 98

Wn.2d at 363).

In Ramirez, this Court found that it was reversible error to try two indecent liberties offenses together because proof of one count could not have been adduced at a separate trial for the other. The Court held that “the jury may well have cumulated the evidence of the crimes charged and found guilty, when if the evidence had been considered separately, it may not have so found.” 46 Wn. App. at 228 (citing Drew v. United States, 331 F.2d 85, 88 (D.C.Cir.1964)).

The trial court’s joinder of 10 counts for a single trial encouraged the jury to infer that Morgan had a criminal disposition. Under the circumstances, Morgan meets his burden of demonstrating that a single trial involving all counts was so manifestly prejudicial as to outweigh the concern for judicial economy. Bythrow, 114 Wn.2d at 718. To ensure a fair trial, the charges should not have been joined. The convictions should be reversed.

B. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY CHALLENGE VENUE FOR THE COUNTS PERTAINING TO R.C.

There was no question that the offenses relating to R.C. occurred in Thurston County. (RP13 2008; RP14 2092-93, 2100-01) This information was available to the defense as early as May

24, 2017, when the State filed its motion to join offenses. (CP 17, 24) Even though the defense objected to joining all 10 counts pertaining to the three children for one trial, defense counsel did not raise the venue issue as a reason to dismiss the charges for the incidents against R.C. This failure amounted to a violation of Morgan's constitutional right to effective assistance of counsel and right to be tried in the county where the alleged offenses occurred.

Effective assistance of counsel is guaranteed by both the Federal and State constitutions. U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable probability" means a

probability “sufficient to undermine confidence in the outcome.” State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). “[C]onduct that can be characterized as legitimate trial strategy or tactics cannot form the basis for a claim of ineffective assistance of counsel.” State v. Rockl, 130 Wn. App. 293, 299, 122 P.3d 759 (2005) (citing State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)).

The Washington Constitution also provides that the accused in a criminal case shall have the right not only to a speedy, public trial before an impartial jury, but that the jury be “of the county in which the offense is charged to have been committed.” Wash. Const. art. 1, § 22; see *also* State v. Dent, 123 Wn.2d 467, 479, 869 P.2d 392 (1994). The right to proper venue is not an element of the crime but is instead a constitutional right. Dent, 123 Wn.2d at 479.

Trial and conviction of a defendant in a county other than the one in which the crime allegedly occurred violates Article 1, section 22 and is reversible error. See State v. Carrol, 55 Wash. 588, 591, 104 P. 814 (1909). “[W]here no reasonable jury could have found that venue was proper by a preponderance of the evidence because no facts at trial established venue, this error cannot be

harmless.” State v. Stearman, 187 Wn. App. 257, 272-73, 348 P.3d 394 (2015).

However, because the right to proper venue is a personal privilege, it may be waived by the defendant. State v. Hardamon, 29 Wn.2d 182, 188, 186 P.2d 634 (1947). Generally speaking, a challenge to venue must be brought before trial. Dent, 123 Wn.2d at 480. The defendant must object as soon as he has knowledge upon which to base the objection. CrR 5.1(c); State v. Price, 94 Wn.2d 810, 815-16, 620 P.2d 994 (1980). Failure to timely object constitutes a waiver. Dent, 123 Wn.2d at 480.

Trial counsel’s failure to object to venue fell below an objective standard of reasonableness. That the incidents with R.C. occurred in Thurston County was known by trial counsel several months before the trial started. Venue in Pierce County was clearly improper for those incidents. Counsel should have raised this objection as soon as he became aware of the venue problem, or at the very latest when the State moved to join the charges with the other offenses that occurred in Pierce County. Had counsel raised a venue objection, it would have been granted.

Failure by trial counsel to do so cannot be characterized as a legitimate trial strategy. Trial counsel objected to joining all of the

offenses primarily because the evidence of each offense would not be cross-admissible, and because of a concern that stacking so many charges into one trial would cause additional undue prejudice. (06/12/17 RP 61-62, 68-69, 71-72) But counsel failed to raise the one point that would guarantee a separate trial for the offenses relating to R.C.—that they did not occur in Pierce County.

Had counsel raised a venue objection as to allegations of conduct that occurred exclusively in Thurston County, those charges would have been dismissed. Morgan suffered prejudice because he was instead convicted of those offenses in violation of his constitutional right to be tried in the venue where they occurred. Morgan's convictions on these counts must be reversed.

C. MORGAN'S JUDGMENT AND SENTENCE CONTAINS COST PROVISIONS THAT ARE NO LONGER AUTHORIZED AFTER ENACTMENT OF HOUSE BILL 1783.

Morgan was sentenced on February 23, 2018. The trial court imposed the then-mandatory \$500.00 crime victim assessment fee, \$100.00 DNA database collection fee, and \$200.00 criminal filing fee. (CP 342) The Judgment and Sentence also includes a provision stating that "[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full[.]" (CP 343) The trial court found

that Morgan did not have the financial resources to pay for his appeal and signed an Order of Indigency. (CP 411-12)

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783) amended the legal financial obligation (LFO) system in Washington State. As recently noted by our State Supreme Court:

House Bill 1783's amendments modify Washington's system of LFOs, addressing some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction. For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, it establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction, and it provides that a court may not sanction an offender for failure to pay LFOs unless the failure to pay is willful. Laws of 2018, ch. 269, §§ 1, 18, 7. ... House Bill 1783 amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Laws of 2018, ch. 269, § 6(3). It also prohibits imposing the \$200 filing fee on indigent defendants. *Id.* § 17.

State v. Ramirez, ___ Wn.2d ___, ___ P.3d ___ (2018 WL 4499761 at *6) (Sept. 20, 2018). House Bill 1783's amendments were effective as of June 7, 2018.

In Ramirez, the Court held that these amendments applied prospectively to Ramirez's case because it was still on appeal and

his judgment was not yet final. ___ Wn.2d at ___ (2018 WL 4499761 at *6). The Court remanded his case for the trial court to amend the Judgment and Sentence to strike the criminal filing fee and other improperly imposed LFOs. ___ Wn.2d at ___ (2018 WL 4499761 at *8). Similarly, Morgan’s case is on appeal and his judgment is not yet final, so House Bill 1783’s amendments apply to his case.

The trial court imposed a \$100.00 DNA collection fee. (CP 342) But Morgan has previously been convicted of a felony, so DNA has previously been collected. (CP 340-41) See RCW 43.43.7541 (mandatory DNA fee upon felony conviction).

The trial court also imposed a \$200.00 criminal filing fee, which can no longer be imposed on indigent defendants. (CP 342) Morgan was found to be indigent. (CP 411-12) And the trial court did not conduct an analysis of Morgan’s “ability to pay,” as required by RCW 10.01.160(3) and State v. Blazina, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015), before imposing this now-discretionary LFO.

Finally, the Judgment and Sentence states that interest shall begin accruing immediately. (CP 343) But House Bill 1783 eliminates interest accrual on all non-restitution portions of LFOs.

Like Ramirez, Morgan was sentenced before House Bill 1783 was enacted in 2018, and his case is still on direct appeal. Like Ramirez, Morgan was subjected to LFOs that are no longer authorized under House Bill 1783. Morgan's case should be remanded to the trial court to amend the Judgment and Sentence to strike the improper fees and the interest accrual provision.

V. CONCLUSION

The trial court abused its discretion when it granted the State's motion to join offenses because the evidence of each offense would not have been cross-admissible at separate trials and because the prejudice from joinder outweighed considerations of judicial economy. Furthermore, trial counsel's failure to object to venue, which would have prevented the charges relating to R.C. from being joined for trial, constituted ineffective assistance of counsel. For these reasons, Morgan's convictions should be reversed and his case remanded for a new trial. Alternatively, Morgan is entitled to relief from the statutory changes of House Bill 1783, and his case should be remanded so the trial court can amend the Judgment and Sentence.

DATED: October 31, 2018

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Attorney for Shawn D. Morgan

CERTIFICATE OF MAILING

I certify that on 10/31/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Shawn D. Morgan, DOC# 880281, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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