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Division III
State of Washington
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DOUGLAS SCYPHERS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

There are no assignments of error.

II. POSSIBLE ISSUES

1. Did the trial court err when it declined to sever the bail jumping charge from the sex offenses?
2. Are issues of credibility, including identification, reviewable by the appellate court?
3. Was the Mr. Scyphers properly impeached?
4. Was defense counsel ineffective because he failed to object to the impeachment of Mr. Scyphers?
5. Does RCW 9.94A.701(9) apply where a sentencing court imposes an exceptional sentence?

III. STATEMENT OF THE CASE

For purposes of this response to the motion to withdraw, respondent accepts appellant/defendant's statement of the case.

IV. ARGUMENT

A. THE APPEAL IS WITHOUT MERIT AND SHOULD BE DISMISSED WITHOUT AN AWARD OF APPELLATE COSTS TO THE STATE.

Counsel for appellant has properly noted there are no meritorious issues presented by this appeal. Accordingly, the motion to withdraw should be granted and the appeal dismissed by the court. *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Because this is an

Anders brief, no appellate costs should be awarded against the defendant.

State v. Stump, 185 Wn.2d 454, 374 P.3d 89 (2016).

B. THE TRIAL COURT DID NOT ERR WHEN IT JOINED THE BAIL JUMPING CHARGE WITH THE SEX OFFENSES.

Mr. Scyphers moved the trial court to sever the bail jumping charge that was added to the second amended information from the initial allegations which were all sex offenses. The trial court denied the motion after reviewing briefing and hearing argument from the parties. CP 80; RP 76-85.¹

CrR 4.4(b) provides that offenses should be severed if doing so “will promote a fair determination of the defendant’s guilt or innocence of each offense.” A trial court’s decision to deny a motion to sever counts will only be reversed if the decision was a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

Whether to sever offenses goes hand-in-hand with the initial decision to join the charges. Joinder of offenses is authorized by CrR 4.3(a)(2) when the offenses “are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.” Joinder is appropriate if these criteria are satisfied and a defendant is

¹ There are various transcripts of this matter. The transcript by Terri Cochran consisting of six volumes is the only one referenced herein and is simply referred to as “RP.”

not prejudiced. “Prejudice may result from joinder ... if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition.” *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). However, there are several factors that may diminish the potential prejudice of joinder:

(1) the strength of the state's evidence on each count, (2) the clarity of defenses to each count, (3) the court properly instructed the jury to consider the evidence of each crime, and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined.

State v. York, 50 Wn. App. 446, 451, 749 P.2d 683 (1987) (quoting *State v. Smith*, 74 Wn.2d 744, 755–56, 446 P.2d 571 (1968), *vacated in part on other grounds*, 408 U.S. 934 (1972)).

First, a bail jumping charge is sufficiently connected to the underlying charges to warrant joinder if the bail jump arises directly from the underlying charges and both counts are connected in time. *State v. Bryant*, 89 Wn. App. 857, 866–67, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017, 978 P.2d 1100 (1999). Here, the bail jump occurred approximately two weeks after the State filed an amended information with additional allegations. CP 28-36. Consequently, the bail jump arises directly from the sex offenses and is related in time to those charges.

As such, the issue is whether Mr. Scyphers was unduly prejudiced by the joinder as he argued in his initial motion. As the State acknowledged in its response to the motion to sever, all evidence offered at trial is prejudicial to some degree. RP 81. Here, the evidence of the bail jump was highly probative, and its prejudice was mitigatable under the above listed factors.

First, the court had already found probable cause for each count. Second, defendant did not argue in his motion that he would present conflicting defenses. RP 77-80. Third, the court properly instructed the jury to consider the evidence of each crime separately. RP 958; CP 163. Fourth, and last, the evidence of the underlying sex offenses would be admissible in the bail jump trial to establish consciousness of guilt. *See* ER 404(b). Likewise, evidence of flight prior to prosecution may be admissible to prove consciousness of guilt. *State v. Nichols*, 5 Wn. App. 657, 660, 491 P.2d 677 (1971).

Therefore, the trial court correctly found that joining the bail jumping and the underlying sex offenses would not unfairly prejudice Mr. Scyphers. Consequently, the trial court did not err when it denied defendant's motion to sever and there is no appealable issue.

C. ISSUES OF CREDIBILITY, INCLUDING IDENTIFICATION, ARE QUESTIONS OF FACT FOR THE JURY AND NOT REVIEWABLE BY A TRIAL COURT.

At trial, A.M.² took the stand and testified that Mr. Scyphers assaulted and molested her. In support of its case, the State entered into evidence numerous pornographic photographs that were found on a computer that was seized from Mr. Scyphers' home. A.M. testified that Mr. Scyphers took photos of her partially nude and nude. RP 592-93. Detective Buell identified that A.M. was the subject of the seized photos and that the photos had been taken at the residence where Mr. Scyphers molested A.M. RP 290-91. In several of these photos, male genitalia was also visible. *Id.* Mr. Scyphers denied molesting A.M. or that it was his genitalia in the photos.

A central issue at trial became the identification of the male whose penis was visible in these photos. Ultimately, the jury convicted Mr. Scyphers of the majority of the charges, disregarding his denials. The fact that the jury did not believe him is not a basis for an appeal. Credibility

² Pursuant to General Orders of Division III dated June 18, 2012, stating that victims "known to have been under the age of 18 at the time of any event in the case," the State refers to the victim by initials in abundance of caution. At the time of the offenses, the victim was under the age of 18, but did not report the crimes until after the age of 18. The State would note that in all pleadings below, the victim is identified by her full name.

determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987). The only potential appellate issue is whether there was sufficient evidence to lead a reasonable trier of fact to find beyond a reasonable doubt that the alleged crimes were committed based on the conflicting statements. *Camarillo*, 115 Wn.2d at 71.

As part of his direct testimony, Detective Buell identified certain physical features on the portion of the male's body that was visible in the photos. He then testified that as part of his investigation he had taken photos of Mr. Scyphers genitalia and upper thigh in 2015 and 2017. RP 316-18. Detective Buell proceeded to describe similarities between Mr. Scyphers' genitalia and upper thigh that he believed matched the genitalia and upper thigh visible in the photos with A.M. RP 316-40. He also explained that a mark that was visible in the 2017 photo of Mr. Scyphers was not present in 2015. *Id.*

On cross-examination, defense counsel thoroughly reviewed the photos with Detective Buell and focused on the physical differences between the 2017 photos and the other photos. Defense counsel asked numerous questions about how the 2015 photos were from fewer angles and did not show the full surface area of Mr. Scyphers' penis. Consequently, the

mark in the 2017 photos could have been present in 2015, but not visible to Detective Buell. RP 384-90.

Mr. Scyphers testified and denied ever molesting A.M. RP 731. He also testified that the penis in the photos with A.M. was not his, and that the 2017 photos of the shaft of his penis shows a birthmark that he has always had. RP 731. He went on to testify that his erect penis did not look like the erect penis in the photos with A.M. RP 732.

During Mr. Scyphers' cross-examination, the State went through the photos in question with him and noted that he owned the type of camera that was used to produce the images. The State also called attention to the fact that the mark was only visible in the 2017 photos, after he had been charged, and that Mr. Scyphers and his defense team produced the photos to call into question the identification of the genitalia in the photo with A.M. The State also went over the mole on the thigh and how it closely resembled the mole on Mr. Scyphers' thigh. Mr. Syphers said during cross-examination that the man with A.M. could be anyone. RP 780-87.

In sum, there was plenty of evidence in the records to lead a reasonable trier of fact to find Mr. Scyphers guilty beyond a reasonable doubt because it was his genitalia in the photos, regardless of his denials. Any issue as to his credibility or the credibility of the State's witness is not an appealable issue.

D. THE PROSECUTOR’S IMPEACHMENT OF MR. SCYPHERS BASED ON HIS INCONSISTENT STATEMENTS WAS PROPER, AND DOES NOT CREATE AN ISSUE FOR APPEAL.

The State impeached Mr. Scyphers based on conflicting statements he made during his direct testimony and previous statements he had made in declarations and court filings as part of his divorce. RP 736-49. This impeachment was not improper, and it was not as to collateral matters. Even if it was as to collateral matters, it is not a basis of appeal because defense counsel did not object to the line of questioning and opened the door to it.

It is well settled that a witness may not be impeached on matters collateral to the issues at trial. *State v. Oswalt*, 62 Wn.2d 118, 121, 381 P.2d 617 (1963). A collateral matter is one that serves no evidentiary purpose beyond showing the contradiction. *Id.* However, “a cross-examiner is, within the sound discretion of the trial court, permitted to inquire into collateral matters testing the credibility of a witness.” *Id.* (citing *State v. Anderson*, 46 Wn.2d 864, 285 P.2d 879 (1955)). The cross-examiner is bound by the witness’s answers. *Id.*

Here, Mr. Scyphers testified in his direct examination that he traveled frequently for work and as such could not have abused A.M. with the frequency she claimed. RP 627-29, 701-07. Mr. Scyphers also testified that he was very busy with his businesses, and very successful. However, this testimony directly contradicted his declarations in his divorce

proceedings where he stated that he did not have any income and was unemployed. RP 736-49.

The State's cross-examination confirmed that Mr. Scyphers made conflicting statements, which called into question both his statement that he traveled extensively when A.M. alleged he was abusing her regularly, and the overall credibility of his direct testimony. These were both issues at trial because Mr. Scyphers denied the allegations, and the jury heard conflicting stories from A.M. and Mr. Scyphers.

Even if the cross-examination was as to a collateral matter, it was invited error by Mr. Scyphers. The cross-examination is clearly based on Mr. Scyphers' responses to his counsel's questions during his direct testimony. "[W]hen a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Therefore, the doctrine of invited error applies to this situation. "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial." *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009).

For the reasons explained above the cross-exam was proper and it is not a basis for an appeal.

E. DEFENSE COUNSEL WAS NOT INEFFECTIVE WHEN HE FAILED TO OBJECT TO THE IMPEACHMENT OF MR. SCYPHERS BASED ON MR. SCYPHERS' INCONSISTENT STATEMENTS.

Even if the impeachment of Mr. Scyphers was as to a collateral matter, defense counsel's decision to not object does not rise to the level of ineffective assistance.

In a claim of ineffective assistance of counsel, "[t]he defendant has the heavy burden of showing, after a review of the entire record, that counsel's performance fell below the objective standard of reasonableness after considering all surrounding circumstances." *State v. Sherwood*, 71 Wn. App. 481, 483, 860 P.2d 407 (1993) (citations omitted), *review denied*, 123 Wn.2d 1022, 875 P.2d 635 (1994). "Trial strategy and tactics cannot form the basis of a finding of deficient performance." *State v. Johnston*, 143 Wn. App. 1, 16, 177 P.3d 1127 (2007) (citations omitted). Counsel's decision to object, or not object, is a tactical decision. *Id.* It is a basis for an ineffective assistance of counsel claim only in the most extreme situations where the failure to object is as to testimony central to the State's case. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

Here, there is no evidence that counsel's decision to not object during Mr. Scyphers' impeachment fell below an objective standard of reasonableness. Defense counsel made the tactical decision to not object, so as not to draw undue attention to the inconsistencies in defendant's statements. Defendant has failed to demonstrate the absence of any legitimate, tactical reason for counsel's failure to object. Thus, this is not a basis for appeal.

F. THE COURT IMPOSED AN EXCEPTIONAL SENTENCE OF CONFINEMENT SO THERE IS NO APPEALABLE ISSUE BASED ON THE IMPOSED COMMUNITY CUSTODY.

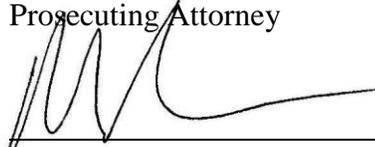
The jury found Mr. Scyphers guilty on counts V-X, and also found him guilty on the special verdict that an aggravating circumstance was involved, which applied to all but the last count. CP 206-16. Given the special verdict, the court sentenced Mr. Scyphers to an exceptional sentence. The sentence includes the statutory maximum confinement and 36 months of community custody. "RCW 9.94A.701(9) applies only to terms of confinement imposed within the *standard range*." *In re McWilliams*, 182 Wn.2d 213, 217, 340 P.3d 223 (2014) (emphasis in original). Since Mr. Scyphers was sentenced to an exceptional sentence of confinement, the statute does not apply and there is no appealable issue with the sentence.

V. CONCLUSION

For the reasons stated, the conviction should be affirmed, the motion to withdraw granted, and the appeal dismissed.

Dated this 12 day of October, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'M. MacRae', written over a horizontal line.

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Attorney for Respondent

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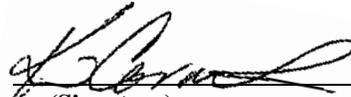
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on October 12, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Dennis Morgan
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(Date)

Spokane, WA
(Place)


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SPOKANE COUNTY PROSECUTOR

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