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Division III
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No. 36539-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO ABONZA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR WHITMAN COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Antonio Abonza was initially charged with a single count of residential burglary for unlawfully entering a fellow student's building. Prior to trial, the State amended the information to charge a count of criminal trespass, but also charged a count of third degree rape involving the same student but for an event several weeks prior to the unlawful entry. Mr. Abonza's motion to sever was denied when the trial court erroneously found the evidence supporting the two offenses cross-admissible. Mr. Abonza subsequently pleaded guilty to the trespass count. He seeks reversal of the rape conviction.

The trial court also erroneously imposed the discretionary \$200 filing fee. In light of continuing indigency, Mr. Abonza asks this Court to strike the fee.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion to sever the counts.

2. To the extent they are considered findings of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusions of Law 2(A), (B), (E), and (F).

3. The trial court erred in imposing the discretionary \$200 filing fee.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Offenses may only be joined in an information where they are of the same character or are based on connected acts. Properly joined counts must be severed when the defendant may suffer prejudice from the joined offenses. Mr. Abonza moved to sever the trespass count from the rape count because they were not of the same character or connected acts and he would suffer prejudice from a joint trial as the evidence supporting the counts was not cross-admissible. Without a complete analysis as required, the trial court found the evidence supporting the counts cross-admissible under ER 404(b) and denied the motion to sever. Is reversal of Mr. Abonza's convictions required where the trial court erroneously denied Mr. Abonza's motion and he established prejudice from the joinder?

2. Discretionary legal financial obligations (LFOs) cannot be imposed where the court has found the defendant to be indigent. The \$200 filing fee is a discretionary LFO. Must this Court strike the imposition of the \$200 filing fee where the court had found Mr. Abonza indigent?

D. STATEMENT OF THE CASE

On April 13, 2018, Anthony Abonza, a student at Washington State University (WSU) in Pullman, was socializing at a bar when he saw Ashley Meyer, who also a student a WSU. RP 173. Mr. Abonza and Ms. Meyer were in a class together during the fall 2017 semester and jointly worked on a project. RP 171. The two spoke briefly. RP 171.

At approximately 1:00 am, Ms. Meyer left the bar and walked home. RP 174. Ms. Meyer had been drinking and was, as she described, very intoxicated. RP 174. Shortly after arriving at home, Ms. Meyer received a text from Mr. Abonza asking to come over. RP 175. Ms. Meyer agreed and the two “hung out” watching a movie on Ms. Meyer’s laptop. RP 175-76. The two discussed Ms. Meyer’s pet hedgehog and she then noticed Mr. Abonza undressing. RP 184. Mr. Abonza sat on the bed next to Ms. Meyer and she either fell asleep or passed out. RP 185.

Ms. Meyer said she awoke around 7:00 am with Mr. Abonza’s hand touching her side. RP 186. She stated she rolled on her back and Mr. Abonza got on top of her. RP 186-87. She claimed Mr. Abonza began to kiss her and she told him she did not want to have sex. RP

189. Ms. Meyer stated that Mr. Abonza began having sexual intercourse with her. RP 187. She said she told Mr. Abonza five times to stop until he finally stopped. RP 187-88. He dressed and Ms. Meyer escorted him out of her apartment. RP 188. Ms. Meyer attempted to contact her best friend to tell her what had happened but her friend did not respond. RP 189-91.

Ms. Meyer again saw Mr. Abonza at the bar on May 1, 2018. RP 193. She did not speak to him and went home shortly after. RP 193.

After she returned to her apartment, Ms. Meyer received a text from her roommate stating that someone had just walked into her room. RP 194. Ms. Meyer then heard someone trying to get into her room, jiggling the door knob, and calling her name. RP 195-96. She recognized the voice as Mr. Abonza's. RP 196. Ms. Meyer texted her roommate, told her she knew who the person was, and did not want him in the building. RP 195-96. The roommate's boyfriend escorted Mr. Abonza out of the building and he was subsequently arrested by Pullman Police. RP 198-99.

Mr. Abonza admitted entering Ms. Meyer's apartment building on May 2, 2018, without permission because he wanted to talk to her. RP 244. He admitted he had been drinking. RP 244. Mr. Abonza stated

that he was intoxicated as well on April 13, 2018, and Ms. Meyer and he began kissing and had consensual sex that night. RP 246. The next morning, he was rubbing Ms. Meyer's body and kissing her. RP 247. He began having intercourse with her, but when she said she did not want to, he stopped. RP 247.

The State charged Mr. Abonza with residential burglary. CP 1-2. The State subsequently filed an amended information charging Mr. Abonza with a count of third degree rape for the incident that occurred on April 14, 2018, and a count of first degree criminal trespass for the incident that occurred on May 2, 2019. CP 9-10. On December 12, 2018, the first day of trial, Mr. Abonza moved to sever the counts for trial because the offenses were not a single scheme or plan, nor were the offenses of a similar character or a connected series of acts. CP 12-21; RP 5-7. The trial court subsequently denied the severance motion. CP 50-52 ("The Court does conclude that judicial economy was served by a single trial on all counts, and in this case you're going to have the same roommates testifying"). Mr. Abonza renewed his motion to sever the following day. RP 26-27.

In order to ameliorate the prejudice he would suffer from a joint trial, Mr. Abonza entered a guilty plea to the criminal trespass count.

CP 27-33; RP 31-35. The court also granted the State's motion, ruling the facts admitted by Mr. Abonza in his guilty plea could be admitted at trial under ER 404(b). CP 51; RP 29-30.

Following a jury trial on the rape count, Mr. Abonza was found guilty as charged. CP 49; RP 295. At sentencing, in addition the \$500 victim penalty assessment and the \$100 DNA collection fee, the court imposed the discretionary \$200 filing fee without any inquiry of Mr. Abonza's ability to pay. CP 85; RP 336.

E. ARGUMENT

1. A failure to sever the offenses was manifestly prejudicial.

a. Properly joined counts must be severed where joinder prejudices the defendant.

Joinder is only proper when two offenses are of the same character or are based on connected acts. CrR 4.3(a). Offenses properly joined under CrR 4.3(a) should be severed if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).¹

¹ CrR 4.4(a)(2) requires a defendant renew a pretrial motion for severance that was overruled "before or at the close of all the evidence." A defendant who fails to renew his motion to sever waives the issue. CrR 4.4(a)(2). Here, Mr. Abonza moved to sever on the first day of trial. RP 6. Mr. Abonza renewed his motion to

However, joinder must not be used in such a way as to prejudice a defendant. Prejudice may result if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition. *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), *overruled on other grounds*, 85 Wn.2d 758, 539 P.2d 680 (1975). If the defendant can demonstrate substantial prejudice from the joinder of offenses, the trial court's failure to sever is an abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990); *State v. Ramirez*, 46 Wn.App. 223, 226, 730 P.2d 98 (1986); *State v. Hentz*, 32 Wn.App. 186, 647 P.2d 39 (1982).

In moving to sever counts, severance is necessary where “a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.” *Bythrow*, 114 Wn.2d at 718. In assessing whether severance is appropriate, a trial court weighs the prejudice inherent in joined trials against the State's interest in

sever at the beginning of the second day of trial. RP 26-27. As a result, Mr. Abonza preserved the severance issue for appeal.

maximizing judicial economy. *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). Factors the trial court considers when assessing prejudice include (1) the strength of the State's evidence with respect to each charge, (2) the jury's ability to keep the evidence separate, (3) the court's instructions to the jury to consider the evidence separately, and (4) the cross-admissibility of the offenses had they not been tried together. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994); *Kalakosky*, 121 Wn.2d at 537.

b. *The evidence on the two offenses was not cross-admissible, thus severance was required.*

The offenses here were neither of the same character nor were they based on connected acts. In addition, the third degree rape count is a sex offense, which is inherently prejudicial when analyzing the propriety of severance. *See State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982); *Ramirez*, 46 Wn.App. at 227 (the "prejudice potential of prior acts is at its highest" in cases involving sexual offenses).

The two charged incidents were separate and distinct. Each count involved a different date of occurrence. Thus, there was no evidence that overlapped from one count to the other. Where the evidence with respect to each charge is separate and distinct, it is easier for the jury to evaluate the pertinent evidence without regard to the

other charges. *State v. Harris*, 36 Wn.App. 746, 751, 677 P.2d 202 (1984).

While consideration of the first three factors seems to favor joinder, analysis of the fourth factor, the cross-admissibility of the counts, leads to the inescapable conclusion that severance of the two counts for trial was required. Initially, the trial court failed to properly consider the admissibility of the counts under ER 404(b) as required.

Whether evidence is admissible under ER 404(b) requires the court to determine: (1) whether the evidence is relevant to prove any of the issues permitted by ER 404(b); (2) whether any prejudicial effect is outweighed by the probative value; and (3) whether limitation of the purpose for which the jury may consider the evidence can be accomplished. *State v. Watkins*, 53 Wn.App. 264, 270, 766 P.2d 484 (1989). The trial court failed to consider any of these factors, merely making a conclusory statement that the counts would be cross-admissible as *res gestae* evidence, or admissible regarding Mr. Abonza's "intent, knowledge, preparation, plan, motive, or absence of mistake." CP 51; RP 16, 29-30.

First, the evidence would not be admissible for the purposes of intent as neither offense, rape nor trespass, have intent as an element.

See Saltarelli, 98 Wn.2d at 364 (where the State intends to offer evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense). That a prior act “goes to intent” is not a “magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].” *Id.* There are other circumstances in which prior acts may properly prove intent beyond mere propensity to act such as using prior acts to show a certain plan, which can imply intent. Such use of prior acts turns on the facts of the acts themselves, not on the propensity of the defendant to commit the acts. *State v. Wade*, 98 Wn.App. 328, 336, 989 P.2d 576 (1999). Such a link was not argued by the State and no such link existed, thus the only use of the prior act evidence was for Mr. Abonza’s propensity to commit the offense.

The evidence also was not admissible to show the absence of mistake. Mistake or accident is not a material issue unless first raised by the defendant. *Ramirez*, 46 Wn.App. at 228. “Evidence of other misconduct that the State offers to prove absence of mistake or accident must directly negate such a defense.” *Id.* Otherwise, evidence of lack of mistake or accident is not relevant and is inadmissible. *Id.* Here, Mr.

Abonza's defense was a general denial. He did not argue mistake or accident. Thus any evidence relating to accident or absence of mistake was irrelevant and, therefore, inadmissible on this ground.

Further, the trial court's conclusion the prior act evidence was admissible as evidence of motive was erroneous. "Motive" is a "[c]ause or reason that moves the will[;] ... [a]n inducement, or that which leads or tempts the mind to indulge in a criminal act." *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981), quoting Black's Law Dictionary 1164 (4th ed. rev. 1968). Motive is distinguishable from "intent," which is the purpose or design with which the act is done. *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995). In the absence of any explanation by the trial court or the prosecution as to how this evidence was logically relevant to motive, the evidence demonstrates little more than a general propensity to violate rules, precisely the purpose forbidden under ER 404(b). *Saltarelli*, 98 Wn.2d at 365.

Finally, the evidence was not admissible as *res gestae*. Under the *res gestae* or "same transaction" exception, evidence of other crimes is admissible "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (internal quotation omitted);

State v. Fish, 99 Wn.App. 86, 94, 992 P.2d 505 (1999). Each act must be “a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.” *Powell*, 126 Wn.2d at 263 (internal quotation omitted). Two acts occurring weeks apart do not explain “the immediate context” of one another.

c. *Mr. Abonza is entitled to reversal of his conviction and remand for a new trial.*

Thus, because proof of one count could not have been adduced at a separate trial for the other, it was error to deny Mr. Abonza’s timely motion to sever. Here, the jury may well have cumulated the evidence of the crimes charged and found guilt, when if the evidence had been considered separately, it may not have so found. *Ramirez*, 46 Wn.App. at 228. Further, despite Mr. Abonza’s guilty plea to the trespass count, the jury may have used the evidence presented regarding this offense to infer a criminal disposition on the part of Mr. Ramirez, from which was found his guilt of the rape. Mr. Abonza must be granted a new trial.

2. Amendments to the statutes authorizing legal financial obligations requires that the \$200 in legal financial obligations against Mr. Abonza be stricken.

In 2018, the law on legal financial obligations changed. Laws of 2018, ch. 269. Now, it is categorically impermissible to impose discretionary costs on indigent defendants. RCW 10.01.160(3). The previously mandatory \$200 filing fee cannot be imposed on indigent defendants. RCW 36.18.020(2)(h).

The Washington Supreme Court has determined that these changes apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). In other words, that the statute was not in effect at the time of the trial court's decision to impose legal financial obligations does not matter. *Id.* at 747-48. Applying the change in the law, the Supreme Court in *Ramirez* ruled the trial court impermissibly imposed discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.*

Here, Mr. Abonza was found to be indigent for trial and the trial court subsequently found him indigent for the purpose of appeal. CP 110-11. Despite Mr. Abonza's indigency, the trial court imposed the \$200 filing fee. CP 100. In light of Mr. Abonza's indigency, this Court should strike the \$200 filing fee. *Ramirez*, 191 Wn.2d at 747-48.

F. CONCLUSION

For the reasons stated, Mr. Abonza asks this Court to reverse his convictions and remand for a new trial. Alternatively, he asks this Court to strike the \$200 filing fee or remand for resentencing.

DATED this 18th day of October 2019.

Respectfully submitted,

s/Thomas M. Kummerow

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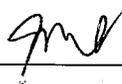
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v.)	NO. 36539-5-III
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)	
APPELLANT.)	

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