

APR 28 2006

79988-1

WASHINGTON STATE COURT OF APPEALS  
DIVISION I

STATE OF WASHINGTON,	)	NO: 56812-4-I
	)	
Respondent,	)	
	)	APPELLANT'S
	)	STATEMENT OF
	)	ADDITIONAL
	)	GROUND FOR
	)	REVIEW
v.	)	RAP 10.10
	)	
Eric Bahl,	)	
	)	
Appellant.	)	

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COMES NOW the appellant, Eric Bahl, and moves the court to consider the following additional grounds for review that were not addressed by my appellate attorney. These errors are all rooted in the lower court's refusal to try separately the distinct allegations made by the different accusers.<sup>1</sup>

I. Additional Ground 1: ERROR IN JOINDER / DENIAL OF SEVERANCE

I assign error to the trial court's joinder of, and its denial of my motion to sever, the indecent exposure charge from the allegations involving rape (rape, burglary, trespass: *hereinafter referenced together as* rape allegation). This error was extremely prejudicial, and that prejudice is easily ascertained. Consider, for example, if you were deciding where to get a haircut, or which mechanic you

<sup>1</sup> There were two separate accusers involving distinct and unrelated accusations. It is my contention, as it was at trial, that the allegations made by these different accusers should have been tried separately.

were going to have work on your car; would it make a difference in your decision whether the person you were considering was alleged to have publicly exposed his penis to an unsuspecting neighbor? Of course it would.

In this case, the jury was being asked to decide whether or not I committed the crime of rape, and the first thing they were told about me was that I had publicly exposed myself to my neighbor. It is impossible to suggest that the jury was not prejudiced by this information; the charges should have been severed.

My appellate attorney believes this is not an issue because I was not convicted of indecent exposure (the jury hung, and then the state dismissed).

However in State v. Ramirez, 46 Wn.App. 223, 730 P.2d 98 (1986), the court reversed a conviction due to improper joinder in a trial in which the defendant was convicted of one charge and acquitted of the other. As noted in my trial attorney's motion:

“In Ramirez, the defendant was charged with two counts of indecent liberties for allegedly fondling two different children - both playmates of his child - on two separate occasions. The court denied motions to sever and instructed the jury that it must decide each count separately. The jury convicted on one count and acquitted on the other. In reversing the trial court for erroneously denying the motion to sever, the court held as dispositive the lack of cross-admissibility of the evidence had separate trials been

granted for each offense.<sup>2</sup> The court reasoned that presenting the two charges to the same jury “creates strongly the impression of a general propensity for pedophilia. This falls squarely within the lesson of *State v. Saltarelli* that an intelligent application of ER 404(b) is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.” *Id.*, at 227.”

Clearly, the fact that the jury could not reach a verdict on the indecent exposure charge does not render the error of improper joinder mute.

Denial of my motion to sever / improper joinder is a valid issue and my conviction should be reversed, for both the following reasons:

- A. Specifically, the charges should have been severed as a matter of law because CrR 4.3(a) does not allow charges to be joined if the charges are not of the same or similar character or part of a single scheme or plan. The two charges in my trial were not the same character, and there was no common scheme or plan. These issues are fully briefed in the pretrial motions that were filed and argued by my trial attorney, and which are contained in the clerk’s papers.
- B. The trial court should have granted my motion to sever under CrR 4.4(b) and it was error to deny the motion to sever. This issue is briefed in my trial attorney’s many motions filed and argued at the lower court, which are contained in the clerk’s papers.

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<sup>2</sup> The court held that “because proof of one count could not have been adduced at a separate trial for the other, it was error to deny defendant’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. And, despite the acquittal on count one, the jury may have used the evidence presented to prove count one to infer a criminal disposition on the part of Ramirez, from which guilt was found his guilt on count two.” *Ramirez*, at 227, *citing Drew v. United States*, 331 F.2d 85, 88 (D.C.Cir. 1964).

## II. Additional Ground 2: PROSECUTORIAL MISCONDUCT

The prosecutor committed misconduct and irretrievably prejudiced my right to a fair trial when he presented improper argument to the jury in his closing argument.

To understand the extraordinary inappropriateness of the prosecutor's comments, it is important to remember the context in which the comments were made: the severance issue was argued at least five different times. Each time my attorney – in both his written motions and his oral argument – argued that it would be prejudicial to allow this joinder to go forward because the jury would be likely to cumulate the evidence and because they would pass judgment based on a perceived propensity rather than the actual evidence. The prosecutor asserted that he would not be arguing propensity evidence, and the judges instructed the prosecutor to not argue propensity.

Then, the first words out of the prosecutor's mouth in the rebuttal phase of his closing argument were: 'Two different woman on the same night make these allegations against this man. Coincidence?'

My attorney objected and the judge sustained it. My attorney asked for a curative instruction and the judge complied. But by then, the cat was out of the

bag. My attorney's objection – and the Judge's instruction – served to do little more than highlight the issue. Given the history of this issue in this case – the extensive arguments, the briefing, the motions in limine – the prosecutor had to know that to argue propensity in his closing was inexcusable.

This prosecutorial misconduct, when taken in context of the sensitivity and attention of the issue in question, should result in a new trial.

### III. Additional Ground 3: DENIAL OF MISTRIAL MOTIONS

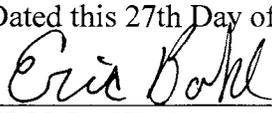
Following the prosecutorial misconduct described above, my attorney moved for a mistrial. The court should have granted that motion.

That was the second time my attorney had moved for a mistrial based on the same issue. The first should have been granted as well.

### CONCLUSION

For the reasons stated in the above three additional grounds for review, I respectfully ask this court to recognize the error committed by the trial court, reverse my conviction, and grant me a new trial.

Dated this 27th Day of April, 2006.

 by   
ERIC BAHL, by and through his agent Glenn Bahl

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DECLARATION OF GLENN BAHL

1. My name is Glenn Bahl. I am the father of the appellant, Eric Bahl.
2. Eric is incarcerated by the Washington State Department of Corrections. However, he was recently sent to be housed in prison in Arizona. Thus, he had a difficult time trying to prepare his additional grounds for review paperwork.
3. I have spoken with Eric many times by telephone. He has told me that the issues contained in the attached brief are the additional issues he would like the court to review in considering his appeal. He asked me to have a brief prepared outlining these issues, and he asked that I review it, sign it, and submit it to the court.
4. It is Eric's desire that these additional grounds for review be considered in his appeal.

Declared to be true under penalty of perjury under the laws of the state of Washington.

Signed in the city of Marysville, Washington.

Glenn Bahl  
Glenn Bahl

Apr 28-06  
Date

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*[Handwritten signature]*