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No. 71388-4-I

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

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUN 27 AM 11:46

STATE OF WASHINGTON,

Respondent,

V.

BOBBY COLBERT,

Appellant.

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

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I. INTRODUCTION

Colbert's personal restraint petition (PRP) is founded on State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013). However, Lynch's holding that a trial court may not instruct on an affirmative defense where the defendant objects to the instruction and wants to proceed on a failure of proof defense is not a new rule. The rule is dictated by existing precedent.

Colbert may not rely on the minority's concurrence either. Lynch does not set out a rule that instructing the jury on the affirmative defense of consent in a trial on rape in the second (or first) degree shifts the burden of proof for an element of the crime – forcible compulsion – to the defendant. Only a minority of three justices took that position and the majority, with five justices concurring, did not overrule State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989) or State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), both of which hold that instructing on an affirmative defense of consent to rape does not shift the burden of proof from the State to the defendant.

Further, Colbert has already challenged the affirmative defense instruction as erroneous in his direct appeal and in a prior PRP. In both cases, however, Colbert failed to offer reasoned analysis for his challenge or establish actual prejudice, as he fails to do here.

II. ISSUES PRESENTED FOR REVIEW

1. Is the rule that instructing on an affirmative defense of consent where the defendant is charged with rape in the second degree dictated by precedent existing, and should the court therefore deny Colbert's PRP?

2. Does a position advanced by a minority of the justices establish a new rule, and if not, should the court therefore deny Colbert's PRP?

3. Should the court deny Colbert's PRP because he has not met his burden of showing actual prejudice for any alleged error?

III. STATEMENT OF THE CASE

A. Procedural history.

On January 31, 2005, Colbert was tried on two charges of rape, one in the first the degree and one in the second degree, involving two different victims on two different dates. CP 1-2.

The State proposed the following instruction:

> Consent is a defense to a charge of rape in the second degree. This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 39.

Colbert objected:

> The other objection the defense has is that, is the inclusion of the State's 45.04. And my objection is based upon, with exception to the last statement, I think it's, while inconsistent, the second sentence preponderance of the evidence means you must be persuaded. I think that's appropriately September 4th in another instruction. But that is kind of a structural objection. And I don't think that that is a misstatement of the law at all. But then it says if you find that the defendant has established this defense it will be your duty to return a verdict of not guilty. I think that that's inappropriate because -- I guess I'll cite State v. Camara for this proposition. I think that that decision was in artful. And it didn't quite – it dealt confusingly with the burdens as to consent and whether the State has a burden and so forth or whether the defense had the burden. I do believe it uses language to the effect that the defendant had the burden, but I don't think that the defendant has to establish the defense. When I think of establishing defenses I think of putting on witnesses, exhibits, and so forth and that this sentence is inappropriate because it can confuse the jury. They could go back into the deliberation room and think well, what did the defendant do? What did his attorney do? What exhibits did he admit? What testimony did he put on that established this defense regardless of what the State did? And it's my presumption that the defense doesn't have to do anything. If the defense is established by the State's witnesses, by the State's exhibits and so forth. Then, not only can the defense argue it, but the defense can [ ] establish it. So it's unnecessarily confusing for the jury and I would object to it.

2/8/05 RP2 at 5-6.[1]

---

[1] The State will refer to the volumes of the verbatim report of proceedings by using the date followed by "RP" and the page number. On dates where

The trial court understood that Colbert was concerned about the jury interpreting the instruction as precluding him from using evidence offered by the State to prove the sex was consensual:

> THE COURT: All right. I think you're concerned about the consent defense instruction is properly addressed by paragraph 5 of Instruction Number 1. And if you're concerned about that, that paragraph what you should focus on, every party is entitled the benefit of the evidence whether produced by that party or by another party.

2/8/05 RP2 at 7. Colbert did not dispute the trial court's interpretation.

Colbert was convicted. On direct appeal, Colbert argued that, with respect to the charge of rape in the second degree, the affirmative defense instruction shifted the burden of proof. Appendix A (Appellant's Opening Brief, COA no. 56298-3-I at 16, filed on or about December 19, 2006) ("Thus, despite the consistency of Mr. Colbert's defenses to the charges, the burden of proof not only shifted, but also varied between the charges[.]") In his Reply, Colbert implied that the State had shifted the burden of proof for the charge of rape in the second degree, count 2, to him Appendix B (Appellant's Reply Brief, COA no. 56298-3-I at 2). In neither brief, however, did Colbert attempt to offer any authority or analysis to support this position. Colbert's direct appeal was denied. Appendix C (Unpublished Opinion filed July 24, 2006).

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two volumes of transcripts were prepared, the first will be cited as "RP1" and the second as "RP2."

In his petition for review (PFR) Colbert conceded:

> . . . As to the conviction for second degree rape, however, the State's significantly bolstered Ms. Peterson's account with testimony from the emergency room physician who related his physical exam and Ms. Peterson's description of the crime. The jury also heard from police officers who interviewed Ms. Peterson and friends and family members who observed her immediately after the incident or noted changes in her demeanor during the following months. The State's case on the second degree rape charge was thus much stronger than the State's case on the third degree rape count.

Appendix D (PFR at 10). Colbert's petition was denied. Appendix E (Order, no. 79105-8 dated May 1, 2007).

Colbert's first PRP, filed January 14, 2008, sought reversal on grounds that his appellate counsel was ineffective for, in part, not addressing error caused by the affirmative defense instruction:

> H. An objection was brought to the trial court's attention <u>specifically</u> addressing ERRONEOUS JURY INSTRUCTION. (RP 5 and 6, Exhibits 13 and 14). This issue was omitted in the direct appeal of the present case.")

Appendix F at 9 (COA case no. 61160-7, without exhibits). Colbert did not further elaborate on the alleged error in his first PRP. Thus, the State responded: "There is insufficient showing by Colbert that the use of the instruction created error or that he was prejudiced thereby." Appendix G at 16 (State's Response to Personal Restraint Petition, without exhibits). The

court of appeals denied Colbert's PRP, holding "As to Colbert's claim of ineffective assistance of appellate counsel, Colbert's assertions are too conclusory to demonstrate that he was prejudiced by counsel's performance." Appendix H (Order of Dismissal, no. 61160-7-I filed July 16, 2008)

Colbert's second PRP, filed October 21, 2010, was dismissed on November 17, 2010. See Order Dismissing Personal Restraint Petition, cause no. 66284-8-I (copy not attached).

This is Colbert's third PRP.

B. Testimony regarding count two, rape in the second degree involving victim K.P.

> . . . Count two at the jury trial was rape in the second degree by forcible compulsion on March 18, 2004, where the victim was K.P. . . .
>
> . . .
>
> K.P. then testified as follows. She said that she met Colbert through her boyfriend. She described an incident in early March, 2004, when she and Colbert were alone in her house and Colbert exposed himself to her and asked her for sex. K.P. refused, and Colbert left when she asked him to.
>
> K.P. further testified that on March 18, 2004, she was alone with Colbert at his apartment and he began to kiss her. She told him "no" and did not kiss him back. K.P. said that she tried to push Colbert away but he over-powered her. Colbert then unfastened K.P.'s pants despite her efforts to stop him. When she tried to pull her pants back on, Colbert put his arm in the small of her back, bent

> her over at the waist, and put his penis in her vagina.
>
> K.P. then went to a friend's apartment and told her what happened. K.P. reported the incident to the police [very shortly thereafter].
>
> . . .
>
> Colbert testified that . . . K.P. initiated sex with him and that his sexual intercourse [with her] was consensual.

Appendix C.

IV. ANALYSIS

"Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." In re Hagler, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). Collateral relief, therefore, is limited to the consideration of serious and potentially valid claims. In re Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990).

Generally, a PRP is time barred when filed more than one year after the mandate issues. RCW 10.73.090. The one year time bar does not apply "to a petition or motion that is based solely on one or more of the following grounds:

> There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court,

> in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard."

RCW 10.73.100(6).

RCW 10.73.100 has been interpreted as entirely consistent with the federal retroactivity analysis:

> Under the Teague [v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)] analysis, a new rule of criminal procedure applies retroactively to all cases pending on direct review or not yet final. A new rule, however, will not apply retroactively to final judgments unless the rule places certain kinds of private conduct beyond the State's power to proscribe or requires the observance of procedures implicit in the concept of ordered justice. A new rule is considered one that "'breaks new ground or ... was not *dictated* by precedent existing at the time the defendant's conviction became final.'" Moreover, if "'reasonable jurists could disagree on the rule of law, the rule is new.'"

In re Pers. Restraint of Haghighi, 178 Wn.2d 435, 443, 309 P.3d 459, 463, (2013) (citations omitted).

Because Colbert seeks collateral relief through a PRP, he has the burden of establishing error and, because the alleged error is constitutional in nature, actual prejudice. This showing must be made by a preponderance of the evidence. *See* In re Pers. Restraint of Eastmond, 173 Wn.2d 632, 638-639, 272 P.3d 188 (2012); In re Personal Restraint of

Gentry, 1137 Wn.2d 378, 409, 972 P.2d 1250 (1999) (The petitioner has to "prove actual prejudice from the language of the instruction, as is his burden in a personal restraint petition.") .

Actual prejudice must be proven by the petitioner even for constitutional errors which can never be considered harmless on direct appeal.[2] In re St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992); In re Haverty, 101 Wn.2d 498, 504, 681 P.2d 835 (1984) ("Before this court grants a personal restraint petition, the petitioner must prove that the constitutional errors worked to his "actual and substantial prejudice."); In re Hagler, 97 Wn.2d at 823 ("On direct appeal, the burden is on the State to establish beyond reasonable doubt that any error of constitutional dimensions is harmless. . . . On collateral review, we shift the burden to the petitioner to establish that the error was not harmless[.]")

Thus, relief should only be granted if Colbert shows that State v. Lynch announced a new rule and that the alleged constitutional error had substantial and injurious effect or influence in determining the jury's

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[2] The only constitutional errors that do not require the petitioner to make a showing of actual prejudice are: (1) improper denial of the right to appear pro se; (2) total deprivation of counsel; (3) trial by an actually biased judge; (4) closed adult criminal trial; and (5) constitutionally deficient reasonable doubt instruction. See Sullivan v. Louisiana, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078, 2081-83 (1993); Arizona v. Fulminante, 499 U.S. 279, 113 L. Ed. 2d 302, 111 S. Ct. 1246, 1265 (1991); Sherman v. Smith, 89 F.3d 1134, 1138 (4th Cir. 1996), cert. denied, 117 S. Ct. 765 (1997). None of these errors are at issue here.

verdict. *See* Brecht v. Abrahamson, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993).

A. Lynch does not establish a new rule of retroactive application regarding the use of an affirmative defense instruction over defense objection.

Relying on the court's decision in State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013), Colbert's third PRP argues for reversal of his 2005 conviction because: (1) the state imposed the affirmative defense of consent on him by requesting the consent instruction over his objection and (2) the consent instruction impermissibly relieved the state of the burden of proving the elements of the crime of rape in the second degree.

State v. Lynch, which involved a direct appeal, does not establish a rule of retroactive application for a PRP.

1. Lynch's holding that the State cannot force an affirmative defense on a defendant is not a new rule and was dictated by precedent existing at the time of Colbert's conviction.

Lynch holds that an instruction that identifies consent as an affirmative defense should not be given when the defendant intends to rely solely on a lack of proof defense.

Lynch was charged with rape in the second degree. The State proposed a jury instruction that stated, in part, that "[t]he defendant has the burden of proving that the sexual intercourse or sexual contact was consensual by a preponderance of the evidence." State v. Lynch, 178

Wn.2d at 490. "Lynch objected to the proposed consent instruction on the ground that he had the right to control his defense and because he did not want to bear the burden of proving consent." State v. Lynch, 178 Wn.2d 487, 489, 309 P.3d 482, 483 (2013). In effect, although Lynch testified that the sexual contact was consensual, he chose to defend against the charge utilizing a "failure of proof" defense. State v. Lynch, at 493. Lynch's conviction was reversed on direct appeal because "[i]nstructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense." State v. Lynch, 178 Wn.2d at 492.

Lynch does not announce a new rule. That "forcing an unwanted defense on a criminal defendant may in many cases slip into a violation of the Sixth Amendment" follows from Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). *See* State v. Floyd, 178 Wn. App. 402, 412, 316 P.3d 1091 (2013) *citing* Faretta v. California, 422 U.S. at 819 ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.") As the Coristine court elaborated, this rule was well-established by 1983:

> The Sixth Amendment right to control one's defense encompasses the decision to present an affirmative defense. We first recognized this

> principle in [*State v. Jones*, 99 Wn.2d 735, 664 P.2d 1216 (1983)]. In Jones, the trial court entered a plea of not guilty by reason of insanity over the defendant's objection and allowed the introduction of evidence of insanity after the defense presented its case. *Id.* at 739. The jury found the defendant to be insane at the time he committed the crime. *Id.* at 738.
>
> We granted the defendant a new trial. Relying on Faretta, we observed that "a defendant has a *constitutional* right to at least broadly control his own defense." Jones, 99 Wn.2d at 740. In Faretta, the United States Supreme Court held the Sixth Amendment grants criminal defendants the personal right to self-representation at trial. 422 U.S. at 819. We noted that Faretta stands for "'the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount.'" Jones, 99 Wn.2d at 740 (quoting United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979)); *see also* North Carolina v. Alford, 400 U.S. 25, 33, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) ("[Courts] should not 'force any defense on a defendant in a criminal case.'" (quoting Tremblay v. Overholser, 199 F. Supp. 569, 570 (D.D.C. 1961))).

State v. Coristine, 177 Wn.2d 370, 376-77, 300 P.3d 400, 401 (2013).

State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983), cited by the Coristine court, held that a "defendant's fundamental right to make decisions about the course of the defense is mandated by 'respect for [his or her] freedom as a person.'" State v. Jones, 99 Wn.2d at 742 *quoting* Frendak v. United States, 408 A.2d 364, 376 (D.C. 1979).

Thus, the rule that an affirmative defense cannot be forced on a defendant was – if not well established in 2005 – dictated by precedent existing at that time.

The rule was recognized by Colbert's trial defense counsel who raised the objection during argument to the trial court. Similarly, Colbert challenged the instruction as having shifted the burden of proof to him in his direct appeal and alleged that the instruction was erroneous in his first PRP. However, Colbert failed to provide the court with a reasoned analysis or citation to authority, which precluded the court of appeals from considering the issue. See RAP 10.3; Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("We will not consider arguments that are not supported by pertinent authority or meaningful analysis."); Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) (issue not briefed deemed waived).

Having already challenged the affirmative defense instruction Colbert is precluded from further review of alleged error. A collateral attack will not be considered if it presents grounds that have been previously heard and determined in the direct appeal or in a prior collateral attack. An issue will be barred on this ground if:

> (1) The same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) and prior

> determination was on the merits, and (3) the ends of justice [1] would not be served by reaching the merits of the subsequent application.

In re Haverty, 101 Wn.2d at 503. Simply revising a previously rejected legal argument neither creates a new claim nor constitutes good cause to reconsider the original claim. In re Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990) ("Jeffries III") (citations omitted). For example, a challenge to a jury instruction upon one theory will bar a later challenge to the same jury instruction under a different theory. See, e.g., In re Medina, 109 F.3d 1556, 1566 (11th Cir. 1997); Campbell v. Blodgett, 997 F.2d 512, 517-19 (9th Cir. 1992), cert. denied, 510 U.S. 1215 (1994).

2. The minority's concurrence in Lynch does not establish a new rule of retroactive application regarding burden shifting.

The position that instructing on the affirmative defense of consent violates a defendant's right to due process and relieves the prosecution of the burden of proving the element of forcible compulsion beyond a reasonable doubt is only found in the concurring opinion that was signed by just three justices. Thus, it does not establish a new rule that would apply to Colbert's PRP.

A minority concurring opinion is not binding precedent. *See* State v. Lessley, 59 Wn. App. 461, 466, 798 P.2d 302 (1990) ("a plurality opinion, three Justices concurring in the majority opinion, one Justice

concurring in the result only, and four Justices dissenting. . . is of limited precedential value."); Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wn.2d 413, 428, 780 P.2d 1282 (1989) ("Thus, in *Alderwood, a 5-member majority of this court rejected the argument now posited by the NDPC* that the free speech provision of our state constitution does not require "state action.") (Italics in original.)

Further, nothing in the majority opinion supports Colbert's argument. The majority did not discuss the minority's position and did not overrule State v. Camara, 113 Wn.2d 631, 642-43, 781 P.2d 483 (1989) or State v. Gregory, 158 Wn.2d 759, 801-802, 147 P.3d 1201 (2006), which hold that instructing the jury on the affirmative defense of consent does not relieve the State of its burden of proof.

Gregory is instructive. Gregory argued "that requiring him to prove consent by a preponderance of the evidence violated due process because the jury could have become confused, thinking that it could acquit *only* if consent is proved by a preponderance of the evidence, even if a reasonable doubt may have been raised with regard to the element of forcible compulsion." State v. Gregory, 158 Wn.2d at 801-802. The Gregory court declined to overrule Camara, explaining:

> . . . The jury in a first degree rape case must be convinced that none of the evidence presented raises a reasonable doubt that sexual intercourse

> occurred as the result of forcible compulsion. *See* Martin v. Ohio, 480 U.S. 228, 233, 107 S. Ct. 1098, 1102, 94 L. Ed. 2d 267 (1987). Therefore, so long as the jury instructions allow the jury to consider all of the evidence, including evidence presented in the hopes of establishing consent, to determine whether a reasonable doubt exists as to the element of forcible compulsion, the conceptual overlap between the consent defense and the forcible compulsion element does not relieve the State of its burden to prove forcible compulsion beyond a reasonable doubt. We decline to overrule Camara and conclude that the jury instructions here complied with due process.

State v. Gregory, 158 Wn.2d at 803-804.

Because Lynch did not overrule Camara or Gregory and only a minority of three justices discussed the position Colbert relies upon, Lynch does not establish a new rule about burden shifting that would allow the court to accept another PRP from Colbert.

3. Compelling reasons exist for not treating Lynch's minority concurrence as a rule requiring retroactive application.

When the legislature amended the elements for rape in the second degree in 1975, it removed the requirement that the act of sexual intercourse was "committed against the person's will and without the person's consent." *See* 1973 Wash. Laws (1st Ex. Sess.) ch. 154, sec. 122, at 1198 (repealed 1975). Therefore, the State does not have to prove a lack of consent to convict a defendant of rape in the second degree. *See* RCW 9A.44.050 ("A person is guilty of rape in the second degree when . . . the

person engages in sexual intercourse with another person: (a) By forcible compulsion . . . ") In contrast, the legislature still requires the State to prove a lack of consent to convict a defendant of rape in the third degree. *See* RCW 9A.44.060. Thus, the intent shown by the legislature's 1975 amendment replacing the element of consent with forcible compulsion for rape in the second degree, the plain language of the rape in the second degree statute, and the principle of *expressio unis est exclusion alterius*,[3] leads to the conclusion that the State does not have the burden to disprove consent beyond a reasonable doubt to convict a defendant of rape in the second degree.

Legal commentaries written contemporaneously with the 1975 rape reform legislation reinforce this conclusion. One commenter observed that, in Washington's 1975 revision, the legislature "define[d] consent in a positive manner whereas previously, the *lack* of consent was an essential element of rape." Helen Glenn Tutt, Washington's Attempt to View Sexual Assault as More than a "Violation" of the Moral Woman - The Revision of the Rape Laws, 11 Gonz. L. Rev. 145, 154 (1975) (italics in original) ["Tutt Comment"]. In a section titled *"First and Second*

[3] The expression of one thing is the exclusion of another. Black's Law Dictionary at 521 (5th Ed., 1979)

Degree Rape- Removal of 'Lack of Consent' as an Element of the Crime,"

Tutt elaborated on the significance of this change:

> First and second degree rape basically require violence or a threat of violence for conviction. An important change from prior law is the omission of any language pertaining to consent unless the victim is physically or mentally Incapacitated. The law previously made lack of consent an element of the crime, and the burden was on the state to prove lack of consent. This wording emphasized the victim's behavior rather than the defendant's.
>
> Under the new statute, the emphasis is on proof of forcible compulsion. This focuses attention on the defendant's acts rather than the victim's.
>
> . . .
>
> Narrowing the issues to credibility and forcible compulsion rather th.an consent is especially important [in the context of second degree forcible rape] to effecting the policy of the new law.

Tutt Comment at 156-57.

The Tutt comment contrasted first and second degree forcible rape with third degree rape, where "lack of consent is mentioned for the first time." Tutt Comment at 157. Noting that one type of third degree rape occurs when sexual intercourse with a nonspouse is without forcible compulsion but also without consent, the commenter observed that "[i]n this situation, the state must prove lack of consent, and consent is thus at issue." Tutt Comment at 158.

Washington's changes were again examined in 1980. The article elaborated on policy considerations:

> Nonconsent is one of the main evidentiary issues around which the trial revolves. As a practical matter, a prosecutor still must demonstrate nonconsensual intercourse whether this was because of actor's force, victim's resistance, or both. The same kinds of evidence are used to establish the crime regardless of the statutory formulation and language. As a legal matter, though, a prosecutor under the new legislation no longer has the burden of proving victim resistance or nonconsent. He is relieved of the risk of nonpersuasion as to that element.
>
> Thus, although nonconsent is the basic substantive element of the crime and its evidentiary proof at trial remains unchanged, the standard chosen as its operational indicator has important legal implications. The new law channels the jury's focus, via instructions, on the culpability of the actor rather than the response of the victim. It may render the jury's exercise of its nullification power less likely because of stereotypes about rape and rape complainants. In addition, with [the] victim's conduct no longer a separate formal element of the crime, there is less legal justification for evidentiary rules unique to rape law based on the victim's past sexual actions. The symbolic value of the shift should not be minimized. The reform statutes announce society's interest in accurately identifying perpetrators of rape, not in reinforcing traditional assumptions regarding appropriate behavior of virtuous women.

Wallace D. Loh, The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study, 55 Wash. L. Rev. 543,557 (1980) ["Loh Article"] (italics added).

In drafting its own rape reform laws, Washington's legislature looked to the "sweeping revision" of prior law that Michigan had already

undertaken. Loh Article, at 552-53. Michigan was "[t]he first state to shift the focus of rape law from the victim's nonconsent to the defendant's forceful or violent conduct." Cynthia Ann Wicktom, Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws, 56 Geo. Wash. L. Rev. 399, 418 (1988) ["Wicktom Note"]. Like Washington, Michigan eliminated nonconsent as an element of forcible rape:

> Unlike traditional rape law, Michigan's criminal sexual conduct statute is silent on the issue of consent. Michigan's courts have interpreted the statute's silence to mean that nonconsent is not an element of the crime. This interpretation relieves the prosecution of the burden of proving the victim's nonconsent beyond a reasonable doubt in its case-in-chief.

Id. at 419[4] See People v. Stull, 127 Mich. App. 14, 19-20, 338 N.W.2d 403 (1983) (nonconsent is not an element of criminal sexual conduct by force or coercion); People v. Jansson, 116 Mich. App. 674, 682, 323 N.W.2d 508 (1982) (prosecution is not required to prove nonconsent as an independent element of criminal sexual conduct by force or coercion).

Requiring the State to disprove consent beyond a reasonable doubt where rape by forcible compulsion is charged would refocus the jury on

---

[4] The issue of nonconsent is not completely absent from a case of criminal sexual conduct in Michigan. A Michigan defendant may "either present evidence of consent to disprove the prosecution's evidence of force or raise consent as a defense to admittedly forceful conduct." Wicktom Note, at 419.

the *victim's* conduct, and would represent a major step backward in the prosecution of rape. The legislature in 1975 adopted a more progressive approach; due process does not require a return to the previous legal scheme.

In sum, based on the plain language of the rape statutes, the changes made by the legislature, and the course taken by another state to which the Washington legislature looked in reforming its own rape laws, the legislative intent is clear – nonconsent is no longer an element of forcible rape, and the State need not disprove nonconsent beyond a reasonable doubt.[5] It follows that an instruction on the affirmative defense of consent does not shift the burden of proof on an element of the crime – forcible compulsion – to a defendant.

B. Colbert's conclusory claim of prejudice fails to meet his burden of showing actual prejudice.

Colbert seeks relief under a PRP. He is not challenging the instruction on direct appeal. Therefore, he must show that the alleged error caused him actual prejudice.

A petitioner is only entitled to relief in a personal restraint petition if he can demonstrate as to each claimed constitutional error, which was not previously raised, that he was actually prejudiced by the error. In re

[5] The minority position from Lynch may be addressed by the Supreme Court in State v. W.R. (No. 88241-6).

Rice, 118 Wn.2d 876, 884, 828 P.2d 1086, cert. denied, 113 S. Ct. 421 (1992) ("Rice II"); In re Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983). If the petitioner does not demonstrate actual prejudice his or her petition will be dismissed. In re Grisby, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

Colbert makes no effort to show actual prejudice. Instead, he argues an odd conclusion:

> In a "he said, she said" case such as the prosecution's case against Colbert, the affirmative defense instruction creates a significant risk that the defendant may be convicted based on evidence falling short of proof beyond a reasonable doubt. Accordingly, Colbert's claims should be reviewed in state court because the consent instruction allows for conviction of a non-existent crime. Because Colbert may show that he was convicted of a non-existent crime, he may show a fundamental constitutional error that actually and substantially prejudiced him.

Colbert's Brief in Support of Personal Restraint Petition at 19.

Contrary to Colbert's conclusion, his defense at trial, as explained by his defense counsel to the jury during closing argument, was consent. 2/8/05 RP at 37 ("the defense in this case is consent.")

Colbert had to embrace the affirmative defense of consent and not rely on a failure of proof defense because of the obvious and logical deduction the evidence presented. Colbert exposed himself once to K.P. in her bedroom, but did not get in trouble for it. The jury would have understood that Colbert thought K.P. would not report the rape either.

Thus, Colbert avoids addressing the detailed trial testimony – "significantly bolstered" as Colbert conceded in his petition for review of the denial of his direct appeal – about the rape's impact on K.P.'s behavior and how it proved forcible compulsion beyond a reasonable doubt.

Granting a PRP is appropriate if the petitioner has proven actual prejudice, and granting a reference hearing is appropriate where the petitioner makes the required prima facie showing "but the merits of the contentions cannot be determined solely on the record." In re Pers. Restraint of Yates, 177 Wn.2d 1, 18, 296 P.3d 872 (2013) *citing* In re Pers. Restraint of Hews, 99 Wn.2d at 88. However, to establish the prima facie showing required for a reference hearing, a petitioner must offer "the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations." In re Pers. Restraint of Yates, 177 Wn.2d at 18 *citing* In re Pers. Restraint of Rice, 118 Wn.2d at 885-86 (Mere "[b]ald assertions and conclusory allegations" are insufficient to justify a reference hearing.)

As in his first PRP where he first challenged the affirmative defense instruction, Colbert again fails to set out and discuss the relevant facts and as a result, he fails to make the necessary showing of actual prejudice. As a consequence, he also fails to show that prejudice could be determined from the record or through a reference hearing.

V. CONCLUSION

For the reasons addressed above, the court should deny Colbert's PRP.

RESPECTFULLY SUBMITTED this 25th day of June, 2014.

RICHARD A. WEYRICH
Skagit County Prosecuting Attorney

By: _____
A. O. DENNY, WSBA #14021
Deputy Prosecuting Attorney

DECLARATION OF DELIVERY

I, Karen Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Bobby Darrell Colbert, DOC #879561, addressed as Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 26th day of June, 2014.

Karen Wallace

Karen Wallace, DECLARANT

APPENDIX A

COA No. 56298-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BOBBY COLBERT,

Appellant.

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

The Honorable Susan Cook

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL.

A jury convicted Appellant Bobby Colbert of one count of rape in the third degree and one count of rape in the second degree. On appeal, Mr. Colbert argues the trial court abused its discretion in denying his multiple motions to sever the two unrelated charges. The prejudice resulting from this error warrants reversal and remand.

B. ASSIGNMENT OF ERROR.

The trial court abused its discretion when it denied Mr. Colbert's motion to sever the two charges for trial.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

Severance of multiple counts is necessary where severance promotes a fair determination of guilt or innocence on each offense. In determining whether to sever multiple counts for trial, a court must consider: (1) the strength of the State's evidence on each count; (2) the clarity of defenses to each count; (3) instructions to the jury describing the limited purpose for which it may consider the evidence on each count; (4) whether evidence on one count would be admissible to prove another count if the two had been tried separately; and (5) the concern for judicial economy. Here, the strength of the State's evidence on each count

was nominal, the defenses were clear as to each incident, and the evidence from either count would not have been cross-admissible. Did the court abuse its discretion in denying Mr. Colbert's repeated motions to sever?

D. STATEMENT OF THE CASE.

1. Count I. On July 22, 2003, Appellant Bobby Colbert and his friend, Corey Rankins, met Brandi Jones and her friend, Crystal Cyrus, at a mall. 2/1/05RPA 4, 6.[1] The four spoke for ten to fifteen minutes, then exchanged telephone numbers. Id. at 8. Later that night, Ms. Jones and Ms. Cyrus called Mr. Colbert and Mr. Rankins and the four agreed to meet again at the mall the next day. Id. at 12, 14.

On July 23, 2003, Mr. Colbert and Mr. Rankins met the women at the mall, and the four left in Mr. Rankins's car. Id. at 16. The four drove around, and eventually Mr. Rankins left the group for a period of time. Id. at 17. Mr. Colbert and the women then drove around the area in Mr. Rankins's car. Id. at 20. According to Ms. Jones, after Mr. Rankins rejoined the group, he drove them to

[1] There are several verbatim reports of proceedings, cited herein by date, followed by page number. The February 1, 2005, transcript consists of two volumes, cited as "2/1/05RPA" and "2/1/05RPB." The February 7, 2005, is similarly cited.

an area behind a building and parked the car near some railroad tracks. Id. at 21. Ms. Jones testified no one was in the area at that time. Id.

Mr. Rankins and Ms. Cyrus then went for a walk, leaving Ms. Jones alone with Mr. Colbert. Id. at 22. Ms. Jones got into the back seat of the car with Mr. Colbert and the two spoke about various things. Id. at 22-25. Mr. Colbert began to kiss Ms. Jones. Id. at 25. Ms. Jones testified that she did not kiss Mr. Colbert back, but he nevertheless continued to kiss her. Id. at 25-27.

After this went on for five minutes, according to Ms. Jones's testimony, Mr. Colbert began to take Ms. Jones's pants off. Id. at 28. Ms. Jones testified that she pushed Mr. Colbert away with her hand and told him to stop. Id. at 29. Mr. Colbert then took his pants off and engaged in sexual intercourse with Ms. Jones. Id. at 31, 42. Ms. Jones said she told Mr. Colbert "no" more than ten times during the course of the incident. Id. at 42. She also testified that she was crying after Mr. Colbert took her pants down. Id. at 43-44. Later that night, Ms. Jones told someone, not Ms. Cyrus, about the incident. Id. at 48. A few days later, Ms. Jones went home to her mother, who called the police and reported the incident. Id. at 50.

In his testimony, Mr. Colbert corroborated much of Ms. Jones's testimony regarding how they met and how they ended up at the railroad tracks. 2/4/05RP 59, 63, 80. Mr. Colbert added that the four had smoked marijuana while driving around after leaving the mall. Id. at 66. Mr. Colbert testified once the car was parked at the railroad tracks, Ms. Jones "immediately" began physical contact with Mr. Colbert and the two began kissing. Id. at 81. Mr. Colbert testified at that point, Mr. Rankins and Ms. Cyrus walked away. Id. at 83. According to Mr. Colbert, once they were alone, both had their pants down and Ms. Jones initiated sexual contact. Id. at 85. He acknowledged that she said "no" during intercourse, but explained that she was referring to his positions or motions, and that she also said "yes" when the motions were agreeable to her. Id. at 87-88. After intercourse, Mr. Colbert told Ms. Jones he did not want to be her boyfriend, as he already had a girlfriend, and she began crying. Id. at 91.

2. Count II. In early March 2004, Mr. Colbert was at a neighbor's house, Kelly Peterson. 2/1/05RPB 42. Ms. Peterson testified that when her boyfriend left to pick up dinner, Mr. Colbert exposed himself to her and asked for "just one night." Id. Ms.

Peterson refused, explaining she could not do that to her boyfriend and asked Mr. Colbert to leave which he did. Id. at 42-43.

On March 17, 2004, Ms. Peterson went to Mr. Colbert's apartment to borrow some cigarettes. 2/1/05RPB 37, 45. Ms. Peterson testified that Mr. Colbert motioned her into the kitchen and gave her three cigarettes. Id. at 47-48. Ms. Peterson said that after she thanked him, he grabbed onto the belt loops of her pants and against asked for "one time." Id. at 48-49. Ms. Peterson testified that Mr. Colbert then began to kiss her and she did not kiss him back. Id. at 50. She also said she tried unsuccessfully to push Mr. Colbert away. Id. at 70. She testified that Mr. Colbert unbuttoned and unzipped her pants and that she rebuttoned and rezipped the pants. Id. at 71. Ms. Peterson said Mr. Colbert got her pants unzipped and unbuttoned at the same time and placed his hands on her hips. Id. at 71, 74. Ms. Peterson testified she said repeatedly "no" and "stop." Id. at 72. She also stated she was unable to leave the kitchen. Id. at 75. Ms. Peterson testified that she was unable to move because Mr. Colbert's arm was on her back. Id. at 76-77. Over Ms. Peterson's verbal objections, Mr. Colbert put his penis into her vagina. Id. at 78. Ms. Peterson testified she never agreed to have sex with Mr. Colbert. Id. at 80.

After the incident, she ran to a friend's apartment nearby and told her the story. Id. at 81. Later that day she called the police and reported the incident. Id.

Mr. Colbert recalled that as to the alleged "exposure" incident, after Ms. Peterson's boyfriend left the bedroom to buy dinner, Ms. Peterson closed and locked the bedroom door, then she took off his pants and engaged in oral sex with Mr. Colbert. 2/7/05RPA 70, 71. Mr. Colbert testified that this occurred again a few days later. Id. at 80. According to Mr. Colbert, Ms. Peterson told him she wanted to "go all the way," but they did not. Id. at 84-85. As to March 17, 2004, Mr. Colbert recalled Ms. Peterson coming into his apartment, uninvited, and the two of them smoked cigarettes, then she initiated sexual contact in the kitchen. 2/4/05RP 116-17. After the consensual sexual encounter, Mr. Colbert took a shower and asked Ms. Peterson to leave the door open on her way out. Id. at 119-23.

3. Trial proceedings. The State charged Mr. Colbert with one count of "rape in the third degree (lack of consent)," in violation of RCW 9A.44.060(1)(a) and with one count of "rape in the second degree (forcible compulsion)," in violation of RCW

9A.44.050(1)(a).[2] CP 1-2. Mr. Colbert's repeated motions to sever the counts were denied and the charges were tried together. CP 7-10; 7/30/04RP 2-10 (pre-trial severance motion); 2/1/05RPA 53 (motion to sever and motion for mistrial after Ms. Jones's testimony); 2/1/05RPB 54-61 (motion to sever after Ms. Peterson's testimony); 2/1/05RPB 84; 2/3/05RP 100-09. A jury convicted Mr. Colbert of both counts. CP 45-46.

The court imposed concurrent standard range sentences. CP 49, 51; 3/31/05RP 10-11. This appeal timely follows. CP 77-78.

E. ARGUMENT.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. COLBERT'S MOTIONS TO SEVER THE TWO COUNTS AGAINST HIM.

1. Severance is required where it is necessary to promote a fair determination of guilt or innocence.

CrR 4.3(a) permits two or more offenses of similar character to be joined in one trial. Offenses properly joined under CrR 4.3(a), however, may 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). The failure of the trial court to sever counts is reversible only upon a showing that

[2] A count of indecent liberties – of which Mr. Colbert was ultimately acquitted – was severed before trial and is not part of this appeal. CP 2, 76.

the court's decision was a manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990) (footnotes omitted). While Washington has a liberal joinder rule, "joinder must not be utilized in such a way as to prejudice a defendant." State v. Harris, 36 Wn.App. 746, 749-50, 677 P.2d 202 (1984) (citing State v. Smith, 74 Wn.2d 744, 466 P.2d 571 (1968), vacated in part, 408 U.S. 934 (1972)). Washington courts have recognized that joinder of offenses is deemed "inherently prejudicial." State v. Ramirez, 46 Wn.App. 223, 226, 730 P.2d 98 (1986) (citing Smith, supra).

The principle underlying severance is "that the defendant receive a fair trial untainted by undue prejudice." State v. Bryant, 89 Wn.App. 857, 865, 950 P.2d 1004 (1998). Even where joinder is legally permissible, the trial court should not join offenses for prosecution in a single trial where joinder prejudices the accused. Id. Prejudice will result if a single trial invites the jury to cumulate evidence to find guilt or to otherwise infer criminal disposition. State v. Watkins, 53 Wn.App. 264, 268, 766 P.2d 484 (1989) (citing Smith, 74 Wn.2d at 754-55). "A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent

feeling of hostility engendered by the charging of several crimes as distinct from only one." Harris, 36 Wn.App. at 750.

When assessing whether undue prejudice results from joining separate offenses, a court must consider several factors: (1) the strength of the prosecution's evidence with respect to each charge, (2) the clarity of the defenses regarding each count; (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). Finally, and "residual prejudice" must be weighed against the need for judicial economy. Id. at 63 (citing State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993)).

In the instant case, the joint trial of wholly separate rape allegations caused substantial prejudice to Mr. Colbert. The State's evidence as to each count was not strong and evidence of either incident would not have been admissible had the cases been tried separately. Mr. Colbert's defense to each count was clear – both women consented to sexual relations with him. But due to the nature of the charges, it was highly likely the jury cumulated the evidence against Mr. Colbert to convict him of both counts, as set forth below. Because Mr. Colbert was unduly prejudiced by the

joinder of these two unrelated rape allegations, the trial court abused its discretion in denying his repeated motions for severance.

2. Severance was necessary and appropriate in Mr. Colbert's case. Because the factors established by caselaw weigh in favor of severance in Mr. Colbert's case, the trial court abused its discretion in denying Mr. Colbert's motions to sever.

a. The relative strengths of the cases favored severance. In Kalakosky, the defendant moved to sever five counts of rape. 121 Wn.2d at 529. The Supreme Court noted that although the methods of approaching the women was the same, "each victim described quite a different episode." 121 Wn.2d at 537.[3] Each incident was located in a different area and involved varying types of confinement, weapons and assaults. Id. at 537-38. In Kalakosky, the Supreme Court found the State's case strong for each of the five counts, as corroborating evidence supported

[3] In the first count, the assailant taped the victim's eyes, tied her hands, and raped her at gun and knifepoint in a trailer. Id. at 537. In the second case, the victim was raped in a car while blindfolded, her mouth duct tapped, and her hands tied. Id. In another case, the victim was raped in her home at gunpoint and the assailant threatened to kill a child. Id. In the fourth case, a woman was kidnapped, blindfolded, her hands tied with a bandana, and she was raped in an abandoned house and assaulted with a gun. Id. at 538. In the last case, the victim was kidnapped at gunpoint, and heard a gun "click" a gun" before her assailant attempted to rape her in an alley. Id.

each conviction. 121 Wn.2d at 538-39. In the first case, a sleeve of a shirt found tied around the victim's neck matched a shirt later discovered in the defendant's trailer. Id. at 538. The second victim was able to identify a portion of the vehicle which matched the defendant's vehicle and duct tape, used in the incident, was located in the defendant's home. Id. As to the third charge, the defendant's DNA matched the DNA discovered in semen at the victim's house. Id. The fourth victim was able to describe a white pickup and bandana, both of which the police connected to the defendant. Id. at 539. Lastly, in the fifth offense, the police located a bandana with the hair similar to the victim's in his vehicle. 121 Wnh.2d at 539. The Kalakosky Court concluded,

> Given that the crimes were not particularly difficult to "compartmentalize", that the State's evidence on each count was strong, and that the trial court instructed the jury to consider the crimes separately, we conclude that the trial court was well within its broad discretion in finding that the potential prejudice did not outweigh the concern for judicial economy.

121 Wn.2d at 539.

On the other hand, where the evidence is not uniformly strong, severance may be necessary to ensure a fair trial. State v. Hernandez, 58 Wn.App. 793, 800, 794 P.2d 1327 (1990). In Hernandez, the defendant was charged with three robberies of

three different businesses on three different dates. Id. at 795. Each charge was based on eyewitnesses whose identifications varied as to reliability. Id. at 800. The Hernandez court found significant prejudice likely resulted from joinder of the offenses: "It is apparent to us that where the prosecution tries a weak case or cases, together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case." Id. at 801.

Mr. Colbert's case is similar to Hernandez. While the allegations against Mr. Colbert were weak and consisted of both women claiming Mr. Colbert engaged in sexual relations without consent, the State's cases differed in strength. As to the Jones incident, Ms. Jones and Mr. Colbert were the only eyewitnesses and two additional police witnesses. 2/1/05RPB 198-202; 2/3/05RP 73-76, 83-88. In contrast, in the Peterson incident, in addition to Ms. Peterson, the State brought in Ms. Peterson's friend and boyfriend who testified as to Ms. Peterson's actions after the incident. 2/1/05RPB 213-17; 2/3/05RP 147, 150-51. The State also brought in an emergency room doctor who examined Ms. Peterson and testified, at length, as to what Ms. Peterson told him had happened. 2/3/05RP 33-43. Two police officers also testified

as to their involvement on the Peterson case, one of whom described taking Ms. Peterson to the hospital and taking a rape kit into evidence, the other who said Ms. Peterson cried when he interviewed her. 2/3/05RP 64-69; 2/3/05RP 97. Finally, Ms. Peterson's mother testified about Ms. Peterson's room and whether or not the door could be locked. 2/7/05RPB 91-96.

Because the State brought in additional sympathetic witnesses in the Peterson case – the emergency room doctor, her mother, and two of her friends – there was a distinct danger that the jury would bolster their feelings regarding the Jones incident which lacked such supporting witnesses. Unlike Kalakosky, there was no "smoking gun" evidence to demonstrate Mr. Colbert had committed either or both of the offenses charged.

As in Hernandez, a danger existed that the jury would find each count fortified by the fact that Mr. Colbert was accused of engaging in non-consensual sexual relations with two different women within a four month period of time in Mount Vernon. Although the additional witnesses in Ms. Peterson's case could not shed light on the actual nature of the incident between Mr. Colbert and Ms. Peterson, the volume of witnesses was plainly an attempt

by the State to bolster not only Ms. Peterson's claims, but also Ms. Jones's.

Because the relative strengths of the cases against Mr. Colbert differed, the joinder of the cases for trial unduly prejudiced Mr. Colbert and encouraged the jury to find Mr. Colbert had a propensity to engage in unwanted sexual activity with younger female acquaintances.[4]

b. The "clarity of defenses" weighed in favor of severance. While Mr. Colbert's defenses were consistent – that both Ms. Jones and Ms. Peterson consented to sexual intercourse with him – the charges themselves required different understandings of consent and the burden of proof.

In the Jones incident, Mr. Colbert was charged with third degree rape, requiring the jury to find in pertinent part, beyond a reasonable doubt, "That Brandi L. Jones did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct." CP 32. The jury was instructed: "Consent means that at the time of the act of sexual

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4 See e.g., State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.3d 697 (1982) (danger of propensity evidence especially high in sex cases); State v. Johnson, 90 Wn.App. 54, 63, 950 P.2d 981 (1998) (unfair prejudice induced by evidence of prior rape conviction, provoking emotional, rather than rational verdict).

intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse." CP 35. Thus, in order to convict Mr. Colbert of the third degree rape of Ms. Jones, the jury had only to consider and find Ms. Jones expressed a lack of consent by words or conduct, beyond a reasonable doubt.

The charge regarding Ms. Peterson was not so straightforward. Mr. Colbert was charged with second degree rape by forcible compulsion for the incident involving Ms. Peterson. CP 2. As to that count, the jury was instructed:

> Consent is a defense to a charge of rape in the second degree. This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 39. Thus, in considering Mr. Colbert's consent defense to this charge, the jury had to determine whether Mr. Colbert showed, by a preponderance of the evidence, that Ms. Peterson consented to their sexual encounter.

If the jury found, by a preponderance of the evidence, that Ms. Peterson consented, a verdict of not guilty as to second degree rape was required. But under the instructions, the jury was then to

consider the lesser crime of third degree rape if it could not find Mr. Colbert guilty of the second degree rape charge involving Ms. Peterson. CP 40-41. This required the jury to again consider, as it was previously instructed on the Jones matter, if the prosecution showed, beyond a reasonable doubt, that Ms. Peterson did not consent to sexual intercourse and demonstrated that lack of consent by words or conduct. CP 41, 35.

Thus, despite the consistency of Mr. Colbert's defenses to the charges, the burden of proof not only shifted, but also varied between the charges, undoubtedly confusing the jurors' deliberations.

c. The court instructed the jury to consider each charge separately, generally favoring joinder. In the instant case, the jury was instructed:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 42. Mr. Colbert acknowledges this instruction has been approved of by appellate courts in the context of severability determinations. Bythrow, 114 Wn.2d 723; State v. Cotten, 75

Wn.App. 669, 688, 879 P.2d 971 (1994), rev. denied, 126 Wn.2d 1004 (1995).

d. The charged conduct with regard to each individual count was not cross-admissible, supporting severance of the counts. Cross-admissibility considerations involve evaluating whether the evidence of various offenses would be admissible to prove the other charges if each offense was tried separately. Ramirez, 46 Wn.App. at 226. In Ramirez, this Court considered the trial court's decision to join two counts of indecent liberties. Id. at 224. The State argued the evidence was cross-admissible to prove the element of sexual gratification. Id. at 225. Recognizing the defendant denied touching either complainant, this Court found the evidence would not have been admissible had there been separate trials. Id. at 226. Accordingly, this Court reversed Ramirez's convictions and remanded for a new trial. Id. at 232.

Here, in analyzing Mr. Colbert's motion to sever, the trial court recognized it was unlikely that evidence of each incident would have been admitted in the other trial, had the trials been severed. 2/1/05RPB 61. Because the evidence was not cross-admissible, the joint trial of these separate offenses created an improper impression of a "general propensity" toward criminal acts

of nonconsensual sexual intercourse, supporting severance of the trials. Ramirez, 46 Wn.App. at 227.

e. The prejudice engendered by joining Mr. Colbert's charges far exceeded any concerns for judicial economy. Interests of judicial economy will be balanced against the accused's interest in receiving a fair trial free of improper taint from unrelated charges. Russell, 125 Wn.2d at 68. The primary concern underlying review of a severance decision is whether evidence of one crime taints the jury's considerations of another charge. Bythrow, 114 Wn.2d at 721.

Joining Mr. Colbert's two counts in one trial did little to conserve judicial resources. As recognized by the trial court, none of the evidence regarding the Jones case would have been admissible in the Peterson case, and vice versa, had the cases been tried separately. 2/1/05RPB 61. Judicial economy did not favor a joint trial as only one police officer was involved in both cases and could have been brought in to testify at two separate trials. 2/3/05RP 74-97. Other than that one officer, all of the witnesses were separate and distinct between the counts, making the likelihood of a repetition of evidence nominal had the charges been properly severed.

On the other hand, the prejudice created by the joint trial was significant. Mr. Colbert's charges were wholly unrelated; the prosecutor made it a point to ask the complainants whether they knew each other and they testified they did not. 2/1/05RPA 52; 2/1/05RPB 83. Nonetheless, there were similarities between the offenses making them difficult for the jury to compartmentalize. Each complainant was a younger, female acquaintance of Mr. Colbert's; each smoked cigarettes with him; according to Mr. Colbert, each showed she was attracted to him. 2/1/05RPA 3, 5; 2/1/05RPB 37-38; 2/4/05RP 60-61, 66, 68, 111, 116. In each case, Mr. Colbert spoke tenderly to the women during sexual intercourse, calling the women "Baby." 2/1/05RPA 27; 2/1/05RPB 50. The jury, hearing about two separate, yet similar, accounts of non-consensual sexual intercourse with Mr. Colbert, was much more likely to convict. In contrast, had the court properly severed the counts, any conviction(s) resulting would have been untainted by the unrelated, yet damaging evidence of the other encounter.

In contrast to Kalakosky, where corroborating physical evidence connected the accused to each of five rape charges, in Mr. Colbert's case, the only evidence against him came from the complainants. Rather than carefully considering one woman's

word against Mr. Colbert's, the jury was instead invited to base its verdict on propensity evidence. The evidence presented led the jury to believe Mr. Colbert regularly engaged in non-consensual sex with younger women. No reasonable jury could help but be swayed by the cumulation of such testimony, despite any weaknesses in the individual cases. Given the joint trial and the testimony, the jury was forced to believe Mr. Colbert routinely committed sexual assaults against young women.

This sort of prejudice demands severance to protect the accused's right to a fair trial. While interests of judicial economy are important, they cannot trump the accused's right to due process, nor society's interests in seeing the accused receive a fair trial with a just outcome. Bryant, 89 Wn.App. at 865.

Here, the interests of judicial economy were outweighed by Mr. Colbert's interest in a fair trial with a just outcome, thus judicial economy was not the definitive factor to the determination of severability in this case.

3. Reversal is required. Mr. Colbert requested severance of the charges before the trial started, as well as multiple times during the course of the trial when the prejudice of the joint trial progressively worsened his prospects for a fair trial. CP 7-10;

7/30/04RP 2-10; 2/1/05RPA 53; 2/1/05RPB 54-61; 2/1/05RPB 84; 2/3/05RP 100-09. A trial court's failure to grant severance requires reversal when the danger of prejudice from the evidence of the various counts deprives the accused of a fair trial. Harris, 36 Wn.App. at 752. As set forth above, the jury was unable to render a fair verdict since the trial was tainted by the admission of substantially similar propensity evidence demonstrating Mr. Colbert's proclivity to engage in casual sexual relations with younger women. Under the circumstances of this case, the trial court's denial of Mr. Colbert's numerous severance motions constituted a manifest abuse of discretion requiring reversal and remand for new, separate trials. Id.

F. CONCLUSION.

For the reasons set forth above, Mr. Colbert respectfully requests this Court reverse his convictions and remand his case for new, separate trials. If Mr. Colbert does not prevail in this appeal, he asks this Court to deny any request for costs.

Respectfully submitted this 16th day of December, 2005.

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APPENDIX B

COA No. 56298-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BOBBY COLBERT,

Appellant.

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

The Honorable Susan Cook

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

THE LOWER COURT'S FAILURE TO SEVER MR. COLBERT'S COUNTS REQUIRES REVERSAL.

Offenses should be severed where "severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). A trial court's failure to sever counts is reversible where the court's decision was a manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990) (footnotes omitted). Severance is guided by the notion that a defendant should receive a fair trial, untainted by "undue prejudice." State v. Bryant, 89 Wn.App. 857, 865, 950 P.2d 1004 (1998).

As set forth in the Opening Brief, Appellant Bobby Colbert contends the trial court's denial of his numerous motions to sever was a manifest abuse of discretion requiring reversal by this Court. While a trial court's "careful evaluation" of the factors to be considered in a severance motion is significant, a careful evaluation of the factors does not equate to a proper ruling on the motion to sever. RB at 10. Mr. Colbert asks this Court to recognize the trial court's analysis was faulty, requiring remand.

1. The "clarity of defenses" factor favors severance. In part, Respondent claims Mr. Colbert failed to articulate the trial court error in evaluating the "clarity of defenses." Respondent's Brief (RB) at 14. In the Opening Brief, Mr. Colbert explained, at length, the differing jury instructions necessary to consider each count which created an obfuscation of the defenses presented here. Appellant's Opening Brief (AOB) at 14-16. Because the actual charges involving each complainant varied, the court gave three separate jury instructions relating to the defense of consent. CP 32, 35, 39. As to Count II, the count involving Ms. Peterson, the instructions placed the burden on Mr. Colbert to establish, by a preponderance of the evidence, that Ms. Peterson consented to sexual intercourse, in order for the jury to acquit him of that charge. CP 39. In contrast, in Count I, the instructions required the jury to consider whether the State proved, beyond a reasonable doubt, that Ms. Jones did not "clearly express" her consent to sexual relations with Mr. Colbert by actual words or conduct. CP 32, 35. Thus, as to Count I involving Ms. Jones, the burden of proof remained on the State to prove, beyond a reasonable doubt, a lack of consent by Ms. Jones, and that burden was never shifted to Mr. Colbert, in contrast to the other charge.

Considering the similarities between the stories told by the complainants, but the differing burdens of proof, the "clarity of defenses" factor is not as easily resolved as Respondent imagines. RB at 14-15. Rather, the jury was asked to take the jury instructions defining consent and third degree rape, and determine, beyond a reasonable doubt, that Ms. Jones did not use words or conduct showing her agreement to engage in sexual relations with Mr. Colbert, before finding him guilty of that charge. CP 32, 35. The jury was simultaneously asked to determine if Mr. Colbert established, by a preponderance of the evidence, that Ms. Peterson had, by words or conduct, consented to sexual activity with him. CP 35, 39. If the jury found Mr. Colbert demonstrated that Ms. Peterson consented to sexual activity, it was then asked to consider the lesser included offense of third degree rape, which then required the jury to consider whether the State proved beyond a reasonable doubt that Ms. Peterson did not consent. CP 40-41. These instructions are circular in and of themselves, but when compounded with the instructions given for Count I, it is evident that the "clarity of defenses" factor properly weighed in favor of severance of Mr. Colbert's charges.

2. The standard jury instruction for considering each count separately was insufficient in this case. Although the jury was given the standard instruction to consider each count separately, due to the circular and/or internally contradictory instructions regarding the evidence and the burdens of proof, even this instruction was difficult for the jury to follow. As such, this factor, too, weighs in favor of severance.

3. The evidence presented was not easy to compartmentalize, thus favoring severance. Finally, Respondent asks this Court to adopt the trial court's view of the jury's ability to compartmentalize Mr. Colbert's alleged misdeeds. RB at 17-18. Mr. Colbert concedes the incidents involved two separate complainants in two separate locations at two separate times. This, however, is not the linchpin to compartmentalization. Another factor which must be considered is the length of the trial as it impacts the jury's ability to retain and keep distinct the evidence related to each charge. Bythrow, 114 Wn.2d at 721 (citing United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978), cert denied, 439 U.S. 1074 (1979)). Where the issues are straightforward and a trial "lasts only a couple of days, the jury can reasonably be

expected to compartmentalize the evidence." Bythrow, 114 Wn.2d at 721 (citing Brady, 579 U.S. at 1128).

Here, Mr. Colbert's trial lasted 6 days and included 10 different witnesses, some of whom testified on multiple days, and one of whom was called by both parties. 2/1/05RP 36-53; 2/3/05RP 122-28. Given the complexities surrounding the differing burdens of proof, which evidence was associated with which incident, and the length of Mr. Colbert's trial, it is not clear the jury could compartmentalize all of the issues it needed to in order to fairly consider the cases against Mr. Colbert. Further, the jury's ability to compartmentalize the allegations was tainted by the similarities between the cases. And, although Respondent concedes the evidence in each case was not cross-admissible had the cases been tried separately, the jury's consideration of damning testimony from two young acquaintances of Mr. Colbert's was likely to settle in the minds of jurors and make them think the allegations were more likely than not true. RB at 16-17.

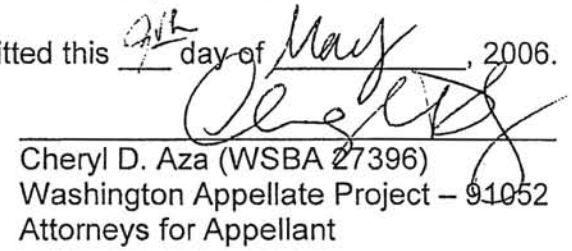
4. Remand for separate trials is the appropriate remedy. As set forth in the Opening Brief, it is clear the prejudice to Mr. Colbert caused by trying his cases together was significant. The interest in judicial economy was outweighed by Mr. Colbert's right to a fair

trial, untainted by the prejudice resulting from the repetitive nature of the testimony in his trial. Where a court erroneously fails to sever multiple counts, the appropriate remedy is remand. State v. Ramirez, 46 Wn.App. 223, 228, 232, 730 P.2d 98 (1986).

B. CONCLUSION.

For the reasons set forth above and in the Opening Brief, Mr. Colbert respectfully requests this Court reverse his convictions and remand his case for new and separate trials.

Respectfully submitted this 9th day of May, 2006.



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APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 56298-3-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
BOBBY D. COLBERT,	)	
	)	
Appellant.	)	FILED: July 24, 2006

PER CURIAM. -- A jury found Bobby Colbert guilty of one count of rape in the third degree and one count of rape in the second degree. The two counts involved different victims and events that occurred on different dates. Colbert appeals, arguing that the trial court abused its discretion in denying his motion to sever the counts for trial. Finding no error, we affirm.

FACTS

Bobby Colbert was charged with three sex offenses. Count one was rape in the third degree by lack of consent on November 29, 2004, where the victim was B.J. Count two was rape in the second degree by forcible compulsion on March 18, 2004, where the victim was K.P. Count three was indecent liberties against a physically helpless individual on June 26, 2004.

Following a hearing on Colbert's motion to sever the counts for trial, the trial court ordered that the charge of Indecent Liberties be severed from the other two counts.

At Colbert's trial on the rape charges, the State first put forth its evidence regarding B.J. She testified that she first met Colbert at a shopping mall on November 28, 2003. She saw Colbert again at the mall the next day. B.J. was with a female friend and Colbert was with a male friend. The four of them left the mall together in Colbert's friend's car and parked in an isolated area. Colbert and B.J. sat in the back seat of the car while the other two went for a walk. Colbert began to kiss B.J. and she pushed him away. Colbert pulled B.J.'s pants off and she pushed him away and told him to stop. Colbert then took his own pants down, got on top of her so that she could not move, and put his penis in her vagina. B.J. testified that she told Colbert "no" more than 10 times during the incident.

B.J. testified that she told an acquaintance about the incident that night. A few days later, B.J. told her mother about the incident and reported it to the police.

After B.J.'s testimony, the defense renewed the motion to sever and the trial court denied the motion.

K.P. then testified as follows. She said that she met Colbert through her boyfriend. She described an incident in early March, 2004, when she and Colbert were alone in her house and Colbert exposed himself to her and asked her for sex. K.P. refused, and Colbert left when she asked him to.

K.P. further testified that on March 18, 2004, she was alone with Colbert at his apartment and he began to kiss her. She told him "no," and did not kiss him

back. K.P. said that she tried to push Colbert away but he over-powered her. Colbert then unfastened K.P.'s pants despite her efforts to stop him. When she tried to pull her pants back on, Colbert put his arm in the small of her back, bent her over at the waist, and put his penis in her vagina.

K.P. then went to a friend's apartment and told her what happened. K.P. reported the incident to the police the next day.

After the State rested, Colbert renewed the motion to sever. The trial denied the motion, ruling in pertinent part,

> Here we have, at least in my view, at this point, pretty strong testimony by both of the complaining witnesses that is detailed and fairly compelling. Obviously we haven't heard the defense's case yet. But at this point I have to say that the State's case on both cases is pretty strong. I can't say one is particularly weaker than the other. ...
>
> The second factor is clarity of the defenses that we're going to propose. ... He testified to both, that in each case the women consented. I don't see there's any embarrassment to him having these cases joined. It doesn't interfere with his defense at all.
>
> ...
>
> The next thing that needs to be considered is whether the jury is able to compartmentalize the evidence in such a way that they can reasonably be expected to make a separate decision on each count. What do we have here? We have different victims with different names. Acts occurred under different locations. One is a car. One is an apartment. I think it's pretty clear they can keep that straight. They even happened in different years. I don't think they are going to have any trouble at all compartmentalizing these two cases, keeping them straight. ...
>
> The next factor one has to consider is very important, in judicial economy. ... Under the circumstances I don't think that examination of all of these factors militates towards the separation of these two cases. I don't think they have to be severed.[1]

[1] Verbatim Report of Proceedings (Feb. 3, 2005) at 107-09.

Colbert testified that both B.J. and K.P. initiated sex with him and that his sexual intercourse with both women was consensual.

On February 8, 2005, the jury returned verdicts of guilty to both rape charges. Colbert appeals.

DISCUSSION

Colbert argues that his convictions should be reversed and the charges remanded for separate trials on the ground that the trial court abused its discretion in denying the motions to sever.

CrR 4.3(a) permits two or more offenses of similar character to be joined in one trial. Offenses properly joined under CrR 4.3(a), however, may 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). We review the denial of a motion to sever for abuse of discretion. State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

In assessing whether severance is appropriate, a trial court weighs the prejudice inherent in joined trials against the State's interest in 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 prosecution'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. Kalakosky, 121 Wn.2d at 537.

A review of these factors demonstrates that the trial court's decision to join the two rape counts for trial was a proper exercise of its discretion.

First, the evidence on each count was uniformly strong. In each instance, the victims gave detailed accounts of the events, there were no eye-witnesses, and the jury was asked to weigh the witnesses' credibility. Consideration of this factor supports joinder.

Second, the two charged incidents were separate and distinct. Each count involved a distinct victim, location and 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). Consideration of this factor similarly favors joinder of the two counts for trial.

Third, the counts were completely distinct and uncomplicated and therefore unlikely to lead to juror confusion. The trial court properly instructed the jury as to the elements of each count and to consider the evidence for each count separately. When a joined trial involves distinct, uncomplicated counts, it is assumed that a jury instructed to decide each count separately can do so. State v. Bythrow, 114 Wn.2d 713, 723, 790 P.2d 154 (1990). Consideration of this factor favors joinder of the two counts for trial.

Fourth, the trial court considered whether the evidence was cross-admissible and found that it was not. Although this factor weighs in favor of severance, this factor alone does not warrant reversal of an order denying severance where separate crimes are not difficult to "compartmentalize," the State's evidence on each count is strong, and the trial court instructed the jury to consider each count separately. Kalakosky, 121 Wn.2d at 539. The record shows that the trial court properly considered this issue in relation to the other factors.[2]

Finally, the benefit to judicial economy outweighed any prejudice suffered by Colbert. The court did not abuse its discretion by so finding and refusing to sever the counts for trial.

In summary, Colbert fails to show that the trial court's ruling on the motion was manifestly unreasonable or that the trial court exercised its discretion on untenable grounds or for untenable reasons.

Colbert also contends that the evidence of forcible compulsion was insufficient to support his conviction for second degree rape. We disagree.

---

[2] Colbert relies on State v. Hernandez, 58 Wn. App. 793, 794 P.2d 1327 (1990), and State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986), to argue that he was unduly prejudiced and the trial court abused its discretion in denying his motion to sever because the evidence on the separate counts was not cross-admissible. We disagree, as both Hernandez and Ramirez are distinguishable. In Hernandez, the defendant was tried on three counts of robbery of different convenience stores occurring on different days and there was great disparity between the witnesses' certainty in identifying the defendant. This difference in the strength of evidence, coupled with the lack of cross-admissibility, required severance. Hernandez, 58 Wn. App. at 800. In Ramirez the defendant faced two counts of indecent liberties with two minor victims, and the State sought to admit each offense against the other to show intent and absence of mistake or accident. Ramirez, 46 Wn. App. at 227. Severance was required because the two offenses were not admissible against each other and the State argued that the evidence of one offense made it more likely that the other offense occurred. Ramirez, 46 Wn. App. at 228. No such argument was made at Colbert's trial.

The second degree rape statute under which Colbert was convicted provides that "[a] person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person ... [b]y forcible compulsion." RCW 9A.44.050(1)(a). Forcible compulsion is "physical force which overcomes resistance ...." RCW 9A.44.010(6).

Whether a rape victim communicated her lack of consent is a question of fact based on the totality of the circumstances. State v. McKnight, 54 Wn. App. 521, 526, 774 P.2d 532 (1989) (citing 65 Am. Jur. 2d Rape § 6, at 765 (1972)). A rape victim's resistance need not be physical. McKnight, 54 Wn. App. at 525. It can be manifested by "'any clear communication of the victim's lack of consent.'" Id. (quoting State v. Reed, 166 W. Va. 558, 562, 276 S.E.2d 313 (1981)). The force referred to in forcible compulsion simply means the exertion of physical power. Id. at 527. The kind of force is immaterial; it could be taking indecent liberties or grabbing and kissing a person against her will. Id.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In assessing the sufficiency of the evidence supporting a conviction, the State's evidence is presumed to be true, and this court considers all reasonable inferences that can be drawn from that evidence. State v. Gear, 30 Wn. App. 307, 310, 633 P.2d 930 (1981).

We find that there is substantial evidence upon which a rational trier of fact could conclude that K.P. resisted Colbert's efforts attempt to have sexual intercourse with her.. She testified that she repeatedly told him no, she tried unsuccessfully to push him away, she repeatedly tried to put her pants back on after he took them off, and he pushed her over with his arm on her back. A reasonable fact finder could conclude from this that Colbert used physical force to overcome K.P.'s resistance.

Finally, because the prosecutor properly stated the law regarding forcible compulsion in her closing argument, we reject Colbert's prosecutorial misconduct claim.

Affirmed.

FOR THE COURT:

Dwyer, J.

Baker, J.

Becker, J.

APPENDIX D

COPY

NO. _____

Court of Appeals No. 56298-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BOBBY D. COLBERT,

Petitioner.

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DIVISION ONE
AUG 1 8 2006

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Bobby Colbert, defendant and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Colbert seeks review of the Court of Appeals opinion affirming his convictions for rape in the third degree and rape in the second degree, State v. Bobby Colbert, No. 56298-3-I. A copy of the Court of Appeals decision dated July 24, 2006, is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Unrelated crimes should be severed for trial if severance will promote a fair determination of the defendant's guilt or innocence. Mr. Colbert was charged with two counts of rape, one where the State had the burden of proving lack of consent beyond a reasonable doubt (third degree rape) and one where Mr. Colbert had the burden of proving consent by a preponderance of the evidence (second degree rape). The State's evidence was stronger on one of the two rape charges, and the jury could have been prejudiced that evidence of the stronger count showed Mr. Colbert's propensity to commit the other count. Was Mr. Colbert's

due process right to a fair trial violated when the superior court denied his motion to sever two counts of rape?

2. The due process clauses of the federal and state constitutions require the State to prove every element of a crime beyond a reasonable doubt. In order to convict Mr. Colbert of rape in the second degree as charged, the State was required to prove beyond a reasonable doubt he had sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a). The complaining witness testified she could not move when Mr. Colbert had sexual intercourse with her because Mr. Colbert's hand was on her back as she bent over, but he did not strike or threaten her and she did not physically resist Mr. Colbert. Looking at the evidence in the light most favorable to the State, must Mr. Colbert's conviction for rape in the second degree be reversed because the State did not prove an element of the crime beyond a reasonable doubt?

3. The prosecutor is a quasi-judicial officer, and a prosecutor's misconduct may violate the defendant's right to a fair trial and due process of law. In closing argument the deputy prosecuting attorney essentially argued that no force was required to prove forcible compulsion because the victim is not required to resist, even though forcible compulsion is defined as "physical force

that overcomes resistance." RCW 9A.44.010(6). Did the prosecutor misstate the law and thus violate Mr. Colbert's constitutional right to a fair trial and due process?

D. STATEMENT OF THE CASE[1]

Bobby Colbert was convicted of rape in the third degree (lack of consent) and rape in the second degree (forcible compulsion) after a jury trial.[2] CP 1-2, 45-46. Mr. Colbert moved to sever the two charged for trial several times, but the motion was denied every time. CP 7-10; 7/30/05 RP 2-10; 2/1/05RP(A) 53; 2/1/05 RP(B) 54-61, 84; 2/3/05 RP 100-09.[3]

For the charge of rape in the third degree, Count I, Brandi Jones testified she and a girlfriend met Bobby Colbert and Corey Rankins at a mall, talked to them on the telephone that evening, and met them again the next day. 2/1/05 RP(A) 4, 6, 8, 12, 14, 16. Ms. Jones and her girlfriend spent several hours with Mr. Colbert and his friend.[4] Id. at 17, 20-21. Eventually Ms. Jones and Mr. Colbert were alone in the backseat of Mr. Rankins's car. Id. at 17,

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[1] A more complete statement of the case is found at the Appellant's Opening Brief, pages 2-7, and the Respondent's Brief, pages 2-10.

[2] In a separate trial, Mr. Colbert was acquitted of a third count of indecent liberties. CP 2, 76.

[3] There are two volumes of transcripts for February 1, 2005. The volume prepared by court reporter Schroeder is referred to as RP(A) and the volume prepared by court reporter Susan Ingram is referred to as RP(B).

[4] Mr. Rankin left the group for part of the afternoon. 2/1/05 RP 17.

20-25. Mr. Colbert kissed Ms. Jones for several minutes, then removed her pants and engaged in vaginal intercourse. Id. at 25-29, 31, 42. Ms. Jones testified she told Mr. Colbert "no" several times and cried when it was over. Id. at 42-44. Mr. Colbert, however, testified the intercourse was consensual. 2/4/05 RP 81-88. Ms. Jones told someone about the incident later that night and reported the matter to the police a few days later. 2/1/05(A) RP 48, 50.

For the charge of rape in the second degree, Count II, Kelly Peterson testified she was a neighbor of Mr. Colbert and went to his apartment to borrow cigarettes. 2/1/05 RP(B) 37, 45, 47-48. Mr. Colbert grabbed the belt loops of her pants and kissed her, asking for "one time." Id. at 48-50. Eventually Mr. Colbert maneuvered her to the kitchen sink, pulled her pants down, placed his hands on her hips, and put his penis into her vagina. Id. at 71-75, 78. Ms. Peterson testified that she told Mr. Colbert "no" and asked him to stop but she did not physically resist; she was unable to move because Mr. Colbert's arm was on her back as she bent over. Id. at 75-79.

Ms. Peterson ran to a friend's apartment, told what happened and then called the police. 2/1/05 RP(B) 81; 2/2/05 RP

212-14. She was taken to the emergency room, and the physician testified about her physical examination and her description of the crime. 2/3/05 RP 33-45, 66-67. Ms. Peterson's friend confirmed her tearful reaction to the incident. 2/2/05 RP 212-14, 216-17; 2/3/05 RP 1.

On appeal, Mr. Colbert argued the trial court erred by denying his motion to sever the two rape counts for trial. Appellant's Opening Brief; Appellant's Reply Brief. The Court of Appeals concluded the trial court did not abuse its discretion. Slip Op. at 4-6. The Court of Appeals also rejected Mr. Colbert's arguments that the State did not prove forcible compulsion beyond a reasonable doubt and the prosecutor committed misconduct in closing argument. Statement of Additional Grounds for Review; Slip Op. at 6-8. Mr. Colbert now weeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE DENIAL OF MR. COLBERT'S MOTION TO SEVER THE TWO COUNTS VIOLATED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

While consent is an issue for both second and third degree rape, the burden of proof and standard of proof of consent is different for the two crimes. Mr. Colbert argued the confusion as to

proof of consent should be considered as part of the "clarity of defenses" factor for determining if unrelated counts should be severed for trial. The Court of Appeals, however, never addressed the differences in proof of consent and ignored the "clarity of defenses" factor in deciding Mr. Colbert's case. Slip Op. at 4-6. This Court should therefore accept review because the Court of Appeals opinion is in conflict with this Court's opinion in State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995), which requires the reviewing court to consider the clarity of defenses and the jury's ability to compartmentalize evidence in addressing a motion to sever counts. RAP 13.4(b)(1). In addition, the denial of a motion to sever the trial of unrelated counts may violate the defendant's right to a fair trial, and is thus a constitutional issue this Court should address. RAP 13.4(b)(3).

Both the federal and state constitutions provide the right to due process of law to a defendant charged with a criminal offense. U.S. Const. amends. 5, 14; Wash. Const. art. 1, §§ 3, 22. The right to due process includes the right to a fair trial. When the defendant is forced to go to trial with counts that should have been tried separately, the result may render the trial fundamentally unfair in violation of the constitutional right to due process. See United

States v. Lane, 474 U.S. 438, 446 n.8, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986) (misjoinder is constitutional violation if results in prejudice that violates Fifth Amendment right to fair trial); Bean v. Calderon, 163 F.3d 1073, 1084 (9th Cir. 1998), cert. denied, 528 U.S. 922 (1999) (finding petitioner's due process rights violated by joinder of counts).

In Washington, counts joined in a single information must be severed for trial 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). While Washington has a liberal joinder rule, counts must never be joined in manner that embarrasses or prejudices the defendant. Russell, 125 Wn.2d at 62; State v. Bryant, 89 Wn.App. 857, 865, 950 P.2d 1004 (1998), rev. denied, 137 Wn.2d 1017 (1999). Prejudice may result if the use of a single trial invites the jury to cumulate evidence to find guilty of infer a criminal disposition. Russell, 125 Wn.2d at 62-63; State v. Watkins, 53 Wn.App. 264, 268, 766 P.2d 484 (1989). The trial court's determination is reviewed for abuse of discretion. Russell, 125 Wn.2d at 53.

In reviewing the trial court's decision on severance of counts, this Court looks to (1) the strength of the State's case on each

count, (2) the jury's ability to compartmentalize the evidence, (3) whether evidence for various counts is cross-admissible, (4) the clarity of the defenses for each count, and (5) whether the court instructed the jury to consider the counts separately. In addition, any "residual prejudice" must be weighed against the need for judicial economy. Russell, 125 Wn.2d at 63; State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

Thus, the "clarity of defenses as to each count" is one of the factors to be considered in determining if counts should be tried jointly or separately. Russell, 125 Wn.2d at 63; State v. Bythrow, 114 Wn.2d 713, 723, 790 P.2d 154 (1990) (noting the issues and defenses were "simple and distinct" in finding no error in joint trials); State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), vacated in part, 408 U.S. 934 (1972), overruled on other grounds, State v. Gosby, 85 Wn.2d 758, 767, 539 P.2d 680 (1975).

The "clarity of defenses" weighs in favor of severance because the statutory differences between rape in the second degree and rape in the third degree place the burden of proof of consent on different parties by different standards of proof. In Count II, Mr. Colbert was charged with rape in the second degree by forcible compulsion. CP 2, 37; RCW 9A.44.050(1)(a). He

therefore had the burden of proving consent by a preponderance of the evidence. CP 39; State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989). In contrast, Mr. Colbert was charged with third degree rape in Count I. CP 1, 32; RCW 9A.44.060(1)(a). An element of third degree rape is that the victim did not consent to sexual intercourse and the lack of consent was clearly expressed by words or conduct. Id. Thus, for that count, the State had the burden of proving lack of consent by proof beyond a reasonable doubt. CP 32.

The jury thus received three separate instructions concerning consent. CP 32, 35, 39. To make matters more complicated, the court instructed the jury on third degree rape as a lesser-included offense of the second degree rape. CP 40-41. If the jury considered the lesser-included offense, it was thus required to again switch gears and place the burden of proof of consent on the State and change the burden of proof to proof beyond a reasonable doubt. CP 41; RCW 9A.44.060(1)(a).

The Court of Appeals opinion completely ignores this issue in its analysis of Mr. Colbert's case and never mentions the "clarity of defenses" factor. Slip Op. at 5-6. The Court of Appeals also improperly concluded that the joined counts were distinct and

uncomplicated and thus easy for the jury to separate. Slip Op. at 5. The opinion is thus in conflict with this Court's opinion in Russell, where clarity of defenses is mentioned as a factor for consideration in granting or denying a severance motion.

The Court of Appeals also concluded severance was not required because the evidence of the two counts was "uniformly strong." Slip Op. at 5. There was no forensic evidence in either case, and the jury was essentially faced with comparing the complaining witnesses' accounts against Mr. Colbert's. As to the conviction for second degree rape, however, the State significantly bolstered Ms. Peterson's account with testimony from the emergency room physician who related his physical exam and Ms. Peterson's description of the crime. The jury also heard from police officers who interviewed Ms. Peterson and friends and family members who observed her immediately after the incident or noted changes in her demeanor during the following months. The State's case on the second degree rape charge was thus much stronger than the State's case on the third degree rape count.

Severance of counts is proper when one case is much stronger than the other. Russell, 125 Wn.2d at 63-64; State v. McDonald, 122 Wn.App. 804, 815, 95 P.3d 1248 (2004), rev.

denied, 153 Wn.2d 1006 (2005). The Court of Appeals conclusion that the evidence on each count was uniformly strong is incorrect. The court never considered the prejudice to Mr. Colbert if the jury used evidence of one rape to show propensity to commit the other.

The Court of Appeals analysis of the denial of Mr. Colbert's motion to sever is in conflict with an opinion of this Court setting forth the applicable standards. The denial of Mr. Colbert's motion to sever also resulted in a trial where he was unfairly prejudiced in violation of his constitutional right to due process. This Court should accept review. RAP 13.4(b)(1), (3).

2. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF THE STATE PROVED RAPE IN THE SECOND DEGREE BEYOND A REASONABLE DOUBT AND TO CLARIFY THE EVIDENCE NECESSARY TO PROVE "FORCIBLE COMPULSION" FOR SECOND DEGREE RAPE

The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 21, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

In Count II, Mr. Colbert was convicted of rape in the second degree, RCW 9A.44.050(1)(a). CP 2, 70. RCW 9A.44.050(1)(a) makes it a crime to have sexual intercourse with another person by "forcible compulsion." "Forcible compulsion" is defined as physical force that overcomes resistance or a threat of injury or death. CP 38; RCW 9A.44.010(6).

> "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

RCW 9A.44.010(6). Forcible compulsion requires more force than is normally used to achieve sexual intercourse or contact. State v. Ritola, 63 Wn.App. 252, 817 P.2d 1390 (1991).

In his Statement of Additional Grounds for Review, Mr. Colbert argued the State did not prove "forcible compulsion" beyond a reasonable doubt. Statement of Additional Grounds for Review at 2-16. Mr. Colbert pointed out Ms. Pederson went to the hospital shortly after the incident and did not have any injuries. Ms.

Peterson testified Ms. Colbert did not threaten or strike her. She simply stated she was caught between Mr. Colbert and the kitchen cabinet and did not struggle or try to resist.

The Court of Appeals has held that a conviction for rape in the second degree based upon forcible compulsion may be upheld even if the victim does not resist. State v. McKnight, 54 Wn.App. 521, 774 P.2d 532 (1989). All that is required is that the "force exerted was directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration." Id. at 527-28. In a dissenting opinion, Judge Forrest argued the majority opinion "obliterates any meaningful distinction" between second and third degree rape. Id. at 529 (Forrest, J., dissenting). Mr. Colbert's case also raises the question of what force is necessary for "forcible compulsion," and this Court has not addressed this important issue. Moreover, the sufficiency of evidence to convict is a significant constitutional issue. This Court should review. RAP 13.4(b)(3), (4).

3. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE IF MR. COLBERT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT

A defendant's constitutional right to due process ensures the right to a fair trial. U.S. Const. amends. 6, 14; Wash. Const. art. 1 §§ 3, 22. The prosecutor is a quasi-judicial officer with the duty to act impartially and seek a verdict free from prejudice. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). A prosecutor's misconduct may violate the defendant's right to a fair trial and due process of law. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In addition, the prosecutor's misconduct may impact a specific constitutional right, such as the defendant's right to counsel or to proof beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996) (right to remain silent).

In closing argument, the prosecuting attorney told the jury that the State could prove the forcible compulsion element of

second degree rape even Ms. Peterson did not resist in any way. The prosecutor stated:

> As the judge told you, forceable [sic] compulsion is that physical force which overcomes resistance.
>
> The interesting thing about that is that resistance isn't required, that a victim physically resists. They don't do that. They don't require women to fight back. Obviously the reason is clear. It could lead to something more serious than being raped. So the resistance someone chose [sic] can be verbal. It can be physical in terms of freezing or not moving. It can be a number of things. . . .

2/8/05 RP 11. In his Statement of Additional Grounds for Review, Mr. Colbert argued the prosecutor's argument constituted misconduct because she improperly stated the law and thus removed an element of the crime from the jury's consideration. Statement of Additional Grounds at 16-22, citing inter alia United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

It is misconduct for the prosecuting attorney to misstate the law as explained in the court's instructions. Davenport, 100 Wn.2d at 760. In Davenport, the prosecutor argued in rebuttal that the jury could convict the defendant as an accomplice even though the State had not charged the defendant as an accomplice or offered accomplice liability instructions. Id. at 758-59. This Court concluded the prosecutor's argument required reversal because the

jury could have convicted the defendant as an accomplice in conflict with the court's instructions. Id. at 764-65.

The prosecutor's argument essentially collapses the differences between second and third degree rape by eliminating the requirement the defendant use force. See McKnight, 54 Wn.App. at 529-32 (Forest, J., dissenting). While the prosecutor was correct that the law does not require rape victims to fight back, a defendant does not commit rape in the second degree in the absence of force as argued by the State.

The Court of Appeals rejected Mr. Colbert's argument in one sentence, concluding the prosecutor's explanation of forcible compulsion was correct. Slip Op. at 8. By reducing forcible compulsion to no requirement of force, however, the prosecutor did misstate the law and mislead the jury.

Prosecutorial misconduct in closing argument is an important constitutional issue, especially when the misconduct permitted the jury to convict without proof beyond a reasonable doubt of one element of the crime. Additionally, Mr. Colbert's prosecutorial misconduct argument requires this Court to review the definition of forcible compulsion, a matter of interest to criminal courts

throughout our state. This Court should accept review.

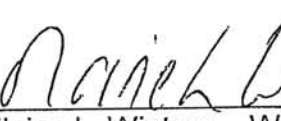
RAP 13.4(b)(3), (4).

F. CONCLUSION

For the reasons stated above, Bobby Colbert requests this Court accept review of the Court of Appeals decision affirming his convictions for third degree rape and second degree rape.

DATED this 18th day of August, 2006.

Respectfully submitted,



Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Petitioner

RECEIVED
COURT OF APPEALS
DIVISION ONE
AUG 18 2006

Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

AUG 18 2006

Name Date

Done in Seattle, Washington

APPENDIX E

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BOBBY D. COLBERT, Petitioner.	)	NO. 79105-8 **ORDER** C/A NO. 56298-3-I

Department I of the Court, composed of Chief Justice Alexander and Justices C. Johnson, Sanders, Chambers and Fairhurst, at its May 1, 2007, Motion Calendar, considered whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 1st day of May, 2007.

For the Court

Henry L. Alexander
CHIEF JUSTICE

FILED
SUPREME COURT
STATE OF WASHINGTON
2007 MAY -1 P 3:25

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APPENDIX F

No. ~~56298-3-1~~ 61160-7

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION ONE

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JAN 14 AM 10:53

IN RE THE PERSONAL RESTRAINT

OF

BOBBY COLBERT

PERSONAL RESTRAINT PETITION

Bobby Darrell Colbert

Pro Se Petitioner

P.O. Box 6900

Florence, AZ 85232

PETITIONER MAY FILE PETITION
WITHOUT PAYMENT OF FILING FEE

COURT ADMINISTRATOR/CLERK

A. STATUS OF PETITIONER

I, BOBBY DARRELL COLBERT, apply for relief from

(Full Name)

confinement. I am now in custody serving sentence upon my conviction of a crime.

1. The court in which I was sentenced is: Skagit County Superior Court.

2. I was convicted of the crimes of: Second Degree Rape, Third Degree Rape.

3. I was sentenced after trial, March 31, 2005.

4. My lawyer at trial court was: Glen Hoff/Public Defender Office, 606 S. 3rd, Mt. Vernon, WA 98273.

5. I did appeal from the decision of the trial court.
I appealed to: Court of Appeals, Division One.
My lawyer on appeal was: C.D. Aza / Elaine Winters, Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101.
The decision of the appellate court was not published.

6. Since my conviction I have asked a court for some relief from my sentence other than I have already written above. The court I asked relief from was The Supreme Court of Washington.
Relief was denied on: May 1, 2007

7. The name of my lawyer in the proceeding mentioned in my answer 6 was: Elaine Winters, Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101.

B. OPENING STATEMENT

I, Petitioner, Bobby Colbert, respectfully ask this Court to consider actual and substantial prejudice arising from constitutional error in the present case. Since I am a layman of the law, proceeding Pro Se, I ask this court to give these pleadings liberal interpretation and to hold them to less stringent standards than those drafted by lawyers. Haines V. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); see also Estelle V. Gamble. 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976); Maleng V. Cook, 490 U.S. 488, 493, 109 S. Ct. 1923, 1926-27, __ L. Ed. 2d 540 (1989).

I am claiming full protection of both Federal and State Constitutions. For all claims presented herein, I am asserting that protections have been violated.

C. MOTION FOR APPOINTMENT OF COUNSEL

MEMORANDUM IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In re the Personal Restraint of:	)Court of Appeals Mo. 56298-3-1
	)From Skagit County Cause No.
BOBBY COLBERT,	)04-1-00497-6
	)MOTION FOR APPOINTMENT OF
Petitioner.	)COUNSEL
	)
	)
	)

COMES NOW the Petitioner, BOBBY COLBERT, pro se, pursuant to CrR 3.1, RAP 15.2(b) (2)(e)(f), RAP 15.2(d)(f), and RAP 16.15(g), and based upon the Memorandum in Support of this motion, he respectfully moves this Honorable Court for an order appointing counsel in this matter.

Respectfully requested on this 1 day of January. 2008

BOBBY COLBERT, 879561
Petitioner Pro Se
Florence Correctional Center
P.O. Box 6900
Florence, AZ 85232

signed in my presence
01-01-08
Gordon L Mc Allan

"OFFICIAL SEAL"
Gordon L. Mc Allan
Notary Public-Arizona
Pinal County
My Commission Expires 4/16/2011

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In re the Personal Restraint of: BOBBY COLBERT, Petitioner.	)Court of Appeals No. 56298-3-1)From Skagit County Cause No.)04-1-00497-6)MEMORANDUM IN SUPPORT OF)MOTION FOR APPOINTMENT OF)COUNSEL))

COMES NOW, the Petitioner, BOBBY COLBERT, pro se, and presents this Memorandum in Support of Motion for Appointment for Counsel, as follows:

1. Petitioner believes the grounds presented in this Personal Restraint Petition may be opposed by the State and will require further litigation by this Petitioner.

2. Petitioner is not an attorney, does not have any legal training or education, and lacks the educational skill and competence to research and comprehend the rules of the Courts to the degree that he would be able to properly prepare further

litigation, nor is there any person available at Florence Correctional Center, Arizona, who is competently trained in Washington law.

3. Petitioner contends ineffective assistance of appellant counsel substantially violated Sixth Amendment rights, due to the fact non-frivolous issues preserved for direct appeal were OMITTED by the appellate advocate.

4. Petitioner contends, with support on the record of trial court proceedings, omitted issue were:

A) Objected to at trial, motions for mistrial brought to the trial court's attention in support of objection's significance, and arguments debated at extensive length.

B) Significant, obvious and arguably contrary to authority.

C) Clearly as strong or stronger than the single misrepresented issue brought by appellant advocates.

D) Subject to deference on appeal regarding the trial court's rulings.

5. Petitioner has no chance to recover financially from his indigent status in hopes of obtaining legal assistance.

6. Petitioner is currently incarcerated out of state, and telephone service has restrictions. All prison movement is severely limited and controlled on a 24 hour basis. The legal

library is incomplete and sometimes inaccessible. There are only three research computers available for over 340 Washington inmates.

For the foregoing reasons, Petitioner respectfully moves this court to appoint counsel to assist in this matter.

I, BOBBY COLBERT, declare under penalty of perjury, under the laws of the State of Arizona, that: I am the Petitioner herein, I have read this document and all related documents, know their contents, and believe them to be true and correct.

DATED THIS 1 day of January, 2008

Respectfully submitted,

BOBBY COLBERT, 879561
Petitioner, Pro Se
Florence Correctional Center
P.O. Box 6900
Florence, AZ 85232

signed in my presence 01-01-08
Gordon L. Mc Allan

"OFFICIAL SEAL"
Gordon L. Mc Allan
Notary Public-Arizona
Pinal County
My Commission Expires 4/16/2011

D. GROUNDS FOR RELIEF

I claim that I have 2 reasons for this court to grant me relief from the conviction and sentence described in Part A.

FIRST GROUND

1. I should be given a new trial because:

I believe there is a reasonable probability that issues preserved for direct appeal would have been successful before THIS COURT, had the issues not been omitted or misrepresented by the appellate advocate. The non-frivolous issues were based on Federal and State law requiring careful advocacy to ensure substantial legal and factual arguments were not inadvertently passed over. Unreasonable conduct of ignoring significant and obvious issues prejudiced the outcome of my appeal and compromised my right to meaningful representation.

2. The following facts are important when considering my case:

A. A timely objection coupled with a motion to declare a mistrial was brought to the trial court's attention, specifically addressing PROSECUTORIAL MISCONDUCT, improper reference to alternate count. (RP 52,53,54, Jones Direct Examination, Exhibits 1,2, and 3). This

issue was misrepresented in the direct appeal of the present case as a motion for SEVERANCE. Severance was the remedy requested in light of actual prejudice shown by the State prosecutor.

B. A timely objection coupled with a second motion to declare a mistrial was brought to the trial court's attention specifically addressing PROSECUTORIAL MISCONDUCT, did not bifurcate counts with secondary witnesses, inadmissably merging unrelated counts. (RP 54,55, Petersen Direct Examination, Exhibits 4 and 5). This issue was misrepresented in the direct appeal of the present case as a motion for SEVERANCE. Severance was the remedy requested in light of actual prejudice shown by the State prosecutor.

C. A timely objection coupled with a third motion to declare a mistrial was brought to the trial court's attention specifically addressing PROSECUTORIAL MISCONDUCT, a second improper reference to alternate count. (RP 83, 84, Petersen Direct Examination, Exhibits 6 and 7) This issue was misrepresented in the direct appeal of the present case as a motion for SEVERANCE. Severance was the remedy requested in light of actual prejudice shown by the State prosecutor.

D. Two timely objections coupled with a motion to dismiss charges was brought to the trial court's attention specifically addressing PROSECUTORIAL MISCONDUCT, two improper references to race. (RP 156, 157, Petersen Redirect Examination, Exhibits 8 and 9). This issue was omitted in the direct appeal of the present case.

E. In addition to the motion to sever counts, an additional motion to declare a mistrial was brought to the trial court's attention, simultaneously, specifically addressing PROSECUTORIAL MISCONDUCT, absence of required 404(b) analysis. (RP 102, State resting case in chief, Exhibit 10). This issue was omitted in the direct appeal of the present case.

F. An objection was brought to the trial court's attention specifically addressing PROSECUTORIAL MISCONDUCT, discovery violation. (RP 48, COLBERT Cross Examination, Exhibits 11). This issue was omitted in the direct appeal of the present case.

G. An objection was brought to the trial court's attention specifically addressing ERRONEOUS REASONABLE DOUBT INSTRUCTION. (RP 5, Exhibit 12). This issue was omitted in the direct appeal of the present case.

H. An objection was brought to the trial court's attention specifically addressing ERRONEOUS JURY INSTRUCTION.

(RP 5 and 6, Exhibits 13 and 14). This issue was omitted in the direct appeal of the present case.

I. THIS IS NOT AN ATTEMPT TO REVISIT AN ISSUE BROUGHT IN THIS PETITIONER'S STATEMENT OF ADDITIONAL GROUNDS. THIS IS AN ASSERTION TO SHOW A SIGNIFICANT ISSUE WAS OMITTED BY THE APPELLATE ADVOCATE.

A motion to dismiss count two was brought to the trial court's attention <u>specifically</u> addressing INSUFFICIENT EVIDENCE. (RP 109, State resting case in chief, Exhibit 16). This issue was omitted by the appellate advocate.

Appellate Advocate ignored the fact these serious issues were preserved for direct appeal. These are nine omitted issues (A-H), showing actual prejudice in the present case. For this reason, I respectfully ask THIS COURT to appoint counsel in this matter, because my right to meaningful representation was compromised.

3. The following reported court decisions in cases similar to mine, show the error I believed happened in my case: <u>NONE KNOWN</u>

4. The following constitutional provisions should be considered by the Court:

The 5th, 6th, and/or 14th Amendment(s), right to due process, to present a defense, to fundamentally fair trial, and/or to effective assistance of counsel.

5. This Petition is the best way I know to get the relief I want, and no other way will work because the above issues were not covered in my direct appeal or advanced properly to the Washington Supreme Court. This Personal Restraint Petition now appears to be the only appropriate remedy available under Washington law to address these matters.

SECOND GROUND

1. I should be given two separate trials because: The trial court did not conduct an ER 404 (b) analysis which is required on the record, nor did the jury receive a limiting instruction which is also required, when evidence of other crimes, wrongs, or acts is admitted. The present case was a simultaneous trial of unrelated rape charges in which the trial court conceded evidence of one count could not be adduced at a separate trial for the altermate count. (CP 108, Exhibit 17). This is a clear violation of Evidence Rule 404 (b). Structural error allowed the erroneous admission of propensity evvidence into my trial rendering the court proceedings fundamentally unfair, in violation of the Due Process Clause. In addition to the presumed prejudicial effects, the State prosecutor's use of "other acts" evidence had substantial and injurious

influence in determining the jury's verdict.

2. The following facts are important when considering my case:

A. A motion to declare a mistrial specifically addressing the absence of the required ER 404(b) analysis was brought to the trial court's attention as the state rested its case in chief. (CP 102, Exhibit 18). Evasively and incorrectly, the trial court relied upon an erroneous analysis which specifically addressed SEVERANCE and the factors which may offset or neutralize the prejudicial effects of joinder. (CP 106. Exhibit 19). The applicable standards set forth in case law require a specific analysis.

> In determining whether evidence of other crimes may be admitted under ER 404(b), a trial court must conduct the following analysis on the record: 1) Identify the purpose for which the evidence is to be admitted; 2). Determine that the evidence is relevant and of consequence to the outcome; and 3). Balance the probative value of the evidence against its potential prejudicial effect. State V. Smith, 106 Wash. 2d 772, 776, 725 P.2d 951 (1986). ER 404(b(rulings are to be reviewed under an abuse of discretion standard. State V. Bacotgarcia, 59 Wash. App. at 824

The trial court's application of the Kalakosky, 121 Wn. 2d 525 (5) five prong analysis contains none of the (3) three prongs required in Smith. Therefore, these analyses are separate and distinct application of law. Also, an ER 404 (b) analysis must be conducted BEFORE

evidence of other crimes may be admitted. The trial court's Kalakosky analysis was conducted AFTER the state rested its case in chief. The trial court's consideration did not remedy any prejudice already suffered by the jury.

Moreover, Kalakosky states:

> In assessing whether severance is appropriate, a trial court weighs the prejudice inherent in joined trials against the state's interests in maximizing judicial economy.

THIS COURT stated April 26, 1993, in State V. Lough, 70 Wn. App. 302 that:

> " A defendant's right to a fair trial is protected by the intense judicial scrutiny which is required before such evidence may be admitted. The appellate courts have shown no hesitancy to reverse the trial courts when such scrutiny is lacking or based on faulty reasoning."

The trial court's denial of my motion to declare a mistrial specifically addressing the absence of a 404(b) analysis basically states that my right to a fair trial in regards to the " interest of justice" is superseded by the " state's interest" in judicial economy. In addition to there being no question about the prejudicial effect of propensity evidence, no limiting instruction was given to the jury. Even if the evidence had been properly admitted, established Rules of Evidence still required a limiting instruction.

> Where evidence of other crimes, wrongs, or acts is admitted under Rule 404(b), the jury should be

given a limiting instruction, Rule 105, to the effect that they are not to consider the evidence as going to the particular purpose for which offered. However, failure of the court to give such an instruction SUA SPONTE is unlikely to be considered plain error, RULE 103 (d), Federal Rules of Evidence 404.5 RULE 404 (b).

B. Despite an instruction to consider counts separately, absence of a 404 (b) analysis allowed this Petitioner to become confounded in the merger of unrelated charges.

> "You all are confusing me by putting these cases together, too." (CP 87, Exhibit 20).
>
> "You almost have to say Brandi or Kelly. It's so confusing." (CP 89, Exhibit 21).

C. Despite an instruction to consider counts separately, actual instances of prejudicial merger are presented by this Petitioner.

1) PROSECUTOR:

> Q. Mr. Hoff asked you, how long you had sex with Brandi (Count 1), how long you had sex with Kelly (Count 2)....(CP 78, Exhibit 22).

2) PROSECUTOR:

> Q. You weren't timing how long you had sex with Brandi Jones (Count 1), were you ?

COLBERT:

> A. No.

PROSECUTOR:

> Q. You weren't timing how long you had sex with Kelly Petersen (Count 2) in your apartment, were you? (CP 78, Exhibits 22)

3) PROSECUTOR:

> Q. Well Mr. Hoff asked you the same type of question, how long it took to have sex with Brandi Jones (Count 1). That's what I'm asking you, how long did the oral sex act with Ms. Petersen (Count 2) take? (CP 79, Exhibit 23).

4) PROSECUTOR:

> Q. Was there something that made you more aware of the timing with Brandi Jones (Count 1) than with Kelly Petersen (Count 2) in her bedroom? (CP 80, Exhibit 24).

This Petitioner contends that the absence of an ER 404 (b) analysis allowed the prosecutor to repeatedly merge unrelated counts even though this Petitioner acknowledge being confounded by merger.

3. The following reported court decisions in cases similar to mine, show the error I believe happened in my case:

State V. Saltarelli, 98 Wn. 2d at 363

> (An intelligent application of ER 404 (b) is particularly important in sex cases, where the prejudice potential of prior acts is at its highest).

State V. Harris, 36 Wn. App. 746, 677 P. 2d 202.

> (Here, despite an instruction to consider the counts separately, there was an extreme danger that defendants would be prejudiced in all of the ways considered in Drew V U.S., 331 F. 2d 85, 88 (D.C. Cir. 1964). In any event, the prejudice-mitigating factor that evidence of each rape would be admissable in a separate trial for the other, is glaringly absent. This being so, there is a clear violation of the rule prohibiting use of evidence of other crimes or misconduct in order to convict).

Old Chief V. United States, 519 U.S. 172, 180-82, 117 S. Ct. 644, 136 L. Ed 2d 574 (1997).

> (It is well established proposition that the Federal Rules of Evidence 404 (b) strictly forbids propensity evidence as improper because its prejudicial effect out-weighs it probative value).

Jammal V. Van de Kamp, 926 F. 2d 918, 920 (9th Cir. 1991)

(Only if there is no permissable inference the jury may draw from the evidence can its admission violate due process).

McKinney V. Rees, 993 F. 2d 1378, 36 Fed. R. Evid. Serv. 1310 (9th Cir. 1993)

(Holding that a state prosecutor's use of "other acts" as character evidence was fundamentally unfair in violation of due process principles....).

4. The following constitutional provision should be considered by the Court:

The 5th, 6th and/or 14th Amendments(s), right to due process, and to fundamentally unfair trial.

5. This Petition is the best way I know to get the relief I want, and no other way will work because the above issues were not covered in my direct appeal or advanced properly to the Washington Supreme Court. This Personal Restraint Petition now appears to be the only appropriate remedy available under Washington law to address these natters.

E. STATEMENT OF FINANCES

1. I do ask the Court to file this petition without making me pay the filing fee because I am indigent, and cannot pay the fee.
2. I have approximately $0.17 in my prison institutional account.
3. I am employed by CCA/Florence Correctional Center. My salary amounts to, a net of $57.00, after mandatory deductions.
4. I do ask the court to appoint a lawyer for me.

5. During the last 12 months I did not get any money from a business, profession or other form of self-employment.
6. During the past 12 months, I did not get any rent payments, interest, or dividends. I do not have any savings or checking accounts and I do not own stocks, bonds, or notes.
7. I have no real estate, other property, or things of value which belong to me. I also do not have any interest or receive payments from such entities.
8. I am not married.
9. All my family, especially my Mother, needs me home.
10. All the bills I owe are unlimited, and owed to the Department of Corrections, Washington State.

F. REQUEST FOR RELIEF

I request that THIS COURT reverse my convictions for Third Degree Rape and Second Degree Rape, and order two separate trials with instructions prohibiting the reoccurance of concerns and issues raised in this petition.

At a minimum, I contend that I have provided THIS COURT with facts, supported by exhibits, as admissable evidence that raised prima facie issues of Federal constitutional errors that warrant THIS COURT granting

my request for a reference and/or evidentiary hearing under RAP 16,11 (b), RAP 16.7 (a), In re Rice, 118 Wn. 2d 876, 828 P. 2d 1086 (1992), and/or State V. Harris, 114 Wn. 2d 419, 789 P. 2d 60 (1990).

G. OATH OF PETITIONER

I declare, under the penalty or perjury under the laws of the State of Arizona, that I have examined this petition and to the best of my knowledge believe it is true and correct. After being duly sworn, an oath, I depose and say: That I am the Petitioner, that I have read this petition, know its contents, and I believe the petition is true.

24 EXHIBITS FOLLOW THIS PETITION

(Exhibit 15 is omitted)

BOBBY DARRELL COLBERT

Pro Se Petitioner
P.O. Box 6900
Florence, AZ 85232

THE STATE OF ARIZONA)
) ss.
COUNTY OF PINAL)

Subscribed and sworn to, before me this 1 day of January, 2008

Notary Public in and
for the State of Arizona
Residing at

Pinal County

"OFFICIAL SEAL"
Gordon L. Mc Allen
Notary Public-Arizona
Pinal County
My Commission Expires 4/16/2011

My commission expires on:

04/16/2011

APPENDIX G

RECEIVED
SKAGIT COUNTY
PROSECUTING ATTORNEY

2008 JUN 17 AM 10: 57

NO. 61160-7-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

In Re the PERSONAL RESTRAINT PETITION of

BOBBY D. COLBERT,

Petitioner,

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR SKAGIT COUNTY

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Office Identification #91059

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DIVISION ONE

JUN 16 2008

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I. SUMMARY OF RESPONSE TO PETITION

Bobby Colbert was tried and convicted by a jury of Rape in the Third Degree and Rape in the Second Degree. The two counts involved different victims on different dates but the same defense of consent. The counts were tried together after the trial court denied motions to sever made both pretrial and during trial. During the trial, the trial court again evaluated the case law factors regarding severance and denied severance.

Colbert filed a personal restraint petition that claims that his appellate counsel from his first appeal failed to raise issues of merit most of which he characterizes as prosecutorial misconduct. However, Colbert's claims are little more than bare assertions and he fails to support his claims with argument or case law. Colbert also makes a claim regarding severance which is based upon the claim that was denied on direct appeal.

Because the trial court and Court of Appeals previously properly decided the issue of severance, and Colbert does not raise any other issues of merit, Colbert's petition must be denied.

II. ISSUES RELATING TO CLAIMED ERROR

Where there is no showing that issues not raised by appellate

counsel on direct appeal merit a determination that Colbert is being unlawfully restrained, must the petition be denied?

Where the admissibility under ER 404(b) is just one factor regarding severance and the jury instructed the jury to try the counts separately, has the defendant established that denial of severance was improper?

III. STATEMENT OF THE CASE

i. Statement of Procedural History

On July 9, 2004, Bobby Colbert was charged by information with three sex offenses. Count one was Rape in the Third Degree by lack of consent alleged to have occurred on November 29, 2004, where the victim was Brandi Jones. Count two was Rape in the Second Degree by forcible compulsion alleged to have occurred on March 18, 2004, where the victim was Kelly Peterson. Count three was Indecent Liberties against a physically helpless individual alleged to have occurred on June 26, 2004, where the victim was Cindy Adams.

On July 30, 2004, the trial court heard a motion to sever the counts for trial. 7/30/04 RP 2-10.[1] The prosecutor argued the five

[1] The State will refer to the volumes of the verbatim report of proceedings by using the date followed by "RP" and the page number. The transcripts of February 1,

factors of Bythrow and the decision of Kalakosy at length. 7/30/04 RP 5-8. The prosecutor noted that the charge of indecent liberties was based upon the victim being unconscious and that thus it was of different character from the other two counts. 7/30/04 RP 8. At the end of that pretrial hearing, the trial court ordered that the charge of Indecent Liberties be severed from the other two counts. 7/30/04 RP 10.

On January 31, 2005, the trial commenced. 1/31/05 RP 2, 15. The trial testimony was taken over the course of six days. After the testimony of Brandi Jones, the victim as to count one the defense renewed the motion to sever based upon a claim that the State was seeking to "dovetail" the cases even though the State had only elicited that the two victims did not know each other. That motion was denied. 2/1/05 RPA 53-4, 56. The defense renewed the motion after the testimony of Kelly Peterson, the victim as to the count of two, upon the same basis as the motion made after the other victim. 2/1/05 RPB 84. The motion was again denied. 2/1/05 RPB 84-5.

2005, and February 7, 2005, contain two transcripts and will be cited to as "RPA" and "RPB" for each of those days. The State will attempt to transfer the transcript from the prior appellate case. If we are unable to do so a new copy of the transcripts will be provided to this Court.

After the State rested, Colbert renewed the motion to sever. 2/3/05 RP 100-2. The trial court made an extensive ruling denying severance which is detailed below. 2/3/05 RP 106-9.

On February 8, 2005, the trial court returned verdicts of guilty to both Rape in the Third Degree and Rape in the Second Degree.

On March 31, 2005, the trial court sentenced Colbert to 20 months on the charge of Rape in the Third Degree and 136 months on the count of Rape in the Second Degree. 3/31/05 RP 10-11.

On May 16, 2005, after the verdict was had on the severed count of Indecent Liberties, Colbert filed a notice of appeal.

On July 24, 2006, the Court of Appeals issued a decision holding that the trial court did not abuse its discretion in denying the motion to sever. State v. Colbert, 134 Wn. 1007, 2006 WL 2048237 (2006), see attached Appendix A.

On May 1, 2007, the Supreme Court denied a petition for review. State v. Colbert, 160 Wn.2d 1004, 158 P.3d 614 (2007).

On January 14, 2008, Colbert filed the present personal restraint petition in the Court of Appeals.

ii. Summary of the Pertinent Trial Testimony

1. Testimony regarding count one involving Brandi Jones.

Brandi Jones testified that she was with her friend Crystal Cyrus had met Bobby Colbert and Corey Rankins at the Cascade Mall on November 28, 2003, when she was in the area working for Job Corps. 2/1/05 RPA 4, 6. She spoke with Colbert a while and gave him the number at Job Corps. 2/1/05 RPA 8.

On November 29, 2003, Jones and Cyrus ran into Colbert and Rankins at the mall near the food court. 2/1/05 RPA 14-5. Jones and Cyrus left with Colbert in the car of Corey Rankins. 2/1/05 RPA 16-7. Rankins got out at one point and Colbert started driving but picked Rankins up later. 2/1/05 RPA 17. Colbert drove them to an area behind a building and parked by some railroad tracks. 2/1/05 RPA 21. Rankins and Cyrus got out to go for a walk. 2/1/05 RPA 22. At that time Colbert moved in to the back seat. 2/1/05 RPA 22. They spoke about things and then Colbert began to kiss Jones. 2/1/05 RPA 25. Jones did not kiss him back and pushed him away. 2/1/05 RPA 25, 27. Colbert kept telling her "it's okay, baby." 2/1/05 RPA 27.

Jones described that Colbert took off her pants. 2/1/05 RPA 28. Jones pushed Colbert away and told him to stop. 2/1/05 RPA

29. Colbert then took his own pants down. 2/1/05 RPA 30. Colbert was on top of her and she could not move or get her pants back up. 2/1/05 RPA 30-1. He then tried to have sex with her and put his penis in her vagina. 2/1/05 RPA 41-2. Jones had told Colbert no at least more than 10 times up to that point. 2/1/05 RPA 42. Jones told someone else about the incident that night and told her mother about the incident a few days later and it was reported to the police. 2/1/05 RPA 48, 50.

Colbert's testimony agreed with most of what Jones described up to the point of sexual intercourse. 2/4/05 RP 59-63. Colbert claimed that Jones began the physical contact. 2/4/05 RP 81. He also claimed that Jones initiated the sex. 2/4/05 RP 85. Colbert also admitted that Jones said "no" during the intercourse but claimed that was due to the positions and that she said "yes" at other times. 2/4/05 RP 87-8.

2. Testimony regarding count two involving Kelly Peterson.

Kelly Peterson testified that she met Colbert through her boyfriend, Justin Olson. 2/1/05 RPB 38-9. In early March, 2004, Colbert was living near her and came over to her house. 2/1/05 RPB 38-9. Peterson said that when Olson left to get dinner and she was

alone with Colbert when he exposed himself to her and told her he needed just one night. 2/1/05 RPB 42. Peterson asked Colbert to leave and he did. 2/1/05 RPB 43. On March 18, 2004, Peterson said that she went over to Colbert's house because she had run out of cigarettes and went over to get some from him or Sandra. 2/1/05 RPB 45. It was about one o'clock to three o'clock. 2/1/05 RPB 45. The music was on loud and Colbert eventually came to the door after she knocked. 2/1/05 RPB 45-6. Colbert motioned her in and she started to talk to him and follow him into the kitchen area in the studio apartment. 2/1/05 RPB 47. Peterson asked for cigarettes and Colbert gave her three. 2/1/05 RPB 48.

Colbert then put his fingers through the belt loops of her jeans. 2/1/05 RPB 48. He then started talking to her calling her "baby" and said "Baby, one time, just one time." 2/1/05 RPB 49. Peterson thought he meant sex and told him no. 2/1/05 RPB 50. Colbert began to kiss her and she did not kiss back. 2/1/05 RPB 50. Peterson tried to push Colbert away but couldn't. 2/1/05 RPB 70. Colbert then unbuttoned and unzipped her pants. 2/1/05 RPB 70. She did them back up and Colbert undid them again. 2/1/05 RPB 71. Colbert then took her pants down. 2/1/05 RPB 71. Peterson told Colbert of Justin and that she couldn't but Colbert continued. 2/1/05

RPB 72. Peterson leaned over to pull her pants up at one point and Colbert put his arm in the small of her back and bent her over at the waist. 2/1/05 RPB 77. Colbert then put his penis in her vagina and moved himself in and out of her having intercourse for about a minute. 2/1/05 RPB 78-9. Peterson went to a friend's apartment where she told her what had occurred. 2/1/05 RPB 81. Police were called that day and Peterson reported what Colbert had done. 2/1/05 RPB 81.

Colbert testified that on the exposure incident, Peterson had approached him and she took off his pants and gave Colbert oral sex. 2/4/05 RP 70-1. Colbert also claimed that a few days later, Peterson had come over to his apartment and that the two of them smoked cigarettes and that Peterson initiated sexual contact with him in the kitchen. 2/4/05 RP 116-7. Colbert claimed the intercourse was consensual. 2/4/05 RP 21-2.

3. Trial Court's Ruling as to Severance at Trial.

> Under that case law there are several things the Court has to take into consideration. First of all, the strength of the State's evidence as to each count. I don't know if the two of you are correct in assuming that if the evidence is strong as to all counts or weak as to all counts that's what makes the difference. In my view, it's whether one count is strong and the other count is weak. And the State is using the strong case out the

weak case, which would be a far more egregious combination of counts. In my view, if we have a very strong case and a weak case together one is used to get the conviction on the other, which wouldn't by itself may be sufficient. That's the situation I think we're trying to avoid here. So the fact that the case is weak as to both or strong as to both, that probably doesn't militate toward severance.

Here we have, at least in my view, at this point, pretty strong testimony by both of the complaining witnesses that is detailed and fairly compelling. Obviously we haven't heard the defense's case yet. But at this point I have to say that the State's case on both cases is pretty strong. I can't say one is particularly weaker than the other. Ms. Peterson's case does have the follow-up witness, Ms. Lumas, which Ms. Jones' case does not have. But given the detail of the testimony by both those women and the emotion that was apparent during the testimony, I can't really say one was particularly stronger than the other.

The second factor is clarity of the defenses that we're going to propose. Obviously if defenses are inconsistent, that's going to be a real problem for the defendant when cases are joined. Likewise, if only going to testify as to one but not the other, that's going to be a real problem for him. We don't have any of that here. He indicated consent. He testified to both, that in each case the women consented. I don't see there's any embarrassment to him having these cases joined. It doesn't interfere with his defense at all.

The Court's instructions, I've already indicated I plan to instruct the jury as I've inquired. I have already instructed them once on that particular issue. I'll do it again. I'd be happy to consider any additional instructions the attorneys want to propose on that particular topic.

Factor Number four, whether the two would be cross admissible against each. Kalakosky says: Facts of separate counts would not be cross admissible in separate proceedings. It does not necessarily take issue with that when we had talked about it last time, if

that factor was in and of itself sufficient to make. Clearly under the law in the State of Washington it is not. It's simply one thing that is to be considered. I don't think it would be cross admissible.

I agree with you, Mr. Hoff. In this case I don't think Jones would be cross admissible on Peterson or Peterson on Jones. If the two were tried separate – this is not an identity case. It's a consent case. The only way those particular features Ms. Bracke pointed wouldn't be useful is if we were concerned about who did things. But we're not concerned about who did this. We're concerned whether there was consent. They are not cross admissible, that is not the end of the inquiry.

The next thing that needs to be considered is whether the jury is able to compartmentalize the evidence in such a way that they can reasonably be expected to make a separate decision on each count. What do we have here? We have different victims with different names. Acts occurred under different locations. One is a car. One is an apartment. I think it's pretty clear they can keep that straight. They even happened in different years. I don't think they are going to have any trouble at all compartmentalizing these two cases, keeping them straight. It is not a blur. Doesn't blur in my mind. I don't think it's going to blur in theirs.

The next factor one has to consider is very important, in judicial economy. That is instead of having two trials we're going to have one. And that's an important factor. Under the circumstances I don't think that examination of all of these factors militates towards the separation of these two cases. I don't think they have to be severed. We're going to proceed.

2/3/05 RP 106-9.

IV. ARGUMENT

To prevail on a personal restraint petition, the petitioner must show that there is an unlawful restraint. In re Personal Restraint Petition of Cashaw, 123 Wn.2d 138, 148-9, 866 P.2d 8 (1994); RAP 16.4. To establish unlawful restraint, the petitioner must show either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Personal Restraint Petition of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Personal Restraint Petition of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). In order to prevail in a personal restraint petition, a petitioner must set out the facts underlying the challenge and the evidence available to support the factual allegations. In re Personal Restraint Petition of Rice, 118 Wn.2d 876, 885-6, 828 P.2d 1086 (1992). Bare assertions and conclusory allegations are insufficient to gain consideration of a personal restraint petition. Rice, 118 Wn.2d at 886.

i. Colbert has not established that his appellate counsel failed to raise issues of merit.

Colbert's first ground for his personal restraint petition is that his appellate counsel omitted or misrepresented issues before the Court of Appeals on his direct appeal. Personal Restraint Petition at page 7. Colbert goes on to list nine sections of the transcripts and

make various claims as to those sections of the transcripts in turn. These references are labeled A. through I. in Colbert's petition. Colbert makes claims without legal support for each of these factual references. All of these claims are bare assertions. The State deals with these claims in turn.

A. Prosecutorial misconduct for "improper reference to alternate count."

Colbert claims prosecutorial misconduct by the prosecutor asking the victim from count one if she knew the victim of count two. 2/1/05 RP 52. The trial court properly ruled that this just resolved a potential fact and that there was no prejudice shown. 2/1/05 RP 54. This is nothing more than a bare claim of prosecutorial misconduct.

> A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (*citing* State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). Prejudice exists if there is a substantial likelihood that the misconduct affected the verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Where, as here, a defendant does not object or request a curative instruction, he waives the error unless we find the remark " 'so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.' " McKenzie, 157 Wn.2d at 52, 134 P.3d 221 (*quoting* State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

State v. Miles, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007). Since the objection made by defense was regarding severance rather than misconduct, the standard requires Colbert to show that the prosecutor's actions were so flagrant and ill-intentioned that a curative instruction would not have resolved. Colbert does not come close to meeting these standards.

Furthermore, as explained below and ruled previously by this Court, the trial court's decision regarding severance was proper.

B. Prosecutorial misconduct for "merging counts."

This apparently pertains to the State's calling of the two victims on the two counts sequentially. 2/1/05 RPB 54-5. This was addressed at the trial court as a renewal of the motion to sever. 2/1/05 RPB 54-5. This claim is nothing more than a bare claim of prosecutorial misconduct.

C. Prosecutorial misconduct for "second improper reference to alternative count."

Colbert's claim here is the same as above in section A. The claim is that it was improper to ask the victim of count two if she knew the victim of count one. 2/1/05 RPB 84. As explained above, there is nothing more than a bare assertion and no misconduct.

D. Prosecutorial misconduct for "improper references to race."

One of the victims testified that the incident affected her in her work as a fast food cashier because she sometimes heard voices that reminded her of Colbert's. 2/2/05 RP 156. In describing the voices, she stated that the voices sounded like "African American male using Ebonics. 2/2/05 RP 156. This prompted the prosecutor to ask if the victim had a bias against people of the race of the defendant. 2/2/05 RP 156. An objection was made and overruled. 2/2/05 RP 156. The trial court ended up dealing with the motion in detail and denied the motion because it was relevant to the victim's credibility and any bias she may have had toward the defendant. 2/2/05 RP 158-61. Colbert has not shown that the trial court erred or how the question amounted to prosecutorial misconduct.

E. Prosecutorial misconduct for "absence of required 404(b) analysis."

The issue of an ER "404(b)" analysis came up when the defendant was renewing a motion to sever at the close of the State's case in chief. 2/3/05 RP 100-2. The trial court heard the motion and denied the motion for severance. 2/3/05 RP 109. In doing so, the trial court recognized that the evidence of each count was not cross-admissible under ER 404(b). 2/3/05 RP 108. But this was just one

factor in the trial court's decision finding that the motion to sever should be denied. 2/3/05 RP 109. Thus, there was no prosecutorial misconduct.

F. Prosecutorial misconduct for "discovery violations."

Colbert's claim arises from the State's use of photographs which were taken following Colbert's testimony on Friday, February 4, 2005. 2/7/05 RP 49. Following court, law enforcement took photographs which would contradict some of Colbert's claims. 2/7/05 RP 49. Those photographs were printed on Monday, February 7, 2005, and provided to defense that day. 2/7/05 RP 49. That is when the State realized it would use the photographs. This was a discovery issue under CrR 4.7 and not an issue of prosecutorial misconduct. The trial court properly ruled there was no discovery violation. 2/7/05 RP 57.

G. Erroneous reasonable doubt instruction.

Colbert's claim is that the reasonable doubt instruction used, commonly referred as to the Castle instruction, was improper. State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997). See Appendix B, Instruction No. 3, 2/8/05 RP 5.

Although use of versions of reasonable doubt instructions which differ from the pattern instruction have been indicated as

disfavored by the Washington Supreme Court, the instruction presented was not an unconstitutional statement of the law meriting reversal. State v. Bennett, 161 Wn.2d 303, 315, 317, 165 P.3d 1241 (2007). Therefore, Colbert cannot prevail in his petition on this basis.

H. Erroneous jury instruction.

Colbert's claim as to this instruction was that the trial court erred in some of the language of a consent defense to the Rape in the Second Degree charge which defense had requested. See Appendix B, Instruction No 15, 2/8/05 RP 5-6. The trial court ended up using the State's version. 2/8/05 RP 5. Defense counsel's claim at the trial court acknowledged that the instruction was a correct statement of the law. 2/8/05 RP 6. The only defense claim at the trial court was that the instruction was inartfully crafted. 2/8/05 RP 6. There is insufficient showing by Colbert that the use of the instruction created error or that he was prejudiced thereby.

I. Insufficiency of the evidence as to count two.

Colbert cites to the one page where the motion to dismiss count two was made because of a claim of a lack of proof of use of force. Personal Restraint Petition at page 10. The records shows that the trial court carefully analyzed State v. McNight, 54 Wn. App. 521, 774 P.2d 532 (1989), with both counsel. 2/3/05 RP 110-7. The

trial court ended up ruling that there was sufficient evidence of use of force. 2/3/05 RP 116-7. Colbert does nothing to establish that this ruling was erroneous.

ii. Colbert fails to establish that the trial court erred in denying severance by not conducting an ER 404(b) weighing analysis or provide insufficient limiting instructions.

In Colbert's second ground, he claims that the trial court failed to conduct an ER 404(b) weighing analysis before deciding upon the motion for severance and failed to provide sufficient limiting instructions. As ruled by the trial court, an ER 404(b) analysis is just one factor in deciding whether counts should be severed. Furthermore, the trial court's use of the standard pattern instruction that directed the jury to try each count separately sufficiently instructed the jury.

A. An ER 404(b) weighing analysis is not required deciding upon the motion for severance.

The trial court recognized that the evidence was not cross-admissible and this generally did favor severance. 2/3/05 RP 108. Although this factor weighs in favor of severance, since that was the

only factor that the trial court found weighed in favor of severance that should not automatically result in severance of the counts.

> With regard to cross admissibility, evidence of another crime is not admissible to prove identity under ER 404(b) unless the method of both is so unique that the proof that an accused committed one of them creates a high probability that he committed the other. Whether or not the method of committing the five crimes in this case was sufficient to constitute such a "modus operandi" as to make the crimes cross admissible, severance is not necessarily mandated even if they were not so related. The fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law.

State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993) *citing* State v. Bythrow, 114 Wn.2d 713, 720, 790 P.2d 154 (1990).

Since lack of cross-admissibility does not provide sufficient grounds to sever by itself, the trial court properly considered this issue in relation to the other factors.

Washington case law regarding motion to sever supports the conclusion that the trial court did not abuse its discretion.

In State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993), the defendant was charged with four counts of rape and one count of attempted rape of sexual offenses. They occurred on separate dates and times and involved completely separate victims. They were tried together. In evaluating the severance, the Supreme Court gave a

synopsis of each of the counts. State v. Kalakosky, 121 Wn.2d at 537-8. They described each event occurring where the suspect wore a dark ski mask, but the method of offenses differed. The court characterized the differences:

> In the present case, it was not a particularly complicated task to keep the testimony and evidence of the five crimes separate. Each victim described quite a different episode even though there was much in the rapist's methods that was the same.

State v. Kalakosky, 121 Wn.2d at 537. The court went on to describe that the offenses were not cross-admissible under ER 404(b). Even so, the Supreme Court found that the denial of severance of these cases was proper.

> 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." Given that the crimes were not particularly difficult to "compartmentalize", that the State's evidence on each count was strong, and that the trial court instructed the jury to consider the crimes separately, we conclude that the trial court was well within its broad discretion in finding that the potential prejudice did not outweigh the concern for judicial economy.

State v. Kalakosky, 121 Wn.2d at 539.

Of all the reported Washington cases, Kalakosky appears to have the factual circumstance most similar to the facts of the present

case since there were multiple counts of rape where the different events could be compartmentalized for the jury to decide each case separately.

Thus, the trial court was not required to complete an ER 404(b) analysis before ruling on severance. To the extent that it was considered by the trial court, the court ruled that the evidence was not cross-admissible. 2/3/05 RP 108. And the trial court evaluated this in light of the remaining factor as done in Kalakosky.

B. The trial court sufficiently directed the jury to try each count separately.

The trial court properly instructed the jury to consider each count separately by use of the standard instruction.

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

See Appendix B, Instruction No 18. WPIC 3.01.

The use of instructions is recognized as the proper method for instructing the jury so that the counts may be properly joined. State v. Cotten, 75 Wn. App. 669, 688, 879 P.2d 971 (1994) *rev. denied* 124 Wn.2d 1004 (1995).

Furthermore, a jury is presumed to follow the trial court's instructions as to the law. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Thus, the jury was properly instructed to try the counts separately and not consider facts from one count in deciding the other.

Thus, Colbert's claim that the jury was insufficiently instructed fails.

V. CONCLUSION

For the foregoing reasons, Colbert's personal restraint petition must be denied.

DATED this 13th day of June, 2008.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [ ]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Bobby Darrell Colbert, addressed as P.O. Box 6900 Florence, AZ 85232. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 13th day of June 2008.

_____

KAREN R. WALLACE, DECLARANT

APPENDIX H

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 61160-7-I
	)	ORDER OF DISMISSAL
BOBBY COLBERT,	)	
Petitioner.	)	

Bobby Colbert was convicted by jury verdict of one count of rape in the third degree and one count of rape in the second degree in Skagit County No. 04-1-00497-6. Colbert appealed his rape convictions to this court, which affirmed in State v. Colbert, No. 56298-3-I. The case was mandated on May 1, 2007.

Colbert now files this personal restraint petition contending his rape convictions should be set aside because (1) the attorney appointed to represent Colbert on appeal was ineffective for failing to raise all possible issues and (2) the trial court should have severed the rape counts for trial. To prevail here, however, Colbert must establish either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 803, 792 P.2d 506 (1990); In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

As to Colbert's claim of ineffective assistance of appellate counsel, Colbert's assertions are too conclusory to demonstrate that he was prejudiced by counsel's performance. In Washington, the Strickland[1] test is used for

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[1] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

determining the effectiveness of counsel. To satisfy this two-pronged test, a defendant bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). To prevail on an appellate ineffectiveness claim, an appellant "must show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly and then demonstrate actual prejudice." In re Pers. Restraint of Lord, 123 Wn.2d 296, 314, 868 P.2d 835 (1994).

Colbert argues that his appellate counsel was ineffective for failing to raise certain claims of prosecutorial misconduct and instructional error. Colbert points out that he raised timely objections to the alleged errors in the trial court. But Colbert must do more than simply allege that counsel failed to raise certain issues, even if they were adequately preserved, to prevail on a claim of ineffective assistance of appellate counsel. See State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Courts indulge in a strong presumption that counsel's performance was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To rebut that presumption, it is not enough to show that counsel failed to raise every conceivable issue. In re Pers. Restraint of Frampton, 45 Wn. App. 554, 562 n.8, 726 P.2d 486 (1986). Nothing here suggests that the outcome of Colbert's appeal would have been any different had counsel raised the omitted issues.

In sum, Colbert's claims are not supported by the record, citation to pertinent authority, or meaningful analysis. Unsupported or vague assertions are not sufficient to command judicial consideration and discussion in a personal restraint proceeding. In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Because Colbert has not established either prong of the test for ineffective assistance, the claim fails.

As to the severance claim, Colbert contends that the trial court improperly failed to give him separate trials on the rape charges. According to Colbert, "[t]he trial court did not conduct an ER 404(b) analysis which is required on the record, nor did the jury receive a limiting instruction which is also required[.]" However, this court considered and rejected essentially the same claims in Colbert's direct appeal. A personal restraint petitioner may not renew an issue that was resolved on direct review. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). "An issue is considered raised and rejected on direct appeal if the same ground presented in the petition was determined adversely to the petitioner on appeal and the prior determination was on the merits." In re Pers. Restraint of Davis, 152 Wn.2d 647, 671 n.14, 101 P.3d 1 (2004). Nor can a petitioner simply revise a previously rejected argument by alleging different facts or by asserting different legal theories. In re Pers. Restraint of Lord, 123 Wn.2d 296, 329, 868 P.2d 835 (1994).

Colbert also appears to argue that the evidence presented at his trial was insufficient to convict him of the rape charges. But this court, in Colbert's direct

appeal, found the evidence was sufficient to sustain his second degree rape conviction. In addition, there was sufficient evidence to convict Colbert of third degree rape.

In reviewing a sufficiency challenge, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here the State presented evidence that Colbert engaged in sexual intercourse with the eighteen-year-old victim of the third degree rape charge. The victim testified that Colbert pulled her pants down while the two of them were in the back seat of a car and put his penis in her vagina. The victim stated that she repeatedly told Colbert "no" during the incident. Determinations regarding the persuasiveness of the evidence are left to the trier of fact. State v. Ong, 88 Wn. App. 572, 579, 945 P.2d 749 (1997). The evidence presented was sufficient to convict Colbert of third degree rape. See RCW 9A.44.060(1)(a).

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 16th day of July, 2008.

Dwyer A.C.J.
Acting Chief Judge

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