

NO. 73241-2-I

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

STATE OF WASHINGTON,

Respondent

v.

MARVIN DUQUE,

Appellant.

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

The Honorable John H. Chun, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Duque's motion to sever counts based on different victims.
2. Mr. Duque was denied effective assistance of counsel when his attorney failed to renew the motion to sever at the close of the State's presentation of evidence.
3. The trial court erred in granting the State's motion to admit uncharged allegations by C.D. and A.D. against Mr. Duque where this propensity evidence should have been excluded under ER 404(b) and its exclusion should have been grounds for the court to sever the offenses.
4. The trial court erred by finding that the dissimilar allegations of C.D. and A.D. were admissible as common scheme or plan.
5. The trial court erred by allowing the jury to review a transcript, which was not admitted as an exhibit, during its deliberations.

Issues Pertaining to Assignment of Error

1. Mr. Duque was tried jointly on counts related to his daughter, C.D. (Child Molestation in the First Degree - Domestic Violence, Rape of a Child in the Second Degree - Domestic Violence) and three counts related to his niece, A.D. (Rape of a Child in the First Degree - Domestic Violence, and two counts of Child Molestation in the First Degree - Domestic Violence). Originally Mr. Duque

was only charged with the two counts related to C.D. Two months prior to trial, the State amended the charges adding the counts alleging sexual misconduct with A.D. On the morning of trial, defense counsel moved to sever the counts of A.D. from the counts of C.D. The trial court denied the motion. Counsel did not renew the motion to sever at the close of all the evidence. Where the offenses related to two victims spanning over different decades allowing the jury to unfairly cumulate the evidence against appellant and improperly infer a criminal disposition, was defense counsel ineffective for failing to renew the motion to sever?

2. Did the trial court commit reversible error when it found C.D. and A.D.'s allegations admissible under ER 404(b) as evidence of a common scheme or plan where the allegations were dissimilar to each other in nearly every way?
3. Did the trial court err in allowing the jury to review a transcript not admitted as an exhibit during its deliberations?

B. STATEMENT OF THE CASE

1. Procedural History

The State's original Information charged Mr. Duque with two counts; Count 1: Child Molestation in the First Degree – Domestic Violence occurring between December 30, 2003, and December 29, 2004, for victim C.D.; Count 2: Rape of a Child in the Second Degree – Domestic Violence occurring between December 30, 2004, and

December 29, 2006, for victim C.D. CP Sub #1.¹ Two months prior to trial, the State's First Amended Information charged Mr. Duque with an additional three count, now encompassing two victims; Count 3: Rape of a Child in the First Degree occurring between December 31, 1995 and December 30, 2001, for victim A.D.; Count 4: Child Molestation in the First Degree occurring between December 31, 1995, and December 30, 2001, for victim A.D.; Count 5: Child Molestation in the First Degree occurring between December 31, 1995, and December 30, 2001, for victim A.D. CP Sub #26. On February 24, 2015, the State amended the Information for a third time removing the Domestic Violence designation as to Counts 3, 4, and 5. CP Sub #51.

On February 10, 2015, the parties called ready for trial. RP1² 2:21-22. Defense counsel did not file a motion to sever the offenses prior to the first day of trial. RP1 6:25-7:7.

The jury found Mr. Duque guilty of all counts charged. RP10 4:7-5:2.

At sentencing, the Court sentenced Mr. Duque to 279 months in prison. CP Sub #72. Mr. Duque filed a timely Notice of Appeal. CP Sub #78.

¹ CP shall designate the "Clerk's Papers."

² This brief refers to the Verbatim Report of Proceedings as "RP" and designates each day as follows: RP1 shall designate proceedings for February 10, 2015; RP2 is February 11, 2015; RP3 is February 12, 2015; RP4 is February 17, 2015; RP5 is February 18, 2015; RP6 is February 19, 2015; RP7 is February 23, 2015; RP8 is February 24, 2015; RP9 is February 25, 2015; and RP10 is February 27, 2015.

2. Motion to Sever

After calling ready for trial, defense counsel included a motion to sever offenses by victim in her trial brief. RP1 4:15-18. The State was unprepared to respond, so it asked the Court to reserve ruling to allow time to prepare a response. RP1 4:18-23. Defense counsel indicated she had been instructed by the criminal motions clerk to have motions to sever heard by the trial judge, and she noted a motion to sever on the omnibus paperwork. RP1 7:1-7. The Court questioned whether defense counsel waived severance and inquired whether the motion was being heard in the interest of justice. RP1 35:11-18. Defense counsel restated her position regarding having motions to sever heard on the criminal motions calendar, and added that defense's objection to joinder was noted on the record when the State added counts related to A.D. RP1 35:19-25.

The motion to sever was argued the following day, and defense counsel argued that the jury would infer criminal disposition from one victim to the other, i.e., if Mr. Duque did this to C.D., he likely did it to A.D. too. RP2 34:12-17. Moreover, if the offenses were not severed by victim, the jury would hear evidence admitted to prove the C.D. offenses, which would not otherwise be admissible in a trial for the A.D. offenses. RP2 34:17-35:1. The State's position regarding severance was the offenses were properly joined because the evidence for each victim was equally strong due to each victim being called as a witness for trial and the

fact complaint testimony for each victim would be the same. RP2 36:20-37:5. The State believed the case would rest on the credibility of the victims and the evidence was not disproportionate. RP2 37:5-19. The State later acknowledged that a key piece of evidence in a trial for the C.D. offenses, a recording of Mr. Duque extorting C.D. for sex as the State puts it, would not be admissible in a trial for the A.D. offenses. RP3 15:10-12. RP2 37:20-22, RP3 1:8-12; RP2 4:35-5:5. The State then argued the defense can portray the recording as not meaning what the State purports it means, and that juries are presumed to follow the Court's instructions in considering each offense separately. RP2 37:23-38:14. The State believed the evidence would be cross-admissible in separate trials under 404(b) as a common scheme or plan. RP 39:4-12. On this note, the State argued that evidence of a common scheme or plan was that both victims were female, between the ages of five and thirteen years old, under Mr. Duque's authority, and the criminal acts were similar with each victim. RP2 39:15-40:8. Last, the State argued that the defenses to each offense was general denial and the witnesses would be the same for separate trials. RP2 38:15-22; RP2 40:11-19.

On rebuttal, the defense pointed out that with respect to cross-admissibility, the bulk of the evidence was not cross-admissible. RP2 43:12-14. Specifically, C.D. would not testify in a trial on the A.D. offenses and visa versa, the recording of Mr. Duque would not come into

evidence in a trial on the A.D. offenses, and C.D.'s boyfriend would not testify about C.D.'s disclosure to him in a trial on the A.D. offenses. RP2 43:14-23. The defense also argued that there are distinct factual differences in the offenses as they relate to each victim. RP2 44:15-17. The defense noted that the only similarities are that the victims are minor age female family members of Mr. Duque. RP2 44:17-19. Of most importance, the defense noted the offenses occurred years apart and did not occur while the victims were of similar age because A.D. alleged the molestation occurred when she was between five and eight years old whereas C.D. alleged the molestation was ongoing between eleven and twenty or twenty-one years old. RP2 44:19-45:5. Moreover, the details of the offenses are different in that A.D. alleged the molestation occurred in the afternoon and Mr. Duque would look at pornographic magazines and ejaculate on her back whereas C.D. alleged the molestation occurred in the middle of the night when he would get into her bed. RP2 45:14-20. The defense agreed that the defense to all offenses was general denial and acknowledged the Court's ability to instruct the jury to decide each count separately. RP2 46:4-10.

The following day, the Court denied the defense's motion to sever offenses finding that the offenses are of similar character, involve a single scheme or plan, a single defense to all offenses, and a court's instruction to the jury can be given regarding deciding each count separately. RP3

10:15-22. The Court also found the alleged conduct towards C.D. and A.D. have been proved by preponderance of the evidence and the acts are substantially similar because both minor females were between five and thirteen years old, Mr. Duque made advances at them when they were alone, both victims were relatives, Mr. Duque was in a position of power, and the alleged sexual acts were substantially similar. RP3 11:1-18. The Court noted that even if there is not cross-admissibility by some evidence, severance is not necessarily required. RP3 14: 21-24.

3. Admitting 404(b) Evidence

The State sought to admit uncharged behavior under ER 404(b) to show lustful disposition towards both victims. RP1 20:23-21:16. The Court requested the State be specific about the behavior it was seeking to introduce in order to perform a proper 404(b) analysis. RP1 21:17-21. The State explained the facts of the behavior to which the Court responded sounded like evidence of the actual crime. RP1 22:3-22. The State was essentially seeking to admit testimony from A.D. that Mr. Duque molested her multiple times per week over a five year period starting when she was five years old, despite the State having charged only two counts. RP1 22:23-23:5. Similarly, the State sought to admit testimony from C.D. that Mr. Duque molested her multiple times per week beginning when she was eleven years old, and sought admission of specific instances of molestation. RP1 23:7-24:3. The purpose of introducing this evidence was to show Mr. Duque's lustful disposition towards both victims. RP1

24:6-11.

The defense's position was to exclude all uncharged allegations of molestation because it was more prejudicial than probative RP1 25:16-19, RP1 27:8-22. Ultimately, the Court granted the State's motion the following day after some discussion with both counsel about common scheme or plan and lustful disposition. RP3 17-19:2. The Court's ruling was limited to "The State has proved that the behavior, by a preponderance of the evidence...". RP3 19:3-4.

4. Allowing Jury to Review Transcript During Deliberations

On the first day of jury deliberations, the jury asked the Court to review the transcript of the audio recording, Exhibit #6. RP9 57:15-21. The transcript was an interpreted document prepared by Claudia A'Zar who testified during the trial. RP9 20-21. The jury stated in its question to the Court that the admitted CD of the audio recording was not useful to them because it was in Spanish. RP9 17-20. Although the State admitted the audio recording it did not admit the interpreted transcript, and the defense properly advised the Court the transcript was not evidence. RP9 58:6-8. The State believed the transcript was a visual aid, which the jury could review while listening to the audio recording. RP9 58:13-15. The Court drafted a response reading "The transcript is not admitted into evidence. However, the transcript is available to you as a visual aid in listening to the audio in open court if you wish to do so." CP Sub #65. On February 26, 2015, at 1:03 p.m.

the jury (pursuant to request #1) requested to review the transcript and audio recording of Exhibit #6. The Court granted the request. CP Sub #67.

5. Trial Testimony

(i) C.D.

C.D.'s date of birth is December 30, 1992, and she is the daughter of Mr. Duque. RP8 37:21-22. For the first eleven years of her life she lived in Guatemala with her grandfather, aunts, and half siblings. RP8 36:8-10; RP8 38:11-16; RP8 39:3-7. In 2003, when C.D. was eleven years old, and still living in Guatemala, she met Mr. Duque for the first time. RP8 42:1-7. After meeting Mr. Duque she went to live with him and his brother, Jimmy Duque, for a couple of weeks before moving to the United States with Mr. Duque. RP8 43:7-16.

When C.D. first arrived in the United States, C.D. lived with Mr. Duque's brother, Jari, and his wife, Sandra Duque, and their daughter, A.D. at their home in Snohomish.³ RP8 46:4-9; RP6 39:14-40:15. This living arrangement lasted for a few months while Mr. Duque arranged for an apartment for him and C.D. RP8 48:4-7. Mr. Duque secured a two bedroom apartment in the Greenwood area. RP8 48:8-15. Mr. Duque and C.D. shared one bedroom while a roommate lived in the second bedroom. RP8 48:12-15. There was a period where Mr. Duque and C.D. shared a

³ Jari and Sandra are referred to by first name to avoid confusion as their last name is Duque.

bed, but eventually Mr. Duque bought C.D. her own bed. RP8 48:24-49:5. Later, Mr. Duque secured a three bedroom apartment in the same apartment complex and C.D. had her own bedroom, Mr. Duque had his own bedroom, and the roommate had his own bedroom. RP8 49:6-50:2.

Months after living with Mr. Duque in Greenwood, C.D. began spending the weekends with Jari, Sandra, and A.D. at their home in Snohomish. RP8 50:16-25; RP8 51:3-5; RP6 45:5-11. There were periods of time when C.D. lived with Jari, Sandra, and A.D. in Snohomish. RP8 51-21-52:2. During high school, C.D. consistently went back and forth living between Mr. Duque's apartment in Greenwood and Jari, Sandra, and A.D.'s home in Snohomish. RP8 52:5-7; RP6 48:8-22. C.D. did not like the rules at Mr. Duque's house, but also had a hard time following the rules when she lived with Jari, Sandra, and A.D. RP8 108:7-23. There were times C.D. did not want to live with Jari, Sandra, and A.D. because she wasn't getting along with A.D. RP8 114:1-5.

C.D. testified that she was eleven years old the first time Mr. Duque molested her and the incident happened just a few days prior to coming to the United States when they were staying at her uncle Jimmy's house. RP8 58:6-11; RP8 60:23-61:3. They shared a bed and in the early morning hours, C.D. remembered Mr. Duque's hand going inside her pajamas and touching her vagina. RP8 58:6-21; RP8 59:14-16. According to C.D., Mr. Duque's hand did not penetrate her vagina on this

occasion. RP8 60:3-6.

C.D. testified that Mr. Duque began molesting her regularly when she was eleven years old, living with him in the two bedroom apartment and they shared a bed. RP8 61:4-13; RP8 63:22-25. C.D. described multiple times she woke up to Mr. Duque putting his hands inside her pants, around her breasts, his bare skin next to hers, and his penis pressed against her body. RP8 62:3-14. C.D. testified that Mr. Duque did not initially put his fingers inside her vagina. RP8 63:14-18. C.D. also testified these incidents happened three to four times a week. RP8 64:1-5. After C.D. got her own bed, but still shared a bedroom with Mr. Duque, she testified the molesting continued and he would get in her bed. RP8 65:10-17.

When C.D. was approximately twelve or thirteen years old they moved into the three bedroom apartment where C.D. had her own room. RP8 67:15-20; RP8 68:10-12. C.D. testified that it was then when Mr. Duque began putting his fingers inside her vagina, and she recalled she was molested more often after moving to the three bedroom apartment. RP8 68:14-16; RP8 73:3-6. C.D. recalled one incident where Mr. Duque performed oral sex on her and put her hand on his penis to masturbate him. RP8 68:18-22. C.D. testified that although the molesting happened three to five times a week, Mr. Duque performed oral sex on her and she masturbated him only one time. RP8 72:2-12. C.D. recalled being

molested from the time she was eleven years old to when she graduated high school. RP8 72:19-23. C.D. also recalled that Mr. Duque began putting his fingers inside her vagina when she was thirteen to fourteen years old. RP8 72:15-18.

The first time C.D. told anyone about being molested she was eleven years old. RP8 73:25-74:4. C.D. told Sandra and A.D. while Jari was at work, but Sandra called Jari requesting he come home. RP8 74:12-13; RP8 74:23-75:1. Later, C.D. told Jari she had lied about the allegations and she testified that was at Mr. Duque's direction and fear of being deported back to Guatemala. RP8 54:17-18; RP8 75:7-23.

C.D. confronted Mr. Duque about the molestation in 2011, and he apologized saying it wouldn't happen again. RP8 78:5-19. At the end of the conversation, C.D. testified that Mr. Duque took away her phone and grounded her. RP8 78:22. A couple of hours later, Mr. Duque told her he would make her a deal that she could have her phone back and be ungrounded if she went to his room for thirty minutes for him to do what he wanted with her. RP8 78:23-79:4.

In 2012, three weeks after C.D.'s high school graduation, she moved out of Mr. Duque's apartment. RP8 79:6-10. In 2013, after finding it difficult to live with roommates, her boyfriend at the time, Ivan Estrella, suggested she move back in with Mr. Duque. RP8 79:17-25; RP8 81:19-82:5. C.D. told Mr. Estrella that Mr. Duque molested her and that

was the reason she did not want to live with him again. RP8 79:17-25. C.D. struggled with finding a place to live and transportation, so she asked Jari for help getting a loan to buy a car. RP8 115:25-116:15; RP8 117:1-4. C.D. ended up moving back in with Mr. Duque in October 2013, into the same three bedroom apartment. RP8 83:15-21. On December 24, 2013, C.D. testified that Mr. Duque came into her room with only a shirt on and attempted to molest her, but she got out of bed and confronted him. RP8 85:1-12; RP8 86:5-10. According to C.D.'s testimony, a couple days later, Mr. Duque approached her with a deal that he would continue to let her live with him and buy her a car if she let him do what he wanted with her for thirty minutes. RP8 87:14-24. C.D. recorded a conversation she had with Mr. Duque wherein he conveyed his offer to spend thirty minutes in his room. RP8 90:2-3; RP8 90:22-23; RP8 97:21-23. C.D. testified that Mr. Duque told her that if she sought his help in the future he would force her to have sex with him, but C.D. claimed this part of the conversation was not on the recording. RP8 118:15-24. C.D. stayed with Mr. Duque for about a week after the recorded conversation while she looked for another place to live. RP8 89:9-12; RP8 98:4-7. During that week, she blocked the door to her room with a dresser. RP8 98:11-12. When C.D. found a place to live and moved out of Mr. Duque's apartment, she testified he texted her about his offer to come back and live at his apartment in exchange for thirty minutes. RP8 99:23-24; RP8 100:6-7.

C.D. deleted the text and blocked Mr. Duque from contacting her. RP8 100:9-10.

C.D. talked to Jari and A.D. about Mr. Duque's continued molestation and offered proof with the recorded conversation between her and Mr. Duque. RP8 100:24-101:3. A.D. told C.D. that Mr. Duque had molested her when she was younger. RP8 101:11-13. This was the first time C.D. learned of this. RP8 101:11-13. After this conversation, A.D. went to the police and C.D. decided to follow A.D.'s lead and also talked to the police. RP8 101:20-102:1.

(ii) A.D.

A.D.'s date of birth is December 31, 1990, and she is the paternal niece of Mr. Duque. RP7 22:22; RP7 24:22-23. When A.D. was four or five years old she lived in a two bedroom apartment in Shoreline with her parents, Jari and Sandra. RP7 24:6-11; RP7 30:15-21; RP7 31:15-17. In 1996, Mr. Duque moved from Guatemala and he began living with Jari, Sandra, and A.D., and he shared a room with A.D. until they moved into a three bedroom apartment within the same apartment complex. RP6 92:24-93:11; RP6 93:20-95:1; RP7 33:19-20. After Mr. Duque arrived in the United States, he and A.D. began building a relationship; he took her to the store, bought her things, drove her to school, and drove her to see her mom. RP6 99:18-100:6; RP7 36:7-20.

During the time Jari, Sandra, A.D., and Mr. Duque lived in

Shoreline, Jari worked from 9am to 5pm, or 8am to 4pm, and Sandra also worked days. RP6 20:18-25; RP6 96:25-98:9. Mr. Duque worked evenings, so he helped watch A.D. when she got home from school. RP6 98:10-25; RP6 99:1-17; RP7 38:24-39:1. Sandra never saw anything between Mr. Duque and A.D. that concerned her and she thought it was a good thing that A.D. was around Mr. Duque. RP6 34:8-25. When A.D. was six or seven years old, Sandra took her to the doctor because she had complained of vaginal irritation, and the doctor told Sandra to stop giving A.D. bubble baths. RP6 36:12-23.

A.D. did not remember an exact time period when Mr. Duque started molesting her. RP7 40:25-41:2. A.D. testified that she did not have a time frame, but only recurring memories that her clothes came off, but didn't remember how they came off; only that Mr. Duque was the one who took them off. RP7 41:14-21; RP7 45:5-7. A.D. also testified that she remembered being in her underwear and Mr. Duque's clothes being on and then off. RP7 42:2-6. A.D. recalled incidents when Mr. Duque would kiss her, touch her breasts, put the tip of his penis in her mouth, rub her vagina, pull her hand toward his penis, rub her body, and kiss her vagina. RP7 43:3-13; RP7 44:1-12; RP7 44:13; RP7 50:16-23; RP7 52:4-9. A.D. used a circus television show as her frame of reference to recall how often Mr. Duque molested her, i.e., Mr. Duque would allow her to watch the circus television show after he molested her so she associated how often

she watched the show to how many times Mr. Duque molested her. RP7 58:3-59:1. A.D. could not say if these incidents happened after day care, kindergarten, first grade, second grade, or third grade. RP7 99:18-22.

A.D. lived in the three bedroom apartment in Shoreline until moving to Snohomish in 2000, when A.D. was nine or ten years old. RP7 39:17-20. When A.D. was twelve or thirteen, she remembered C.D. telling her and Sandra that she was being molested by Mr. Duque. RP7 74:4-15. After C.D. said she was being molested, A.D. disclosed that it happened to her too. RP7 75:16-18. In 2014, A.D. recalled a time when C.D. came to her house in Snohomish to talk to Jari and it was then that A.D. decided to go to the police. RP7 84:17-19; RP7 21-22.

C. ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING MR. DUQUE'S MOTION TO SEVER OFFENSES.

A trial court must sever offenses when "severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). This is true even if offenses are properly joined on one charging document. Id.; CrR 4.3(a)(1); State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). A pretrial severance motion denied by the court may be renewed up until the close of all the evidence. CrR 4.4(a)(2). Failing to renew an unsuccessful severance motion constitutes a waiver. State v. Henderson, 48 Wn. App. 543, 545, 551, 740 P.2d 329 (1987).

Joinder of unrelated offenses is "inherently prejudicial." State

v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). A defendant may be prejudiced by joinder in a number of ways:

(1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. 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.

State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) (citations omitted). A more subtle prejudicial effect may be present in a “latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” Harris, 36 Wn. App. At 750 (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)). Factors that may mitigate this inherent prejudice include:

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

State v. Sutherby, 165 Wn.2d 870, 884-885, 204 P.3d 916 (2009).

In addressing the first fact, it is important to note State v. MacDonald, which stands for the proposition that when the case on one charge is remarkably stronger than that of another charge, severance of trials is proper. State v. MacDonald, 122 Wn. App. 804,

814-815 (2004). In MacDonald, the defendant was charged with one count of First Degree Rape and one count of Second Degree Rape based on two separate incidents involving two separate victims. Id. at 807-808. The age of the victims were 16 and 18 respectively, and the incident dates occurred on April 26, 2000, for Count I and on March 23, 2000, for Count II. The two counts were joined for trial and the defendant moved to sever the two counts for trial arguing that the counts involved separate incidents, separate victims, and separate defenses. Id. The Court of Appeals found that joinder of the offenses would prejudice the defendant's right to a fair trial. MacDonald, at 815. The court made the following findings justifying severance of offenses:

Here, none of the evidence in one case supports the other. Moreover, although the court properly instructed the jury to "decide each count separately" and that the "verdict on one count should not control your verdict on any other count," when MacDonald elected to testify and deny that he raped L.P., the State argued that he had failed to also deny that he raped C.T. and thus merged the prosecution of the two entirely separate charges.

The Court also noted that the evidence pertaining to one count was significantly weaker than the evidence pertaining to the second count. Id. at 815. Similarly, in State v. Harris, the Court of Appeals found it impermissible to join two counts of Rape in the First Degree involving two separate victims and two incidents separated by a two and a half week period. State v. Harris, 36 Wn. App. 746, 749-750 (1984). The Court of Appeals found that the two rapes were not part of a common scheme or plan, so that evidence of one was not admissible in the prosecution for the

other, where the only similarity was that both victims voluntarily entered the defendant's vehicle, but were then driven against their will to the area where the rapes occurred. Id. at 751. The two incidents merely showed a propensity of the defendant to commit rape, which is prohibited under Evidence Rule 404(b). Id.

The trial court's denial of the motion to sever allowed the jury to infer that Mr. Duque had a disposition to molest young girls. At the very least, trying the counts related to his daughter and separate counts with his niece together necessarily engendered a latent feeling of hostility toward Mr. Duque. See State v. Hernandez, 58 Wn. App. 793, 801, 794 P.2d1327 (1990) ("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[.]"), disapproved on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 99, 812 P.2d 86 (1991). If considered separately, the counts involving A.D. based on the relative weakness of the evidence would have resulted in different outcome.

The second factor, clarity of defenses, also favored severance. General denial was a defense to all the counts, but there was a clear motive to lie in the case involving C.D., which only slightly existed in the case involving A.D. For example, Jari, Sandra, and C.D. testified that C.D. had a hard time following the rules at Mr. Duque's house, so she'd return to live with Jari, Sandra, and A.D. Then she'd have a hard time following

the rules there and go back to living with Mr. Duque. Jari presented the perception that when something wasn't going C.D.'s way she'd find a way to make it go her way, and during that time it was moving back and forth between households to avoid responsibilities. The first time C.D. disclosed that Mr. Duque was molesting her she was headed back to live with him, so the defense was able to lay the groundwork for their theory that C.D. made up these allegations to avoid living with Mr. Duque. This overarching theme did not exist in the case involving A.D. The only theory available for development with regard to A.D. was that she followed C.D.'s lead in disclosing the molestation by jumping in after C.D.'s disclosure telling her mother it happened to her too. As such, while the defenses as to all offenses was general denial, the theories of each victim's case was vastly different.

The third factor also supports severance despite instructions informing the jury it must "decide each count separately." The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. State v. Bythrow, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). In Bythrow, the court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence, different witnesses testified as to the different counts, the jury was properly instructed to consider the counts

separately, and the issues and defenses were distinct. Bythrow at 723. On that basis, the reviewing court concluded the jury was likely not influenced by evidence of multiple crimes that refusal to sever was not error. Id.

Unlike in Bythrow, the jury in this case was unlikely to properly compartmentalize the evidence of the different counts. First, Mr. Duque's trial spanned ten days, with constant starting and stopping points. Moreover, testimony on the different counts were not presented in sequence, with testimony of various witnesses jumping from incident to incident. Given the length of trial, non-sequential testimony, and multiple charged counts, the jury was likely to infer Mr. Duque had a criminal disposition despite the limiting instruction. See State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) ("A juror 's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended."), review denied, 116 Wn.2d 1020 (1991).

The fourth factor also favored severance. After denying the defense motion to sever, the Court noted that there was some evidence that wasn't cross-admissible, namely the recording, but then quickly found that even when there is not cross-admissibility by certain evidence, severance is not necessarily required. The Court seems to have based its ruling on the admissibility of uncharged offenses and their admissibility, and it went

into a lengthy 404(b) analysis. The fact of the matter is the recording of Mr. Duque's alleged extortion of C.D. for sexual acts would not have been admissible in a separate trial for the A.D. offenses, C.D.'s boyfriend whom she disclosed to would not have been admissible in a separate trial for the A.D. offenses, and the testimony of the victims would not have been cross-admissible for reasons set forth below.

For all the reasons discussed above, trying the charges together necessarily engendered a latent feeling of hostility toward Mr. Duque. And the limiting instruction was insufficient to mitigate the prejudice inherent in trying the offenses together. The separate counts involving C.D. should have been severed from those involving A.D. to guarantee Mr. Duque a fair trial.

II. MR. DUQUE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO RENEW THE MOTION TO SEVER THE COUNTS AT CLOSE OF THE STATE'S EVIDENCE.

Defense counsel's failure to renew motion to sever the counts fell below the objective standard expected of a reasonable attorney. The failure caused Mr. Duque prejudice. There was a reasonable likelihood Mr. Duque would have been acquitted of counts associated with A.D. absent the jury being able to consider the irrelevant and prejudicial evidence relevant to only the counts involving C.D. Mr. Duque's convictions should be reversed and remanded for severance and retrial.

Article I, Section 22 and the Sixth Amendment guarantees criminal defendants receive effective representation of counsel. U.S. Const. Amend. 6; Const. Art. I §§ 3, 22; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984); *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420, 114 P.3d 607 (2005) overruled in part on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) . A defendant establishes ineffective assistance by showing (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Decisions based on reasonable tactics or strategy are not deficient. State v. Pottorff, 138 Wn. App. 343, 349, 156 P.3d 955 (2007). Prejudice exists when, but for the deficient performance, there is a reasonable probability the result would have been different. State v. B.J S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); State v. Horton, 136 Wn. App. 29, 36, 146

P.3d 1227 (2006), review denied, 162 Wn.2d 1014 (2008). Ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. State v. Greiff, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

Trial counsel's failure to renew her previous motion to sever offenses will support an ineffective assistance of counsel claim only when the defendant can show the severance motion, properly made, would have been granted. State v. Jamison, 105 Wn. App. 572, 591, 20 P.3d 1010, review denied, 144 Wn.2d 1018 (2001); State v. Price, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005) ctf d, 158 Wn.2d 630 (2006). Denial of a motion to sever offenses when such severance should have been granted is an abuse of discretion. Harris, 36 Wn. App. at 749-50.

Nothing happened during trial to mitigate the prejudice counsel anticipated when bringing the motion in the first place. Thus, there was no reasonable trial strategy that would lead counsel to abandon the motion to sever offenses. Counsel simply neglected to renew the motion as required by the rules. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. Sutherby, 165 Wn.2d at 887.

In Mr. Duque's case, his attorney simply neglected to renew the

motion to sever offenses at the close of the State's case and there was no reasonable trial strategy to explain the abandonment of the motion based on the evidence presented. The State presented testimony from C.D. who had a clear memory of the incidents of molestation she endured starting when she was eleven years old and lasting into her twenties. C.D. had no doubts as to when it happened, how it happened, who was around when it happened, or why it happened. C.D. recalled specific details, dates, conversations, and her feelings at the time. To bolster C.D.'s allegations, the State called C.D.'s ex-boyfriend to testify that C.D. told him Mr. Duque molested her and that was the reason she did not want to move in with him. Then the State had the recorded conversation between Mr. Duque and C.D. wherein Mr. Duque is heard asking C.D. to spend thirty minutes with him in exchange for a place to live and a car. The evidence in A.D.'s case is underwhelming at best. The evidence in A.D.'s case came down to A.D. and her rambling of unspecific occasions she vaguely remembered from a time period she didn't recall. There was no evidence to corroborate A.D.'s allegations. Clearly, based on the evidence presented any reasonable attorney would have renewed the motion to sever offenses and no reason other than neglect can explain why Mr. Duque's defense counsel failed to renew the motion.

For the reasons discussed above, defense counsel's failure to renew the motion to sever was prejudicial. Mr. Duque's constitutional right to

effective assistance of counsel was violated.

III. THE COURT ERRED WHEN IT ADMITTED C.D. AND A.D.'S UNCHARGED ALLEGATIONS UNDER 404(B) AS EVIDENCE OF A COMMON SCHEME OR PLAN.

A defendant must only be tried for those offenses actually charged. Therefore, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 2, 240 P.2d 251 (1952) overruled on other grounds by State v. Lough, 125 Wn.2d 847, 860 n. 19, 889 P.2d 487 (1995). The prosecution's attempts to use evidence of other crimes must be evaluated under ER 404(b), which reads:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

Admission of evidence under this rule is reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 59 I, 637 P.2d 961 (1981). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court abused its discretion in this case.

Although evidence of a "common scheme or plan" is a recognized exception to ER 404(b)'s ban on propensity evidence, before evidence can be admitted under this exception, it must satisfy four requirements: the prior acts must be (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common scheme or plan, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). The State's burden to demonstrate admissibility is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

The testimony about C.D. and A.D.'s uncharged allegations fails to satisfy the second and fourth prongs of the test. C.D. and A.D.'s uncharged allegations did not demonstrate a common scheme or plan because they are dissimilar to each other. To prove a common scheme or plan, the other crime evidence must demonstrate "that the person 'committed markedly similar acts of misconduct against similar victims under similar circumstances.'" State v. Carleton, 82 Wn. App. 680, 683, 919 P.2d 128 (1996) (quoting Lough, 125 Wn.2d at 852). Stated another way, the "prior misconduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual

manifestations." Id. at 684 (quoting Lough, 125 Wn.2d at 860).

This case does not bear the markers of similarity noted in other cases when validating a finding of "common scheme or plan." For example, in State v. Schemer, 153 Wn. App. 621, 225 P.3d 248 (2009), affirmed by State v. Gresham, 173 Wash.2d 405, 269 P.3d 207 (Wash., 2012), the court found sufficient evidence of a common scheme or plan because: 1) "the girls were of similar prepubescent age and size," 2) "in each instance Schemer was a trusted relative or friend of the girl," 3) "in each instance he molested the girl in bed, sometimes after she had gone to sleep," and 4) "in each case the abuse involved rubbing the girl's genital area or performing oral sex." Schemer, 153 Wn. App. at 657.

By contrast, C.D. and A.D.'s allegations of sexual interaction with Mr. Duque on multiple occasions does not satisfy the similarity requirement. There are many marked differences between their allegations. C.D.'s allegations were all instances where she alleged Mr. Duque got into her bed or the bed they shared and his touching escalating from rubbing her vagina and breasts to putting his finger inside her vagina to performing oral sex on her. C.D. alleged these sexual interactions started occurring when she was eleven years old and continued until she was twenty or twenty-one years old. C.D. alleged that the sexual interactions occurred at night or early morning hours while other people were sleeping in neighboring rooms. A.D.'s allegations were that Mr.

Duque would undress her or he'd be undressed and he'd masturbate then ejaculate on her back. C.D. testified that this happened when she was between five and ten years old when he watched her after school. C.D. testified the sexual interactions occurred in either her or his bedroom while no one was home.

C.D.'s allegations bear little resemblance to A.D.'s allegations and this evidence does not show an overarching plan. What the State has attempted to do in this case is to pick and choose random facts from C.D.'s statements to manufacture similarities to A.D.'s statements where none exist. But the State's has failed to produce evidence of a common scheme or plan in this case. In fact, the allegations of C.D. and A.D. bear only superficial similarity. The prosecutor argued that C.D. and A.D. were of similar age at the time of the alleged abuse. However, C.D. recalled being eleven years old when the abuse started and A.D. believed she was between the ages of five to ten years old. The truth of the matter is the alleged abuse occurred in different decades and when both C.D. and A.D. were of completely different ages and development. The only other similarity is that both girls are Mr. Duque's family members; C.D. is Mr. Duque's daughter and A.D. is Mr. Duque's niece. These are hardly the "marked similarities" to the charged offenses described by controlling case law. See State v. DeVincentis, 150 Wn.2d 111, 113, 74 P.3d 119 (2004) (while uniqueness is not required, "a unique method of committing the

bad acts is a potential factor in determining similarity"). If the court allows the most superficial of similarities to control in cases such as these, the exception to ER 404(b) will simply swallow the rule. There are not sufficient similarities here to establish a common scheme or plan and the evidence of C.D. and A.D.'s allegations should not have been admitted. The trial court abused its discretion. Admission of this highly inflammatory evidence unfairly prejudiced Mr. Duque because the jurors were presented with inflammatory and disturbing testimony of alleged sexual misconduct, which they would have been naturally inclined to treat as evidence of criminal propensity. The prejudice potential of prior bad acts evidence is at its highest in sex abuse cases. This is so because, as the Washington Supreme Court has recognized, "Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (citation omitted).

To compound the problem, this was a classic credibility case. C.D. and A.D.'s testimony was the only evidence against Mr. Duque. The prosecutor argued to the jury this evidence shows what kind of man Mr. Duque is and it could rely on the testimony of C.D. and A.D. alone to convict Mr. Duque. The prejudicial impact of the testimony provided by C.D. and A.D.'s uncharged allegations must be weighed against the

probative value of this evidence. The Supreme Court's decision in Lough is instructive on this point. In Lough, the defendant was charged with drugging and then raping his victim while she was unconscious. The State attempted to introduce evidence from four other women that over a ten-year period, Lough had raped them in a similar manner. The trial court allowed the women's testimony as evidence of a common scheme or plan to drug and rape women. Lough, 125 Wn.2d at 849-50.

On appeal, the Supreme Court considered three factors in deciding the probative value of the testimony clearly outweighed its prejudicial effect. These factors were discussed in State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996), review denied, 131 Wn.2d 1007 (1997).

First, the court found the evidence highly probative because it showed the same design or plan on a number of occasions. Krause at 696. That is not true in Mr. Duque's case. As discussed above, the acts described by C.D. are very different from A.D.'s allegations and do not show a common design or plan. In Lough, there were five victims testifying to substantially similar acts, making the existence of a common scheme or plan significantly more likely. Here, there were only two alleged victims and very dissimilar acts alleged. Thus, unlike in Lough, there is no common design or plan here to increase the probative value.

The second factor identified by the Lough court was the need

for the ER 404(b) testimony because the victim was drugged during the attack and not entirely capable of testifying to the defendant's actions. Lough, 125 Wn.2d at 859. Only by hearing from all of the witnesses would a clear picture of events emerge. Krause, 82 Wn. App. at 696. Again, this is not true in Mr. Duque's case. Both C.D. and A.D. were capable of testifying and recalling the sexual interactions although C.D. had a much clearer memory. Compare State v Kennealy, 151 Wn. App. 861, 214 P.3d 200 (2009) (noting young age of alleged victims when they testified supported admission).

The third factor identified in Lough was the repeated use of a limiting instruction. Krause, 82 Wn. App. at 696. Even if a proper instruction has been given, "[c]ourts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction." Krause, 82 Wn. App. at 696. Thus, application of the Lough factors shows the evidence in this case was not more probative than prejudicial.

The erroneous admission of the testimony of C.D. and A.D. regarding uncharged allegations requires reversal. Where prior misconduct evidence is erroneously admitted, reversal is required if "within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred." State v. Carleton, 82 Wn.App. 680, 686, 919 P.2d 128 (1996). Without the testimony of the

uncharged allegations, the court would have likely severed the offenses giving each alleged victim their day in Court and the jury would have only been permitted to hear what Mr. Duque alleged did to C.D. during the trial involving the C.D. offenses and visa versa.

IV. THE COURT ERRED IN ALLOWED THE JURY TO REVIEW THE TRANSCRIPT OF THE RECORDING BECAUSE IT WAS NOT ADMITTED INTO EVIDENCE

CrR 6.15(e) provides that the jury "shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms" when it retires to consider the verdict. Accordingly, we have held that the jury can take into deliberation tapes that have been admitted into evidence. State v. Elmore, 139 Wash.2d 250, 294–96, 985 P.2d 289 (1999) (discussing State v. Castellanos, 132 Wash.2d 94, 935 P.2d 1353 (1997))(cert. denied, 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed.2d 57 (2000)).

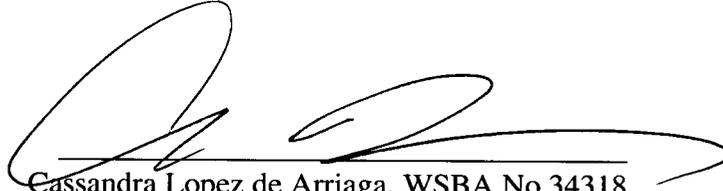
In the present case the Court allowed the jurors to review transcripts of the recording while listening to the recording despite the transcripts not being admitted into evidence in violation of CrR 6.15(e). Both the State's written response signed by the Court clearly states the transcript was not evidence. Accordingly, the jury should have not been allowed to review the transcript in any way during their deliberations, regardless of it being in open court while listening to the audio recording.

D. CONCLUSION

Mr. Duque conviction should be reversed and his cases

remanded for retrial.

Respectfully submitted this 24th day of
November 2015.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a long, sweeping horizontal line that ends in a small loop.

Cassandra Lopez de Arriaga, WSBA No.34318
Attorney for Marvin Duque, Appellant

CERTIFICATE OF SERVICE

Cassandra Lopez de Arriaga declare as follows:

On today's date, November 25, 2015, I caused service via legal messenger of Appellant's Opening Brief to: (1) King Prosecutor, King County Prosecutor's Office, King County Courthouse, Room 554, 516 Third Avenue, Seattle, WA 98104, (2) the Court of Appeals, Division I; and (3) I mailed a true and correct copy to Marvin Duque/DOC#381416, Coyote Ridge Corrections Center, 1301 N Ephrata Ave, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 25 2015, in Everett, Washington.



Cassandra Lopez de Arriaga, WSBA No.34318
Attorney for Marvin Duque, Appellant

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