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Court of Appeals
Division I
State of Washington

NO. 73241-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARVIN DUQUE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN CHUN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Evidence of prior acts is admissible under ER 404(b) to show the defendant's lustful disposition toward the complaining witnesses and to show a common scheme or plan of which the charged offenses were a part. Here, the trial court ruled that evidence of the defendant's "uncharged" acts of sexual misconduct against CD and AD were admissible to show both his lustful disposition and his use of a common scheme or plan. Duque challenges the ruling only with respect to the common scheme or plan basis for admission; he does not argue the court erred by admitting the evidence to show lustful disposition. Where the evidence was properly admitted for that purpose, has Duque failed to establish any abuse of discretion?

2. CrR 4.4(a) requires a defendant to make a pretrial motion to sever and, if denied, to renew the motion before or at the close of evidence. If the defendant fails to do either, then severance is waived. Here, the defendant made a pretrial motion to sever the counts by victim. The trial court denied the motion to sever and the defendant failed to renew that motion at the close of evidence. Has the defendant waived appellate review of the severance issue?

3. To prove ineffective assistance of counsel based on the failure to renew a pretrial motion to sever offenses, the defendant must show both that the trial court should have granted the motion and that, but for counsel's failure to renew the motion, the outcome at trial would have been different. Here, the defendant would not have prevailed on a renewed motion to sever because the evidence on all counts was comparably strong, the defenses were not inconsistent, most evidence was cross-admissible, and the jury was instructed to consider each crime separately. Additionally, defense counsel had a legitimate strategic reason for not renewing the motion to sever. Has the defendant failed to show ineffective assistance of counsel?

4. The jury is to take into its deliberations the instructions and exhibits in evidence. Here, the trial court admitted a recording of a foreign-language conversation into evidence, provided the jury with a translated transcript while the conversation was played, and instructed the jury to rely exclusively on the translation. When the jury later requested the transcript during deliberations, the court consulted the parties and the defendant agreed that the jury should have the transcripts if the tape was replayed in open court. Has the defendant invited or waived any

error in allowing the jury to consider the unadmitted transcript by affirmatively agreeing with this procedure?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

By amended information, the State charged Marvin Duque with three counts of Child Molestation in the First Degree, one count of Rape of a Child in the First Degree, and one count of Rape of a Child in the Second Degree. CP 27-29. The State alleged that Duque engaged in a pattern of sexual abuse of his biological daughter, CD, and of his niece, AD, over several years. CP 3-4. With respect to the charges involving CD, the State alleged that the offenses were crimes of domestic violence. CP 27-29.

On the day of trial, Duque moved to sever the counts involving CD from those involving AD. 1RP 4;¹ CP 12-14. Presuming the success of his severance motion, Duque also moved to exclude testimony by one victim in a separate trial concerning the other. CP 14-16. The State opposed severance, and the trial court denied the motion. 3RP 10-25. Duque never renewed the severance motion.

¹ This brief refers to the Verbatim Report of Proceedings as follows: 1RP – 2/10/15; 2RP – 2/11/15; 3RP – 2/12/15; 4RP – 2/17/15; 5RP – 2/18/15; 6RP – 2/19/15; 7RP – 2/23/15; 8RP – 2/24/15; 9RP – 2/25/15; 10RP – 2/27/15.

The State moved to admit evidence of uncharged sexual behavior toward AD and CD in the joint trial as res gestae and to establish Duque's lustful disposition toward the two victims. 1RP 20-27; Supp. CP ___ (Sub No. 44: State's Trial Memorandum, pp. 11-14). Duque opposed the motion and moved to exclude such evidence. CP 19-20, 21-26; 1RP 26-27. After inviting and considering additional defense briefing and argument on the issue, the trial court granted the State's motion to admit this evidence for the purposes of establishing lustful disposition and common scheme or plan. 1RP 27-28; 3RP 17-25.

The parties also disagreed about whether to admit a recording that CD made of a conversation between herself and the defendant in which Duque insists that CD move out unless she submits to additional sexual abuse. CP 16-19; Supp. CP ___ (Sub No. 44: State's Trial Memorandum, pp. 14-16); 1RP 28-35; 2RP 12-25. The trial court concluded that the recording was relevant to show lustful disposition and common scheme or plan and did not violate Washington's Privacy Act. 2RP 4, 12-25, 46; 3RP 9. The court granted the State's motion to admit the audio recording. 2RP 25.

The recording was transcribed and translated by a certified Spanish interpreter. 7RP 4-5, 12. Without objection, the State provided the transcript to the jury while playing the Spanish-language recording. 7RP 145-46. At the defense's request, the trial court instructed the jury to "rely only on the transcription and translation that has been provided to you" rather than the jurors' own possible understanding of Spanish. 7RP 145-47; 8RP 91-92. The transcript itself was not admitted into evidence.

During its deliberations, the jury requested the transcript of the recording, as the untranslated recording was not useful. 9RP 57. The parties agreed that the transcript was not in evidence, but that the jury could review the transcripts while listening to the recording again in open court. 9RP 57-59.

The jury found Duque guilty as charged. 10RP 4; CP 67-71. The jury also found that his offenses against CD were crimes of domestic violence. 10RP 4; CP 72-73. The trial court imposed concurrent sentences on the five counts, resulting in a term of 279 months' confinement. CP 89.

2. SUBSTANTIVE FACTS

Marvin Duque moved from Guatemala to the United States in 1995 or 1996. 6RP 25, 93. Duque initially lived in his brother

Jari's² home in Shoreline, along with Jari's wife, Sandra, and their five-year-old daughter, AD (DOB 12/31/1990). 6RP 24, 26, 93-95. Duque shared a room with the young girl at first, but the family eventually moved to a larger apartment where she had her own room. 6RP 29-30, 94-95.

Because Jari and Sandra worked during the day and Duque worked in the evening, Duque took care of AD after school until her parents came home. 6RP 33, 98-99; 7RP 39. While they were alone, Duque repeatedly raped and molested the young girl. 7RP 41-61.

AD recalled that Duque would remove her clothes and his own, show her a pornographic magazine, and touch and kiss her body. 7RP 41-43. Duque put his penis between her legs and touched her vagina. 7RP 44, 48-50. Many times, Duque attempted to force AD to perform fellatio by pushing her head down toward his penis. 7RP 43, 53. Once, he managed to put the tip of his penis in her mouth, but she pulled away quickly. 7RP 43. Another time, Duque put his mouth on her vagina. 7RP 44-45. Duque also had AD touch his penis, and wrapped his hand around hers to

² Since most witnesses in this case share the same last name, this brief refers to appellant as Duque and to other family members by their first names or initials. No disrespect is intended.

masturbate. 7RP 44, 53. On at least one occasion, the molestation ended with Duque ejaculating on the girl's back and then cleaning her off with Kleenex. 7RP 45, 59. AD's parents did not allow her to watch much television, but Duque always let her watch a particular show after the molestation. 7RP 58. AD suffered vaginal redness and irritation during this time, but a doctor dismissed the concern as the result of too-frequent bubble baths. 6RP 36; 7RP 64-65.

The abuse continued until 2000, when AD was 9 or 10 and moved with her parents to a home in Snohomish. 7RP 61; 6RP 35, 95. Duque approached her once more in the new home, but AD told him "no" and pushed him away. 7RP 61-63. Duque did not molest AD again and moved out a month or two later. 7RP 63, 66.

In 2001 or 2002, Duque went to Guatemala to retrieve his daughter, CD (DOB 12/30/1992). 6RP 24, 37-38, 102; 7RP 67-68; 8RP 42-43. CD had been living mostly with her grandfather in poor conditions and had never before met her father. 6RP 39; 8RP 32, 38. Duque moved CD to another brother's house, and a couple weeks later, they flew to the United States. 8RP 43. Duque began molesting his daughter before they even left Guatemala, by

touching CD's vagina under her underwear while she was sleeping.
8RP 58, 60, 122.

CD lived with Jari, Sandra, and AD for some time after arriving in the United States. 6RP 39, 102; 7RP 68. She then moved into a two-bedroom apartment that Duque shared with a roommate, forcing CD to share a bed with her father. 8RP 48. Later, CD got her own bed in Duque's room, and eventually, they moved to a larger apartment where CD had her own room. 8RP 49.

CD recalled that while she and Duque shared a bed, she would wake up to Duque putting his hands in her pants, touching her breasts, and pressing or rubbing his erect penis against her. 8RP 62-63, 65. Duque began by touching only the outside of her vagina, but started penetrating her with his fingers when she was 13 or 14. 8RP 63, 72. The abuse became more frequent after she had her own bedroom, occurring three to five times per week. 8RP 64-65, 73. Once, Duque removed CD's pants and put his mouth on her vagina. 8RP 68-69, 72. He then grabbed her hand, placed it on his penis, wrapped his hand around hers, and masturbated. 8RP 68-70. The abuse continued until CD graduated from high school in 2012 and moved out. 8RP 72, 79.

CD disclosed the abuse to her aunt and uncle soon after it started. CD often spent weekends with them, and frequently told her aunt that she did not want to go back home. 8RP 45. In 2003, Sandra insisted that CD tell her why she did not want to go home and CD disclosed the sexual abuse. 6RP 49; 8RP 74. "As soon as she said it, [AD] blurted out, 'It happened to me, too.'" 7RP 75. Sandra informed Jari, who came home to speak to the girls separately. 6RP 61; 7RP 76, 79; 8RP 74-75. Jari called the police the next day, but did not make AD available for an interview, and no further action was taken at that time. 6RP 62-63, 112; 8RP 21. Sandra and Jari put AD in counseling, but that effort was quickly abandoned. 6RP 64; 7RP 81. They took no action with regard to CD's allegations.

Despite her disclosure, CD was returned to Duque. 6RP 64, 81, 117. Duque threatened to send her back to Guatemala unless she immediately called Jari to say that she had lied about the abuse. 8RP 75. CD did as she was told, which ruined her relationship with Jari and eliminated his home as a place of refuge. 8RP 76-77. Duque waited about a month before he started molesting her again. 8RP 76.

CD confronted her father about the abuse in 2011. 8RP 78. Duque apologized and promised not to do it again, but grounded her and took her phone. 8RP 78. Duque later came to her room to make a "deal" with her. 8RP 78. "He said, 'If you come in my room for thirty minutes and let me do anything I want ... with you, you can have your phone back, or I will buy you a new phone and I will let you go out more with your friends.'" 8RP 78-79. CD refused and remained grounded. 8RP 79.

CD graduated from high school in 2012 and moved out three weeks later. 8RP 79. She did not speak to her father for a year, until circumstances forced her out of the home of the friend with whom she had been living. 8RP 81-82. Having nowhere else to go, CD asked Duque if she could move back for a couple months. 8RP 83. He agreed, and on Christmas Eve 2013, he again came into her room in the middle of the night, half-dressed. 8RP 85. This time, CD told him no. 8RP 85. He became angry and said, "Keep acting that way and see what's going to happen to you." 8RP 85.

A few days later, Duque approached CD with another offer. 8RP 87. He told CD that if she allowed him to do whatever he wanted to her for thirty minutes, she could live in the apartment

rent-free and he would buy her a car. 8RP 87. Duque assured her that he would not penetrate her with his penis. 8RP 87. When CD refused, Duque gave her ten minutes to think about it. 8RP 87. She still refused, and told him that what he was doing was wrong. 8RP 88. Duque suggested that she pretend it was her boyfriend doing it to her. 8RP 88. When she still refused, he told her, "Okay, then, I want you out of my house in a week." 8RP 88. He further advised that if she wanted his help again, she would have to have sex with him. 8RP 88. CD started looking for a place to live and blockaded her bedroom door with her dresser at night. 8RP 89.

Duque continued to promote his offer. CD secretly recorded one of the conversations they had about it so she could prove to her uncle that she was not lying about the abuse. 8RP 90. In the recording, Duque promises that if she submits to the thirty-minute encounter, "it is not going to happen again" and "[a]fterwards, everything here will change, you will see." Appendix A at 4.³ CD tells him, "You do not understand that what you do is wrong," to which Duque replies, "I know, but uh ... it's just going to be this last time." Appendix A at 5. As CD sobs and repeatedly insists that

³ The translated transcription was attached as Appendix B to the State's trial brief. Supp. CP __ (Sub No. 44: State's Trial Memo). The transcript is appended to this brief for the Court's convenience.

she does not want to do this, Duque reminds her, "But I am not going to put it in you." Appendix A at 5. When she still refuses, Duque tells her to move out by the 28th of the month. Appendix A at 9. But he continues to ask her to accept his deal, tells her that "it is now or never," warns that she is "going to throw away everything for half an hour" and that "[l]ater I do not want you to cry to me because that is not going to work." Appendix A at 10-12. Finally, Duque tells his daughter not to come back and that "we will not talk to each other or anything." Appendix A at 12-13. Despite that promise, Duque sent CD a text message after she moved out to say that his offer was still available. 8RP 99. CD deleted the text, blocked his number, and has not spoken to him since. 8RP 100.

CD went to her uncle and told him that she had proof that Duque was molesting her. 8RP 101. Jari said he was sorry and that she should go to the police, and then he went to work. 8RP 101. CD was upset when Jari left, and spoke with AD for a while. 8RP 101. AD decided they had to do something, and she went to the police on her own. 7RP 86-86; 8RP 101. AD met with the detective who had responded to the 2003 disclosure and gave a recorded statement. 7RP 87-88; 8RP 22. CD provided a recorded statement later. 8RP 22-23. The detective contacted Jari

and Sandra, who had split up by then, but Jari refused to give a statement. 8RP 24-25.

At trial, Jari testified that he loves his brother and "will do anything for him." 6RP 96. Jari then claimed that he did not remember his daughter disclosing that she had been molested by his brother. 6RP 111-12. He remembered meeting with the police about it, but claimed that the officer told him that there was nothing they could do. 6RP 112, 116. The detective explained that there was nothing they could do because they had not been able to speak with AD. 8RP 21. Jari testified that following the girls' disclosures, he and Duque were upset at each other, but Jari still allowed Duque to be around AD and "didn't have any concerns about my brother being with my daughter or near my niece at all." 6RP 118.

The defendant did not testify at trial.

Additional facts are included in the discussions to which they pertain.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE.

Duque contends that the trial court erred by admitting evidence of “uncharged allegations” as evidence of a common scheme or plan under ER 404(b). He argues that “C.D. and A.D.’s allegations of sexual interaction with Mr. Duque on multiple occasions does not satisfy the similarity requirement” for admission as evidence of a common scheme or plan. Duque’s argument should be rejected because the acts to which he refers were not, for the most part, “uncharged.” Additionally, even if this evidence is properly considered “other acts” evidence, the trial court ruled it admissible to show Duque’s lustful disposition toward each of the victims, and Duque does not challenge that ruling. He demonstrates no abuse of discretion.

a. The Trial Court Did Not Admit “Uncharged” Acts.

Before trial, both the State and defense made motions about the admissibility of “uncharged acts” or “uncharged sexual behavior.” As a preliminary point of clarification, none of the evidence of Duque’s sexual behavior with the victims during the

charging periods was “uncharged.”⁴ This is because the victims both testified that the abuse occurred multiple times per week over several years, but the State charged only five counts of molestation and child-rape. The State did not elect any specific act as the basis of any particular count, but instead argued that the jury could base its verdict on any act it unanimously agreed had occurred.⁵ 9RP 20-22, 27-28, 29. Appropriate Petrich⁶ instructions were provided to ensure unanimity. CP 50, 54, 57, 60. Thus, all of the evidence of sexual conduct during the charging period was admissible as substantive proof of the charges.⁷

⁴ The only exception is with respect to CD's testimony about the first molestation in Guatemala. This occurred during the charging period, but obviously not within the State of Washington. Duque makes no argument about the Guatemala incident in particular, but this evidence would be admissible to show his lustful disposition toward CD, as argued below. Additionally, CD testified that abuse similar to what she described during the charging period continued through high school. She also testified about her efforts to confront Duque about it in 2011 and 2012, and the resulting “offers” he made. But CD described no act of sexual abuse that occurred after age 14, the end of the applicable charging period.

⁵ The State identified certain acts that could form the basis of a guilty verdict for each count, but did not expressly rely on any single act to prove any one count. See 9RP 20-22, 27-30.

⁶ State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

⁷ As the prosecutor pointed out below, “this is generally a non-issue in these types of trials. ... The reason that it is a non-issue is because the alternative to not allowing [such evidence] is the State’s motion to amend to add 100 counts.” 3RP 18.

- b. Even If Considered "Other Acts," The Evidence Was Admissible Under ER 404(b) To Show Duque's Lustful Disposition Toward AD And CD.

Duque contends that evidence of his "uncharged" sexual abuse of AD and CD was erroneously admitted under ER 404(b) to prove that he acted in conformity with a propensity to molest young girls. He argues that the trial court erred by admitting it under the exception for evidence showing a common scheme or plan because the conduct that AD alleged was not sufficiently similar to that alleged by CD. He does not argue that this evidence was not admissible to show his lustful disposition toward the girls. As that was the principal basis on which the evidence was admitted, his argument must fail.

ER 404(b) generally prohibits the use of evidence of other crimes to prove the character of the person in order to show action in conformity therewith. Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). To justify the admission of prior acts under the rule, there must be a showing that the evidence serves a legitimate purpose, is relevant to prove an element of the crime

charged, and the probative value of the evidence outweighs its prejudicial effect. State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008). Evidence is relevant if it has a tendency to make the existence of any consequential fact more or less probable than it would be without the evidence. ER 401.

Appellate courts review decisions on the admission of evidence for abuse of discretion. Magers, 164 Wn.2d at 181. Abuse of discretion exists only when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. Id.

The State moved in limine to admit Duque's "uncharged sexual behavior" toward AD and CD to establish his lustful disposition toward them. Supp. CP ___ (Sub No. 44: State's Trial Memo, pp. 11-13). The trial court expressly admitted the evidence on that basis; it also added as a second basis for admission that the evidence tended to prove a common scheme or plan. CP 116. Duque acknowledges that establishing lustful disposition was one of two bases for admission of the evidence, but he makes no

argument with respect to lustful disposition. Brief of Appellant at 7-8. Thus, even if the evidence was not admissible to show common scheme or plan,⁸ Duque cannot establish that the trial court abused its discretion in admitting the evidence.

Further, the trial court's decision to admit the evidence to show lustful disposition was correct. Our supreme court "has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female." State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). See also State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983). Evidence of a defendant's lustful inclination toward the victim makes it more probable that he committed the sexual offense charged. Id. (citing Ferguson, 100 Wn.2d at 134). "The kind of conduct receivable to prove this desire at such ... subsequent time is whatever would naturally be interpretable as the expression of sexual desire." Id.

⁸ As argued below with respect to his severance argument, the evidence was properly admitted for this purpose.

In this case, evidence that Duque molested and raped AD and CD on multiple occasions demonstrated his lustful disposition toward them and was admissible for that purpose. The audio recording in which Duque attempts to extort CD for sex is further evidence of his lustful inclination toward her. This evidence makes it more likely that he committed the five counts of molestation and child-rape that were charged in this case. The trial court found that the probative value of this evidence for showing Duque's lustful disposition outweighed the danger of unfair prejudice, another conclusion that Duque has not challenged. This Court should reject Duque's claim.

2. DUQUE WAIVED HIS CHALLENGE TO THE TRIAL COURT'S DENIAL OF HIS SEVERANCE MOTION.

Duque contends that the trial court improperly denied his day-of-trial motion to sever the counts related to AD from those related to CD.⁹ Because Duque failed to renew the motion at the close of evidence, he has waived his claim.

CrR 4.4(a) requires a defendant to make a pretrial motion to sever, and, if denied, to renew the motion before or at the close of

⁹ Duque does not argue on appeal that the charges were improperly joined in the first place.

evidence.¹⁰ If a defendant fails to do either, then severance is waived by the plain and unambiguous language of the rule. Here, Duque concedes that he did not renew his motion to sever. Brief of Appellant at 22. Accordingly, Duque waived the issue and cannot raise it on appeal. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998); State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329 (1987); CrR 4.4(a). Duque's challenge to the trial court's denial of his motion to sever should be denied.

3. DEFENSE COUNSEL'S FAILURE TO RENEW THE MOTION TO SEVER DOES NOT AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Duque contends that he received ineffective assistance of counsel by his trial attorney's failure to preserve the severance issue for appeal. This argument should be rejected. Because severance was unwarranted, the trial court would have properly denied a renewed motion to sever. Additionally, trial counsel had a

¹⁰ CrR 4.4(a), entitled "Timeliness of Motion – Waiver," provides:

- (1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.
- (2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all of the evidence. Severance is waived by failure to renew the motion.

Since Duque failed to make his motion to sever before trial, the trial court considered the request under the "interests of justice" exception. 2RP 35.

legitimate tactical reason to keep the offenses joined for trial.

Counsel's failure to renew the severance motion was thus neither deficient nor prejudicial to Duque.

To prevail on a claim of ineffective assistance of counsel, the defendant must show both that (1) his attorney's performance fell below a minimum objective standard of reasonable conduct; and that (2) but for his counsel's errors, there is a reasonable probability that the trial's result would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If the defendant fails to establish either prong, the court should deny the claim. Strickland, 466 U.S. at 697; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Counsel's competency is based upon the entire record below, not simply those portions identified by a defendant, and this Court must strongly presume that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court will "make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Pers. Restraint of Rice, 118 Wn.2d 876, 888-89, 823 P.2d 1086 (1992).

Because the presumption runs in favor of effective representation, Duque has the burden of showing that there were no legitimate strategic or tactical reasons for his attorney's conduct. McFarland, 127 Wn.2d at 336. If defense counsel's conduct may be characterized as a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. Thomas, 109 Wn.2d at 229-30.

To prevail on an ineffective assistance of counsel claim based specifically on counsel's failure to renew a motion to sever, the defendant must show both that the motion would have been granted if made and that, but for the deficient performance, there is a reasonable probability that the outcome would be different. State v. Standifer, 48 Wn. App. 121, 125-26, 737 P.2d 1308 (1987). Duque cannot make this showing.

Under CrR 4.4(b), the trial court shall grant severance if it determines that severance "will promote a fair determination of the defendant's guilt or innocence of each offense." A trial court's refusal to sever will be reversed only upon a showing of manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). To support a finding of manifest abuse of discretion in a trial court's denial of a motion to sever, the defendant

must be able to point to specific prejudice resulting from the joint trial. Id. at 720.

A defendant seeking severance must show that a trial on multiple counts would be “so manifestly prejudicial as to outweigh the concern for judicial economy.” Id. at 718. Prejudice may arise from joinder “if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition.” State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994) (citations omitted). Any potential prejudice arising from joinder is mitigated where (1) the State’s evidence is comparably strong on each count; (2) the defenses are clear as to each count; (3) the trial court instructs the jury to consider each count separately; and (4) the evidence of each count is admissible on the other count even if not joined for trial. Id. at 63. Additionally, “any residual prejudice must be weighed against the need for judicial economy.” Id. Here, Duque suffered no prejudice from a joint trial on all counts.

a. The State's Evidence Was Comparably Strong With Respect To Each Victim.

Duque argues that the evidence concerning his abuse of AD was weaker than the evidence concerning his abuse of CD, and asserts that, if tried separately, he would have been acquitted of the charges concerning AD. Brief of Appellant at 19. The argument appears to be based on his suggestion that AD's testimony was less credible than CD's testimony because she could not recall the dates or certain details of the abuse.¹¹ See Brief of Appellant at 15-16.

The strength of the evidence supporting *each* of the charges depended equally and entirely upon the credibility of the complaining witnesses. There was no forensic or medical evidence and very little evidence about law enforcement's investigation. All crucial evidence about the abuse came exclusively from AD and CD. Even the damning recording of Duque extorting his daughter for sex depended on CD's credibility because it contained no patent

¹¹ It is not at all clear that AD's testimony was less credible than CD's testimony. Although AD could not recall dates and certain details of her abuse, she gave compellingly detailed testimony about the abuse itself. For example, she testified about the room in which she was abused, what Duque said to her during the molestation, seeing Duque's head between her legs, the position of the blinds while she was being abused, the feel of a Kleenex box touching her leg while the abuse occurred, the sound of a tissue pulled from the box, indicating that Duque was finished and cleaning up, etc. See 7RP 41-59.

reference to sexual acts and because it was CD who created the recording and only her word that the male voice on the recording was Duque's. While the testimony of each of the women had its own strengths and weaknesses, the weight of the evidence against Duque in each count was not so grossly disparate as to warrant severance. The evidence supporting each count was comparably strong. This factor weighs against severance.

b. Duque's Defense To Each Charge Was Identical.

Duque concedes that he pursued the same general denial defense to each charge, but argues that this factor nonetheless favors severance because he had a better basis to argue that CD had a motive to lie than he did with respect to AD. While he could argue that CD was angry and resentful and fabricated the allegations to avoid complying with Duque's household rules, see 9RP 35, "[t]he 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." Brief of Appellant at 20. Duque appears to concede that without CD's testimony, he would have had no defense to the charges concerning AD. Thus, not only was Duque not prejudiced

by the joinder in presenting his defenses, it appears that he benefited from it. This factor also weighs against severance.

c. The Jury Was Properly Instructed To Consider Each Count Separately.

The trial court properly instructed the jury to consider each count separately. CP 45. The pattern instruction provides: "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 45; WPIC 3.01. This instruction has been deemed sufficient to eliminate any prejudice resulting from joinder of counts. State v. Cotten, 75 Wn. App. 669, 688 & n.14, 879 P.2d 971 (1994). The jury is presumed to follow the court's instructions absent evidence to the contrary. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). No such evidence appears in the record here.

Duque argues that this factor supports severance because, despite the court's instruction, the jury was unlikely to be able to properly compartmentalize the evidence of the different counts. This is so, he asserts, because the trial "spanned ten days, with constant starting and stopping points," and because the testimony on the different counts was not presented in sequence "with the

testimony of various witnesses jumping from incident to incident.” Brief of Appellant at 21. Duque provides no citation to the record to support these assertions. The trial did span ten days, but testimony was only presented during three sequential court days.¹² Nor was the testimony particularly disjointed. No witness’s testimony was interrupted by other witnesses, and the jury was not frequently asked to leave the courtroom for sidebar discussions. Both CD and AD largely presented their testimony in chronological order. 7RP 22-90; 8RP 35-103. Further, the abuse happened in different locations, to different victims, in different years; Duque had ceased molesting AD before CD came to the United States. And only one witness testified about each instance of abuse. Thus, the jury was not required to sift through the convoluted testimony of several witnesses to figure out what happened to each of the girls.

The jury was easily able to compartmentalize the evidence pertaining to each count. The jury was instructed that it must do so. The jury is presumed to abide by such instructions. Thus, this factor does not favor severance.

¹² February 10, 11, and 12, 2015 were devoted to scheduling matters and pretrial motions. February 17 and 18 were devoted to jury selection. Evidence was presented only during the three consecutive court days of February 19, 23, and 24, 2015. The parties gave closing arguments and the jury began deliberating on February 24, 2015. And the jury asked questions, deliberated, and rendered a verdict on February 25, 2015. Supp. CP __ (Sub No: 45A: Clerk’s Minutes).

d. The Evidence Was Cross-Admissible.

Duque argues that severance was necessary because the evidence of his sexual abuse of each girl would not have been admissible in the separate trial on charges related to the other. He is mistaken.

ER 404(b) provides:

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 or absence of mistake or accident.

Thus, while evidence of prior misconduct is not admissible to show that the defendant is a criminal type and therefore likely to have committed the presently charged crime, such evidence may be admitted for a variety of other reasons including proving a scheme or plan of which the offense charged is a manifestation. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). Evidence is admissible under ER 404(b) when “the evidence serves a legitimate purpose, is relevant to prove an element of the crime charged, and, on balance, the probative value of the evidence outweighs its prejudicial effect.” State v. DeVries, 149 Wn.2d 842, 848, 72 P.3d 748 (2003).

Other acts evidence is admissible when it shows that a person committed “markedly similar acts of misconduct against similar victims under similar circumstances.” Lough, at 856 (internal quotation omitted). Conduct is sufficiently similar to demonstrate a common scheme or plan when “the similarity is not merely coincidental, but indicates that the conduct was directed by design.” Id. at 860. Although the similarities must be substantial, it is not necessary that the similar conduct be unique or uncommon. State v. DeVincentis, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003).

Here, the similarities between Duque’s sexual misconduct toward AD and CD are clear. In each case, Duque chose a young female family member to abuse. In each situation, he committed the sexual misconduct in bed while the girls were alone and in his care. In each situation, he was in a position of power and control: Duque abused CD when he was her sole custodial parent and abused AD when he was her sole after-school caregiver. Duque also committed similar acts against both CD and AD. With AD, Duque touched her vagina, performed oral sex, and wrapped his hand around hers on his penis to masturbate. He did the same things to CD, in addition to digitally penetrating her vagina. Finally, in each case, Duque was able to rely on his unassailable bond with

his brother to ensure that the girls were not believed when they disclosed the abuse.

Duque cites State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009), to support his argument that these similarities are not sufficiently "marked" to show a common scheme or plan. There, the court found sufficient commonality where "the girls were of similar prepubescent age and size when Scherner began molesting them," the defendant was in each case "a trusted relative or friend of the girl," the molestation in each case occurred "in bed," and the abuse in each case involved "rubbing the girl's genital area or performing oral sex." Id. at 657. The same similarities exist in this case¹³ and demonstrate that evidence of the abuse of each girl was admissible under ER 404(b) as a common scheme or plan in a separate trial on charges related to the other.

Finally, even if some of the evidence was not cross-admissible, that is not dispositive. The decision whether to sever does not rest solely on any one factor. Even when evidence of one count would not be admissible in a separate trial of other counts,

¹³ While CD was older than AD when the abuse started, they were both under 14 when the charged abuse occurred.

severance is not necessarily required. Bythrow, 114 Wn.2d at 720-21.

Given that all of the above factors weigh against severance, Duque cannot show prejudice resulting from his attorney's failure to renew the motion to sever. Furthermore, if there was any residual prejudice from joinder, it was minimal and did not outweigh considerations of judicial economy. Even if the trial court had severed the counts by victim, the evidence at each trial would have been largely identical. The jury in each trial would have heard from the same witnesses and it would have been presented with the same history of abuse.¹⁴ Where, as here, the evidence was not difficult to compartmentalize, the State's evidence on each count was comparably strong, and the jury was properly instructed to consider the claims separately, Duque cannot show that a joint trial was so prejudicial that it outweighed concerns for judicial economy. Since Duque would not have prevailed on a renewed motion to sever, his counsel was not ineffective for failing to make that motion.

¹⁴ AD's disclosure of the abuse was precipitated by and inseparable from CD's own disclosure. Fact of complaint evidence in each case would necessarily reveal the allegations pertaining to the other victim.

e. Defense Counsel Had A Legitimate Strategic Reason Not To Renew The Motion To Sever.

Finally, defense counsel had a legitimate strategic reason to decline to renew the severance motion. As noted above, the credibility of AD and CD was the deciding factor in this case. In attacking AD's credibility, Duque highlighted the conflicted relationship she had with CD and the jealousy and resentment she experienced as a result of the attention her mother gave to CD. He relied on the theory that AD fabricated her allegations against him simply to share in the attention that CD's disclosure generated. 9RP 43-44. Indeed, Duque concedes on appeal that this was the "*only theory available* for development with regard to AD." Brief of Appellant at 20 (emphasis added). To sever the trials would be to sacrifice the only defense Duque had to three of the five charges he faced, including the most serious charge: first-degree rape of a child.¹⁵ See CP 27-29. Because defense counsel had a sound strategic reason for wanting to keep the charges joined after hearing the testimony and evidence, Duque cannot establish that his counsel's failure to renew the severance motion constituted ineffective assistance of counsel. Duque's claim fails.

¹⁵ This is the charge that resulted in the lengthiest term of imprisonment. See CP 85, 89.

4. DUQUE FAILED TO PRESERVE HIS CLAIM OF ERROR IN ALLOWING THE JURY TO REVIEW THE TRANSLATED TRANSCRIPT.

Duque contends that the trial court violated CrR 6.15(e)¹⁶ by allowing the jury to review a translated transcript of a Spanish-language audio recording during its deliberations because the transcript itself was not admitted into evidence. Because Duque failed to object, and indeed affirmatively agreed to allow the jury to use the transcript, he invited the error and review is precluded by RAP 2.5(a).

a. Relevant Facts.

The recording at issue is of the conversation in which Duque and CD discuss his ultimatum that she submit to a 30-minute sexual encounter or move out and not speak to him again. Because that conversation was in Spanish, the State had it transcribed and translated by certified Spanish interpreter Claudia A'Zar, who testified to provide a foundation for the transcription and translation. 7RP 4-21. Although Duque objected to the recording being admitted, he never challenged the accuracy of the transcript or its use as an illustrative aid. 7RP 146.

¹⁶ CrR 6.15(e) provides: "**Deliberation.** After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms."

The transcript was provided to the jury to facilitate its understanding of the recording itself. 8RP 91-92. At defense counsel's suggestion, 7RP 145, the trial court gave the following instruction before the audio exhibit was played:

Members of the jury, you will now hear a recording in the Spanish language. You will be provided with a transcription and translation of that recording. If you speak Spanish, understand Spanish, or have any personal knowledge of the Spanish language, you are to disregard that personal knowledge and rely only on the transcription and translation that has been provided to you.

8RP 91-92. Although these instructions precluded the jury from considering the audio exhibit without the transcript, only the recording was admitted into evidence.¹⁷

During its deliberations, the jury asked for the "transcript of the audio recording, evidence Exhibit No. 6. A CD was provided as evidence, but it is not useful as evidence. An audio player will not be sufficient as the recording is in Spanish. The transcript was testified by Claudia A'Zar." 9RP 57. The trial court solicited counsels' suggestions for a response. The prosecutor proposed answering the jury in this way: "The transcript is not admitted into

¹⁷ When the recorded conversation is in a foreign language, the better practice may be to admit the transcript as evidence and not even play the recording. See Clifford S. Fishman, Recordings, Transcripts, and Translations As Evidence, 81 Wash. L. Rev. 473 (2006).

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.”

9RP 59. Defense counsel did not object to allowing the jury to use the transcript while listening to the recording, and agreed with the State’s proposed response, stating: “I think that’s fine.” 9RP 59.

b. Duque Invited Any Error.

The doctrine of “invited error” provides that a “party may not request an instruction and later complain on appeal that the requested instruction was given.” City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002) (quoting State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999)). Invited error prevents review of instructional errors even if they are of “constitutional magnitude.” Id. at 720. It applies when the trial court’s instruction contains the same error as the defendant’s proposed instruction. State v. Bradley, 96 Wn. App. 678, 681-82, 980 P.2d 235 (1999). It is undoubtedly a strict rule, but our courts have “rejected the opportunity to adopt a more flexible approach.” Studd, 137 Wn.2d at 547. Failure to employ the invited error doctrine “would put a premium on defendants misleading trial courts; this we decline to encourage.” State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Duque affirmatively agreed to allow the jury to use the transcript as an aid in listening to the audio exhibit in open court during its deliberations. He also suggested the instruction that prohibited the jury from using the audio recording without the transcript. Under the circumstances, he cannot now complain that the trial court followed his direction.

c. RAP 2.5(a) Precludes Review Of Non-Constitutional Error.

Generally, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The policy underlying the rule is to encourage the efficient use of judicial resources: where an objection would have given the trial court an opportunity to address any error and avoid an appeal, the appellate court should not sanction a party's failure to timely object. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

Duque does not address RAP 2.5(a) or explain why it should not operate in this instance to preclude review when he affirmatively agreed to the error. This Court should decline to consider the alleged non-constitutional violation of a court rule.

D. CONCLUSION

For the reasons expressed above, the State respectfully requests this Court affirm Duque's convictions.

DATED this 22nd day of February, 2016.

Respectfully submitted,

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Appendix A

BILINGUAL FORENSIC TRANSCRIPT

Transcribed and Translated by Claudia A'Zar, United States Court Certified Interpreter

KEY TO TRANSCRIPTIONS AND TRANSLATION

UMV1	Unidentified Male Voice 1
UFV1	Unidentified Female Voice 1

Italics Spoken in English

[u] Unintelligible

[i] Inaudible

--- Non linguistic audio content

/ Separates two valid alternatives for the translation

An unintelligible portion may include multiple syllables, words, or other linguistic units. Unintelligible portions starting at 10 seconds in length are timed. (i.e., if an unintelligible portion is not timed, its length is less than 10 seconds.)

Certification Transcriber/ Translator's certification upon request.

Voice designations were not supplied

State of Washington vs. Marvin Duque
Cause No. 14-1-03801-8 SEA
Duration: 10:37 minutes

	Voices	Original	Translation
1.	---	<i>Today is August sixth. The time is fourteen thirty four hours. Uh we are going to be capturing a recording from an iPhone. The memo is from a QuickVoice— iPhone App. It's labeled "My recording". The date and time on it says January eleventh two thousand fourteen, five twenty three PM. It's, uh the recording is nine minutes and fifty nine seconds long.</i>	<i>Today is August sixth. The time is fourteen thirty four hours. Uh we are going to be capturing a recording from an iPhone. The memo is from a QuickVoice— iPhone App. It's labeled "My recording". The date and time on it says January eleventh two thousand fourteen, five twenty three PM. It's, uh the recording is nine minutes and fifty nine seconds long.</i>
2.	---	[00:00:26-00:00:44]	[00:00:26-00:00:44]
3.	---	[ruido en el trasfondo]	[background noise]
4.	UMV1	¿Entonces qué? ¿No?	Then what? No?
5.	---	[pausa]	[pause]
6.	UMV1	¿Ah?	Uh?
7.	---	[pausa]	[pause]
8.	UMV1	Cinthia...	Cinthia...
9.	---	[pausa] [ruido en el trasfondo]	[pause] [background noise]
10.	UMV1	Cinthia...	Cinthia...
11.	---	[pausa]	[pause]
12.	UMV1	Cinthia...	Cinthia...
13.	---	[pausa]	[pause]
14.	UMV1	Dígame pues.	Come on tell me.
15.	UFV1	¡No!	No!
16.	UMV1	¿Ah?	Uh?
17.	UFV1	No.	No.

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18.	UMV1	¿No? No, no te dé pena. No te dé pena, está bien. ¿Estás segura, verdad? ¿Ah?	No? Don't be ashamed. Don't be ashamed, it's okay. You are sure, right? Uh?
19.	UFV1	<i>Yeah.</i>	<i>Yeah.</i>
20.	UMV1	¿Sí? Va. Entonces pues, como quedamos, ¿verdad? ¿Está bien así? ¿Está bien así o no? ¿Ah?	Really? Okay then. Then it will be as we agreed, right? Is it all right like that? Is it all right like that or not? Uh?
21.	---	[pausa]	[pause]
22.	UMV1	Contéstame pues. Estamos hablando; no estamos peleando.	Come on answer me, we are talking we are not fighting.
23.	---	[pausa]	[pause]
24.	UMV1	¿Ah?	Uh?
25.	---	[pausa]	[pause]
26.	UMV1	¿Está bien así entonces? ¿Ah?	Is it all right like this then? Uh?
27.	---	[pausa]	[pause]
28.	UMV1	Yo le estoy dando mi palabra. Después, yo le digo, se lo prometo y le doy mi palabra de hombre que nunca más va a volver a pasar.	I am giving you my word. After that – I am telling you – I promise, I am giving you my word, it will never happen again.
29.	---	[pausa]	[pause]
30.	UMV1	¿Ah?	Uh?
31.	---	[pausa]	[pause]
32.	UMV1	Entonces cómo quedamos, ¿quedamos como estábamos antes? [sorbe por la nariz] ¿Igual?	So what's the deal then? Shall we continue the way we were before? [sniff] Same?
33.	---	[pausa]	[pause]
34.	UMV1	Contésteme pues, no, no, no	Como on, answer me, we're not,

		estamos peleando. Estamos hablando. ¿Ah?	not, not fighting, we are having a conversation. Uh?
35.	---	[pausa]	[pause]
36.	UMV1	Contésteme pues. ¿Quedamos como estábamos antes?	Come on answer me. Shall we continue the same way we were before?
37.	---	[sorbe por la nariz] [pausa]	[sniff] [pause]
38.	UMV1	Yo le digo, le estoy dando mi palabra y ya no va a volver a pasar. Va a ser la última, se lo prometo y le doy mi palabra de hombre. Y después todo aquí va a cambiar. Usted se va a dar cuenta.	I am telling you, I am giving you my word; it is not going to happen again. It will be the last one. I promise, I am giving you my word and...Afterwards, everything here will change, you will see.
39.	---	[sorbe por la nariz] [pausa]	[sniff] [pause]
40.	UMV1	Se lo prometo. ¿Qué dice?	I promise. What do you say?
41.	UFV1	[sorbe por la nariz] No.	[sniff] No.
42.	UMV1	¿Segura?	You sure?
43.	UFV1	Sí.	Yes.
44.	UMV1	Entonces quedamos como estaba la situación de anteriormente. ¿Sí? El veintiocho...	Then we agree that we will have the same situation we had in the past. Right? On the twenty-eighth...
45.	UFV1	[sorbe por la nariz]	[sniff]
46.	UMV1	...usted se va de aquí. ¿Sí?	...you get out of here. Right?
47.	UFV1	[sorbe por la nariz]	[sniff]

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48.	UMV1	¿Quedamos así?	That is the deal?
49.	UFV1	[sorbe por la nariz] [pausa]	[sniff] [pause]
50.	UMV1	Estamos hablando, no estamos peleando. Estoy diciendo lo, lo que es.	We are talking, we are not arguing. I am telling you how it is.
51.	UFV1	[sorbe por la nariz] [llorando] Es que usted sólo me está corriendo por algo que yo no quiero hacer.	[sniff] [crying] You are only kicking me out because of something I do not want to do.
52.	UMV1	Y yo le estoy diciendo de...yo nada más [voces se traslapan]	I am telling you that...I only [voices overlap]
53.	UFV1	[sorbe por la nariz] ¡Pero yo no quiero! Usted no entiende que lo que usted hace es mal.	[sniff] But I don't want to! You do not understand that what you do is wrong.
54.	UMV1	Yo sé, pero pues...sólo va a ser ésta última vez...	I know, but uh...it's just going to be this last time.
55.	UFV1	[sorbe por la nariz] ¡Pero yo no quiero! [sollozo]	[sniff] But I don't want to! [sobbing]
56.	UMV1	Hm...yo le estoy diciendo.	Hm...I am telling you.
57.	UFV1	Usted lo hizo muchas veces cuando yo era pequeña. [sorbe por la nariz]	You did it many times when I was little. [sniff]
58.	UMV1	Pero yo le digo, va a ser la última vez. Se lo prometo.	But I am telling you, it will be the last time. I promise.
59.	UFV1	¡Pero yo no quiero!	But I don't want to!
60.	UMV1	Se lo prometo, vale.	Come on, I promise.
61.	UFV1	[sorbe por la nariz] Pero yo no quiero. [sollozo] [sorbe por la	[sniff] But I don't want to. [sobbing] [sniff]

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		nariz]	
62.	UMV1	Yo le estoy haciendo una promesa hija y la voy a cumplir.	Daughter, I am making you a promise and I will follow through.
63.	UFV1	[sorbe por la nariz].	[sniff]
64.	UMV1	Y ahí todo va a cambiar aquí con nosotros.	And then everything here will change with us.
65.	UFV1	[aspira por la nariz] Yo no quiero.	[sniff] I don't want to.
66.	UMV1	Y yo no le estoy diciendo...yo no se la voy a meter.	And I am not telling you...I am not going to put it in you.
67.	UFV1	[sorbe por la nariz] Pero si yo no quiero.	[sniff] But I don't want to.
68.	UMV1	Que si yo no se la voy a meter.	But I am not going to put it in you.
69.	UFV1	Y mí qué me importa, si yo no quiero. [llorando]	What do I care, I don't want to. [crying]
70.	UMV1	Bueno, entonces...pero yo no estoy llorando. Estoy hablando lo que es. Estoy hablando con palabras.	Okay then...but I am not crying. I am saying it how it is. I am having a conversation using words.
71.	UFV1	[sorbe por la nariz]	[sniff]
72.	UMV1	No estoy peleando como usted, ¿o sí?	I am not arguing with you, am I?
73.	UFV1	[sorbe por la nariz] Pero lo que usted hace es mal.	[sniff] But what you do is wrong.
74.	UMV1	Va a ser la última vez.	It will be the last time.
75.	UFV1	[sorbe por la nariz] Y a mí qué, a mí no me importa. [sollozo] [sorbe por la nariz]	[sniff] So what? I don't care. [sobbing] [sniff]

		Usted tiene que ser mi papá, no tiene que hacerme eso. [llorando]	You have to be my dad; you don't have to do that to me. [crying]
76.	UMV1	Va a ser la última vez.	It will be the last time.
77.	UFV1	Yo no quiero. [sorbe por la nariz]	I don't want to. [sniff]
78.	UMV1	Bueno, pues entonces como le digo, hacemos así entonces. ¿Está bien?	Okay then, I am telling you, we will do it like that then. Is that okay?
79.	UFV1	[sorbe por la nariz] [pausa]	[sniff] [pause]
80.	UMV1	¿Está bien así o no? ¿Cómo quedamos?	Is it okay like that or not? As we agreed?
81.	UFV1	[sorbe por la nariz] [pausa]	[sniff] [pause]
82.	UMV1	El veintiocho usted se va de aquí. ¿Sí? Segura, ¿verdad? Okay pues. No se preocupe, no tenga pena...	You get out of here on the twenty-eight. Right? You are sure, right? Okay then. Do not worry, do not feel ashamed...
83.	UFV1	[sorbe por la nariz]	[sniff]
84.	UMV1	...y como le digo, aquí estamos. Yo aquí estoy y...	...and as I said, we are here... I am here and...
85.	UFV1	[sorbe por la nariz]	[sniff]
86.	UMV1	...sí le digo, tiene pa'l veintiocho. Empiece a buscar domicilio. ¿Eh?	...I am telling you, you have till the twenty-eighth. Start looking for a new address. Uh?
87.	UFV1	¿Veintiocho de qué? [sorbe por la nariz]	Which twenty-eight? [sniff]
88.	UMV1	De este mes que viene.	This coming month.
89.	UFV1	[sorbe por la nariz] [sorbe por la nariz]	[sniff] [sniff]

90.	UMV1	¿Estamos? ¿Sí? Acuérdense y después que no [u]...	Deal? Yes? And remember and then [u]
91.	UFV1	[sorbe por la nariz]	[sniff]
92.		...yo le digo, yo se lo estoy diciendo. Es una promesa que le estoy haciendo que usted no quiere. No... Yo digo, está bien, no hay ningún problema.	...I am telling you, I am just telling you. I am making you a promise that you are not accepting. No... I am saying that it is all right, no problem.
93.	UFV1	[sorbe por la nariz]	[sniff]
94.	UMV1	Le estoy diciendo, es sólo una promesa que le estoy haciendo.	I am telling you, this is just a promise I am making to you.
95.	UFV1	[sorbe por la nariz]	[sniff]
96.	UMV1	En una media hora de estar ahí conmigo rapidito y ahí...se va a terminar rápido y ya. Y ya vamos a platicar.	You will be there with me for half an hour, it will be quick, it will end quickly, and that's that. Later we will have a conversation.
97.	UFV1	[sorbe por la nariz] [pausa]	[sniff] [pause]
98.	UMV1	Yo le estoy diciendo, no yo no se la voy a meter.	I am telling you, I am not going to put it in you.
99.	UFV1	[sorbe por la nariz] [pausa]	[sniff] [pause]
100.	UMV1	Es media hora nada más y es rápido. ¿Cómo la ve?	It is only half an hour and it is quick. What do you think?
101.	UFV1	No.	No.
102.	UMV1	¿Segura?	You sure?
103.	UFV1	[sorbe por la nariz]	[sniff]
104.	UMV1	Va pues, yo respeto su decisión y no se preocupe, ¿okay? Pero le digo, sí, yo también respeto su	Okay then. Don not worry, I respect your decision, okay? But I am also telling you that I respect

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		decisión y la respeté anteriormente, usted por favor también va a respetar la mía, ¿verdad?	your decision and I have respected it in the past, so please respect mine now. Okay?
105.	UFV1	[sorbe por la nariz]	[sniff]
106.	UMV1	¿Eh? Usted contenta, yo contento y todos contentos y...	Uh? You are happy, I am happy and we are all happy, and...
107.	UFV1	[sorbe por la nariz]	[sniff]
108.	UMV1	No hay ningún problema. ¿Cómo la ve? ¿Está bien?	There is no problem. What do you think? Is that all right?
109.	UFV1	[pausa] [sorbe por la nariz]	[pause] [sniff]
110.	UMV1	Va a ser media hora, rapidito vas a ver. Y ya, que lo va a olvidar todo y ahí muere.	You will see, it will be for half an hour, and it will be quickly. And that will be it, you will forget everything and that will be the end of it.
111.	UFV1	[sorbe por la nariz]	[sniff]
112.	UMV1	Y yo le estoy dando mi palabra de hombre.	I am giving you my word.
113.	UFV1	[sorbe por la nariz]	[sniff]
114.	UMV1	¿Qué dice?	What do you say?
115.	UFV1	No.	No.
116.	UMV1	Va pues. Entonces yo respeto su decisión. Entonces...	Okay, then I respect your decision. Then...
117.	UFV1	[sorbe por la nariz]	[sniff]
118.	UMV1	...tiene hasta el veinticcho, ¿okay? Va pues. Espero que	...you have until the twenty-eighth. Okay then, I hope that

		después...	later on...
119.	UFV1	[sorbe por la nariz]	[sniff]
120.	UMV1	...porque usted dice ahorita "No, no, no" y está bien. Yo re- yo respeto eso.	...because right now you are saying "No, no, no" and that is fine, I re- I respect that.
121.	UFV1	[sorbe por la nariz]	[sniff]
122.	UMV1	Al rato no me vaya a estar lloriqueando porque no va a servir. ¿Okay?	Later I do not want you to cry to me because that is not going to work. Okay?
123.	UFV1	[sorbe por la nariz]	[sniff]
124.	UMV1	Pero se lo estoy diciendo así de [u] No estamos peleando ni nada.	But I am just telling you, just like that [u]. We are not fighting or anything.
125.	UFV1	[sorbe por la nariz]	[sniff]
126.	UMV1	Sólo le estoy diciendo. O es hoy o...	I am just telling you. It is either today or...
127.	UFV1	[sorbe por la nariz]	[sniff]
128.	UMV1	...o nunca, no hay ningún problema. ¿Entiende?	...or never, there is no problem. You understand me?
129.	UFV1	[sorbe por la nariz]	[sniff]
130.	UMV1	Le digo, con media hora...	I am telling you, half an hour...
131.	UFV1	[sorbe por la nariz]	[sniff]
132.	UMV1	...va a ser rápido y ahí está, yo le dije que le estoy dando mi palabra. ¿Entiende? Y va a ver usted que todo va a cambiar.	...it will be quick and that is it. I told you, I am giving you my word. You understand? And then you will see that everything will change.
133.	UFV1	[sorbe por la nariz]	[sniff]
134.	UMV1	¿Cómo la ve?	What do you think?

135.	UFV1	[sorbe por la nariz] No.	[sniff] No.
136.	UMV1	Bueno, entonces yo respeto su decisión. ¿Okay? Y usted va a respetar a la mía, ¿okay? Empiece a buscar y...me hubiera...ya hubiera empezado...	Okay then, I respect your decision. Okay? And you will respect mine, okay? Start looking and...you should...you should have started...
137.	UFV1	[sorbe por la nariz]	[sniff]
138.	UMV1	...desde la vez pasada. Que ha de tener con sus amigas, no sé.	...since the last time. Maybe you will have one with your friends, I do not know.
139.	UFV1	[sorbe por la nariz]	[sniff]
140.	UMV1	Cómo pueda [u].	Anyway you can [u]
141.	UFV1	[sorbe por la nariz]	[sniff]
142.	UMV1	¿Okay? ¿Estamos? ¿Está bien así?	Okay? Deal? Is it all right like this?
143.	UFV1	[sorbe por la nariz]	[sniff]
144.	UMV1	Pero después no se haga...	But later don't you...
145.	UFV1	[sorbe por la nariz]	[sniff]
146.	UMV1	Pero es, o es ahora o nunca. De una vez entonces usted está diciendo ya. ¿Quedamos así entonces? Tranquilo todo, ¿verdad? ¿No hay ningún problema? ¿Está bien así?	But it is, it is now or never. Might as well, you are telling me now. That's the deal then? Everything is fine, right? No problems? Is it all right like that?
147.	UFV1	[sorbe por la nariz]	[sniff]
148.	UMV1	Va pues. Yo espero...	Okay then. I hope...
149.	UFV1	[sorbe por la nariz]	[sniff]

150.	UMV1	...que para el veintiocho...	...that by the twenty-eight...
151.	UFV1	[sorbe por la nariz]	[sniff]
152.	UMV1	...ya como lo le dije la vez pasada, me dé la llavé – me la va a dar personalmente a mí cuando usted se vaya – ¿Me entiende?	...like I told you last time, you give me the key—you hand it to me personally—when you leave. You understand?
153.	UFV1	[sorbe por la nariz]	[sniff]
154.	UMV1	¿Sí?	Yes?
155.	UFV1	[sorbe por la nariz]	[sniff]
156.	UMV1	Va pues. Entonces así quedamos y...no se preocupe, estamos bien así, ¿no? Por media hora va a tirar todo, está bien no hay problema.	Okay then, that's the deal and...do not worry, we are okay, right? If you are going to throw away everything for half an hour, that's fine, no problem.
157.	UFV1	[sorbe por la nariz]	[sniff]
158.	UMV1	¿Estamos?	Deal?
159.	UFV1	[sorbe por la nariz] [pausa]	[sniff] [pause]
160.	UMV1	¿Está bien o no? Va. Pal veintiocho, voy a tener marcados los días ahí en el calendario hasta el veintiocho.	Is it all right or not? Okay then, on the twenty-eight. I will mark the days on the calendar, until the twenty-eight.
161.	UFV1	[sorbe por la nariz]	[sniff]
162.	UMV1	Espero cuando después, cuando sea tarde, no me vaya a estar diciendo "Mire que"...	But when, when –later when it is too late, do not come and tell me, "Look..."
163.	UFV1	[sorbe por la nariz]	[sniff]
164.	UMV1	El veintiocho es el último día que tiene usted para estar acá, ¿eh? Ah bueno, pase buena noche y así	The twenty-eight is the last day you can be here, uh? Uh okay then, have a good night and that's

		estamos...	how it will be...
165.	UFV1	[sorbe por la nariz]	[sniff]
166.	UMV1	...igualmente, sin cruzar palabra ni nada. Es mejor así. ¿Okay? ¿Entiende? Va.	...same thing, we will not talk to each other or anything. It is better that way, right? Got it? All right then.
167.	UFV1	[sorbe por la nariz]	[sniff]
168.	---	[ruido de trasfondo]	[background noise]
169.	---	[00:10:26- 00:10:29]	[00:10:26- 00:10:29]
170.	---	<i>And the recording file has stopped ending this recording. The time now is fourteen forty five hours.</i>	<i>And the recording file has stopped ending this recording. The time now is fourteen forty five hours.</i>
171.	---	[fin de la grabación]	[end of the recording]

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Cassandra Lopez De Arriaga (cassandralopezlaw@gmail.com), the attorney for the appellant, Marvin Duque, containing a copy of the Brief of Respondent in State v. Duque, Cause No. 73241-2-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame

Name
Done in Seattle, Washington

2/22/16
Date