NO. 43432-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JUAN CARLOS PARRA-INTERIAN,

Appellant.

BRIEF OF RESPONDENT

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I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly denied the defendant's motion to sever the counts for trial.

2. There was no prejudice from the joinder of the offenses, thus the defendant received a fair trial.

3. The trial court properly entered the judgment of conviction as there was sufficient evidence proving rape in the second degree.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court properly denied the defendant's motion to sever the counts for trial?

2. Whether there was substantial evidence of the charge of second degree rape when the State presented evidence that the victim first felt the appellant touching her inner thighs and penetration of her vagina while she was asleep?

III. STATEMENT OF THE CASE

The State concurs with Parra-Interian's rendition of the Statement of the Case with the following exceptions and additions:

S.A. was asleep after intercourse with her fiancée, but later was partially awakened by someone touching her inner thighs and digitally penetrating her vagina, the force of which increased as time passed. 2A RP 236-41. The person eventually attempted penetration with his penis and masturbated himself. 2A RP 244. S.A. fully awakened when the person tried to tear off her birth control patch. 2A RP 244-45. She looked and saw the person crouched at the foot of her bed. 2A RP 246. The squatting person flees the room as S.A. tries to wake up Christopher McGowan, her fiancée, who was sleeping next to her. 2A RP 246. Once she woke up McGowan she told him she thought his brother, Andrew, raped her as she believed he was the only other male in the house besides her infant son. 2A RP 247, 3A RP 422-23. McGowan opened the bedroom door and is shocked to find Parra-Interian in the hallway. 3A RP 423-25. Parra-Interian then blurts out he saw [Andrew] do it. 3A RP 425. McGowan wakes up Andrew, but it is difficult. 3A RP 427. McGowan is confused so he returns to speak with S.A. 3A RP 427. S.A. tells McGowan to smell the hands of the people present in the house as the

smell of sex would still be present on whoever had contact with her. 2A RP 248. McGowan returns to his brother, smells his hands and smells nothing. 3A RP 428-29. McGowan then turns to ask Parra-Interian if he can smell his hands, however he had already gone outside. 3A RP 430. McGowan asks Parra-Interian why he will not let him smell his hands. 3A RP 430. Parra-Interian says he needs to go and eventually leaves. 3A RP 430-32. During McGowan's interactions with Parra-Interian they never had any physical contact. 3A RP 431. Parra-Interian is then found and interviewed at the Kelso Police Station, where a birth control patch is eventually discovered inside the interview room where Parra-Interian was questioned. 3A RP 489. The found patch was tested and contained DNA from both S.A. and Parra-Interian. 3B RP 569. Additionally, biological material from McGowan was recovered from Parra-Interian's hands. 3B RP 578.

IV. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SEVER THE COUNTS FOR TRIAL.

A trial court's decision regarding severance of offenses will be reversed only upon a showing of a manifest abuse of discretion. *State v. Watkins*, 53 Wn.App. 264, 766 P.2d 484 (1989); *State v. Brythow*, 114

Wn.2d 713, 790 P.2d 154 (1990). To determine whether severance is necessary, the courts look to four factors: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses as to each count; (3) whether the trial court properly instructed the jury to consider each count separately; and (4) the cross-admissibility of the evidence. *Watkins*, 53 Wn.App. at 269, 766 P.2d 484.[1]

Charges are properly joined for trial where they are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. CrR 4.3(a)(2). Thus, the defendant bears the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern of judicial economy. *State v. Thompson*, 74 Wn.2d 774, 775, 446 P.2d 571 (1968); *Brythow*, 114 Wn.2d at 718. The courts have noted that this burden is difficult to meet. *State v. Alsup*, 75 Wn.App. 128, 131, 876 P.2d 935 (1994), *citing State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982). As the following cases illustrate, the "heavy burden" described by the courts is rarely met by the defense, though complaints regarding joinder are commonplace.

In *State v. Price*, 127 Wn.App. 193, 110 P.3d 1171 (2005), this Court held counsel was not ineffective for failing to renew a pre-trial

[1] However, the lack of cross-admissibility does not require severance as a matter of law. See *State v. Kalakosky*, 121 Wn.2d 525, 825 P.2d 1064 (1993).

motion to sever charges involving two different victims separated by almost ten years. There, the defendant was charged with molesting one child in 2001 and another in 1992. *Price*, 127 Wn.App. at 197. This Court found severance was inappropriate as the jury was instructed to consider each count separately, and because the evidence was cross-admissible to rebut a claim of accident or mistake. Id. 204-205.

Similarly, in *State v. Standifer*, 48 Wn.App. 121, 737 P.2d 1308 (1987), the defendant was charged with raping three different women in separate incidents. Trial counsel moved to sever the charges prior to trial, but did not renew the motion, thus barring appellate counsel from raising the issue. This Court found the failure to renew the motion was not ineffective, as the jury was instructed to consider each count separately per WPIC 3.01. *Standifer*, 48 Wn.App. at 126-127.

Even in cases where defense counsel renewed the motion, and the issue was preserved for appeal, appellate courts are loath to find an abuse of discretion on this issue. Indeed, severance was held to be inappropriate where the defendant was charged with raping five different women in five distinct incidents. *State v. Kalakosky*, 121 Wn.2d 525, 537, 825 P.2d 1064 (1993). Also, in *Brythow*, the court found severance was not required where the defendant was charged with two different robberies, not part of a common *modus operandi*, over the course of a month. 114 Wn.2d 713.

Again in *State v. Markle*, 118 Wn.2d 424, 823 P.2d 1101 (1992), the court held severance was not required in a case where two separate minor victims accused the defendant of various sex crimes.

Furthermore, in *State v. Easterbrook*, 58 Wn.App. 805, 795 P.2d 151 (1990), the court once more found severance was not appropriate where the defendant was charged with the burglary and rape of one woman and another separate burglary with sexual connotations that occurred a month later and involved a different victim. Yet again, in *State v. Robinson*, 38 Wn.App. 871, 691 P.2d 213 (1984), the court held severance inappropriate where the defendant was charged with shooting his wife's nephew and then murdering her lawyer five days later, noting that the events were "inextricably intertwined."

A review of the factors to determine whether or not severance needed to occur demonstrates that the trial court's decision to join and then not to sever the counts was a proper exercise of its discretion.

First, the evidence for each case is strong. In the 2010 rape and burglary case, S.A. testified she went to sleep after intercourse with her fiancée, but later was partially awakened by someone touching her inner thighs and digitally penetrating her vagina, the force of which increased as time passed. 2A RP 236-41. She also indicated the person eventually attempted penetration with his penis and masturbated himself. 2A RP

244. She then stated she was fully awakened and alert when someone tried to tear off her birth control patch. 2A RP 244-45. She looked and saw someone crouched at the foot of her bed. 2A RP 246. The squatting person flees the room as S.A. tries to wake up Christopher McGowan, her fiancée, who was sleeping next to her. 2A RP 246. Once she woke up McGowan she told him she thought his brother, Andrew, raped her she thought as he was the only other male in the house besides her infant son. 2A RP 247, 3A RP 422-23. McGowan opens the bedroom door and is shocked to find Parra-Interian in the hallway. 3A RP 423-25. Parra-Interian then blurts out he saw [Andrew] do it. 3A RP 425. McGowan wakes up Andrew, but it is difficult. 3A RP 427. McGowan is confused so he returns to S.A. 3A RP 427. S.A. tells McGowan to smell the hands of the people present in the house as the smell of sex would still be present on whoever had contact with her. 2A RP 248. McGowan returns to his brother, smells his hands and smells nothing. 3A RP 428-29. McGowan then turns to ask Parra-Interian if he can smell his hands, however he had already gone outside. 3A RP 430. McGowan asks Parra-Interian why he will not let him smell his hands. 3A RP 430. Parra-Interian says he needs to go and eventually leaves. 3A RP 430-32. During McGowan's interactions with Parra-Interian they never had any physical contact. 3A RP 431. Parra-Interian is then found and interviewed at the Kelso Police

Station, where a birth control patch is eventually discovered inside the interview room where Parra-Interian was questioned. 3A RP 489. The found patch wass tested and contained DNA from both S.A. and Parra-Interian. 3B RP 569. Additionally, biological material from McGowan, S.A.'s fiancée, was recovered from Parra-Interian's hands. 3B RP 578.

In the 2011 solicitation to commit murder case, the body-wire recordings provided clear evidence that Parra-Interian solicited Ronald White to "take out" S.A., thus preventing her from testifying. 5 RP 939-941. Furthermore, during his testimony Parra-Interian admits to wanting S.A. absent from the trial for the rape and burglary charges. 6 RP 1104-06.

Defense counsel argues the rape and burglary case is weak because S.A. cannot identify her assailant and the solicitation case strong because of the body wire. Defense counsel's argument ignores the plethora of circumstantial evidence indicating Parra-Interrian was wrongfully in the home and sexually assaulted S.A. Because each separate case was strong, there was no danger of unfair prejudice by the weaker case being significantly bolstered by the stronger case.

Second, Parra-Interian's defenses were clear. He denied committing the charges from 2010 as well as denied committing the charge in 2011. "The likelihood that joinder will cause a jury to be

confused as to the accused's defense is very small where the defense is identical on each charge." *State v. Russell*, 125 Wn.2d 24, 64, 882 P.2d 747 (1994) (citing *State v. Hernandez*, 58 Wn.App. 793, 799, 794 P.2d 1327 (1990)).

During direct examination Parra-Interian responds "No" when asked if he ever engaged with Ronald White to commit murder. 6 RP 1104. His counsel later on asks him again if he ever said anything to Ms. Ayala about a murder plot which he denied as well. 6 RP 1107. On cross-examination of Parra-Interian, he continues to deny that he wanted to kill S.A. 6 RP 1112. This does not create a conflict or confuse the jury as both defenses were denial. Parra-Interian admitting to a crime he was not charged with does not negate his denial of the crime he was charged with, it bolsters the denial. Thus, the defense in both cases was denial which is unlikely to cause the jurors to be confused between the charges.

Third, the court gave the proper instruction to consider each charge separately. Jury Instruction No. 3 states:

> 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 122. Parra-Interian agrees that this instruction has been approved as generally favoring joinder. App's Br. 21. As the jury was instructed to

consider each count separate from each other, this factor weighs in favor of joining the counts and denying the motion to sever.

Fourth, the court factors in whether or not the evidence of each count would be cross admissible. This is not a strict ER 404(b) analysis as there are other considerations for judicial economy taken into account. *Bythrow*, 114 Wn.2d at 722, 790 P.2d 154. Here, the trial court recognized certain facts and circumstances from each case would be admissible in the other as well as the nature of the charges. 1 RP 25. This again favors the joining of the cases for trial.

Parra-Interian is required to demonstrate the prejudicial effects of joinder existed and that the joint trial was so prejudicial it outweighed the concern for judicial economy. He points to the outrage of the jury when hearing details of the solicitation charge, however, the defense attorney's characterization of the jury's outrage does not specifically show prejudice. Jurors often hear testimony that provokes an emotional response, but they are expected to not let their emotional response control their ultimate decision. Additionally, each of the factors the court considers weighs in favor of joining the cases for trial and preserving judicial economy. Both cases were strong without the other, both defenses were denial, the court properly instructed the jury to consider each charge separately and some evidence from each case would have been cross-admissible. Parra-

Interian did not demonstrate sufficient prejudicial effects to outweigh the concern for judicial economy. Based on this the trial court did not abuse it's discretion in joining the cases for trial.

2. THE TRIAL COURT PROPERLY ENTERED THE JUDGMENT OF CONVICTION AS THERE WAS SUFFICIENT EVIDENCE OF RAPE IN THE SECOND DEGREE.

The standard of review for a claim of insufficient evidence is after viewing the evidence in the light most favorable to the prosecution, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Zamora,* 63 Wn.App. 220, 223, 817 P.2d 880 (1991). Additionally, the Court should afford the State all reasonable inferences. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Saunders*, 132 Wn.App. 592, 600, 132 P.3d 743 (2006). In such review, "circumstantial evidence is no less reliable than direct evidence [and] specific criminal intent may be inferred from circumstances as a matter of logical probability." *Id.* Lastly, the reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See Price*, 127 Wn.App. at 202, 110 P.3d 1171; *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d. 533 (1992); *State v. Camarillo*, 115

Wn.2d 60, 71, 794 P.2d 850 (1990) (appellate court will not review credibility determinations).

At specific issue in the present case is RCW 9A.44.050(1)(b) which states in pertinent part, "[a] person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person...when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." "Sexual intercourse" is defined as having

> its ordinary meaning and occurs upon any penetration, however slight, and...means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and... [a]lso means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010(1). The statute further defines "sexual contact" to mean "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). A person who is "physically helpless" is one "who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5). It has been held that "[t]he state of sleep appears to be universally understood as unconsciousness or

physical inability to communicate unwillingness." *State v. Puapuaga*, 54 Wn.App. 857, 861, 776 P.2d 170 (1989).

At trial, S.A. testified during direct examination as follows:

> Q....Now, after you fell asleep, ma'am, did there come a point when you felt something in your sleep?
> A. Yes.
> Q. Could you describe that?
> A. I felt somebody touching my inner thighs and my pelvic area.
> Q. Now, when you first felt the touching, what was your, I guess, level of consciousness?
> A. I wasn't all the way awake at all.
> Q. Okay. How – maybe, if ten is all the way awake, and one is completely asleep, where would you be in there?
> A. Probably a four.
> Q. What did [the touching] feel like, at first?
> A. At first, it just felt like they were running their fingers up my leg and touching my pelvic area.
> Q. ...[W]hen you say pelvic area, are you referring to a particular part of your body?
> A. My vagina.
> Q. Okay. Was the touching inside or outside your body at that point?
> A. At that point, a little bit of both.

2A Report of Proceedings 240-241. As S.A.'s testimony continues she indicates the penetration by the assailant's fingers became more forceful as time passed. 2A RP 241-242. S.A. states that she was probably mostly asleep, but more alert as it went on. 2A RP 242. Eventually, she realizes it is not McGowan, her significant other, when her birth control patch is removed, she sees a person squatting at the foot of the bed and has to wake McGowan up from a sound sleep. 2A RP 245-246.

This is consistent with what she told Officer Kirk Wiper on the night of the incident. During direct examination, Office Wiper testified that S.A. "explained she had been asleep in bed when she realized that she was being penetrated vaginally." 2B RP 316. Officer Wiper then went on to explain S.A. stated she was initially penetrated by fingers. 2B RP 317. Additionally, S.A. told Sarah Reid, that she had been digitally penetrated. 2B RP 304.

This evidence shows S.A. was sleeping until Parra-Interian began to wake her up by digitally penetrating her. S.A.'s testimony indicates she became more conscious as time passed and fully awake when her birth control patch was ripped off her body alerting her to the fact that it was not McGowan penetrating her, but someone else. The jury is allowed to believe this testimony, which is sufficient to establish the required sexual intercourse as it can be penetration by an object.

Parra-Interian argues SA was not "physically unable to communicate unwillingness to an act" because she was partially awake by the touching that preceded the intercourse. Courts have distinguished a victim who was sleeping from a victim with physical limitations, but able to communicate and a victim who was "profoundly mentally retarded." *See State v. Mohamed*, ____ Wn.App. ____ , 301 P.3d 504, 511 (2013) *citing State v. Bucknell*, 144 Wn.App. 524, 530, 183 P.3d 1078 (2008);

People v. Huurre, 193 A.D.2d 305, 306, 603 N.Y.S.2d 179 (1993). Sleep renders an individual "physically helpless." *Mohamed*, ____ Wn.App. at ___, 301 P.3d at 511. Here, S.A.'s testimony indicated the penetrating of her vagina as well as touching of her inner thighs partially woke her up. Thus, it can be determined she was unconscious when Parra-Interian first started penetrating her vagina. Thus, there is sufficient evidence for the jury to find Parra-Interian guilty of rape in the second degree.

V. CONCLUSION

Based on the preceding argument, the State respectfully requests this Court to deny the instant appeal. The appellant failed to show the trial court abused its discretion in approving the joinder of the cases and not severing them for trial. Furthermore, the jury's verdict was supported by

sufficient evidence to demonstrate the appellant's guilt. The State asks this Court to affirm the convictions.

Respectfully submitted this 23rd day of August, 2013.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on August 23rd, 2013.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

August 23, 2013 - 11:33 AM

Transmittal Letter

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