No. 91523-7
Court of Appeals No. 70860-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID J. HANSEN, III,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

David J. Hansen, III, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Hansen requests this Court grant review of the decision of the Court of Appeals, No. 70860-1-I (March 2, 2015). A copy of the decision is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

The due process clauses of the Fourteenth Amendment and Article I, section 3, as well as CrR 4.4(b), require severance of counts when necessary to promote a fair determination of the guilt or innocence of the defendant. The trial court denied Mr. Hansen's motion to sever the two counts of robbery in the first degree and thereby allowed admission of highly prejudicial evidence that was not otherwise cross-admissible, when the two counts involved different victims, occurred almost eight weeks apart and under different circumstances, and involved different defense theories. Under these circumstances, does the Court of Appeals' ruling that the trial court did not abuse its discretion raise a significant question of law under the state and federal constitutions, conflict with decisions of this court and other decisions of the Court of Appeals, and involve an

issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE

On the evening of November 13, 2012, David Hansen went to Troy Bodnar's house in response to an on-line advertisement placed by Mr. Bodnar for a sexual encounter and to "party," a code word for drug use. 7/2/13(AM) RP 86-88; 7/2/13(PM) RP 28. Over the next several hours, they injected methamphetamine and engaged in sex. 7/2/13(AM) RP 89, 92; 7/2/13(PM) RP 32. Mr. Hansen offered to perform additional sexual acts in exchange for money. 7/2/13(AM) RP 93. Mr. Bodnar declined and asked Mr. Hansen to leave. 7/2/13(AM) RP 93, 94. Mr. Bodnar went into the bathroom to dress, but as he came out of the bathroom he was struck on the back of his head and knocked to the floor. 7/2/13(AM) RP 97, 110; 7/2/13(PM) RP 6. According to Mr. Bodnar, Mr. Hansen stated he had a gun and then ran toward the door with Mr. Bodnar's iPad. 7/2/13(AM) RP 103, 110-11; 7/2/13(PM) RP 10. Mr. Bodnar did not see a gun, but he saw Mr. Hansen holding a glass candleholder that he assumed was used to strike him. 7/2/13(PM) RP 5, 7, 9, 51-52. Mr. Bodnar chased after Mr. Hansen but Mr. Hansen escaped out the back door with the iPad. 7/2/13(PM) RP 9-10.

Mr. Bodnar called 911. 7/2/13(PM) RP 14. Officer Wade Jelcick interviewed Mr. Bodnar and took the candleholder into evidence. 7/2/13(PM) RP 19, 57. Mr. Bodnar did not allow Officer Jelcick into his bedroom, and he did not report that Mr. Hansen mentioned a gun or that they used drugs. 7/2/13(AM) RP 72-73, 104; 7/2/13(PM) RP 21, 63. Detective Dale Williams investigated the robbery of Mr. Bodnar. 7/2/13(PM) RP 56. A fingerprint lifted from the candleholder matched Mr. Hansen and Mr. Bodnar identified Mr. Hansen from a photo montage created by Detective Williams. 7/2/13(PM) RP 58-59, 61, 80-81, 86.

Almost eight weeks later, on January 4, 2013, Al Payne invited Josh Jasperson, an acquaintance, to his house where they smoked methamphetamine. 7/3/13 RP 12-13, 14. Mr. Jasperson arranged for Mr. Hansen to join them. 7/3/13 RP 15. Mr. Hansen knew Mr. Jasperson but he had not previously met Mr. Payne. 7/3/13 RP 15. Mr. Hansen arrived, smoked methamphetamine, engaged in sex with Mr. Jasperson, and left several hours later. 7/3/13 RP 16-17. Mr. Hansen never discussed money. 7/3/13 RP 17.

The following afternoon, Mr. Hansen allegedly returned to Mr. Payne's house by the back door. 7/3/13 RP 18-20. Mr. Jasperson was still there. 7/3/13 RP 19. At first Mr. Hansen was friendly, but after about 15 minutes, he purportedly pulled a gun from his waistband and said, "This is

a robbery." 7/3/13 RP 21-22. He then took their cellular telephones, as well as Mr. Payne's laptop computer, wallet, and several watches, and left through the back door. 7/3/13 RP 24-26. Mr. Payne used a borrowed telephone to cancel his credit cards and then took a sleeping aid and went to sleep. 7/3/13 RP 26-28, 50.

Two weeks later, Mr. Payne reported the robbery to police after he read a newspaper report about a robbery at gunpoint following a sexual encounter in a car that matched the description of Mr. Hansen's car. 7/3/13 RP 31-32. Detective Michael Magan investigated the robbery of Mr. Payne. 7/2/13(AM) RP 6. Mr. Payne identified Mr. Hansen from a photo montage created by Detective Magan, but he would not provide any contact information for Mr. Jasperson or for the person whose telephone he borrowed to cancel his credit cards. 7/2/13(AM) 32-33; 7/2/13(PM) RP 23-24.

Mr. Hansen was charged in a single information with two counts of robbery in the first degree, Count I charging robbery of Mr. Bodnar by infliction of bodily injury, and Count II charging robbery of Mr. Payne by display of a firearm. CP 1-2. Mr. Hansen's motion to sever the counts was denied. 7/1/13 RP 3-12; CP 19-24. Following a jury trial, Mr. Hansen was convicted as charged. CP 74, 75.

On appeal, Mr. Hansen argued the trial court abused its discretion in denying his motion to sever the two counts. The Court of Appeals disagreed, and ruled the testimony of the alleged victims was sufficiently strong on both counts, Mr. Hansen did not make a convincing showing that he needed to testify on one count and remain silent on the other count, and the lack of cross-admissibility was not sufficient to warrant severance. Opinion at 6-9.

E. ARGUMENT

The Court of Appeals' ruling that joinder of the two unrelated charges was appropriate is unsupported by the record and contrary to the case law upon which it relied.

A defendant has the constitutional right to due process and a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3. To this end, separate counts must be severed when joinder would prevent a fair trial. CrR 4.4(b) provides:

> (b) Severance of Offenses. The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

CrR 4.4(b) includes the term "shall," which creates a mandatory duty. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Severance is

necessary where it prevents undue prejudice, including the risk that a single trial invites the jury to cumulate evidence or to infer a guilty disposition. *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994); *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Two or more offense may be joined when the offenses "are of the same or similar character." CrR 4.3(a)(1). However, Washington courts have articulated four specific concerns regarding the prejudicial impact of improper joinder: 1) a defendant may be confounded or embarrassed in presenting separate defenses; 2) the jury may use evidence of one crime to improperly infer a defendant's criminal disposition; 3) the jury may cumulate evidence of several crimes to find guilt when, if considered separately, it would not find guilt; and 4) the jury may feel a latent hostility against the defendant engendered by charging several crimes as distinct from a single charge. *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571, *vacated in part on other grounds sub nom. in Smith v. Washington*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972). To assist courts weigh these concerns, this Court set forth the following "prejudice-mitigating" factors that a court must consider when determining whether the potential for prejudice requires severance: 1) the strength of the State's evidence on each count; 2) the clarity of defenses as to each count; 3) the court's instructions to consider each count separately;

and 4) the admissibility of evidence of other charges even if not joined for trial. *Russell*, 125 Wn.2d at 63. "In addition, any residual prejudice must be weighed against the need for judicial economy." *Id.* at 63 (citing *State v. Kalakosky*, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993).

The prejudice demonstrated by factors (1), (2), and (4) mandated severance here.

1. The strength of Count I bolstered the relative weakness of Count II.

To establish Count I, the State relied not only on the credibility of Mr. Bodnar who did not allow Detective Williams into his bedroom, but also on the testimony of the responding officer and the latent fingerprint examiner. By contrast, to establish Count II, the State relied exclusively on the credibility of Mr. Payne, but he did not report the incident for several weeks and he withheld contact information for two witnesses who could corroborate his account. 7/2/13(AM) RP 32-33. In light of the comparative weakness of the evidence to establish Count II, joinder invited the jury to cumulate the evidence and to infer criminal disposition, rather than to look closely at the lack of evidence as to Count II and lack of credibility of the individual alleged victims.

The Court of Appeals ruled the corroborating evidence for Count I did not "shed light" on whether Mr. Hansen committed a robbery and the

evidence was "sufficiently strong" on both counts. Opinion at 6. The court cited to *State v. Bryant*, in which the court considered whether joinder of a charge of bail jumping with the underlying charge of robbery in the second degree was proper as a matter of law and whether such joinder resulted in undue prejudice in the case at bar. 89 Wn. App. 857, 867, 950 P.2d 1004 (1998). The court concluded that joinder was proper as a matter of law and the defendant could not establish prejudice because he was convicted of the lesser offense of theft in the third degree. *Id.* at 867-88. Because *Bryant* does not address the issues presented here, the court's reliance is misplaced.

The court also relied on *State v. MacDonald*, in which the court noted, "When one case is remarkably stronger than the other, severance is proper." 122 Wn. App. 804, 815 95 P.3d 1248 (2004) (citing *Russell*, 125 Wn.2d at 63-64). Significantly, however, *MacDonald* did not hold that severance was proper *only* where one count was "remarkably stronger" that the other. Moreover, no case has cited *MacDonald* for that generalization in the eleven years since it was decided. The court here misinterpreted *MacDonald*.

2. Mr. Hansen had a strong need to testify on Count I and an equally strong need to remain silent on Count II.

Mr. Hansen had separate defense theories; he claimed self-defense on Count I and general denial on Count II. CP 22. To present his theory of self-defense, he needed to give up his right to remain silent, thereby unnecessarily exposing him to impeachment with his prior convictions on the remaining count. 7/1/13 RP 5-6, 12. Severance is required "if the defendant makes a convincing showing to the trial court that he has important testimony to give concerning one count and a strong need to refrain from testifying about the other." *State v. Weddel*, 29 Wn. App. 461, 467, 629 P.2d 912 (1981).

The Court of Appeals ruled Mr. Hansen failed to make a sufficient offer of proof regarding his proposed testimony for Count I and he failed to identify a strong need to refrain from testifying on Count II. Opinion at 7-8. But evidence of prior convictions is inherently prejudicial. "Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes." *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997).

The court relied on *Russell*, in which the defendant was charged with three counts of murder in the first degree and his defense for each

count was denial. 125 Wn.2d at 65. The trial court in *Russell* specifically noted, "It isn't as though there will be a self-defense argument on one and a different type of defense on another, or that there will be an admission of one or denial of another." *Id.* (quoting Verbatim Report on Appeal, at 2067). Accordingly, *Russell* does not support the court's ruling here.

The court cited to *State v. Watkins*, in which the defendant was charged with five counts of robbery, four of which were committed in convenience stores and one of which was committed in a car. 53 Wn. App. 264, 268, 766 P.2d 484 (1989). The defendant moved to sever the car robbery from the convenience store robberies, on the grounds her defense for the car robbery was mistaken identity whereas her defense for the convenience store robberies was duress, and she would have remained silent on the car robbery charge had it been tried separately. *Id.* at 269. However, the defendant did not show she had a strong need to remain silent. *Id.* By contrast, here, Mr. Hansen specifically showed his strong need to remain silent on Count II, that is, to prevent prejudicial impeachment with his prior convictions. *Watkins* does not support the court's conclusion.

3. The evidence of the two robberies was not cross-admissible.

Cross-admissibility is analyzed under ER 404(b). *State v. Gatalski*, 40 Wn. App. 601, 607, 699 P.2d 804 (1985). A mere general similarity between the counts is insufficient to establish cross-admissibility. *State v. Smith*, 106 Wn.2d 772, 777-79, 725 P.2d 951 (1986). In determining whether evidence is admissible under ER 404(b), courts must "(1) identify the purpose for which the evidence is to be admitted; (2) determine that the evidence is relevant and of consequence to the outcome; and (3) balance the probative value of the evidence against its potential prejudicial effect." *Id.* at 776. Here, however, the trial court failed to conduct an ER 404(b) analysis, but found the two counts were "likely cross-admissible" based on an inaccurate summary of the testimony. 7/1/13 RP 13; 7/3/13 RP 29, 31.

The Court of Appeals ruled any inaccuracy in the trial court's determination of cross-admissibility was insufficient to merit severance. Opinion at 8. The court relied on *State v. Kalakosky*, in which this Court stated that lack of cross-admissibility alone "does not necessarily represent a sufficient ground to sever *as a matter of law*." 121 Wn.2d at 538 (emphasis added). The court also relied on *State v. Bythrow*, in which this Court stated, "When the issues are relatively simple and the trial lasts only

a couple of days, the jury can be reasonably expected to compartmentalize the evidence. Under these circumstances, there *may* be no prejudicial effect from joinder even when the evidence would not have been admissible in separate trials." 114 Wn.2d at 721 (emphasis added). *Kalakosky* and *Bythrow* support the general rule that lack of cross-admissibility is not necessarily the single deciding factor for severance, but the cases do not support the specific conclusion that the lack of cross-admissibility was insignificant here.

4. The prejudice of joinder outweighed any minimal judicial economy.

Joinder is inherently prejudicial. *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1986) (citing *State v. Smith,* 74 Wn.2d at 754). Here, the two counts involved entirely separate investigations and separate witnesses. Therefore, the inherent prejudice of joinder outweighed the minimal judicial economy. By contrast, in *Russell*, the trial court found judicial economy was served by joinder because "a great deal of evidence" would be repeated if the counts were severed. 125 Wn.2d at 68.

The court ruled that Mr. Hansen failed "to demonstrate any specific prejudice." Opinion at 9-10. As argued above however, Mr. Hansen was specifically prejudiced in the presentation of his separate

defenses for the separate counts. The court's ruling is unsupported by the record.

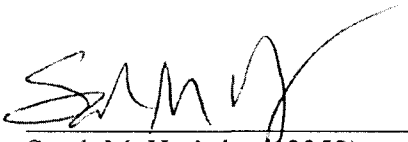
F. CONCLUSION

The Court of Appeals' ruling that severance was not required and that joinder did not violate Mr. Hansen's right to due process raises a significant question of law under the state and federal constitutions, and involves an issue of substantial public interest that should be determined by this Court. The ruling that there was no significant disparity in the strength of the evidence on the two counts is unsupported by the record and involves a misinterpretation of other decisions by the Court of Appeals. The ruling that Mr. Hansen did not make an adequate offer of proof regarding his need to remain silent on Count II is contrary to the record and in conflict with decisions by this Court and another decision of the Court of Appeals. The ruling that Mr. Hansen failed to demonstrate "specific prejudice" is similarly unsupported by the record and based on a misinterpretation of decisions by this Court and other decisions of the

Court of Appeals. For the foregoing reasons, this Court should accept review pursuant to RAP 13.4(b)(1), (2), (3), and (4).

DATED this 30th day of March 2015.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID JAMES HANSEN III, Appellant.	)	DIVISION ONE No. 70860-1-I UNPUBLISHED OPINION FILED: March 2, 2015

DWYER, J. — A jury convicted David Hansen of two counts of robbery in the first degree. The charges arose from separate incidents involving different victims. Hansen appeals, challenging the trial court's denial of his motion to sever the counts. Balancing the potential prejudice of joinder against the concerns of judicial economy, we conclude that the trial court properly exercised its discretion in denying the motion to sever. We affirm.

I

On the evening of November 13, 2012 Troy Bodnar posted an advertisement on Craigslist, soliciting a partner for an evening of sex and drug use. David Hansen responded to the advertisement and the two men exchanged e-mail messages. Bodnar invited Hansen to his home in Seattle.

Hansen called Bodnar on his cell phone shortly before he arrived at around 10:00 p.m. The two men used methamphetamine, "got high and had sex." Over the course of the night, Bodnar became "uneasy," partly based on

certain information Hansen shared and questions he asked. For instance, early on, Hansen asked Bodnar if he had a gun, and later, Hansen offered to engage in certain sexual activity for payment. Eventually, Bodnar asked Hansen to leave. Hansen did not appear to be angry or offended.

However, after Bodnar dressed and emerged from the bathroom, he was struck on the head and knocked to the ground. Afterward, Bodnar noticed a candleholder in Hansen's hand. Hansen ordered Bodnar to stay on the ground, stating that he had a gun, although Bodnar did not see a gun. Bodnar saw Hansen running downstairs with Bodnar's iPad and Bodnar gave chase. Bodnar then saw Hansen attempting to maneuver a bicycle out of the entryway. After Hansen saw Bodnar press an alarm button on his keychain and nearby police sirens became audible, Hansen left without the bicycle.

Bodnar realized that his head was bleeding profusely and that he needed medical attention. He called 911. An ambulance arrived and medical personnel took Bodnar to a nearby hospital for medical treatment. A few hours later, two police officers accompanied Bodnar home from the hospital. They took photographs and dusted for finger prints. Apprehensive about exposing his drug activity, Bodnar did not allow the officers to search his bedroom. Bodnar had deleted Hansen's e-mail messages and the photograph Hansen had sent him and did not offer Hansen's telephone number to the police.

Several weeks later, Bodnar identified Hansen in a photomontage. Hansen's fingerprints matched two latent fingerprints taken from the candleholder Bodnar believed Hansen had used to strike him.

Almost two months after this incident, on the evening of January 4, 2013, Al Payne arranged for an acquaintance, Josh Jasperson, to come to his Seattle apartment. Payne's implicit expectation for the evening was that he and Jasperson would use methamphetamine and have a sexual encounter. Jasperson arrived and they used methamphetamine. Then, after exchanging several text messages, Jasperson asked to invite Hansen to Payne's apartment. Payne agreed, although he had never met Hansen.

Hansen arrived, used methamphetamine, and had sexual contact with Jasperson. Sometime in the early morning, after the sexual contact, Hansen said he had to leave. He did so.

Several hours later, in the early afternoon, Hansen unexpectedly returned to Payne's apartment. Jasperson was still there. Hansen initially behaved in a friendly manner, but about 10 minutes after he arrived, he removed a gun from his waistband and said, "This is a robbery. Don't move or I'll kill you." Hansen hit Payne on the leg with the gun. Payne believed the gun was real and later described it as a semiautomatic, possibly a Glock.

Hansen took Payne's and Jasperson's cell phones. Then, he picked up a reusable shopping bag and said, "[W]hat do I want here?" Hansen took a laptop, several watches, and Payne's wallet. Before leaving, Hansen said, "[D]on't call the police, because I know where you live."

Payne and Jasperson remained on the sofa, in a state of "shock," for some time after Hansen left. Jasperson then left the house. He soon returned, accompanied by a mutual acquaintance who lent Payne a cell phone so that he

could call his cell phone service provider and credit card company and report the theft. Jasperson left soon thereafter. Payne took sleep medication and went to bed.

Payne did not report the incident to the police until approximately two weeks later, after he read a news report about another person being robbed at gunpoint. Payne gave Hansen's name and description to the police, but initially refused to provide any contact information for Jasperson or information about the person who lent him the cell phone after the robbery and who was mutually acquainted with both Jasperson and Hansen.[1] A few days after he made his report, Payne identified Hansen in a photomontage as the person who had robbed him.

Police eventually arrested Hansen. The State charged him with two counts of robbery in the first degree. The police searched Hansen's residence, but found neither property belonging to Bodnar or Payne nor any weapons.

Prior to trial, Hansen moved to sever the two charges. The court denied the motion. Bodnar and Payne were the primary witnesses at trial. Police officers were unable to locate Jasperson. Hansen did not testify. The jury found Hansen guilty as charged.

II

Hansen contends that the trial court abused its discretion in denying his motion to sever the robbery counts. We disagree.

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[1] Payne eventually provided Jasperson's e-mail to the police. He also testified that after Hansen was arrested, he tried to contact Jasperson and convince him to cooperate with the prosecution, to no avail.

Under CrR 4.3's "liberal" joinder rule, the trial court has considerable discretion to join two or more offenses of "the same or similar character, even if [they are] not part of a single scheme or plan." CrR 4.3(a)(1); State v. Eastabrook, 58 Wn. App. 805, 811, 795 P.2d 151 (1990). Nevertheless, offenses properly joined under CrR 4.3(a) may be severed "if 'the [trial] court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.'" State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990) (quoting CrR 4.4(b)). Prejudice may result from joinder where the defendant is embarrassed or confounded by the presentation of separate defenses, or if a single trial invites the jury to cumulate the evidence to find guilt or infer criminal disposition. State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994). A defendant seeking severance has the burden of demonstrating that "a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718.

In determining whether the potential for prejudice requires severance, a trial court must consider four factors that may "offset or neutralize the prejudicial effect of joinder": (1) the strength of the State's evidence on each count, (2) the clarity of defenses as to each count, (3) the court's instructions to the jury to consider each count separately, and (4) the potential cross-admissibility of evidence on the other charges even if they were tried separately. Russell, 125 Wn.2d at 63; State v. Sanders, 66 Wn. App. 878, 885, 833 P.2d 452 (1992). "[A]ny residual prejudice must be weighed against the need for judicial economy." Russell, 125 Wn.2d at 63. We review a trial court's denial of a CrR 4.4(b) motion

to sever counts for a manifest abuse of discretion. Bythrow, 114 Wn.2d at 717; State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998).

Concerning the first factor, Hansen argues that the evidence supporting the charge involving Bodnar was significantly stronger and bolstered the weaker charge involving Payne. Severance may be proper when the evidence on one count is "remarkably stronger" than the other. State v. MacDonald, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004). Hansen claims that Bodnar's allegations were corroborated by the testimony of a latent print examiner and police officers who responded to Bodnar's 911 call, whereas no witnesses corroborated Payne's allegations. But the only witness who shed light on the contested issue—whether the encounter with Hansen ended in a robbery as alleged—was Bodnar. The fingerprint match merely confirmed that Hansen had been at Bodnar's home, a fact Hansen did not dispute. The testimony did not conclusively establish that Hansen used the candleholder as a weapon against Bodnar in order to rob him.

Evidence is sufficiently strong if it would allow a rational jury to find the defendant guilty of each charge independently. Bryant, 89 Wn. App. at 867. With respect to both counts, the victims' testimony established that the robberies occurred and this evidence was sufficiently strong on both counts. There was no significant disparity in the strength of the State's evidence that led to manifest prejudice resulting from the joint trial.

As to the clarity of defenses, Hansen contends that his desire to testify about one charge and not the other charge required severance. In the trial court, Hansen indicated his intent to raise self-defense as a defense to the count

involving Bodnar as opposed to his defense of general denial as to the count involving Payne. While reserving the right to decide at trial whether to testify, Hansen said he might testify as to one count and not the other. At the hearing on the severance motion, defense counsel explained that a defendant asserting self-defense would "typically" take the stand in order to explain how the injury occurred. Hansen then argued that it would be "way too prejudicial" for him to testify as to only one charge because the jury could speculate that he was "hiding something" with respect to the other charge or that he had no defense. Later during the same hearing, the court ruled that if Hansen did testify, the State would be permitted to impeach him with evidence of several prior convictions.

An expressed desire to testify as to one count but not others does not, without more, require severance. Russell, 125 Wn.2d at 65; State v. Watkins, 53 Wn. App. 264, 269-70, 766 P.2d 484 (1989). Severance is required only if a defendant makes a "'convincing showing that she has important testimony to give concerning one count and a strong need to refrain from testifying about another.'" Russell, 125 Wn.2d at 65 (quoting Watkins, 53 Wn. App. at 270).

In Russell, the defendant made no offer of proof as to the content of his anticipated testimony as to one count and, consequently, the court could not conclude that joinder of three murder counts involving separate dates and victims affected his decision not to testify. 125 Wn.2d at 65. Likewise, here, beyond stating that which a claim of self-defense "typically" involves, Hansen made no offer of proof with regard to his testimony. And while Hansen declared that he had no "obligation to testify" on the second count, he failed to identify a strong

need to refrain from testifying with respect to the count involving Payne. As in Russell, this record does not provide an adequate basis for us to evaluate whether or how joinder affected Hansen's decision not to testify. See Russell, 125 Wn.2d 65-66.

The third factor is not significant here because the court's instructions directed the jury to "decide each count separately" and not to let its "verdict on one count . . . control [the] verdict on the other count." Appellate courts have repeatedly found this instruction sufficient to mitigate prejudice resulting from joinder. See, e.g., Bythrow, 114 Wn.2d at 723; State v. Cotten, 75 Wn. App. 669, 688, 879 P.2d 971 (1994).

Finally, as to the cross admissibility of the evidence in separate trials, the trial court observed that the evidence was likely cross-admissible because the incident involving Bodnar was relevant to Payne's "significant delay in reporting, explained by reading about the defendant's other case that happened a couple of months later." Hansen argues that the trial court failed to properly analyze this factor under ER 404(b). He also correctly points out that the Bodnar incident took place two months before, not after, the incident at Payne's apartment and accordingly argues that the record does not support the court's reason for concluding that the Bodnar incident was relevant to the timing of Payne's report.

Even assuming the court erred in its determination of cross-admissibility, "[t]he fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law." State v. Kalakosky, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993).

For instance, in Bythrow, the Supreme Court determined that despite some general similarities, evidence about a donut shop robbery would not have been admissible in the separate trial of a gas station robbery. 114 Wn.2d at 720. Nevertheless, the court held that, "'[w]hen evidence concerning the other crime is limited or not admissible, our primary concern is whether the jury can reasonably be expected to "compartmentalize the evidence" so that evidence of one crime does not taint the jury's consideration of another crime.'" Bythrow, 114 Wn.2d at 721 (quoting United States v. Johnson, 820 F.2d 1065, 1071 (9th Cir.1987)). Where the issues are relatively simple and the trial was short, the jury may be reasonably expected to compartmentalize the evidence, and "there may be no prejudicial effect from joinder even when the evidence would not have been admissible in separate trials." Bythrow, 114 Wn.2d at 721. The issues in Hansen's case were relatively simple and his trial took place over two days. The jury could reasonably be expected to compartmentalize the evidence.

While potential for prejudice invariably exists when similar counts are joined, the potential prejudice in this case was mitigated by several factors, including the sufficiently strong evidence on each count, the relatively equal strength of the evidence supporting each count, the clarity of defenses, and the jury instructions. Moreover, the defendant must be able to point to "specific prejudice" from the trial court's failure to sever counts; and any "residual prejudice" must still be "weighed against the need for judicial economy." Russell, 125 Wn.2d at 63; Bythrow, 114 Wn.2d at 720. Hansen fails to demonstrate any

specific prejudice resulting from the trial court's denial of his motion to sever the robbery counts. The trial court did not abuse its discretion.

Affirmed.

We concur:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70860-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 31, 2015

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Case Name: STATE V. DAVID HANSEN III
Court of Appeals Case Number: 70860-1

Party Respresented: PETITIONER
Is this a Personal Restraint Petition? ○ Yes ◉ No
Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

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