Supreme Court No. 92101-6
COA No. 71842-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYLER M. FARRAR-BRECKENRIDGE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Tyler M. Farrar-Breckenridge requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Farrar-Breckenridge, No. 71842-8-I, filed July 20, 2015. A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

A defense attorney provides ineffective assistance of counsel if he fails to move to sever unrelated charges, the court would likely have granted a severance if one had been requested, and there is a reasonable probability the outcome of the proceeding would have been different. Here, did Mr. Farrar-Breckenridge receive ineffective assistance of counsel, where his attorney failed to request severance of unrelated charges, it is likely the court would have granted a severance if requested, and the outcome of the proceeding would probably have been different had the jury not been allowed to consider inflammatory evidence of unrelated acts of sexual misconduct?

C. STATEMENT OF THE CASE

The State charged Mr. Farrar-Breckenridge with three counts of third degree rape of a child. CP 199. The first two charges arose from an incident involving C.L. when she was 15 years old and Mr. Farrar-

Breckenridge was 20 years old. CP 199; 2/24/14RP 86. The third charge arose from an incident involving B.B. when she was 14 years old and he was 19 years old. CP 199; 2/24/14RP 86.

Mr. Farrar-Breckenridge's attorney never moved to sever the counts involving C.L. from the count involving B.B., and thus all three charges were tried together in a single trial.

a. Alleged incident involving B.B.

In summer 2011, Tyler was living in Granite Falls with his mother and younger brother Zach. 2/24/14RP 29. One day, B.B., her older sister Marissa, and a couple of friends, went to Zach's house to visit him. 2/20/14RP 113; 2/21/14(a.m.)RP 137-40. They ended up spending the night. 2/20/14RP 114, 118; 2/21/14(a.m.)RP 137-40.

B.B. said everyone found a place to sleep downstairs but there was no room for her. 2/20/14RP 158-59. She said someone told her to go upstairs to sleep in Tyler's room. 2/20/14RP 158-59.

Tyler testified he was in his room watching a movie when B.B. knocked on his door and said she had nowhere to sleep. 2/24/14RP 58. He said she could sleep on the floor. 2/24/14RP 59. When she tried to get in bed with him, he asked her to leave. 2/24/14RP 60. He did not have sex with B.B. 2/24/14RP 61.

B.B. remembered very little about that evening. She claimed that while she was in Tyler's room, he forced her to perform oral sex on him and then they had penile-vaginal intercourse. 2/20/14RP 119. She said she cried and pushed him away, then left the room. 2/20/14RP 119-20. She left some of her clothing, including her bra, behind in Tyler's room. 2/20/14RP 134, 177. When she got downstairs, she woke up either Zach or his friend Jake and told him what happened, but that person told her "It's O.K. Just go to sleep." 2/20/14RP 172. She said she had to borrow a bra from her friend Savannah the next day. 2/20/14RP 177.

B.B.'s testimony about the event was vague and incomplete. For example, she was unable to say what she had been doing before she went to Tyler's room, or whether he was already in the room when she got there. 2/20/14RP 128, 160. She could not say whether he said anything to her or touched her before the oral sex. 2/20/14RP 129, 161. She could not say how her clothes came off or whether he was wearing all of his clothes. 2/20/14RP 132. She could not say what, if anything, she was wearing when she left the room. 2/20/14RP 134, 169. She could not say whether she went to sleep at all that night, and could not remember leaving the house the next day. 2/20/14RP 134-35.

None of the other people who slept over at Zach's house that night could corroborate B.B.'s account. Zach said he did not tell B.B. to sleep in Tyler's room and never would have told her to do that. 2/21/14(a.m.)RP 142. Both Zach and Jake said they did not remember B.B. coming downstairs, scantily clad, saying she had been raped. They would have remembered that. 2/20/14RP 50; 2/21/14(a.m.)RP 142. Savannah said she never loaned a bra to B.B. and did not carry an extra bra with her. She and B.B. did not wear the same size and B.B. would not have been able to fit into one of her bras. 2/21/14(a.m.)RP 25. Finally, Marissa said that if B.B. had come downstairs that night alleging rape, she would have remembered it. 2/24/14RP 17.

B.B. did not tell anyone her story until over a year later, when she was visiting the school counselor for an unrelated reason and said she had been raped. 2/20/14RP 135-37, 180, 197; 2/21/14(a.m.)RP 107, 111. The counselor told the police. 2/20/14RP 137.

b. Alleged incident involving C.L.

C.L. was a friend of B.B.'s and the sister of Zach's friend Jake. 2/19/14RP 25. She also lived in Granite Falls. 2/19/14RP 21-22.

One night during November 2012, C.L. was at home drinking alcohol and became drunk. 2/19/14RP 32-33. Later that night, at

around 1 a.m., C.L. went on Facebook and received a message from Tyler, who was a Facebook friend of hers. 2/19/14RP 35; Exhibit 10.

Tyler was at home watching a movie. 2/24/14RP 89-90. When he noticed C.L. was online on Facebook, he struck up a conversation with her. 2/24/14RP 90; Exhibit 10. He told her he was drinking beer and watching a movie and said, "You should join." Exhibit 10 at 2. C.L. declined, saying she was going to bed. Exhibit 10 at 2, 5.

Tyler testified he had intended to invite both C.L. and her brother Jake to come over to watch a movie. 2/24/12RP 61-62. He naturally assumed that if C.L. came over she would bring her brother because she never came over without him, and Tyler knew she was not allowed to come over alone. 2/24/14RP 61-62. In fact, C.L. did not come over that night. 2/24/14RP 63-65; Exhibit 10 at 5.

C.L. told a different story. She said she sneaked out of her window and went over to Tyler's house. 2/19/14RP 41. She said once she got there, she drank some beer and then threw up in the kitchen because she had too much to drink. 2/19/14RP 42-43, 46. As they were cleaning it up, Tyler came over to her, wrapped his arms around her and started kissing her. 2/19/14RP 47. She said they went into the

living room and had sexual intercourse on the couch, then went upstairs and had sexual intercourse in his bedroom. 2/19/14RP 50-56.

C.L. did not tell anyone right away. Later she told her cousin and brother. 2/19/14RP 62, 64-65; 2/20/14RP 21-24. Their mother heard about a month later and called the police. 2/20/14RP 74-78.

At trial, no limiting instruction was provided regarding the other act evidence. The jury found Tyler guilty as charged. CP 74, 91-93.

Mr. Farrar-Breckenridge appealed, arguing he received ineffective assistance of counsel because his attorney did not move to sever the charges involving C.L. from the charge involving B.B. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS' OPINION HOLDING MR. FARRAR-BRECKENRIDGE DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL DESPITE HIS ATTORNEY'S FAILURE TO MOVE TO SEVER UNRELATED CHARGES OF CHILD RAPE CONFLICTS WITH STATE V. SUTHERBY, WARRANTING REVIEW. RAP 13.4(B)(1)

1. A defense attorney provides ineffective assistance of counsel, requiring reversal, if he does not move to sever unrelated charges and the defendant is prejudiced as a result

Although two or more offenses of similar character may be joined in a single charging document, "joinder must not be used in such

a way as to prejudice a defendant." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). Washington courts recognize that "joinder is inherently prejudicial." Id. Even if multiple charges are properly joined in a single charging document, they must be severed for separate trials whenever "the court determines that severance will promote a fair determination of the defendant's guilt or innocence for each offense." CrR 4.4(b).

In State v. Sutherby, this Court explained, "[s]everance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Severance is particularly important when the alleged crimes are sexual in nature. Id. at 884 (citing State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)). "In this context there is a recognized danger of prejudice to the defendant *even if the jury is properly instructed to consider the crimes separately.*" Sutherby, 165 Wn.2d at 884. (emphasis added).

Under CrR 4.4(a), an attorney's failure to make a timely motion for severance amounts to a waiver. But counsel's failure to move to

sever may be addressed on appeal in the context of a claim of ineffective assistance of counsel. Sutherby, 165 Wn.2d at 883.

To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); U.S. Const. amend. VI. The Court presumes counsel was effective and the defendant must show there was no legitimate strategic or tactical reason for counsel's action. McFarland, 127 Wn.2d at 335.

Counsel's failure to move to sever multiple charges amounts to ineffective assistance of counsel that requires reversal if there was no legitimate tactical reason for counsel's failure to act, and the defendant was prejudiced as a result. Sutherby, 165 Wn.2d at 884.

2. Mr. Farrar-Breckenridge's attorney had no legitimate tactical reason not to move to sever

Contrary to the Court of Appeals' conclusion, defense counsel had no legitimate tactical reason not to request that the charges involving C.L. be severed from the charge involving B.B. The two alleged incidents were more than a year apart and involved different

complaining witnesses. The evidence offered to prove the unrelated charges would not have been admissible in separate trials. Also, the jury was much more likely to convict Mr. Farrar-Breckenridge of each charge by relying on the other act evidence. Under these circumstances, there was no reasonable basis not to request that the charges be severed.

In Sutherby, the Court explained that in a prosecution for a sex offense, there can be no legitimate tactical reason not to request severance of unrelated charges if it is possible the jury will use the other act evidence to infer a general predisposition to commit sex offenses. Sutherby, 165 Wn.2d at 884. Sutherby was charged with first degree child rape and first degree child molestation based on allegations that he raped his young granddaughter, and also with possession of child pornography based on images found on his computer at the time of his arrest. Id. at 875-76. The Court held that counsel's failure to move for severance of the possession of child pornography counts from the other charges met the deficiency prong of the ineffective assistance of counsel claim because evidence of child pornography would not have been admissible at a separate trial on the other charges. Id. at 884. Moreover, there was no possible advantage

to Sutherby in holding a joint trial on all of the charges given the prosecutor's stated intent to argue that the pornography counts showed Sutherby's predisposition to molest children. Id.

Similarly, here, there was no possible advantage to Mr. Farrar-Breckenridge in holding a single trial on all of the charges. If the charges were severed, the evidence of the unrelated acts would not have been admissible at separate trials. Evidence of a defendant's "other crimes, wrongs or acts" is categorically excluded from trial if the only relevance of the evidence is to prove the defendant's character and to show he acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012); ER 404(b). Other act evidence is admissible only if it is logically relevant to a material issue other than propensity, and the probative value of the evidence outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982).

Here, the evidence of the unrelated acts would not have been admissible at a separate trial because it was not relevant to any material issue other than propensity. The principal issue for each charge was whether Mr. Farrar-Breckenridge actually had sexual intercourse with each girl, as the ages of the participants were not in dispute. CP 199-

200; RCW 9A.44.079. Evidence that he had sexual intercourse with a different girl of a similar age on a completely different occasion was not relevant to any material issue other than to show he had a general predisposition to have sex with under-age girls. Thus, if separate trials were held, the other act evidence would have been categorically excluded by ER 404(b). Gresham, 173 Wn.2d at 420-21.

Moreover, the jury was likely to infer from the other act evidence that Mr. Farrar-Breckenridge was predisposed to commit sex crimes. This Court has repeatedly recognized that juries are particularly prone in sex offense cases to draw the impermissible inference from other act evidence that the defendant must be guilty because he has a predisposition toward criminality. See, e.g., Gresham, 173 Wn.2d at 433 (pointing out that the potential for prejudice from admitting prior acts is "'at its highest'" in sex offense cases) (quoting Saltarelli, 98 Wn.2d at 363); Sutherby, 165 Wn.2d at 886-87. That is because "[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." Saltarelli, 98 Wn.2d at 363 (internal quotation marks and citation omitted).

In sum, the other act evidence was inflammatory and unfairly prejudicial and would not have been admissible at a separate trial on the unrelated charge. Thus, counsel had no legitimate tactical reason not to request that the charges involving C.L. be severed from the charge involving B.B. The deficiency prong of the ineffective assistance of counsel claim is met. Sutherby, 165 Wn.2d at 884.

3. Reversal is required because there is a reasonable probability that, had counsel requested severance, the trial court would have granted the motion and the outcome of the trial would have been different

To meet the prejudice prong, Mr. Farrar-Breckenridge must show the trial court would likely have granted a motion for severance if one had been made, and there is a reasonable probability that, had severance been granted, the outcome of the proceeding would have been different. Sutherby, 165 Wn.2d at 884.

As discussed, the evidence of the unrelated acts would not have been admissible at a separate trial on the other charge, and the other act evidence carried a great potential for prejudice given that this was a prosecution for a sex offense. Thus, severance was important because there "[wa]s a risk that the jury w[ould] use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general

criminal disposition." Sutherby, 165 Wn.2d at 883. Thus, the trial court would properly have granted a severance motion if one had been made, in order to "promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

Moreover, there is a reasonable probability that, had a severance been granted, the result of the proceeding would have been different. The factors the Court considers in determining prejudice are: (1) the admissibility of evidence of the other charges even if not joined for trial; (2) the court's instructions to the jury to consider each count separately; and (3) the strength of the State's evidence on each count.[1] Sutherby, 165 Wn.2d at 884-85.

a. The failure to sever prejudiced Mr. Farrar-Breckenridge because the jury heard inflammatory evidence of an unrelated sex offense that it would not have heard had the charges been severed

As discussed, evidence of the other acts would not have been admissible at a separate trial on the unrelated charge because the evidence was relevant only to show Mr. Farrar-Breckenridge had a

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[1] An additional factor the Court considers is the clarity of defenses as to each count. Sutherby, 165 Wn.2d at 884-85. That factor is not at issue in this case given that Mr. Farrar-Breckenridge's defense to each charge was the same—general denial.

general propensity to commit sexual crimes. Gresham, 173 Wn.2d at 420-21; ER 404(b). The jury undoubtedly used the evidence of the unrelated acts to infer guilt for the other crimes, and to infer that Mr. Farrar-Breckenridge had a predisposition to commit sex crimes. See Sutherby, 165 Wn.2d at 886-87; Saltarelli, 98 Wn.2d at 363-64. Thus, the other act evidence likely influenced the jury to find guilt for each charge, weighing in favor of a finding of prejudice.

b. The failure to sever prejudiced Mr. Farrar-Breckenridge because the jury was not instructed it could not use other act evidence to decide guilt for a separate crime

In Sutherby, although the jury was instructed to decide each count separately, it was not instructed that evidence of one crime could not be used to decide guilt for a separate crime. Sutherby, 165 Wn.2d at 885-86. The Court concluded this weighed in favor of finding that the failure to sever the unrelated charges prejudiced Sutherby. Id.

As in Sutherby, the jury in this case was not instructed it could not use evidence of one crime to decide guilt for a separate crime. The jury instruction provided was identical to the one provided in Sutherby, which stated:

> 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 99. The jury was provided with no limiting instruction regarding the other act evidence. Thus, the jury instructions did not preclude the jury from using the other act evidence to infer guilt for a separate crime or from inferring a general criminal disposition. This factor weighs in favor of a finding of prejudice. Sutherby, 165 Wn.2d at 885-86.

c. The failure to sever prejudiced Mr. Farrar-Breckenridge because the untainted evidence in support of each charge was not strong

In determining whether a defendant was prejudiced by the admission of other misconduct evidence, the question is not whether the untainted evidence was sufficient to convict. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014) (citing Gresham, 173 Wn.2d at 433-34). The question is whether there is a reasonable probability the outcome of the trial would have been different without the other misconduct evidence. Gower, 179 Wn.2d at 857. The Court has repeatedly recognized that "the potential for prejudice from admitting prior acts is '"at its highest"' in sex offense cases." Id. (quoting Gresham, 173 Wn.2d at 433) (quoting Saltarelli, 98 Wn.2d at 363)).

A defendant may be prejudiced by the failure to sever charges if the State's evidence on one of the counts was not strong. Sutherby, 165 Wn.2d at 885. In Sutherby, Sutherby was prejudiced by counsel's failure to request severance of the child rape and molestation charges from the possession of child pornography charges in part because the evidence of molestation and rape was weaker than the evidence of possession of child pornography. Id. To prove rape and molestation, the State offered only the testimony and out-of-court statements of the six-year-old complainant, as well as medical evidence that was consistent with abuse but did not alone support the conclusion that sexual abuse occurred. Id. In light of this evidence, it is likely the jury was influenced by the other misconduct evidence. Id.

Consistent with Sutherby, courts generally hold that erroneous admission of other misconduct evidence in a sex offense case is prejudicial if the untainted evidence consists primarily of the complaining witness's statements. In Gower, the only evidence corroborating the complaining witness's statements was a witness who corroborated details of the aftermath of the incident rather than the incident itself. Gower, 179 Wn.2d at 858. "'There were no eyewitnesses to the alleged incidents of molestation,'" and "credibility

was the main issue in this case." Id. (quoting Gresham, 173 Wn.2d at 433). Thus, the erroneous admission of other misconduct evidence was prejudicial. Gower, 179 Wn.2d at 858.

Likewise, in Gresham, the untainted evidence consisted of the alleged victim's testimony that Gresham molested her, her parents' corroboration that he had the opportunity to do so, and the investigating officer's testimony. Gresham, 173 Wn.2d at 433-34. This was insufficient to overcome the prejudice caused by admission of other misconduct evidence. Id.; see also Saltarelli, 98 Wn.2d at 367 (reversing conviction for rape where untainted evidence consisted of complaining witness's testimony).

Similarly, the erroneous admission of other misconduct evidence in a sex offense prosecution is prejudicial if the untainted evidence is conflicting. See State v. Slocum, 183 Wn. App. 438, 456-57, 333 P.3d 541 (2014). In Slocum, the 15-year-old complaining witness told her parents and investigators, and testified clearly at trial, that Slocum touched her inappropriately on several occasions. Id. Slocum's theory of her motive in advancing the allegations was not strong. On the other hand, she admitted she had been taught at school and in home about reporting inappropriate touching; she changed and

enlarged upon her allegations; and she provided a date for one incident for which Slocum had an alibi. Id. Also, Slocum presented evidence of his long-standing impotence and the testimony of his ex-wife, who said she had never left the child alone with him. Id. Given this conflicting evidence, the erroneous admission of other misconduct evidence was prejudicial because it bolstered the complaining witness's credibility while detracting from Slocum's credibility. Id.

Under these authorities, the failure to sever unrelated charges in this case was prejudicial because it is reasonably probable the jury's verdict on each charge was materially affected by the other misconduct evidence. First, the untainted evidence consisted primarily of the complaining witnesses' statements. "There were no eyewitnesses to the alleged incidents" and "credibility was the main issue in this case." Gower, 179 Wn.2d at 858. Second, the untainted evidence was conflicting, making it probable that the jury was influenced by the evidence of unrelated acts. See Slocum, 333 P.3d at 550-51.

In regard to the charge involving B.B., the untainted evidence consisted primarily of her statements to the school counselor, made more than a year after the alleged incident, her statements to the nurse practitioner who examined her but found no physical evidence of

abuse, and her testimony at trial. None of her statements were corroborated and in fact were contradicted by the testimonies of other people who were present at Zach and Tyler's house that evening. See 2/20/14RP 50, 134, 159, 172, 177, 194; 2/21/14(a.m.)RP 25, 142.

B.B.'s testimony was vague and she could say very little about what happened. See 2/20/14RP 119, 128-29, 132-35, 160-69. Also, her testimony was directly contradicted by Mr. Farrar-Breckenridge, who denied having sexual intercourse with her. 2/24/14 RP 58-61. Under these circumstances, the jury was likely influenced by the evidence of unrelated acts of sexual misconduct. Gower, 179 Wn.2d at 858; Gresham, 173 Wn.2d at 433-34; Sutherby, 165 Wn.2d at 885; Slocum, 333 P.3d at 550-51.

Similarly, the evidence presented to support the charges involving C.L. was not strong. That evidence consisted principally of C.L.'s statements to her family, made weeks after the alleged incident; her testimony at trial; and the Facebook conversation between her and Tyler that allegedly occurred that evening. But C.L.'s statements were not corroborated and were contradicted by Mr. Farrar-Breckenridge.

Again, because C.L.'s statements were uncorroborated and in conflict with other evidence presented, the jury was undoubtedly

influenced by the evidence of unrelated acts of sexual misconduct. Gower, 179 Wn.2d at 858; Gresham, 173 Wn.2d at 433-34; Sutherby, 165 Wn.2d at 885; Slocum, 333 P.3d at 550-51.

A jury faced with the uncorroborated statements of the complaining witnesses in this case, and the conflicting evidence, would naturally and not unreasonably turn to propensity reasoning to reach its verdicts. There is a reasonable probability the outcome of the trial would have been different if the jury had not heard the unrelated and damaging evidence of other acts of sexual misconduct. Thus, counsel's failure to move to sever the charges involving C.L. from the charge involving B.B. was prejudicial. Sutherby, 165 Wn.2d at 884-85.

E. CONCLUSION

Because the Court of Appeals' opinion affirming the convictions conflicts with State v. Sutherby, this Court should grant review and reverse. RAP 13.4(b)(1).

Respectfully submitted this 17th day of August, 2015.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 71842-8-I
Respondent,	)	DIVISION ONE
v.	)	
TYLER M. FARRAR-BRECKENRIDGE,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: July 20, 2015

LAU, J. — Tyler Farrar-Breckenridge appeals his jury trial convictions on three counts of rape of a child in the third degree. The charges involved separate incidents with two different victims. Farrar-Breckenridge argues his attorney's failure to move to sever the counts constitutes ineffective assistance of counsel. But because (1) the record shows defense counsel's decision to forego severance was a reasonable strategic decision, and (2) Farrar-Breckenridge cannot show either that the trial court would have granted a severance motion or that the outcome of separate trials would have been different, his ineffective assistance of counsel claim fails. We affirm the judgment and sentence.

FACTS

A jury convicted Farrar-Breckenridge on three counts of rape of a child in the third degree involving B.B. and C.L.

Incident Involving B.B.

The incident with B.B. occurred during the summer of 2011 in Granite Falls, Washington. Farrar-Breckenridge lived at his mother's house, and teenagers frequently held social gatherings there. In late July or early August, B.B. went to Farrar-Breckenridge's house with a group of friends. The group included B.B., B.B.'s sister, C.L., C.L.'s brother, and Farrar-Breckenridge and his brother. At the time, Farrar-Breckenridge was 19 (born December 1991), and B.B. was 14 (born April 1997).

The group decided to spend the night at Farrar-Breckenridge's house. B.B. could not find a place to sleep downstairs with everyone else, so she went upstairs to sleep in Farrar-Breckenridge's room. B.B. testified that she got into Farrar-Breckenridge's bed and then he forced her to engage in oral and penile-vaginal sex. B.B. also testified that she remembered crying, telling Farrar-Breckenridge to stop, and pushing him away. At some point, she asked to use the bathroom and ran downstairs. B.B. tried to wake up some of her friends to tell them what happened. The witnesses denied remembering that B.B. tried to wake them up. B.B. eventually left the house in the early morning.

B.B. reported the incident to her counselor over a year later in the fall of 2012. The counselor reported the disclosure to police.

Incident Involving C.L.

On November 14, 2012, 15-year-old C.L. had been drinking at home when she decided to log onto Facebook after 1:00 am. Farrar-Breckenridge sent C.L. a message, asking her if she wanted to watch a movie with him. C.L. declined, stating she planned to go to sleep instead. C.L. snuck out of her house and went to Farrar-Breckenridge's house. C.L. testified that she played beer pong with Farrar-Breckenridge until she eventually threw up. C.L. and Farrar-Breckenridge began kissing and had penile-vaginal intercourse on the living room couch. Afterwards, they watched TV for a few minutes and then went upstairs to Farrar-Breckenridge's bedroom, where they had intercourse again, including anal intercourse. C.L. testified that she never told him to stop but also that she "didn't know what to do." Report of Proceedings (RP) (February 19, 2014) at 57. At one point, she tried to pull away, but Farrar-Breckenridge stopped her.

C.L. did not tell anyone what happened for about two weeks. She eventually told her older cousin about it on Thanksgiving. In February 2013, C.L.'s parents learned about the incident and reported it to police.

In December 2013, Farrar-Breckenridge was charged with two counts of third degree rape of a child involving C.L. and one count of third degree rape of a child involving B.B. under RCW 9A.44.079.[1] Defense counsel never moved to sever any

[1] "A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." RCW 9A.44.079(1). The parties did not dispute the ages of the victims or the defendant. The only issue at trial was whether sexual intercourse occurred.

counts. A jury convicted Farrar-Breckenridge on all three counts as charged. The court imposed a sentence of 60 months.

ANALYSIS

Farrar-Breckenridge argues for reversal of the convictions on grounds he was denied his constitutional right to effective assistance of counsel. He contends that by failing to move to sever three counts of child rape in the third degree, his attorney's performance was deficient and the outcome of the trial would have been different but for this deficiency. We conclude that Farrar-Breckenridge failed to show that his attorney's performance was either deficient or prejudicial. First, the record indicates that defense counsel's decision to forego severance was a reasonable tactical decision. Indeed, the record shows that the defense theory of the case was essentially that the two victims—B.B. and C.L., who were close friends—colluded to manufacture the allegations against Farrar-Breckenridge. Second, Farrar-Breckenridge cannot demonstrate prejudice because it is unlikely the trial court would have granted a severance motion.

I. Standard of Review

Effective assistance of counsel is guaranteed by both the federal and state constitutions. In re Pers. Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). This court reviews claims for ineffective assistance of counsel de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). "To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant." State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "To establish ineffective representation,

the defendant must show that counsel's performance fell below an objective standard of reasonableness. To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citations omitted). Failure to establish either prong of the test is fatal to an ineffective assistance of counsel claim. Strickland, 466 U.S. at 700.

II. Deficient Performance

Because defense counsel relied on a plausible conspiracy theory between the two victims, foregoing severance was a reasonable strategic decision that advanced the defense's strategy. As such, Farrar-Breckenridge was not deprived of effective assistance of counsel.

Scrutiny of counsel's performance under the deficiency prong is extremely deferential. A defendant asserting ineffective assistance of counsel must overcome a strong presumption that counsel's performance was reasonable. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Accordingly, Farrar-Breckenridge "must show there was no legitimate strategic or tactical reason for counsel's action." Sutherby, 165 Wn.2d at 883.

Here, the record shows that throughout the trial, defense counsel advanced the theory that B.B. and C.L. manufactured the rape allegations against Farrar-Breckenridge as revenge for denying B.B.'s sexual advances. This theory afforded the defense a basis to argue motives and fabrication.

For example, in his motions in limine, defense counsel suggested that the rape allegations were part of a coordinated plan to attack his client:

> After C.L. disclosed her alleged rape to her mother, [C.L.'s mother] went on a witch-hunt for all of the girls in Granite Falls who she believed were raped by Tyler. B.B. was mentioned as a possible candidate to bolster her daughter's allegations and [C.L.'s mother] brought B.B. to the Granite Falls police department.

Clerk's Papers (CP) at 164. Just before trial, defense counsel alerted the trial court that he planned to open the door to evidence of B.B.'s disclosure to C.L.:

> When we [the defense] talked to [C.L.], she stated that [B.B.] told her something to the effect of, [s]he told me Tyler tried to sleep with her or tried to touch her and that she tried to push him off.
>
> And then I asked [C.L.] specifically, Did [B.B.] say they had sex? And [C.L.] said no.
>
> . . .
>
> I expected . . . that [the State] would be asking [B.B.] some questions about her disclosure and what had happened that day with Tyler.
>
> I am essentially volunteering that I'm going to open the door as it relates to her disclosure to [C.L.].
>
> . . .
>
> I think the Court can see my strategy behind that, why I'm doing that.

RP (February 19, 2014) at 5-6 (emphasis added). Defense counsel expounded on this theory during closing argument:

> Why are they doing this? . . . Why would they lie? I don't know . . . . Here's my hypothesis. Tyler's account of what happened that night with [B.B.] is actually consistent with everybody who testified except [B.B.]. So if [B.B.] went up to his room and wanted to sleep there and he said, "No, I don't want you there. I just got done having sex with your sister." Kicks her out. He said she was upset. She was very upset. She was mad. She's mad at Tyler . . . . [I]s it plausible to think that [B.B.] would be upset that the man who continues to sleep with her sister rejected her? I don't know. I wasn't a teenage girl. The lie gets little traction. She says she tells her sister . . . . Her story is not getting traction with the person who is most likely to believe her, her sister. She tells her best friend, [C.L.], she doesn't remember when. They do everything together, they share secrets together, they spend time together. They get drunk together, they sneak out of houses. Who can hold Tyler accountable? . . . Look at the timing of these allegations. Look at the timing of the disclosure. [C.L.] alleges this happened on November 14th. What day did [B.B. disclose the details of

> her rape]? November 30th, two weeks afterwards. Three or four days after the Thanksgiving that [C.L.] disclosed to [B.B.]. Within seven days, within a week, these disclosures are out. It could be coincidence and it could not. I don't know. I don't know their motive . . . . I'm not Perry Mason. I'm not Matlock. I'm not going to get them on the stand and break them down until they finally weepingly confess to a lie . . . That's not how this process works.

RP (February 24, 2014) at 167-69. Defense counsel continued, assuring the jury that even if they did not believe his hypothesis, they could still return a not guilty verdict because the victims' testimony was insufficient on its own:

> Even if you disagree with my theory and you think it's not helpful, that I'm full of garbage or my theory is at least full of garbage, you can still find Tyler not guilty. And the way you do that is because the State has not met its burden of proof. There is not enough evidence to prove that this young man raped those two young girls.
>
> . . .
>
> So what are the facts? Two girls, best friends, who do everything together say they were raped by the same man and they're the same amount of proof, none. Just their word. That is all.

RP (February 24, 2014) at 170-76. Defense counsel made the theory clear during closing argument: B.B. wanted revenge against Farrar-Breckenridge for spurning her sexual advances, so she and her best friend, C.L., manufactured false rapes allegations and coincidentally disclosed those allegations within a week of each other.

This conspiracy theory required comparing the two victims' narratives alongside one another in the same trial so as to highlight the suspicious nature of the "coincidence[s]" defense counsel relied on in closing argument. Because the record demonstrates that defense counsel rejected separate trials in furtherance of this strategy, Farrar-Breckenridge has failed to overcome the strong presumption that his attorney's decision was tactical. See Sutherby, 165 Wn.2d at 883.

Farrar-Breckenridge primarily relies on Sutherby. There, our Supreme Court held that counsel was ineffective when he failed to move for severance of child pornography charges from child molestation charges. Sutherby, 165 Wn.2d at 884. Farrar-Breckenridge argues that, as in Sutherby, there was no possible advantage in holding a single trial on all three counts of rape of a child in the third degree because "the evidence of the unrelated acts would not have been admissible at separate trials." Br. of Appellant, 15. Indeed, the Sutherby court noted that "[t]he State's argument suggesting a tactical choice presupposes that evidence of the possession of child pornography would have been allowed in any separate trial on the child rape and molestation charges, but . . . this is a debatable premise." Sutherby, 165 Wn.2d at 884.

But a joint trial on counts that could be severed does not necessarily lack any strategic advantage simply because some evidence would be inadmissible at separate trials. Although that may be a factor, the basis of the court's holding in Sutherby is that defense counsel was deficient when he failed to move for severance after the State indicated that it planned to use the child pornography evidence to show predisposition for molestation:

> There is no indication of any possible advantage to the defendant in having a joint trial on all charges, given the State's announced intent to use the pornography counts to show Sutherby's predisposition to molest children. Even the trial judge appeared to expect a severance motion because he asked at a pretrial hearing if severance was a possibility. We hold that counsel's failure to move for severance meets the deficiency prong.

Sutherby, 165 Wn.2d at 884. Because of the highly prejudicial nature of the charges in Sutherby and the State's announced intent to exploit that prejudice, there was no possible advantage to a joint trial. But, here, the record shows there was a tactical

advantage to a joint trial and defense counsel based his primary trial strategy on that advantage. Further, unlike in Sutherby, there is no indication that the State used any one count to improperly influence the jury's decision on another count. Under these circumstances, defense counsel's performance was not deficient.

III. Prejudice

Farrar-Breckenridge's claim also fails under the prejudice prong. To demonstrate prejudice, Farrar-Breckenridge must show (1) a severance motion would likely have been granted, and (2) if severance had been granted, there is a reasonable probability the jury would not have found him guilty beyond a reasonable doubt. Sutherby, 165 Wn.2d at 884. We conclude that he can show neither.

A. Whether a severance motion would have been granted

Multiple offenses may be joined when they are "of the same or similar character, even if not part of a single scheme or plan." CR 4.3(a)(1). But joining multiple offenses may prejudice a defendant "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). To determine whether joinder results in prejudice to a defendant, a trial court must consider "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial." Russell, 125 Wn.2d at 63. Further, any residual prejudice must be weighed against the need for judicial economy. State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993). We conclude it is unlikely a severance motion would have been granted.

1. The strength of the State's evidence on each count

For this factor, the court need not consider the overall strength of the State's case. Rather, the question is whether the strength of the State's case on each count was similar. See Russell, 125 Wn.2d at 63. "When one case is remarkably stronger than the other, severance is proper." State v. MacDonald, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004).

Here, the State presented similar cases on each count such that neither case was noticeably stronger than the other. The victims' testimony served as the primary evidence for each count. Both C.L. and B.B. testified to their experiences, and Farrar-Breckenridge testified disputing their accounts. No physical evidence supported either victim's testimony. No eyewitnesses corroborated either victim's account of what happened. Therefore, because the strength of the State's case was similar on each count, this factor weighs in favor of joinder.

2. The clarity of the defenses as to each count

This factor also weighed in favor of joinder because Farrar-Breckenridge's defense to each count was the same. "The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each charge." Russell, 125 Wn.2d at 64. Farrar-Breckenridge concedes this factor because he presented identical defenses.

3. The court's instructions to the jury

This factor weighs in favor of joinder because the trial court instructed the jury to consider each count separately. Jury instruction 3 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 at 99. This instruction adequately directed the jury to consider each count separately, and we presume that the jury followed the court's instructions. State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008) ("we should presume the jury followed the court's instructions absent evidence to the contrary.")

Farrar-Breckenridge argues that despite this instruction, he was nevertheless prejudiced because the trial court failed to instruct the jury that evidence of one crime could not be used to decide guilt for the other crime. He again relies on Sutherby, where the court found prejudice even though the trial court provided an identical instruction to the one given in this case. Sutherby, 165 Wn.2d at 885–86. But the court in Sutherby did not hold that the trial court's failure to include a limiting instruction prejudiced Sutherby. Rather, the court concluded that Sutherby was prejudiced by the State's improper argument despite the trial court's adequate instructions:

> Third, though the jury was instructed to decide each count separately, the State consistently argued that the presence of child pornography on Sutherby's computers proved he sexually abused his granddaughter, stating it "shows motive."

Sutherby, 165 Wn.2d at 885. Sutherby does not support the proposition that the lack of an additional limiting instruction is prejudicial.

Further, we note that Farrar-Breckenridge never requested the instruction he now contends was necessary to avoid prejudice. In Russell, the court concluded the trial court did not err when it denied a motion to sever under similar circumstances:

> The third factor to consider is whether the court properly instructed the jury to consider each count separately. The defense now claims that

> the trial court should have instructed the jury to "decide separately what the evidence in the case shows about the crime." See United States v. Johnson, 820 F.2d 1065, 1071 (9th Cir. 1987). Since the defense never proposed such an instruction, however, and since the instruction it did propose is both the one that the trial court gave and a correct statement of the law, we find no error.

Russell, 125 Wn.2d at 66. Therefore, given the trial court's adequate instructions and Farrar-Breckenridge's failure to propose additional instructions, we cannot say the trial court would have granted a motion to sever.

4. The admissibility of other evidence if not joined

Farrar-Breckenridge primarily argues that severance would have been granted because the evidence of each count would be inadmissible in separate trials, and a single trial with all the evidence prejudiced the outcome.

But "[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." Kalakosky, 121 Wn.2d at 538. "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." State v. Bythrow, 114 Wn.2d 713, 721, 790 P.2d 154 (1990) (quoting Johnson, 820 F.2d at 1071). In Kalakosky, the court held that the trial court did not abuse its discretion when it denied a motion to sever five separate counts of rape even though much of the evidence of the rapes would have been inadmissible in separate trials on each count. Kalakosky, 121 Wn.2d 536-38. The court concluded "it was not a particularly complicated task to keep the testimony and evidence of the five crimes separate" because each victim "described quite a different episode even though there was much in the rapist's methods that was

the same." Kalakosky, 121 Wn.2d 537. Further, the trial court instructed the jury to consider each count separately. Kalakosky, 121 Wn.2d at 538.

Like in Kalakosky, the jury here could compartmentalize the different alleged acts. Both victims testified, describing different sexual acts that occurred almost a year apart. And, as mentioned above, the jury was instructed to consider each count separately. Under these circumstances, we conclude that the potential inadmissibility of some evidence at separate trials did not prevent joinder.

5. Judicial economy

Finally, we note that judicial economy considerations supported joinder here. See, e.g., Kalakosky, 121 Wn.2d at 537 (judicial economy may be a factor when considering whether to sever separate counts).

Because Farrar-Breckenridge and both victims socialized in the same circle of friends, many of the witnesses would likely have been required to testify at both trials, had the counts been severed. For example, C.L. and B.B. would have testified at both trials because they disclosed to each other and C.L. was at Farrar-Breckenridge's house the night B.B. was raped. Similarly, Farrar-Breckenridge's brother would probably have testified in both trials because he was also present at the house the night B.B. was raped and C.L. disclosed to him. C.L.'s mother also would have testified at both trials given her relationship to both victims. Given the other factors above, the need for judicial economy outweighed the relatively low risk of prejudice to Farrar-Breckenridge.

Although the trial court had the discretion to grant severance, we conclude the above factors, taken together, weigh in favor of joinder. Farrar-Breckenridge has failed

to show a likelihood that the trial court would have granted a severance motion under the circumstances present here.

B. Whether the outcome of separate trials would have been different

Even if the trial court had granted severance, Farrar-Breckenridge cannot show that the outcome would have been different. We addressed a similar circumstance in State v. Warren, 55 Wn. App. 645, 779 P.2d 1159 (1989), and found no prejudice. In Warren, the defendant was charged with one count of attempted second degree rape and one count of first degree statutory rape. Warren, 55 Wn. App. at 646-47. The counts arose from incidents with two different victims. Warren, 55 Wn. App. at 647. On appeal, Warren argued he was denied effective assistance of counsel when his attorney failed to move to sever the two counts. We affirmed the convictions, concluding that because the defendant and the victims testified, it was unlikely two separate juries would have come to a different conclusion:

> Even if it is assumed, however, that severance would have been granted, appellant was not prejudiced by counsel's alleged deficient performance. Given the nature of the charges, the State's evidence was relatively strong. Both of the victims testified, were subject to cross examination, and gave concise accounts of Warren's conduct. In his defense, Warren took the stand and denied the charges outright. The jury thus had a full opportunity to assess the demeanor and credibility of all the parties. We can find no basis to conclude that the jury might reasonably have performed this assessment differently had the charges been tried separately.

Warren, 55 Wn. App. at 655.

The same is true here. Both C.L. and B.B. testified and were subject to cross-examination. Farrar-Breckenridge testified and denied the allegations. The jury here had a full opportunity to assess the credibility of all the witnesses. Farrar-Breckenridge

failed to identify any specific reason why separate juries would have performed this assessment differently.

CONCLUSION

Because Farrar-Breckenridge cannot show either that his defense counsel was deficient or prejudice, we conclude he was not deprived of effective assistance of counsel. We affirm the judgment and sentence.

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. 71842-8-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: August 17, 2015

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Court of Appeals Case Number: 71842-8

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