Supreme Court No. 94656-6
Court of Appeals No. 73452-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Domingo Montar-Morales,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Domingo Montar-Morales, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision affirming his conviction designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Montar-Morales seeks review of the Court of Appeals unpublished opinion, *State v. Montar-Morales*, No. 73452-1-I, issued on May 8, 2017.

C. ISSUES PRESENTED FOR REVIEW

1. Where police lacked probable cause to arrest Mr. Montar-Morales, was it error for the trial court to find that a half-hour seizure in which Mr. Montar-Morales was handcuffed, transported away from the alleged crime scene to a hospital despite declining medical aid, supervised by police while there, then forced to receive medical care against his will, was a detention of limited duration, scope, and purpose authorized under *Terry v. Ohio*?

2. Due process requires that the State prove every element of a crime beyond a reasonable doubt. When the prosecution badgered a young witness into providing testimony of penetration, but then failed to clarify whether it was penetration of just the buttock or anus, should the rape of a

child conviction be set aside for insufficient evidence of sexual intercourse?

3. Was Mr. Montar-Morales deprived of his right to a fair trial when the court denied his motion to sever?

D. STATEMENT OF THE CASE

1. Pretrial motion to suppress evidence.

Mr. Montar-Morales was staying the night at Noel Lopez's apartment after they had been out drinking together. IIRP 28-33. Noel's cousin Nicodemo, slept in the same room as Noel and Mr. Montar-Morales. IIRP 107. Noel's aunt, Maria, and her children, Y.J., René, and two younger sons, were visiting from California and slept in the living room together. IIRP 38-39, 68, 107, IIIRP 33.

Police were called later that night with a report of fighting in the street. IRP 6. When they arrived Mr. Montar-Morales was being held by Nicodemo and René. IRP 8. When police arrived, the two men vaguely told police that Mr. Montar-Morales "had done something... perhaps molested a sister." CP 148; FF#4.

The alleged victim, Y.J., claimed that someone had touched her while she was sleeping. IIRP 108. She did not see the person. IIRP 109. When police talked to her, she was upset because she thought it was Nicodemo, who had touched her before. IIRP 109.

The police ordered Mr. Montar-Morales to stay on the ground, then handcuffed him, made him sit on a patrol car bumper, and searched him. CP 172. Mr. Montar-Morales' wrists were handcuffed behind his back. IRP 41. He was not free to leave. IRP 57.

Mr. Montar-Morales was bleeding about his head. Mr. Montar-Morales "clearly expressed that he did not want to go to the hospital and did not want medical aid." CP 149; FF#12. Officer McCloud confirmed Mr. Montar-Morales did not ask to go, did not consent to go, and was made to go. IRP 59-60.

Officer McCloud drove to the Skagit Valley Hospital and while there, he kept Mr. Montar-Morales handcuffed to a gurney. CP 172; IRP 61; CP 149 FF#12-17 (Mr. Montar-Morales was in restraints or handcuffs for most of the time from the point of initial police contact).

The police first handcuffed Mr. Montar-Morales at 1:09 or 1:10 a.m. CP 149; FF#10. The way that Sergeant Moore put it, when he got there, "Officer McCloud had one gentleman he was dealing with, he was taking him into custody." IRP 25 (emphasis added). Mr. Montar-Morales was this arrestee.

About half-an-hour after the initial police contact, when Officer McCloud still had Mr. Montar-Morales at the hospital, Sergeant Moore

called to report there was probable cause and that he would prepare jail booking paperwork for Officer McCloud. CP 149; FF#15; IRP 31.

The State alleged that Mr. Montar-Morales committed a sex offense against 13 year-old Y.J., and a burglary at a nearby apartment. CP 6-9, 10-12,[1] 151-52, 209-11. Mr. Montar-Morales moved to suppress evidence of the burglary discovered by the police at the hospital, arguing that the level of police restraint exerted over him was an arrest. CP 171, 174-76; 127-28. IRP 66-68; 72-74. Never claiming there was probable cause to arrest Mr. Montar-Morales when he was handcuffed or when he was being driven to the hospital, the State attempted to justify the warrantless seizure as a *Terry* investigatory detention. CP 203-06; IRP 71.

The trial court agreed this was "a detention without full probable cause, but denied the motion to suppress, ruling that what occurred was a "permissible *Terry* detention." CP 150; CL #2-3, 9. At trial, the State introduced items seized from Mr. Montar-Morales that belonged to the residents where the alleged burglary had occurred. The Court of Appeals determined that the officers acted reasonably under the circumstances, and did not exceed the scope of *Terry* when they transported Mr. Montar-Morales to the hospital against his will. Appendix 1, p. 9.

2. Half-time and post-trial motions to dismiss the rape charge for insufficient evidence.

[1] The State also alleged that he returned to the Flores' apartment to attempt a burglary. CP 12. That is the one charge Mr. Montar-Morales was not convicted of. CP 36.

Y.J. never identified the person who she said touched her. And, when testifying in court, she described being touched about the midsection. IIRP 82. She testified that nothing had gone inside her. IIRP 82. On cross-examination, she confirmed that in a pretrial interview, she said "no" when directly asked if anything went into her "anus" or "vagina." IIRP 110-11.

After several impermissible requests to obtain its desired testimony from Y.J.,[2] the prosecution gave her a diagram to draw on and she marked where she was touched on the top half of the left buttock. IIRP 105; Ex. 37; Supp. CP __. In response to the prosecution's question about what portion of the hand went there, Y.J. said "halfway the knuckle" on a finger went "inside." IIRP 105-06. The State did not ask her to explain the change in her testimony or to provide any additional detail.

The prosecutor admitted he "didn't clarify with respect to whether it was penetration just of a buttock." IIRP 151. The trial court still overruled the defense's half-time motion and the jury convicted of rape. IVRP 6, 27-28. The trial court denied a post-trial motion to arrest judgment. IVRP 109; CP 233. Despite this lack of evidence, the Court of

[2] IIRP 87, 97 (The prosecution asks to have Y.J. read from her previous statement); IIRP 84 (the prosecution asks to have Y.J. write out her statements.)

Appeals ruled that penetration of the anus could be reasonably inferred from this evidence. Appendix 1, p. 12.

3. Motion to sever two child sex offenses from the three nonviolent property crimes.

Mr. Montar-Morales attempted to avoid being simultaneously tried for two child sex offenses and the nonviolent property crimes that allegedly occurred afterwards. CP 161-70; 125-26. The trial court denied the defense motion. IRP 85-86; CP 197-98. The Court of Appeals did not find that this was an abuse of discretion. Appendix 1, p. 16.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review should be granted to decide whether police exceeded the limited duration, scope, and purpose authorized under *Terry v. Ohio* when Mr. Montar-Morales was handcuffed, transported away from the alleged crime scene despite declining medical aid, supervised by police while there, then forced to receive medical care against his will.

a. Brief investigatory stops conducted on less than probable cause must be limited in duration, as to place, and remain investigatory in purpose.

"As a general rule, warrantless searches and seizures are per se unreasonable" under the Fourth Amendment to the United States Constitution. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (*citing Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)); Const. art I, Sec. 7. The State bears the burden of showing a seizure without a warrant falls within one of the "few jealously

and carefully drawn exceptions to the warrant requirement." *Id.*; *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). "One such exception is a brief investigatory detention of a person, known as a *Terry* stop." *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015).

"A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct." *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010), *citing Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). "[T]he scope of a permissible *Terry* stop will vary with the facts of each case, but...it is 'clear' that *Terry* requires that an investigative detention must be temporary, lasting no longer than is necessary to effectuate the purpose of the stop." *State v. Williams*, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984) (*citing Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)). A *Terry* stop must be "limited in duration" and "limited as to place." *State v. Lund*, 70 Wn. App. 437, 446-48, 853 P.2d 1379 (1993).

Generally, a *Terry* detention involves "no more than a brief stop, interrogation and, under proper circumstances, a brief check for weapons." *United States v. Miles*, 247 F.3d 1009, 1012 (9th Cir.2001). "If the stop proceeds beyond these limitations, an arrest occurs, which requires probable cause." *Id.*

"Involuntary transport to a police station for questioning is 'sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause.'" *Kaupp v. Texas*, 538 U.S. 626, 630, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003), *quoting Hayes v. Florida*, 470 U.S. 811, 816, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985). *See Florida v. Royer*, 460 U.S. at 503; *Dunaway v. New York*, 442 U.S. 200, 212, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir.1988) ("a distinction between investigatory stops and arrests may be drawn at the point of transporting the defendant to the police station."); *accord State v. Lewis*, 59 Wn. App. 834, 836, 801 P.2d 289 (1990) (holding suspect driven to police station for questioning was arrested, not detained).

Admittedly, some movement of a detained suspect may be permissible if "the movement is a reasonable means of achieving the legitimate goals of the detention given the specific circumstances of the case." *United States v. Charley*, 396 F.3d 1074, 1080 (9th Cir.2005). Taking a suspect to the scene of a crime for an eyewitness show-up is one such reasonable investigative method. *State v. Wheeler*, 108 Wn.2d 230, 233, 737 P.2d 1005 (1987). In *State v. Wheeler*, the police frisked, handcuffed, and placed a burglary suspect into a patrol car. 108 Wn.2d at 233. Then, the officers drove him the two blocks back the scene of the

break-in, and asked that an eyewitness attempt an identification. *Id.* "The time from detention to identification was from 5 to 10 minutes." *Id.*

Wheeler described the amount of physical intrusion in the case as significant, but not excessive. *Id.* at 235. *Wheeler* also noted "the degree of intrusion must also be appropriate to the type of crime under investigation and to the probable dangerousness of the suspect." *Id.* There is "no bright-line rule to determine when an investigatory stop becomes an arrest." *Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir.1996). "Rather, courts consider the totality of the circumstances, evaluating both the intrusiveness of the stop as well as the justification for the use of such tactics ...." *Id.*

"[H]andcuffing is a substantial factor in determining whether an individual has been arrested." *United States v. Bravo*, 295 F.3d 1002, 1010 (9th Cir.2002); *see also United States v. Juvenile (RRA-A)*, 229 F.3d 737, 743 (9th Cir.2000) ("[W]e conclude that [the respondent's] handcuffing was the clearest indication that she was no longer free to leave and therefore find it to be the point of arrest.").

b. Multiple hallmarks of arrest – the handcuffing, the half-hour detention, and the involuntary transport unrelated to any investigative purpose – confirm that Mr. Montar-Morales was arrested.

The record demonstrates that Mr. Montar-Morales was subjected to an unlawful arrest, not a brief *Terry* stop. The handcuffing was

immediate and ongoing. He was handcuffed to the gurney. IRP 61. Officers were present with him at the hospital. IRP 61.

The police not only took away Mr. Montar-Morales' freedom to be on his way, they also imposed their will on his autonomy to decline medical aid.[3] The fact that Officer McCloud made Mr. Montar-Morales go to the hospital over his objection is more indicative of an arresting officer readying an injured arrestee for booking into the jail, than of any ongoing investigation. In Sergeant Moore's words, Officer McCloud went to the Skagit Valley Hospital "to get the subject he had medical treatment." IRP 32 (emphasis added). Medical staff would later tell Officer McCloud that "he was fit for jail" and that is where the police took him next. IRP 62, 50.

There is no rigid timeline that dictates when a detention becomes an arrest but "longer detentions must be justified by the traditional requirement of probable cause." *United States v. Chamberlin*, 644 F.2d 1262, 1266 (9th Cir.1980) (questioning a suspect in the back of a patrol car for twenty minutes constituted an arrest). Here, the detention was long, approaching nearly half-an-hour. CP 148-49 (findings of fact documenting that passage of time).

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[3] The constitutional right to privacy includes "the freedom to care for one's health and person" and to refuse treatment. *Matter of Welfare of Colyer*, 99 Wn.2d 114, 119-20, 660 P.2d 738 (1983), *modified on other grounds by Matter of Guardianship of Hamlin*, 102 Wn.2d 810, 689 P.2d 1372 (1984) (internal citations omitted). The trial court found that "The injuries were not a basis to detain him, because they were not life threatening." CP 150, CL#3.

Below, the State and the trial court relied heavily on the Court of Appeals decision in *State v. Bray*, 143 Wn. App. 148, 177 P.3d 154 (2008) to justify Mr. Montar-Morales' arrest as a *Terry* detention. CP 150; CL#5. The trial court misread *Bray* as a blanket authorization that police seizures lasting half-an-hour fall within the *Terry* exception to the probable cause requirement.

> Without the *Bray* case, I would have to agree with defense that I felt that the stop, if you will call it that, for close to 30 minutes exceeded the scope of a *Terry* stop.

I RP 78-79; *see also* CP 149 CL#5.

Critically, Bray's detention was executed for a true investigatory purpose and involved no change of location. And *Bray* certainly did not alter the long-standing rule that a *Terry* detention must be brief. As the United States Supreme Court has long made clear,

> [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

Florida v. Royer, 460 U.S. at 500.

The focus should be on "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686, 105 S.Ct. 1568, 84 L.Ed.2d

605 (1985). The transport of Mr. Montar-Morales away from the scene proves this was not the case here.

The police found and handcuffed Mr. Montar-Morales about two blocks away from the alleged crime scene. IRP 16; CP 148, FF#4-5. The obvious means of confirming or dispelling suspicions about Mr. Montar-Morales would have been to have him walk those two blocks to see if the witnesses there would identify him, or in the alternative, to bring the witnesses to him. *See State v. Wheeler*, 108 Wn.2d at 233 (police reasonably drove suspect two blocks to the alleged crime scene to attempt witness identification). "The whole point of an investigatory stop, as the name suggests, is to allow police to investigate... to make sure that they have the right person." *Gallegos v. City of Los Angeles*, 308 F.3d 987, 991 (9th Cir.2002) (holding suspect was detained, not arrested, in part because he was taken to the alleged burglary site for a witness identification). But the police never brought Mr. Montar-Morales to the alleged scene and they never brought any eyewitness to him. IRP 35-36.

Instead, the police drove Mr. Montar-Morales to a different part of town. IRP 45-46. As *Bray* involved no transport, it is inapplicable. Indeed, "there is no such thing as a *Terry* 'transportation.'" *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 591 (6th Cir.1994). Removal of a suspect

from the scene of the stop generally marks the point at which the Fourth Amendment demands probable cause. *Id.*

Fifth Amendment case law dealing with police-suspect contacts occurring inside hospitals confirms that Officer McCloud arrested Mr. Montar-Morales. In deciding whether a patient/suspect is in custody for *Miranda* purposes, our courts have consistently looked to how they got to the hospital and who controls their freedom while there. For example, the suspect in *State v. Kelter*, 71 Wn.2d 52, 54, 426 P.2d 500 (1967) was in the hospital and under investigation for causing a fatal car crash when the police interviewed him. He had not "been placed under arrest or otherwise restrained by the police," so the interview did not call for *Miranda* warnings. *See also State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787 (1992), *as modified* (Feb. 18, 1992) (paramedics brought an injured motorcyclist to the hospital. His un-Mirandized statement was admissible at trial because he was not in police custody).

In contrast, the police brought Mr. Montar-Morales to the hospital against his will. The police, not the hospital's medical staff, restricted his movements. The police handcuffed him to a gurney, not any doctor or nurse.[4] The question of whether a suspect is in custody turns on "whether

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[4] *Compare with State v. Kendall*, 2007 WL 541959 (2007) (defendant not in police custody at time of questioning because she was "restrained as part of [the hospital's] suicide watch, and not because of any police action). Non-binding unpublished opinion cited for persuasive value only. GR 14.1(a).

a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." *State v. Lorenz*, 152 Wn.2d 22, 36–37, 93 P.3d 133 (2004). Here, Mr. Montar-Morales was handcuffed, searched, left in handcuffs, put in the back of a squad car, moved against his will, made to submit to unwanted medical intervention, declared "fit for jail," and finally taken to jail. Thus, Mr. Montar-Morales was arrested, not detained, and that the arrest was without probable cause.

c. Reversal is required because evidence of theft should have been suppressed.

The trial court was clear that evidence seized from Mr. Montar-Morales should be suppressed if a reviewing court finds that the seizure of Mr. Montar-Morales exceeded the scope of *Terry*. IRP 80. The Court of Appeals mistakenly found that this non-investigatory removal of Mr. Montar-Morales was reasonable under the totality of the circumstances, despite the fact that there were far more reasonable means of pursuing the investigation that would not have violated *Terry*. Appendix 1, p. 6.

Where, as here, a *Terry* stop is unlawful, the fruits obtained as a result must be suppressed, because "the exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." *State*

v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009); *see also Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Mr. Montar-Morales' convictions should be reversed for a new trial where the State cannot use the illegally obtained evidence against him.

2. Review should be granted where the State did not prove beyond a reasonable doubt that Mr. Montar-Morales raped Y.J.

a. Due process required the State prove each element of every offense beyond a reasonable doubt.

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Evidence is sufficient only if, reviewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

b. The State failed to prove rape.

The State failed to prove rape because the State presented insufficient evidence of anal penetration. At the start of her sworn testimony, Y.J. remembered that she was woken up by "touching," but not what touched her, or where on her body she was touched. IIRP 32, IIRP 33. After a break, she described the touching as circling around her mid-section. IIRP 74-75. She said the hand she felt did not go anywhere else.

IIRP 75. She did not sense any part of this hand on her body. IIRP 75. There was no touching under her clothes. IIRP 75.

"No," she answered, when the prosecutor asked directly: "did that person who was touching you, did any portion of that person go inside of your body?" IIRP 82 (emphasis added).

When the prosecution asked to have Y.J. read from her previous statement, the court denied this request, noting, "[S]he has testified specifically, no portion of that person went inside her body..." IIRP 87.

Y.J. said she had fully described what happened. IIRP 87-88. Dissatisfied, the prosecutor asked for another recess, and also for permission to have Y.J. answer his questions in writing. IIRP 88. The trial court rejected the second proposal:

> ... when asked point blank about whether or not any part of the person's body went into her body, she said no. When asked point blank if any part of the person's hand touched her under her clothing on the bottom half of her body, she said no. We don't have a witness who is unable to testify; we have a witness who is testifying contrary to the way you expected her to testify.

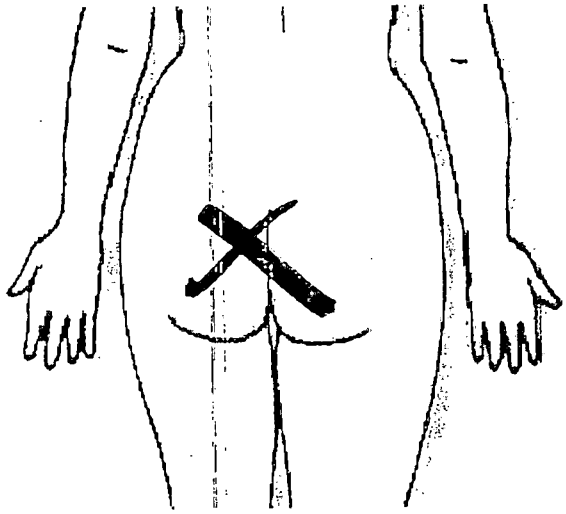
IIRP 95 (emphasis added). Even though the examination had already covered where, and how, Y.J. was allegedly touched, the trial court allowed the prosecution to continue with questions that had been asked and answered over objection by the defense. IIRP 103.

Y.J. was asked if she could say whether the hand went somewhere else, and she responded, "No." The prosecutor then browbeat Y.J.

> And why can't you answer that question? Is there a reason why you can't answer that question? Can you tell me why you can't answer that question? Are you going to sit here and not answer the question?

IIRP 103. The child said "no," but the prosecutor kept at it – "What?" – and the child again said "no." IIRP 103.

The prosecutor then had Y.J. draw on a diagram. IIRP 105; Ex. 37; Supp. CP __. She marked an "X" to show where the hand moved to from her mid-section. IIRP 106. The mark is on the top half of the left buttock:



The prosecutor asked "what portion of the hand went there." IIRP 105. Her answer was interpreted from Spanish as: "Halfway. The knuckle." IIRP 105-106. The prosecutor repeated this as a question: "Halfway up to the knuckle of a finger?" and Y.J. answered "Yes." IIRP 106. Y.J. was then asked "And did that go inside of you or stay outside," and she now answered "Inside." IIRP 106.

After this litany of repeated questioning, the prosecutor then failed to ask for any detail about where "inside" Y.J. was touched. IIRP 106. The prosecution acknowledged this failing in arguing against defense's motion for directed verdict: "I didn't clarify with respect to whether it was penetration just of a buttock..." IIIRP 151. This lack of evidence was fatal where the State had the burden of proving, beyond a reasonable doubt that Mr. Montar-Morales engaged in sexual intercourse with Y.J. by showing that her anus was penetrated. RCW 9A.44.076; RCW 9A.44.010(1); CP 41-42.

A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The State failed to meet its burden because "penetration of the buttocks, but not the anus, does not meet the ordinary meaning of 'sexual intercourse.'" *State v. A.M.*, 163 Wn. App. 414, 421, 260 P.3d 229 (2011). Thus, even reviewed in the light most favorable to the prosecution, no rational trier of fact could have found proof of penetration beyond a reasonable doubt in this case, where the prosecution browbeat Y.J. into testifying that something went "inside," but then failed to establish that it was her anus, and not her buttock, that was penetrated.

For this allegation of rape that went unproven, Mr. Montar-Morales, at age 22, has been condemned to a serve an indeterminate term in prison, up to life. This cannot be. RCW 9.94A.507; CP 131-44.

3. Review should be granted to determine whether the denial of the motion to sever deprived Mr. Montar-Morales of his right to a fair trial.

The rules governing severance of charges are based on the fundamental concern that an accused person receive "a fair trial untainted by undue prejudice." *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998); U.S. Const. amends. V, XIV; Const. Art. I, §§ 3, 22; CrR 4.4(b).

Joinder of offenses is deemed "inherently prejudicial" and, "[i]f the defendant can demonstrate substantial prejudice, the trial court's failure to sever is an abuse of discretion." *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). In assessing whether severance is appropriate, courts weigh the inherent prejudice of joinder against the State's interest in maximizing judicial economy. *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

A defendant may be unfairly prejudiced by a single trial if that 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). Joinder of charges can be particularly prejudicial when the alleged crimes

are sexual in nature. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). This danger of prejudice exists even if the jury is properly instructed to consider the crimes separately. *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

Because the two cases were joined together, the State was able to leverage the strength of its evidence on the burglary charge into a conviction on the weaker child sex offense charges. Mixing these various allegations carried with it the risk that the jury would have a particular hostility against Mr. Montar-Morales as to tip the scales in the State's favor. *Accord State v. Goebel*, 36 Wn.2d at 379 (warning against the risk that "the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it."). The error was harmful and reversal for a new trial is required.

F. CONCLUSION

This issue meets the standards for this Court to accept review. Mr. Montar-Morales therefore requests review pursuant to RAP 13.4(b).

Respectfully submitted this the 1st day of June 2017.

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APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DOMINGO MONTAR-MORALES, Appellant.	No. 73452-1-I DIVISION ONE UNPUBLISHED OPINION FILED: May 8, 2017

TRICKEY, A.C.J. — Domingo Montar-Morales appeals his jury convictions of rape of a child in the second degree, residential burglary, theft in the second degree, and theft in the third degree. Montar-Morales contends that the trial court erred in concluding that police officers did not exceed the scope of Terry v. Ohio[1] when they transported him to a hospital against his will while he was being detained as a suspect, that he was denied a fair trial when the trial court denied his motion to sever his nonviolent property offenses from his sex offenses, and that the State did not carry its burden of proving beyond a reasonable doubt the penetration element of rape of a child. Finding no error, we affirm.

FACTS

On July 18, 2014, Montar-Morales was spending time with Noel Lopez-Flores around Lopez-Flores's apartment, located at 1916 Harrison Street in Mount Vernon. Lopez-Flores's aunt Maria Flores-Garcia and her two children, including

[1] 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

12-year-old Y.J., were staying in the apartment that night. Montar-Morales and Lopez-Flores entered the apartment around 11:00 p.m. When Lopez-Flores went to sleep, Montar-Morales was watching television in Lopez-Flores's room.

Y.J. and her relatives were sleeping in the living room of the apartment. Around 1:00 a.m., Y.J. was awoken by a hand touching her. The hand touched her "stomach, between the front and the back, just from the back."[2] At trial, Y.J. indicated on a diagram that she had been touched on the left buttock. Y.J. stated that the hand touching her there went "halfway the knuckle."[3] In response to the prosecution's question, "And did that go inside of you or stay outside?" Y.J. responded, "Inside."[4] During cross-examination, Y.J. acknowledged that she had previously told investigators and counsel that nothing had entered her anus or vagina.

Y.J. could not see the face of the person touching her. Y.J. unsuccessfully attempted to wake up her mother while she was being touched. Y.J. then got up and locked herself in the bathroom, where she remained for 20 minutes until her mother asked her to come out. There was nobody else in the living room when Y.J. exited the bathroom. Montar-Morales came out of a separate room and was confronted by Y.J.'s mother and cousin, who did not recognize Montar-Morales, and told him to leave or they would call the police.

Around 1:00 a.m., Lucia Perez-Ventura and Margarito Lopez-Ramirez were

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[2] Report of Proceedings (RP) (January 29, 2015) at 74.
[3] RP (January 29, 2015) at 105-106. Y.J. answered affirmatively to the prosecution's follow-up question of "Halfway up to the knuckle of a finger?" RP (January 29, 2015) at 106.
[4] RP (January 29, 2015) at 106.

asleep in their apartment unit in 1912 Harrison Street, which is very close to 1916 Harrison Street. Perez-Ventura was awoken by a noise in the apartment caused by an intruder. She woke Lopez-Ramirez, who pursued the intruder. Although the intruder managed to escape, Lopez-Ramirez was able to identify him as Montar-Morales. Lopez-Ramirez returned to the apartment, and he and Perez-Ventura found that his wallet and various other items of property were missing.

Montar-Morales attempted to reenter 1916 Harrison Street through a window, but ran away when Elizabeth Ramirez-Flores turned on a light. René Jiminez-Flores and Nicodemo Lopez pursued Montar-Morales. Jiminez-Flores and Lopez caught Montar-Morales, and the three briefly fought in the street.

The police received a call at 1:06 a.m. about three males fighting in the street, and were also told of a possible sexual assault. Officers Chester Curry and Joel McCloud responded to the call, and Sergeant Mike Moore arrived shortly thereafter as supervisor. When they arrived, Jiminez-Flores and Lopez had restrained Montar-Morales, and Montar-Morales was bleeding from a head injury. The officers called for medical assistance. The officers interviewed Jiminez-Flores and Lopez, who told them that Montar-Morales had been involved with the reported sexual assault.

The officers instructed Montar-Morales to remain on the ground, but he did not comply. The officers eventually placed Montar-Morales in handcuffs and informed him that he was being detained for an investigation of an assault, based on the reports of the sexual assault and Montar-Morales's failure to comply. Officer McCloud performed a pat down of Montar-Morales for weapons and did not find

any.

Paramedics arrived and evaluated Montar-Morales. The paramedics examined him and felt that a physician needed to attend to Montar-Morales's head injury and conduct further checks. Over Montar-Morales's objections, Officer Moore decided that Montar-Morales was in need of medical assistance based on the paramedics' statements, and transported him to Skagit Valley Hospital's emergency department, where they arrived around 1:30 a.m.

While Montar-Morales was being treated, officers interviewed Y.J., the occupants of 1916 Harrison Street, and the occupants of 1912 Harrison Street who had reported a burglary. The officers called in Detective Jerrad Ely, who interviewed Y.J. and her mother; Y.J. refused to agree to a sexual assault examination. Detective Ely later determined that a photomontage was not necessary to identify Montar-Morales because Lopez-Ramirez knew him, and Lopez and Jiminez-Flores had been with him at the time the police arrived. Montar-Morales had washed his hands at the hospital as part of his treatment, so DNA evidence was unavailable.

At 1:36 a.m., Sergeant Moore notified Officer McCloud, who was with Montar-Morales at the hospital, that the investigation had produced probable cause to arrest. Officer McCloud advised Montar-Morales of his constitutional rights and requested that the hospital evaluate his fitness for jail. The hospital declared Montar-Morales fit and released him to Officer McCloud. As Montar-Morales left the treatment table, a nurse noticed that a wallet had dropped containing the identification of Lopez-Ramirez. When Montar-Morales was booked

into jail, additional property belonging to Lopez-Ramirez and his family was recovered.

The State charged Montar-Morales by third amended information with rape of a child in the second degree, child molestation in the second degree, residential burglary, theft in the second degree, theft in the third degree, and attempted residential burglary.

Montar-Morales moved to suppress evidence and statements from his arrest. Montar-Morales also moved to sever his child sex offense charges from those for property crimes before trial and following jury selection. The trial court denied Montar-Morales's motions.

At trial, Montar-Morales moved to dismiss the rape of a child charge for insufficient evidence. The court denied the motion.

The jury convicted Montar-Morales on all charges except attempted residential burglary. The trial court vacated the child molestation conviction on double jeopardy grounds based on the child rape conviction. The trial court denied Montar-Morales's posttrial motion to arrest judgment.

Montar-Morales appeals.

ANALYSIS

Pretrial Motion to Suppress

Montar-Morales argues that the trial court erred when it denied his motion to suppress evidence obtained when he was arrested without probable cause. Montar-Morales contends that the police exceeded the scope of Terry when they transported him to the hospital because his detention was not limited in duration

or location and did not remain investigatory in purpose. Because the officers acted reasonably under the totality of the circumstances when they transported Montar-Morales to the hospital, we affirm.

Generally, warrantless searches and seizures are per se unreasonable. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). One exception to the warrant requirement is "a brief investigatory detention of a person, known as a Terry stop." State v. Z.U.E., 183 Wn.2d 610, 617, 352 P.3d 796 (2015) (referring to Terry, 392 U.S. 1). A Terry stop requires a well-founded suspicion that the defendant is engaged in criminal conduct. State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). The police officer must be able to point to "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (quoting Terry, 392 U.S. at 21)). If the stop goes beyond investigatory purposes, it becomes an arrest and requires a valid arrest warrant or probable cause. State v. Flores, 186 Wn.2d 506, 520-21, 379 P.3d 104 (2016).

The investigative methods employed must be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. Williams, 102 Wn.2d at 738 (citing Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)). Drawn guns and the use of handcuffs during an investigatory stop are permissible only when police have a legitimate fear of danger. Williams, 102 Wn.2d at 740 n.2.

"An investigative detention must last no longer than is necessary to satisfy the purpose of the stop." State v. Bray, 143 Wn. App. 148, 154, 177 P.3d 154

(2008) (citing Williams, 102 Wn.2d at 738). The scope and duration of the stop may be extended if the officers' suspicions are confirmed by the investigation. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). For example, an investigatory detention lasting 30 minutes may be reasonable under the circumstances. See Bray, 143 Wn. App. at 154. In Bray, officers were justified in detaining the defendant for an extended period of time because his explanation of what he was doing did not dispel the officers' suspicion, and they were reasonable in checking his criminal history and determining whether other areas had been broken into. 143 Wn. App. at 154.

Police do not exceed the scope of an investigative stop when they move a suspect for reasons of safety and security, or so that a crime witness can make an identification, if the distance is short and the police have both knowledge of the crime committed and articulable suspicion that the suspect committed it. State v. Lund, 70 Wn. App. 437, 447-48, 853 P.2d 1379 (1993); see also United States v. Richards, 500 F.2d 1025 (9th Cir. 1974); State v. Wheeler, 108 Wn.2d 230, 236-37, 737 P.2d 1005 (1987). For example, an investigative stop involving frisking, handcuffing, and transporting the defendant two blocks to the scene of the burglary so a witness could identify the defendant did not rise to the level of an arrest. Wheeler, 108 Wn.2d at 235-36.

In evaluating the reasonableness of an investigative stop, courts consider the totality of the circumstances, including the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time

the suspect is detained. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The burden is on the prosecution to show that a warrantless search and seizure falls within an exception. Houser, 95 Wn.2d at 149.

Here, the officers' initial detention of Montar-Morales was a valid Terry stop supported by reasonable articulable suspicion. The officers were responding to calls reporting three males fighting in the street and a possible sexual assault. When the officers arrived on the scene of the fighting, Jiminez-Flores and Lopez told them that Montar-Morales was the one involved in the reported sexual assault. The officers had reasonable articulable suspicion to detain Montar-Morales based on the calls reporting fighting in the street and the allegation that he was involved in the sexual assault. Therefore, the initial detention of Montar-Morales was justified.

The officers' decision to handcuff Montar-Morales at the scene did not elevate the detention into an arrest requiring probable cause. The officers were responding to a report of a fight and a sexual assault, and were informed at the scene that Montar-Morales was responsible for the sexual assault. Montar-Morales did not comply with officer requests to remain seated. The officers' use of handcuffs to detain Montar-Morales was justified by the nature of the reported incidents and Montar-Morales's failure to cooperate.

The duration of Montar-Morales's detention did not exceed the scope of a valid Terry stop. Officer McCloud placed Montar-Morales in handcuffs around 1:10 a.m., and Officer McCloud advised Montar-Morales of his rights at 1:37 a.m. Twenty-seven minutes was a reasonable length of time to detain Montar-Morales.

The officers were initially responding to a report of fighting and an allegation of sexual assault. While investigating the alleged sexual assault, they learned of a burglary that had happened nearby, and were informed that Montar-Morales was the likely perpetrator. The serious nature of the crimes and the need to investigate both crime scenes justified an investigatory stop of a fairly long duration.

The officers did not exceed the scope of Terry when they transported Montar-Morales to the hospital. Under the totality of the circumstances, the officers acted reasonably in obtaining treatment for Montar-Morales's head laceration during his investigatory detention. The officers called for medical assistance soon after arriving at the scene in order to examine Montar-Morales's injury. The paramedics who evaluated Montar-Morales at the scene recommended that he receive further treatment at the hospital. The officers were acting on this recommendation when they moved Montar-Morales from the scene of his initial detention to the hospital. Police officers cannot reasonably be expected to ignore the recommendation of paramedics that an injured party receive additional medical treatment at a hospital rather than simply being treated at the scene of the injury.[5]

The continued use of handcuffs while Montar-Morales was transported and received medical treatment at the hospital was justified in light of his noncompliant

[5] Montar-Morales argues for the first time on appeal that his constitutional right to privacy was violated when he was given medical treatment without his consent. The constitutional right to privacy includes autonomy over one's medical care, and includes the right to refuse treatment. See, e.g., In re Welfare of Colyer, 99 Wn.2d 114, 119-22, 660 P.2d 738 (1983) (discussing common law and constitutional bases for patients' right to refuse treatment); see also RCW 7.70.050 (statutory requirement to obtain informed consent by health care provider). Montar-Morales's refusal to consent to medical treatment is not relevant to a Fourth Amendment search and seizure analysis under Terry. Moreover, Montar-Morales raises this argument for the first time on appeal, and we need not reach the merits of his claim. RAP 2.5(a).

behavior. Further, the record suggests that, if the officers had not transported Montar-Morales to the hospital, they would have detained him at the scene for the same amount of time. Therefore, under the totality of the circumstances, the officers acted reasonably in transporting Montar-Morales to the hospital for treatment within the time frame during which they could have permissibly detained him at the scene.

Sufficiency of the Evidence – Rape of a Child

Montar-Morales contends that the State did not offer sufficient evidence to prove that he raped Y.J. beyond a reasonable doubt. Specifically, he argues that the State did not prove that he penetrated Y.J.'s anus. Because Y.J.'s testimony was sufficient to sustain the jury's verdict, we conclude there was no error.

Due process requires that the State prove every element of an offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Evidence is sufficient to sustain a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201.

The jury's role includes resolving conflicting testimony and evaluating the persuasiveness of the evidence. State v. Rooth, 129 Wn. App. 761, 773, 121 P.3d 755 (2005); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Jury determinations of credibility are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

"A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1). Sexual intercourse "has its ordinary meaning and occurs upon any penetration . . . of the vagina or anus however slight, by an object."[6] RCW 9A.44.010(1)(a), (b). Penetration of the buttocks, but not the anus, is insufficient to sustain a rape conviction." State v. A.M., 163 Wn. App. 414, 421, 260 P.3d 229 (2011).

Here, a rational trier of fact could have found that Montar-Morales committed child rape. Y.J. indicated that the hand had touched her around the buttocks by drawing on a diagram. Y.J. then testified that the hand touching her went halfway up to the knuckle of a finger "inside" of her. Montar-Morales argues that Y.J.'s testimony is insufficient to prove sexual intercourse beyond a reasonable doubt because Y.J. initially stated that her vagina and anus were not penetrated. Similarly, Montar-Morales suggests that Y.J.'s testimony and diagram are ambiguous, and are less supportive of anal rape than penetration of the buttocks alone based on her other testimony. This court does not review the jury's

[6] Clerk's Papers (CP) at 42 (Instruction 8).

determination of credibility or its resolution of conflicting testimony. The jury was free to credit Y.J.'s statement that the hand touching her had gone "inside" of her over her conflicting statements.

Penetration of the anus is a reasonable inference from Y.J.'s diagram and her statement that the hand had gone "inside" of her. This court takes the State's evidence as true and draws all reasonable inferences in favor of the State in a sufficiency challenge. Y.J.'s testimony and diagram are sufficient to establish the element of sexual intercourse.

Motion to Sever

Montar-Morales argues that the trial court abused its discretion when it denied his motion to sever his nonviolent property offenses from his sex offenses.[7] Montar-Morales contends that the denial of his motion to sever deprived him of his right to a fair trial. We disagree because the trial court's denial of Montar-Morales's motion did not cause undue prejudice.

A trial court shall grant a motion to sever if it determines "that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). A defendant seeking severance has the burden of demonstrating that trying the counts together would be manifestly prejudicial, and outweigh any

[7] The State filed a motion to strike ineffective assistance of counsel arguments raised for the first time in Montar-Morales's reply brief, based on counsel's alleged waiver of his severance claim. A defendant's motion for severance must be made before trial, and the defendant must renew his motion to sever on the same ground before or at the close of all evidence. CrR 4.4(a)(1), (2). A failure to renew the motion constitutes a waiver of severance. CrR 4.4(a)(2). Montar-Morales's counsel moved for severance prior to trial. Montar-Morales's counsel renewed the motion at trial, both in briefing and orally after jury selection. Because defense counsel properly renewed the motion to sever, the State's motion to strike is denied. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (2005).

concern for judicial economy. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Joinder of offenses may prejudice a defendant in that

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

State v. Smith, 74 Wn.2d 744, 755, 446 P.2d 571 (1968) (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)), vacated in part, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), overruled on other grounds, State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). The "prejudice potential of prior acts is at its highest" in cases involving sexual offenses. State v. Ramirez, 46 Wn. App. 223, 227, 730 P.2d 98 (1986) (citing State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)); see also State v. Harris, 36 Wn. App. 746, 752, 677 P.2d 202 (1984).

A reviewing court uses several factors to determine whether a trial court's denial of a severance motion was unduly prejudicial to the defendant:

> (1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime.

State v. Cotten, 75 Wn. App. 669, 687, 879 P.2d 971 (1994); State v. Eastabrook, 58 Wn. App. 805, 811-12, 795 P.2d 151 (1990).

A trial court's refusal to sever offenses under CrR 4.4(b) is reviewed for manifest abuse of discretion, and the defendant has the burden of demonstrating that abuse on appeal. Cotten, 75 Wn. App. at 686-87.

A trial court's refusal to sever offenses under CrR 4.4(b) is reviewed for manifest abuse of discretion, and the defendant has the burden of demonstrating that abuse on appeal. Cotten, 75 Wn. App. at 686-87.

The trial court did not manifestly abuse its discretion in denying Montar-Morales's motion to sever. The court found that Montar-Morales's charges were intertwined. The court considered the proximity of the two addresses, the short time frame of the chase and apprehension, and the potential sexual motivation linking the offenses. The court determined that, collectively, there was a similarity of criminal activity, location, and time involving the potential thefts and sexual misconduct at each location that weighed against severance of the charges.

Even assuming that Montar-Morales was prejudiced by the trial court's refusal to sever his sexual offenses from his nonviolent property offenses, he was not unduly prejudiced. First, the State had a strong case for all charged offenses. The State offered circumstantial evidence, the in-court testimony of Y.J. regarding where the hand touched her, that it went "inside," and the diagram showing where the touching occurred. This was not outweighed by the physical and testimonial evidence offered on the property crime charges.

Second, Montar-Morales was not prejudiced in his ability to defend against his property crime charges due to the joinder of the claims. Montar-Morales elected to not submit Lopez-Ramirez's statement that he initially thought Montar-Morales was in jail and could not be the perpetrator, because Montar-Morales feared that the jury would decide that he was predisposed to criminal activity. The statement of belief that Montar-Morales was in jail would be equally prejudicial to

both sex offenses and property offenses by suggesting a criminal disposition. Montar-Morales was not more prejudiced from offering the statement in defense of the property crimes than he was from offering it regarding the child sex offenses.

Third, the trial court's limiting instruction was sufficient to address any prejudice resulting from joining the counts. The trial court instructed the jury that: "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."[8] The jury is presumed to follow the trial court's instructions. State v. Bourgeois, 133 Wn.2d 389, 409-10, 945 P.2d 1120 (1997). The court's instruction told the jury that a finding of guilt on any one count should not weigh in their decision on any other. We presume that the jury followed the court's limiting instruction, and did not consider Montar-Morales's property crimes when deciding his sexual offenses.

Montar-Morales argues that he was prejudiced because evidence for the child rape charge should not have been admissible against him in a trial on the property offenses.

Cross-admissibility considerations involve evaluating whether the evidence of various offenses would be admissible to prove other charges if each offense was tried separately. Ramirez, 46 Wn. App. at 226. Res gestae allows otherwise inadmissible evidence to come in to show the immediate context of the occurrence. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); ER 404(b).

[8] CP at 40 (Instruction 6).

The trial court ruled that the evidence supporting the property crimes was sufficiently close in time and place to fall within res gestae. The trial court considered the time, geographic proximity, and link of possible sexual motivation in its ruling. Montar-Morales's actions formed a common series of events that were close enough in time and space to justify the trial court's finding of res gestae. We cannot say that the trial court manifestly abused its discretion in finding that Montar-Morales's actions fell within res gestae.

In sum, Montar-Morales has failed to produce sufficient evidence of prejudice to outweigh concerns for judicial economy in trying his nonviolent property charges and sexual misconduct charges separately. We cannot say that the trial court manifestly abused its discretion in denying his motion to sever.

Affirmed.

Trickey, ACJ

WE CONCUR:

Dwyer, J.

Cox, J.

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. 73452-1-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 / residence / e-mail address as listed on ACORDS / WSBA website:

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