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Court of Appeals
Division I
State of Washington

No.
Court of Appeals No. 74814-9

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN THOMAS,

Petitioner.

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

Petition for Review

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Steven Thomas asks this court to accept review of the opinion in *State v. Thomas*, 74814-9.

B. OPINION BELOW

Over defense objection the trial court admitted of other acts evidence finding admissible to demonstrate a “lustful propensity.” On appeal, Mr. Thomas argued ER 404(b) and this Court’s opinions barred the admission of propensity evidence for any purpose. Nonetheless the Court of Appeals affirmed Mr. Thomas’s convictions.

C. ISSUES PRESENTED

1. ER 404 categorically bars admission of evidence of other acts offered to show a person’s propensity to act a certain way. Other acts evidence offered to prove “lustful disposition” is by definition evidence offered to show a person’s propensity to act a certain way. Did the trial court err in permitting admission of this other acts evidence?

2. A motion to sever should be granted where necessary to ensure a defendant a fair trial. Mr. Thomas moved to sever charges involving separate alleged victims from one another. The court denied the motion, resulting in a trial where not only did the jury hear evidence of other acts involving a single victim, they heard evidence of other

acts involving both victims, thus magnifying the already existing prejudice. Did the court's denial of Mr. Thomas's motion to sever deny him a fair trial?

D. STATEMENT OF THE CASE

Twenty-year old J.L. testified that when she was nine, she was napping with at the home of her aunt and uncle, Mr. Thomas. 1/15/16 RP 732-33. Mr. Thomas entered the room and briefly rubbed J.L.'s bottom over her pants and then rubbed her back under her shirt. *Id.* at 733-35.

Eighteen year-old C.L., J.L.'s sister, testified that when she was six or seven, she was napping at Mr. Thomas's house, and her uncle placed his hand in her pants and touched her vagina. 1/19/16 RP 1018-19.

The State charged Mr. Thomas with two counts of first degree child molestation. CP 10-11.

E. ARGUMENT

1. The trial court erred and deprived Mr. Thomas a fair trial when it admitted evidence of his other acts which had no relevance beyond establishing he was a bad person.

a. ER 404 bars admission of other-acts evidence offered to prove character.

Evidence of prior acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(b). The rule provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

“Properly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); *see also*, *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (the purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct).

ER 404(b) is not designed ‘to deprive the State of relevant evidence necessary to establish an essential element of its case,’ but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

To admit evidence of other acts the trial court must (1) find by a preponderance of the evidence that the

misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether that purpose is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014)).

The Court has explained the necessary analysis to determine the relevance of such evidence. First, the trial court must identify a proper purpose for admission. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

This has two aspects. First, the identified fact, for which the evidence is to be admitted, must be of consequence to the outcome of the action. The evidence should not be admitted to show intent, for example, if intent is of no consequence to the outcome of the action. Second, the evidence must tend to make the existence of the identified fact more or less probable.

Id. at 362-63. Then, if the court determines the evidence is relevant it must weigh the probative value against the prejudicial effect.

Thus, there are two parts to the relevance analysis, the identification of a consequential purpose, and some tendency to make that consequential purpose more or less likely. Importantly, this second consideration cannot rely on propensity. *State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999) (citing *Saltarelli*, 98 Wn.2d at 362).

In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

- b. The trial court admitted what it termed “lustful propensity” evidence which by definition sought only to prove the defendant had a propensity to engage in the criminal act.

The State charged Mr. Thomas with first degree child molestation involving J.L. based on her claim that in October 2004 he rubbed her “bottom” over her clothing and then rubbed her back under her shirt. 1/15/16 RP 732-35. The State charged Mr. Thomas with another count involving C.L. based upon her claim that in a single incident, eight to ten years earlier, Mr. Thomas put his hand into her pants and touched her vagina. 1/19/16 RP 1018-19.

Over Mr. Thomas’s objection, the trial court permitted the State to present testimony from J.L. regarding other incidents in the following years in which Mr. Thomas had openly masturbated in front of her, digitally penetrated her vagina, and made her masturbate him when she was a teenager. 6/19/15 RP 9-10; 1/15/16 RP 738, 741-42, 745-47, 756. The trial court admitted the evidence concluding it established Mr. Thomas’s “lustful propensity.” 6/19/15 RP 16, 1/8/16 RP 59. The court also reasoned that this evidence describing acts at

various later dates and each in different locations established the res gestae of the crime. 6/19/15 RP 45.

Washington courts have long repeated the same justification for the admissibility of evidence of lustful disposition. Courts have reasoned “[s]uch evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged.” *State v. Thorne*, 43 Wn.2d 47, 60, 260 P.2d 331 (1953), *see also*, *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). That justification, first voiced prior to the adoption of ER 404, is wholly at odds with that rule.

By its very description, evidence of “lustful disposition” is character evidence offered to show the defendant acted in conformity therewith. Indeed, even the trial court understood this, referring to the evidence as “lustful propensity.” RP 59. The Court of Appeals affirmed this reasoning saying the evidence was relevant to prove sexual contact. Opinion at 4. But the evidence only “proves” such contact by permitting the jury to conclude Mr. Thomas was predisposed to such contact; that is that he acted in conformity with his propensity for such

contact. This evidence is squarely within the “categorical bar” that *Gresham* identified.

Even assuming there could be a valid nonpropensity purpose in admitting evidence of prior acts involving an alleged victim to demonstrate a defendant’s intent on a later date, or perhaps a common scheme, no such valid purpose exists in this case. Here the State argued acts committed years after the alleged crimes revealed Mr. Thomas’s intent on the earlier dates. The acts were dissimilar and remote in time to the charged act. A sexual assault involving a post-pubescent teenager in no way demonstrates the sexual intent of a seemingly innocuous touching of a nine year-old nearly a decade before, except as propensity evidence. Indeed, that is precisely what the trial court called it: “lustful propensity.” That evidence simply invites the jury to conclude from the subsequent and remote bad act that the person had the same propensity years earlier and acted accordingly. That is the singular inference barred by ER 404(b).

The trial court erred in admitting the evidence of subsequent acts.

c. The prejudice greatly outweighed any potential probative value.

Without conceding this evidence had any probative value at all beyond its propensity use, it is clear its prejudice greatly outweighed any conceivable probative value.

The State's evidence of the alleged crime consisted of J.L.'s description of a single incident in 2004 of what could be readily described as innocuous touching. 1/15/16 RP 732-35. If the jury had to decide the question of whether Mr. Thomas touched J.L. for purpose of sexual gratification from that evidence alone the State faced a much tougher road.

The other acts evidence described incidents in later years of unquestionably sexual behavior. The other acts evidence is different in kind and in weight from the evidence of the charged incident itself. This evidence allowed the jury to readily convict Mr. Thomas where the evidence of the actual incident was thin. The evidence permitted the jury to do so solely on the basis of the conclusion that Mr. Thomas must have acted for purpose of sexual gratification because the later incidents reveal he was predisposed to so; that is he had the propensity. The prejudice is real and there is no relevant nonpropensity purpose justifying admission of the other acts evidence. A proper balancing should have led to exclusion of the evidence.

Rather than weigh the probative value of evidence of a lustful disposition against the resulting prejudice, the court concluded the evidence was “highly probative of the defendant’s lustful disposition.” 6/19/15 RP 17. Its relevance as proof of lustful disposition begs the question what necessary element is the supposed lustful disposition probative of, independent of its use as propensity. Of course, this class of evidence has no probative value independent of its use as proof of propensity or predisposition.

The required analysis must ask whether the identified purpose established by the other acts evidence outweighs the prejudice and not merely whether the other acts evidence is probative to establish the identified purpose. If it were otherwise the probative value would always outweigh the prejudice as the evidence will always be relevant to prove the identified purpose. Put another way, the probative value of other acts is not in its ability to establish a nonpropensity purpose. Rather the weighing must focus on the probative value of the nonpropensity purpose, established by the other acts evidence, in proving a necessary element as compared to the prejudice. The trial court never engaged in that balancing.

A proper balancing of this evidence reveals the prejudice outweighed any probative value.

The trial court also reasoned the evidence was a part “of the res gestae.” 6/19/2015 RP 17. The court explained “these collateral facts are intertwined and will provide the jury a full picture of what was happening here.” *Id.* The evidence does not fit within the category of “res gestae” evidence. The “‘res gestae’ or ‘same transaction’ exception [permits] evidence of other crimes . . . to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (Internal quotations and brackets omitted.). Evidence of acts occurring years after the alleged crime, and in some instances in other states, does not prove the immediate context of the offense and is most certainly not evidence of acts near in time and place. The evidence did not and could not establish the res gestae of the alleged crime. Where the evidence cannot establish the res gestae of the offense, its admission for that purposes cannot outweigh the resulting prejudice.

Any probative value was outweighed by the real and identified risk that the evidence would be misused and prejudicially so.

This Court should accept review and conclude that “lustful disposition” is merely “propensity” by a different name. Indeed the trial court used the term “propensity” interchangeably with “disposition.” If a trial judge is unable to appreciate any meaningful distinction between the terms jurors cannot be expected to do so. The evidence is simply propensity evidence and its admission is contrary to the categorical bar this Court recognized in *Gresham*. The opinion of the Court of Appeals is contrary to this Court’s opinions. Review is appropriate under RAP 13.4.

2. The trial court erred in denying Mr. Thomas’s motion to sever.

a. Mr. Thomas moved to sever the counts in this case.

Prior to trial Mr. Thomas made a motion to sever the charges in this case. 6/19/15 RP 29. The court reasoned that typically evidence of lustful disposition regarding one person should not be heard in a trial involving an additional alleged victim. *Id.* at 45. However, the court continued, “in this particular case there’s an exception under ER 404(b) under res gestae where the facts are so intertwined and the fact pattern here is intertwined such that it would be allowed.” *Id.* at 45-46.

The court denied the motion to sever. *Id.* at 44-45. Mr. Thomas subsequently renewed the motion. 1/19/16 RP 1002.

b. A court should sever joined offenses where necessary to preserve a fair trial.

The rules governing severance are based on the fundamental concern that an accused person receives “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).

Although a severance determination is reviewed under an abuse of discretion standard, a trial court abuses its discretion when its decision “is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Rohrich*, 149 Wn.2d 647, 653, 71 P.3d 638 (2003). A court abuses its discretion by using the wrong legal standard or by failing to exercise discretion. *Id.* “Indeed, a court ‘would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.’” *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

Judicial discretion “means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.”

Fisons, 122 Wn.2d at 339 (quoting *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)).

An exercise of the trial court's discretion over whether severance is appropriate rests on an evaluation of whether severance promotes a fair determination of guilt or innocence. *In re Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004); CrR 4.4(b). In this case, the court refused to sever the counts concluding the res gestae exception applied to the evidence.

Four criteria guide a court in the assessment of whether to sever counts: (1) the relative strength of the evidence on each count; (2) the clarity of defenses; (3) court instructions to the jury to consider each count separately; and (4) the cross-admissibility of evidence of the remaining charges in separate trials. *State v. Sutherby*, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009). Where joined offenses are sex offenses they are particularly prejudicial and there is a "recognized danger" that that prejudice will persist even where the jury is instructed to consider counts separately. *Id.* at 883-84 (citing *Saltarelli*, 98 Wn.2d at 363; *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984)).

A joint trial merely multiplied the prejudicial effect of the admitted propensity evidence increasing the likelihood that the jury

would misuse the evidence. The court's ruling itself illustrates how easily such evidence is misused. The court's reasoning that the evidence established the *res gestae* of both offenses relies entirely on its use as propensity evidence. The evidence does not supply "context of happenings near in time and place." *Lane*, 125 Wn.2d at 831. The only way the evidence provides "context" of intertwined acts, as the trial reasoned, is by permitting the jury to conclude Mr. Thomas was the sort of person that molested children. And the only way the evidence was cross-admissible would be to allow the jury to reason that J.L.'s allegations bolstered the truth of C.L.'s allegations and vice-versa. This is a wholly impermissible use of the evidence. This evidence was not cross-admissible.

Indeed, despite having concluded at the outset that the evidence was cross-admissible to establish the *res gestae* of intertwined events, the court then instructed the jury at the conclusion of trial that it must separately consider the evidence of lustful disposition pertaining to J.L. and C.L. If this evidence was not cross-admissible, there was no justification to deny the motion to sever.

The Court of Appeals reasons the jury could "easily compartmentalize the evidence as instructed." Opinion at 8. Such a

conclusion overlooks the overwhelming prejudice of evidence of other acts of sexual conduct. Too, that conclusion overlooks, that the trial judge could not appreciate the distinction between “lustful disposition” and “lustful propensity.” Indeed no such distinction exists.

The Court of Appeals also concludes that because the strength of the State’s evidence on each count was the same that weighed against severance. Opinion at 6. But the fact that the State’s evidence of each was comparatively weak does not lessen the prejudice of joinder. Instead, the limited direct evidence of each charge merely increased the likelihood that the jury would turn to evidence of the other and increased the likelihood the jury would rely on the other acts evidence to reach its verdict.

The evidence had the very real likelihood of tainting the jury’s verdicts. A joint trial on all counts denied Mr. Thomas a fair trial. The court erred in denying his motion to sever.

The opinion of the Court of Appeals fails to properly assess the trial court’s reasoning for denying the motion to sever. The opinion does not appreciate the impact of the other acts evidence nor the weakness of the State’s case on each charge. The opinion does not appreciate that the State’s likelihood of proving these charges in

separate trials was far less than its ability to do so in a joint trial.

Severance was proper here, and the opinion to the contrary is contrary to this Court's cases. Review is appropriate under RAP 13.4.

F. CONCLUSION

For the reasons above this Court should grant review and reverse Mr. Thomas's convictions and remand for a new trial.

Respectfully submitted this 1st day of November, 2017.

A handwritten signature in black ink, appearing to read "Gregory C. Link". The signature is fluid and cursive, with the first name "Gregory" being the most prominent part.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 74814-9-1
)	
Respondent,)	
)	
v.)	
)	
STEVEN BRADLEY THOMAS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: October 2, 2017

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STATE OF WASHINGTON
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VERELLEN, C.J. — Steven Thomas was convicted of two counts of first degree child molestation for his acts against J.L. and C.L.¹ The trial court admitted Thomas's other sexual conduct toward J.L. and C.L. as proof of lustful disposition. Because this evidence was relevant and unfair prejudice did not outweigh the substantial probative value, we conclude the trial court did not abuse its discretion when it admitted the evidence.

Thomas also challenges the trial court's denial of his motion to sever the two counts. Considering the relative strength of the evidence supporting each charge, the clarity of the general denial defenses, the court's instructions to the jury to consider each count separately, the jury's ability to compartmentalize the evidence, and the lack of any specific prejudice, we conclude the trial court did not abuse its discretion when it denied the motion.

¹ Because the victims were minors, they will be referred to by their initials.

We affirm.

FACTS

J.L. was born on July 23, 1995 and C.L. was born on January 8, 1997. J.L. and C.L. are sisters, and Thomas is their uncle. In October 2004, Thomas lifted J.L.'s shirt, rubbed her lower back, and rubbed her buttocks over her clothes. Between October 2003 and October 2004, Thomas got in bed with C.L. and put his hand down her underwear and rubbed her vagina.

In July 2013, J.L. disclosed the abuse and said she had been trying to protect C.L. from Thomas for years. Thomas was charged with one count of first degree child molestation for his acts against J.L. and one count of first degree child molestation for his acts against C.L. The Snohomish County Superior Court denied Thomas's motion to sever the two counts.²

The trial court admitted evidence of Thomas's other sexual conduct toward each girl, including testimony that he digitally penetrated J.L.'s vagina, masturbated in front of J.L.; repeatedly rubbed each girl's chest, legs, and vagina over their clothing or swimsuit; touched C.L.'s vagina underneath her underwear; massaged C.L.'s back and told her not to "rat [him] out;"³ forced J.L. to touch his penis until he ejaculated; untied J.L.'s bathing suit top; made several sexual comments to J.L. and C.L.; and slapped C.L. and J.L.'s bottoms. The court concluded the evidence was admissible to show Thomas's lustful disposition toward each girl. The court also concluded the evidence was admissible as *res gestae*.

² The trial court did sever three counts of rape of child against a third victim.

³ Report of Proceedings (RP) (Jan. 20, 2016) at 1048.

A jury convicted Thomas of both counts.

Thomas appeals.

ANALYSIS

I. ER 404(b)

Thomas contends the trial court abused its discretion in admitting evidence of his other acts against J.L. and C.L.

We review a trial court's decision to admit evidence for abuse of discretion.⁴ ER 404(b) bars propensity evidence, including evidence of other crimes, wrongs, or acts intended to prove a person's character and show the person acted in conformity with that character.⁵ But evidence of other crimes, wrongs, or acts is admissible for different purposes, such as proof of lustful disposition.⁶

To admit evidence under ER 404(b),

"the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."⁷

Thomas contends evidence of lustful disposition was not relevant.

⁴ State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

⁵ Id. at 420 (quoting ER 404(b)).

⁶ Id. (quoting ER 404(b); State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991)).

⁷ Gresham, 173 Wn.2d at 420 (quoting State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

Evidence is relevant if it “make[s] the existence of any fact that is of consequence to the determination of the action more probable or less probable.”⁸ The important inquiry is whether the evidence shows “a sexual desire for the *particular* female.”⁹

Here, the trial court concluded the evidence of lustful disposition was “relevant to prove sexual contact,”¹⁰ which is an element of first degree child molestation.¹¹ And the evidence showed Thomas’s particular sexual desire for each girl.

Thomas argues the acts are “too remote in time” to be relevant.

Limits of time over which other act evidence may range lies within the discretion of the trial court.¹² But passage of time does not affect relevance “if the conduct is part of a pattern of similar misconduct over a number of years, or if intervening events make the time lapse insignificant.”¹³

Here, Thomas had repeated contact with J.L. and C.L. from the time of the charged crimes until the disclosure in 2013, and his actions during that time showed a pattern of similar misconduct.

Thomas contends the prejudicial effect substantially outweighs the probative value because lustful disposition evidence has no probative value except to show propensity.

⁸ ER 401.

⁹ State v. Ferguson, 100 Wn.2d 131, 134, 667 P.2d 68 (1983) (emphasis added) (quoting State v. Thorne, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953)).

¹⁰ Clerk’s Papers (CP) at 122.

¹¹ RCW 9A.44.083.

¹² Ray, 116 Wn.2d at 547.

¹³ State v. Baker, 89 Wn. App. 726, 734, 950 P.2d 486 (1997).

But Washington courts have consistently recognized proof of lustful disposition is a permissible nonpropensity purpose under ER 404(b).¹⁴ “Substantial probative value is needed to outweigh the potential prejudicial effect of ER 404(b) evidence,” and “[g]enerally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim.”¹⁵

Here, Thomas’s other misconduct was substantially probative because the only evidence of his sexual contact with J.L. and C.L. is the testimony from each girl.

We conclude the trial court did not abuse its discretion when it admitted evidence of Thomas’s other sexual conduct toward J.L. and C.L. to show lustful disposition. Therefore, we need not address whether it was also admissible as *res gestae*.

II. Severance

Thomas contends the trial court abused its discretion when it denied his motion to sever the two counts of first degree child molestation.

We review the trial court’s denial of a severance motion for abuse of discretion.¹⁶ Two or more offenses of similar character may be joined in one trial.¹⁷ But properly joined offenses may be severed if “the court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.”¹⁸

¹⁴ Ray, 116 Wn.2d at 547; State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); Ferguson, 100 Wn.2d at 133-34.

¹⁵ State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007).

¹⁶ State v. Kalakosky, 121 Wn.2d 525, 536-37, 852 P.2d 1064 (1993).

¹⁷ CrR 4.3(a); State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

¹⁸ CrR 4.4(b); Bythrow, 114 Wn.2d at 717.

In determining whether to sever charges, a court considers: “(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.”¹⁹ The court must also consider whether the defendant has demonstrated that joinder “would be so manifestly prejudicial as to outweigh the concern for judicial economy.”²⁰

In considering the strength of the State’s evidence on each count, the trial court determined it was relatively equal.²¹ J.L. testified that Thomas molested her. C.L. testified that Thomas molested her. Other witnesses corroborated each girl’s testimony concerning time, disclosure, and Thomas’s general access to the girls. The jury’s determination came down to credibility. Because the evidence for each count was relatively equal, this factor did not favor severance.

As to clarity of defenses, “[t]he 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.”²² Here, because Thomas’s asserted a general denial defense for both charges, this factor did not favor severance.

With respect to the third factor, the trial court instructed the jury: “A separate crimes is charged in each count. You must decide each count separately. Your verdict on one count should not control you verdict on the other count.”²³ Courts have

¹⁹ State v. Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009) (quoting State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)).

²⁰ Bythrow, 114 Wn.2d at 718.

²¹ Thomas does not challenge this factor in his brief.

²² Russell, 125 Wn.2d at 64-65.

²³ CP at 186.

repeatedly approved and relied on essentially the same instruction in upholding decisions denying severance.²⁴ Because the court properly instructed the jury, this factor does not favor severance.

As to cross-admissibility, Thomas argues the evidence of his other sexual conduct toward J.L. would not have been admissible in a separate trial involving his molestation of C.L. and vice versa.

In State v. Markle, the defendant was charged with first and second degree statutory rape and indecent liberties for two different victims.²⁵ Our Supreme Court found the trial court did not abuse its discretion in denying severance because the methods of contact and abuse were similar and the charged acts were of the same class of crimes.²⁶ Similarly, Thomas's contact with J.L. and C.L. occurred when the girls visited Thomas's home or when the girls stayed in hotels with Thomas during family trips. And Thomas was charged with first degree child molestation for his acts against each girl.

Even when the evidence is not cross admissible, it is not necessarily an abuse of discretion to deny severance in cases with multiple charges of sex offenses.²⁷ In deciding severance, it is important to consider whether the jury can compartmentalize the evidence.²⁸ Here, Thomas's trial lasted six days, the issues and defense of general

²⁴ Bythrow, 114 Wn.2d at 723; State v. Cotton, 75 Wn. App. 669, 688, 879 P.2d 971 (1994).

²⁵ 118 Wn.2d 424, 439, 823 P.2d 1101 (1992).

²⁶ State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992).

²⁷ Bythrow, 114 Wn.2d at 720; Kalakosky, 121 Wn.2d at 538; Markle, 118 Wn.2d at 439.

²⁸ Bythrow, 114 Wn.2d at 721; Kalakosky, 121 Wn.2d at 537.

denial on all counts were relatively straightforward, and the court instructed the jury to decide each count separately. The court also instructed the jury concerning the limited purpose of Thomas's other sexual conduct toward each girl. Because the jury could easily compartmentalize the evidence as instructed, the trial court did not abuse its discretion by denying severance even if the evidence was not cross admissible.

Finally, Thomas contends the prejudicial effect of the evidence of Thomas's lustful disposition outweighed the concern for judicial economy.

Generally, "[t]he joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature . . . even if the jury is properly instructed to consider the crimes separately."²⁹ But the defendant must still point to "specific prejudice" to support a finding that the trial court abused its discretion in denying severance.³⁰

Consistent with our earlier discussion of lack of unfair prejudice resulting from lustful disposition evidence, Thomas has not satisfied his burden to show specific prejudice.

We conclude the trial court did not abuse its discretion when it denied Thomas's motion to sever the two counts of child molestation.

III. Statement of Additional Grounds

In a one paragraph statement of additional grounds, Thomas makes a vague and general argument denying his guilt and referring to facts that do not appear to be in the record on appeal. Issues involving facts or evidence not in the record on appeal are

²⁹ Sutherby, 165 Wn.2d at 884.

³⁰ Bythrow, 114 Wn.2d at 720.

properly brought in a personal restraint petition and not a statement of additional grounds.³¹ The statement of additional grounds does not support any relief on appeal.

We affirm.

WE CONCUR:

Trickey, J

Urdahl, J

Dryden, J

³¹ State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008); RAP 10.10(c).

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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. 74814-9-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:

- respondent Francesca Yahyavi, DPA
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- petitioner
- Attorney for other party



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Washington Appellate Project

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