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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHAWN DEE MORGAN, Appellant.	No. 51555-5-II UNPUBLISHED OPINION

CRUSER, J. — Shawn Dee Morgan appeals his five first degree child molestation convictions and five first degree rape of a child convictions. Morgan argues that the trial court abused its discretion in joining 10 counts charged in two separate cause numbers in a single trial. Morgan also argues that he received ineffective assistance when his counsel failed to challenge venue for two counts relating to one victim. Finally, Morgan challenges the imposition of the criminal filing fee, deoxyribonucleic acid (DNA) collection fee, and nonrestitution interest accrual provision as a part of his sentence.

We hold that (1) the trial court did not abuse its discretion in joining the two cases for trial, (2) Morgan's ineffective assistance of counsel claim fails because the record does not support a finding that his counsel performed deficiently, and (3) the challenged legal financial obligations

(LFOs) should be stricken. Thus, we affirm Morgan's convictions and remand so the fees and the nonrestitution interest accrual provision can be stricken from Morgan's judgment and sentence.

FACTS

I. BACKGROUND INFORMATION

Morgan dated and lived with Kierra Hall for about six years. Morgan and Hall lived in Morgan's trailer that was either parked on his parents' driveway in Pierce County or at a trailer park in Thurston County. During their relationship, Morgan and Hall used illegal drugs and watched child pornography. Morgan and Hall would watch child pornography every time they would use drugs, which was several times a day. Morgan preferred pornography videos in which children cried and screamed. Morgan and Hall often discussed "snatching" children off the street to abuse them or having children of their own to abuse them. Clerk's Papers (CP) at 38. Morgan talked about kidnapping a child by himself, but expressed that he "had a better chance of luring somebody in" if Hall was present because Hall is "a people person and [is] trustworthy." *Id.*

In November 2015, Hall disclosed to a counselor that she and Morgan had sexually abused minor children. Eventually, Hall disclosed the sexual abuse to law enforcement and provided law enforcement with images and videos of child pornography belonging to Morgan. Law enforcement searched Morgan's trailer and recovered other images and videos of child pornography. Hall stated that she and Morgan viewed child pornography while sexually abusing children.

Hall also described her role in the sexual abuse to law enforcement. Morgan abused children without Hall, but preferred Hall to be present during the abuse because Hall would "teach" the children how to perform the acts, and "they'd be more willing to do it if [Hall] was there." *Id.*

Morgan knew that children generally trusted Hall and "click[ed]" with Hall. *Id.* Morgan would direct Hall to perform sexual acts on Morgan first in front of the children as a "visual thing" to normalize the acts. *Id.* If Hall performed sexual acts on Morgan first in front of a child, it would "make it seem like . . . it's no big thing." *Id.* at 39. If the children would still not perform sexual acts on Morgan, Morgan instructed Hall to keep performing the sexual acts while he touched the children.

The State filed charges against Morgan for child sexual abuse relating to three children, R.C., S.D.-F., and A.D.[1] The following facts pertain to each charged victim.

A. R.C.

Morgan and Hall were friends with R.C.'s mother and grandmother. R.C. was under the care of her grandmother. Morgan and Hall would occasionally care for R.C. and her siblings, which included taking R.C and her siblings to the movies. Hall and Morgan also invited R.C. to come to the trailer. On one occasion when Hall invited R.C. to the trailer, Morgan directed Hall to engage in sexual acts with him so that R.C. could see them.

After this incident occurred, R.C. stayed at Morgan's trailer for a weekend when the trailer was located in Thurston County and when Hall was not present. R.C. was about 10 years old. On their way to the trailer, Morgan instructed R.C. to look away, and he placed R.C.'s hand on his bare penis. Morgan held R.C.'s wrist and moved her hand on his penis to masturbate himself. This occurred again the following day inside Morgan's trailer. After this incident, R.C. "never wanted to come over again." *Id.* at 25.

[1] A.D. was previously known as A.M. until his mother had his name changed.

B. S.D.-F.

Morgan met S.D.-F. through Hall's brother. S.D.-F.'s mother was dating Hall's brother, and Hall and Morgan would occasionally babysit S.D.-F. when she was about five or six years old. Hall also babysat S.D.-F. without Morgan present on multiple occasions. At the time, Morgan's trailer was parked at his parents' residence in Pierce County.

Morgan's abuse of S.D.-F. occurred inside of his trailer and inside of his parents' home when his parents were not present. Morgan and Hall always watched pornography while abusing S.D.-F. Hall recalled that Morgan "wanted [Hall] to drug [S.D.-F.] so he [c]ould do things with" S.D.-F. and "teach" S.D.-F how to perform sexual acts on him. *Id.* at 39-40. Although Morgan sexually abused S.D.-F. without Hall present, he preferred Hall be present during the abuse. S.D.-F. "was comfortable with" Hall, and Hall's presence would ensure S.D.-F. "wouldn't fight as much." *Id.* at 40.

On one occasion, Morgan directed Hall to show S.D.-F how to masturbate him. Hall put S.D.-F.'s hand over her hand while she masturbated Morgan, and then Morgan moved Hall's hand away. This occurred inside Morgan's trailer. On another occasion, when Morgan and Hall were staying in Morgan's parents' home, Morgan took S.D.-F. into a bedroom and locked the door. Hall heard S.D.-F. "screaming and crying" from outside of the bedroom. *Id.* at 23. When Morgan unlocked the door, S.D.-F. ran out of the bedroom without wearing any pants or underwear. Morgan told Hall that he "rubbed himself against [S.D.-F.]." *Id.* at 23, 41. After this incident, S.D.-F. "would just be terrified and just start crying" when she saw Morgan. *Id.* at 41.

C. A.D.

A.D. is Morgan's biological son. Morgan began sexually abusing A.D. at his trailer when A.D. was around 11 years old.

During these incidents, A.D., Morgan, and Hall would all completely undress. Hall would perform sexual acts on Morgan in front of A.D. Both Morgan and Hall masturbated A.D. and raped A.D. Morgan directed Hall to teach A.D. how to engage in these acts, and Morgan became aroused while watching Hall perpetrate the acts. On some visits, Morgan would show A.D. pornography before the abuse began.

II. PROCEDURAL HISTORY

The State charged Morgan with two counts of first degree rape of a child and two counts of child molestation with aggravating factors against A.D.[2] In a separate information, the State charged Morgan with one count of first degree child molestation with aggravating factors against S.D.-F.[3] The State later amended the latter information to add two counts of first degree child molestation with aggravating factors against R.C.[4]

[2] The State alleged in the amended information that each crime was aggravated by Morgan using his "position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." CP at 179-82. The State also alleged that the crimes against A.D. were acts of domestic violence. The State also added three counts of first degree rape of a child against A.D.

[3] The State alleged that the crime was aggravated by Morgan using his "position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense" and that S.D.-F. was a particularly vulnerable victim. CP at 182.

[4] The State also alleged that the crime was aggravated by Morgan using his "position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." CP at 183.

Before trial, the State moved to join the case involving A.D. with the case involving S.D.-F. and R.C. for trial. After considering the briefing and hearing argument on the issue, the court granted the State's motion and joined the counts involving A.D. with the counts involving S.D.-F. and R.C. for trial pursuant to CrR 4.3(a). The court concluded that the offenses charged in both cause numbers were cross admissible as evidence of a common scheme or plan because the offenses were based on the same conduct or a series of acts, or the offenses constituted parts of a single scheme. The court concluded that the offenses were also cross admissible as evidence of motive or intent because each charge constituted evidence of Morgan's sexual motivation and intent to sexually abuse children. The court also concluded that joinder of the offenses "does not cause undue prejudice given the similar nature of the offenses, the ability of jurors to compartmentalize the evidence, the strength of the evidence as to each count, the lack of conflicting defenses, and that the offenses would be cross-admissible." CP at 70. The court further stated that it would instruct the jurors to consider each count separately.

The case proceeded to trial. At trial, each child and their respective parent or guardian testified for the State. Hall also testified and largely corroborated each child's testimony. The witnesses' testimony was generally consistent with the facts above. The State also presented the testimony of the detectives who recovered child pornography from Morgan's trailer. The court gave the following instruction to the jury:

> 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.

Id. at 254.

The jury returned a verdict of guilty on all 10 counts and all aggravating factors. The court imposed an exceptional sentence totaling 720 months to life in prison. The court also imposed a $500 crime victim assessment, a $100 DNA collection fee, a $200 criminal filing fee, and a nonrestitution interest accrual provision. The court found Morgan indigent and signed an order of indigency.

Morgan appeals.

DISCUSSION

I. JOINED OFFENSES

Morgan contends that the trial court's decision to grant the State's motion for joinder of his cause numbers was prejudicial error. Morgan argues that the trial court abused its discretion because (1) the evidence of each offense was not cross admissible pursuant to ER 404(b) to show a common scheme or plan or to show motive or intent and (2) the jury instruction to consider each count separately was insufficient to ensure the jury compartmentalized the evidence. Morgan additionally contends that joinder caused him prejudice because the trial court's failure to provide an ER 404(b) limiting instruction allowed the jury to use evidence pertaining to counts charged under a different cause number as propensity evidence against Morgan.

The State argues that the trial court properly joined Morgan's two cause numbers because (1) the evidence of each offense was cross admissible under ER 404(b) to show a common scheme or plan or to show motive or intent and (2) the trial court's instruction was sufficient to ensure that the jury evaluated each count separately. The State further argues that joinder did not cause Morgan undue prejudice. We agree with the State.

A. LEGAL PRINCIPLES

CrR 4.3(a) permits a trial court to join two or more offenses of similar character for trial. We review a trial court's pretrial joinder decision for abuse of discretion. *State v. Bluford*, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017). A trial court abuses its discretion when its decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. Barry*, 184 Wn. App. 790, 802, 339 P.3d 200 (2014) (quoting *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987)). When reviewing pretrial joinder, we review only the facts known to the trial judge at the time, rather than the facts as they developed at trial. *Bluford*, 188 Wn.2d at 310. "[A] judge cannot abuse his or her discretion based on facts that do not yet exist." *Id*.

Joinder pursuant to CrR 4.3(a) should be liberally allowed where the charged offenses are of similar character or are based on "a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.3(a)(2). A trial court should not allow joinder when joining charged offenses will "unduly embarrass or prejudice" the defendant or deny the right to a fair trial. *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *vacated in part by Smith v. Washington*, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972). "[W]here the likely prejudice to the defendant will not necessarily prevent a fair trial, 'the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and the expedition in judicial administration.'" *Bluford*, 188 Wn.2d at 311 (internal quotation marks omitted) (quoting *Smith*, 74 Wn.2d at 755).

A defendant must demonstrate that a joint trial "would be so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154

(1990). To establish error, Morgan must demonstrate that he experienced undue prejudice as a result of the joint trial. *Bluford*, 188 Wn.2d at 315.

A trial court must consider four factors when determining potential prejudice to the accused, none of which is dispositive. *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245 (2010). To determine whether joinder would potentially cause undue prejudice to the defendant, we examine (1) the strength of the State's evidence as to each count, (2) the clarity of the defendant's defenses, (3) the trial court's instructions directing the jury to consider each count separately, and (4) the admissibility of the evidence in separate trials if not joined for trial. *Bluford*, 188 Wn.2d at 311-12.

B. JOINDER FACTORS

As an initial matter, we address the parameters of our review of Morgan's claim of error. Throughout his brief, Morgan refers to the trial court having "joined" all 10 counts against three victims over two separate cause numbers and purports to argue such joinder was erroneous. However, the trial court did not join the counts involving S.D.-F. and R.C. Those counts were joined in the same cause number at the time the case was charged. Relevant to this appeal, the joinder motion brought by the State asked the trial court to join the cause number involving A.D. with the cause number involving S.D.-F. and R.C. Morgan never moved to sever the counts involving S.D.-F. from the counts involving R.C. Thus, to the extent Morgan argues that the trial court erred in joining the counts involving S.D.-F. with the counts involving R.C., this claim is waived. *See State v. Emery*, 174 Wn.2d 741, 754, 278 P.3d 653 (2012). Our discussion is limited to the question of whether the trial court erred in joining the cause number charging offenses regarding A.D. with the cause number charging offenses regarding S.D.-F and R.C.

In arguing that the trial court abused its discretion by joining his cause numbers, Morgan focuses on two joinder factors. Morgan disputes (1) the cross admissibility of the offenses and (2) the adequacy of the trial court's instruction. Morgan does not contest the trial court's determination that the remaining factors, the strength of the State's evidence as to each count and the clarity of the defendants' defenses, weighed in favor of a conclusion that the concern for judicial economy outweighed any prejudice. We address Morgan's arguments in turn below.

1. CROSS ADMISSIBILITY UNDER ER 404(b)

We first consider whether the trial court abused its discretion when it concluded that evidence of each count involving A.D. was cross admissible under ER 404(b) with the evidence on the counts involving S.D.-F. and R.C. Morgan argues that the evidence would not have been cross admissible under ER 404(b) either as evidence of a common scheme or plan or as evidence of motive or intent. We note that "[t]he mere fact that evidence is not cross admissible does not automatically preclude joinder." *Bluford*, 188 Wn.2d at 315.

Evidence of a defendant's other acts of misconduct is generally not admissible to demonstrate a defendant's propensity to commit the crime charged. ER 404(b); *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). However, evidence of other acts of misconduct is admissible for different purposes, including proof of a common scheme or plan or motive or intent. *Fisher*, 165 Wn.2d at 744.

We read ER 404(b) in conjunction with ER 403, which requires the trial court to exercise its discretion in excluding relevant evidence that would unfairly prejudice the accused. *Id.* at 745. Prior to admitting misconduct evidence, the trial court must (1) find by a preponderance of the

evidence that the misconduct actually occurred,[5] (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence in proving an element of the crime, and (4) weigh the probative value of such evidence against its prejudicial effect. *Id*.

Even if evidence is admissible under one of ER 404(b)'s exceptions, a trial court must exclude the evidence if the unfair prejudice substantially outweighs the evidence's probative value. *State v. Fuller*, 169 Wn. App. 797, 829-30, 282 P.3d 126 (2012). When the alleged misconduct is of a sexual nature, its admission can be particularly prejudicial. "We have previously cautioned about the admissibility of other sex crimes, warning that '[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.'" *State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009) (alteration in original) (quoting *State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984)).

In ruling on the joinder issue, the trial court found that evidence was cross admissible as a common scheme or plan because each charge was either based on the same conduct or a series of acts connected together or each charge constituted parts of a single scheme or plan involving both Morgan and Hall. The trial court also found that each offense was cross admissible as evidence of motive or intent since each charge constituted evidence of Morgan's sexual motivation and intent to sexually abuse children.

We must determine whether the evidence was relevant to prove an element of any of the crimes charged and whether the evidence was more probative than prejudicial.

[5] Morgan does not argue that this prong of the test was not satisfied below.

a. COMMON SCHEME OR PLAN

Evidence of other similar acts may be admissible to show a common scheme or plan where the other acts demonstrate a single plan "used repeatedly to commit separate, but very similar, crimes." *State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003). The similarities must be more than coincidental; it must indicate that the defendant's conduct was "'directed by design.'" *State v. Kennealy*, 151 Wn. App. 861, 887, 214 P.3d 200 (2009) (quoting *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). In cases of child rape or child molestation, evidence showing a "'design to fulfill sexual compulsions'" established by a pattern of other misconduct is probative of the defendant's guilt. *State v. Sexsmith*, 138 Wn. App. 497, 504, 157 P.3d 901 (2007) (quoting *DeVincentis*, 150 Wn.2d at 17-18).

"Evidence of a common scheme or plan may be used to show whether the charged incidents actually occurred or whether the victim was fabricating or mistaken." *Kennealy*, 151 Wn. App. at 886. Evidence of other similar acts of sexual abuse is "generally 'very probative of a common scheme or plan,' and the 'need for such proof is unusually great in child sex abuse cases.'" *Id.* at 890 (quoting *State v. Krause*, 82 Wn. App. 688, 696, 919 P.2d 123 (1996)).

In *Kennealy*, we held that although the defendant's sexual conduct in each case was not identical, four prior acts of molestation of children were correctly admitted as evidence of a common scheme or plan. *Id.* at 888. The four prior incidents were substantially similar because Kennealy committed acts in a place or in a way that went unnoticed by others, against children who were close in age and who knew and trusted him, and Kennealy molested most of the children on multiple occasions in a similar manner. *Id.* at 889. These common features revealed

"Kennealy's design or pattern to gain the trust of children between the ages of 5 and 12 to allow him access to the children in order to sexually molest them." *Id*.

Here, numerous similarities between the sexual abuse of A.D. and the sexual abuse of R.C. and S.D.-F. reveal Morgan's pattern of seeking out children of a similar age, gaining their trust or using Hall to gain their trust, and isolating the children in order to sexually molest them. Morgan's victims were close in age. Morgan befriended R.C.'s mother and grandmother, as well as cared for R.C. and her siblings in a public environment, before Morgan isolated R.C. in his trailer in order to abuse R.C. Morgan knew that Hall was a trusted caretaker for S.D.-F., and S.D.-F. was "comfortable" with Hall because Hall had babysat S.D.-F. without Morgan present on multiple occasions. CP at 40. Morgan abused S.D.-F. while S.D.-F. was under Hall's and Morgan's care and isolated in Morgan's trailer or Morgan's parents' home. Morgan sought out a relationship with his son, A.D., and began abusing him while under his care and while A.D. was isolated in Morgan's trailer.

Another similarity included Morgan's attempts to normalize sexual acts before committing the abuse. In *DeVincentis*, the defendant wore almost no clothing in front of his victims with the intention of reducing the children's "'natural discomfort or negative reaction to such behavior.'" 150 Wn.2d at 22. Similarly here, Morgan desensitized the children by exposing them to sexual conduct. Morgan exposed both A.D. and S.D.-F. to pornography before perpetrating sexual abuse and during the perpetration of sexual abuse. Morgan also exposed A.D., R.C., and S.D.-F. to sexual conduct before perpetrating the abuse by directing Hall to perform sexual acts on Morgan in front of the children.

The manner in which Morgan committed the abuse also demonstrates similarities. Morgan or Hall would guide or teach the child how to arouse Morgan. For example, Morgan made sexual contact by placing R.C.'s hand on his penis and then guiding her hand. Similarly, Morgan made sexual contact with S.D.-F. by directing Hall to place S.D.-F.'s hand over her hand while Hall masturbated Morgan, and then Morgan moved Hall's hand away. Morgan's abuse against A.D. included Morgan also directing Hall to teach A.D. how to engage in sexual acts for Morgan's arousal.

Morgan used Hall's relationship with the children to facilitate his crimes. Morgan knew that Hall "had a better chance of luring somebody in" because children liked and trusted Hall. CP at 38. Morgan would abuse children without Hall present, but preferred to abuse children with Hall present because they "wouldn't fight as much" or be would be "more willing" to perform sexual acts on Morgan if Hall was there. *Id.* at 38, 40. Hall was also integral to normalizing acts of sexual abuse. If Hall performed sexual acts on Morgan first, the children would be more likely to comply because Hall "[made] it seem like . . . it's no big thing." *Id.* at 39.

Morgan points to dissimilarities between the abuse of R.C. and S.D.-F. and the abuse of A.D. to dispute the trial court's finding that the similarities show a common scheme or plan. Morgan points out that he, not Hall, had a closer relationship with A.D. and R.C. However, this dissimilarity was unknown to the trial court when it granted the State's pretrial motion to join Morgan's two cause numbers. As we noted above, our analysis pertains only to the facts known to the trial court at the time it joined Morgan's cause numbers, rather than the facts as they developed at trial. *Bluford*, 188 Wn.2d at 310. Morgan also points to the facts that Hall did not

demonstrate sexual acts to R.C. and that there were gender differences between the three children.[6] However, these differences are not so great as to dissuade a reasonable mind from finding that the incidences are naturally to be explained as "individual manifestations" of the same plan. *Lough*, 125 Wn.2d at 860. Moreover, our review focuses on the similarities between the acts rather than the uniqueness of individual acts. *DeVincentis*, 150 Wn.2d at 19.

We hold that the trial court did not abuse its discretion when concluding that evidence involving the abuse of A.D. and the evidence involving the abuse of R.C. and S.D.-F. would be cross admissible to show Morgan's common scheme or plan.

b. MOTIVE OR INTENT

Evidence of a defendant's other wrongs or acts may be admissible to show the defendant's motive. ER 404(b); *State v. Baker*, 162 Wn. App. 468, 473-74, 259 P.3d 270 (2011). "For ER 404(b) purposes, motive 'goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act.'" *Fuller*, 169 Wn. App. at 829 (internal quotation marks omitted) (quoting *Baker*, 162 Wn. App. at 473-74).

Morgan argues that the trial court abused its discretion when finding that evidence on each count was cross admissible as motive or intent evidence under ER 404(b) to show Morgan's "'sexual motivation and intent to sexually abuse children for the purposes of sexual gratification.'" Br. of Appellant at 22 (quoting CP at 69). Morgan argues that evidence of each count would be inadmissible because "sexual gratification" is not an essential element of first degree child molestation under RCW 9A.44.083. *Id*. at 23.

A person is guilty of first degree child molestation when

[6] A.D. is male, while R.C. and S.D.-F. are females.

> the person has, or knowingly causes another person under the age of eighteen to have, *sexual contact* with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(1) (emphasis added). "Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). In order to prove sexual contact, the State must prove that the defendant acted with the purpose of sexual gratification. *State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006).

Morgan relies on *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004), to support his assertion that the offenses are not cross admissible to show motive or intent because "sexual gratification" is not an essential element of the crimes charged. Br. of Appellant at 23. In *Lorenz*, the court examined the adequacy of a "to convict" instruction for the crime of first degree molestation when the instruction omitted the term "sexual gratification." 152 Wn.2d at 30-31. The court held that the instruction was adequate because "sexual gratification" is not an essential element of first degree molestation. *Id.* at 34, 36.

Morgan's reliance on *Lorenz* is misplaced. We have previously held that for ER 404(b) purposes, evidence of intent or motive can be introduced even when it is not an essential element of the crime charged, provided the prior bad act is reasonably related to the crime charged. *Fuller*, 169 Wn. App. at 829; *State v. Yarbrough*, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009). Indeed, motive is not something the State needs to prove in a criminal case. "Motive" is the desire that drives a person to act, while "intent" speaks to what a person hopes to accomplish when motivated to act. *State v. Powell*, 126 Wn.2d 244, 259, 260, 261, 893 P.2d 615 (1995) (quoting BLACK'S LAW DICTIONARY 1014, 810 (6th rev. ed. 1990)). Morgan does not argue that the acts are not

reasonably related. Additionally, we have affirmed the trial court's admission of previous child molestations to show a defendant's motive or lustful disposition in a child molestation case. *State v. Kilgore*, 147 Wn.2d 288, 291, 295, 53 P.3d 974 (2002).

Child molestation "necessarily involves a purposeful or intentional and unlawful or unprivileged touching." *State v. Stevens*, 127 Wn. App. 269, 277, 110 P.3d 1179 (2005), *aff'd*, 158 Wn.2d 304, 143 P.3d 817 (2006). Intent is relevant to the crime of child molestation because it is necessary to prove the element of sexual contact. *Stevens*, 158 Wn.2d at 310. Accordingly, we hold that Morgan fails to show the trial court abused its discretion when concluding that the offenses would be cross admissible to show Morgan's motive or intent.

c. MORE PROBATIVE THAN PREJUDICIAL

In addition to relevance, evidence of other wrongs or acts must be more probative than prejudicial in order to be admissible under ER 404(b). ER 403; *Sexsmith*, 138 Wn. App. at 505. We recognize that when the allegation is sexual abuse, evidence of similar acts creates a likelihood that a jury will convict based solely upon character. *Krause*, 82 Wn. App. at 696. On the other hand, similar acts of sexual abuse in child abuse cases have considerable probative value because of the "'secrecy in which such acts take place, the vulnerability of the victim[], the absence of physical proof of the crime, [and] the degree of public opprobrium associated with the accusation.'" *Id*. (quoting *State v. Wermerskirchen*, 497 N.W.2d 235, 240-41 (Minn. 1993)).

Because Morgan denied that he raped or molested the victims, the issue in this case was whether the crimes occurred. Therefore, the existence of a design to commit the abuse was relevant to prove the crimes actually occurred. *See DeVincentis*, 150 Wn.2d at 17-18. Additionally, evidence of other offenses was highly probative of Morgan's impulse, desire, and motive to

sexually abuse children, as well as his modus operandi in committing his crimes. We hold that the trial court did not abuse its discretion when it found that the evidence was more probative than prejudicial under ER 403.

2. ADEQUACY OF TRIAL COURT'S INSTRUCTION

When ruling on joinder, the trial court also concluded that prejudice would be mitigated because the court would "instruct the jurors to consider each count separately and the evidence is not so complex that the jury will not be able to separate evidence of one count from another." CP at 70. Morgan challenges the trial court's conclusion, arguing that the jury would be unable to compartmentalize the evidence relating to the different counts due to the length and complexity of the trial and the sexual nature of the offenses. We disagree.

Regarding the length and complexity of the trial, Morgan notes that his trial consisted of 14 days of testimony and involved 10 counts regarding three victims. He further claims that the evidence was not presented sequentially. Morgan relies on *Bythrow*, in which the trial court's decision not to sever offenses was upheld. 114 Wn.2d at 723. *Bythrow*, however, does not support Morgan's argument. In *Bythrow*, the court held that the trial court did not abuse its discretion because the jury could reasonably be expected to compartmentalize the evidence of each count given the short trial, distinct and simple issues and defenses, and the trial court's instruction to the jury to consider each count separately. *Id*. The court also emphasized that in addition to the jury's ability to compartmentalize the evidence, courts must also review the strength of the evidence on each count. *Id*. at 721-22. When the State's evidence is strong on each count, as it was in *Bythrow*, "there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another." *Id.* Here, after reviewing the record, we are unpersuaded that the jury

was unable to compartmentalize the evidence. The State did not present complex or confusing evidence, the evidence was strong on each count, and the court instructed the jury to consider each count separately.

Morgan also argues that the trial court's instruction was inadequate to ensure the jury would consider each count separately given the sexual nature of the offense, relying on *Sutherby*, 165 Wn.2d at 884. Morgan's reliance on *Sutherby* is misplaced. Sutherby was charged with child rape and molestation involving the same child as well as multiple counts of possession of child pornography. *Id.* at 876. The question before the court was whether Sutherby was deprived of effective assistance of counsel when his attorney failed to move for a severance of the child rape and molestation charges from the pornography charges. *Id.* at 883.

In holding that Sutherby had been denied effective assistance of counsel, the court relied, among other factors, on the inflammatory nature of the charges, varying strength of evidence supporting each charge, and the fact that the State intended to use Sutherby's possession of child pornography charge generally to argue that he had a predisposition to commit sexual crimes against the child. *Id.* at 884, 885-86.

Sutherby does not establish a bright line rule prohibiting joint trials when the charged offenses are sexual in nature. Additionally, Morgan's case presents distinguishing factors that offset the danger of potential prejudice. Unlike *Sutherby*, Morgan concedes that the State's evidence supporting each count did not vary in strength, and there is no evidence that the State intended to argue that Morgan was predisposed to commit sexual offenses based on the presence of multiple charges.

We hold that the trial court did not abuse its discretion when it ruled that instructing the jury to decide each count separately would adequately reduce the danger of unfair prejudice.

C. THE POTENTIAL FOR PREJUDICE DID NOT OUTWEIGH CONCERNS FOR JUDICIAL ECONOMY

Finally, the trial court was required to weigh any prejudice that may have resulted from joinder against the concerns for judicial economy and expedition of judicial administration. *Bluford*, 188 Wn.2d at 311. While the potential for prejudice invariably exists when similar counts of a sexual nature are joined, we hold that the trial court correctly concluded that the potential for prejudice in the case was mitigated by several factors and considerations of judicial economy favored joining Morgan's cause numbers for trial.

Here, the trial court's "'exercise of discretion was based upon a careful and thoughtful consideration of the issue'" on the record and supported by tenable grounds. *Id.* at 310 (quoting *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). Separate trials in this case would have resulted in a large expenditure of judicial resources and would have involved the presentation of the same evidence, including A.D, R.C., and S.D.-F. all testifying on multiple occasions.

Moreover, Morgan does not establish that his joint trial produced prejudicial effects that outweigh concerns for judicial economy. *Id.* at 315. Morgan points to the fact that the trial court erred only by failing to give an ER 404(b) limiting instruction to the jury. However, Morgan never proposed an ER 404(b) limiting instruction, and the trial court has no duty to give such an instruction in the absence of a request. *State v. Russell*, 171 Wn.2d 118, 123, 249 P.3d 604 (2011). Failure to request a limiting instruction waives any error or unfair prejudice that may have been cured by the limiting instruction. *State v. Ramirez*, 62 Wn. App. 301, 305, 814 P.2d 227 (1991). Therefore, Morgan's argument fails.

Accordingly, we hold that the trial court did not abuse its discretion in joining Morgan's two cause numbers for trial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Morgan argues that he received ineffective assistance of counsel because his counsel failed to challenge venue in Pierce County for two counts of child molestation relating to R.C. that occurred in Thurston County. Morgan asserts that counsel's failure to challenge venue demonstrates deficient performance because Morgan has a right to be tried in the county where the alleged offense occurred. He further contends that the trial court would have granted his counsel's motion to dismiss R.C.'s charges on the basis of venue, which demonstrates prejudice. We disagree.

The right to counsel includes the right to effective assistance of counsel. *State v. Crawford*, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006). To show ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a defendant cannot establish both components, the claim fails. *Strickland*, 466 U.S. at 697.

To show deficient performance, Morgan must show that defense counsel's performance fell below an objective standard of reasonableness based on the record established in the proceedings below. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We indulge a strong presumption that counsel performed reasonably. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Legitimate trial tactics and strategies generally do not constitute deficient performance. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). To show prejudice,

Morgan must show a reasonable possibility that, but for counsel's purportedly deficient conduct, the outcome of the proceeding would have differed. *Reichenbach*, 153 Wn.2d at 130.

Criminal actions generally must be commenced in the county where the offense, or an element of the offense, was committed. CrR 5.1(a). Under article I, section 22 of the Washington Constitution, a defendant has the right to a "speedy and public trial by an impartial jury 'of the county in which the offense is charged to have been committed.'" *State v. Stearman*, 187 Wn. App. 257, 265, 348 P.3d 394 (2015) (quoting art. I, section 22). A criminal defendant may waive the right to challenge venue. *State v. Dent*, 123 Wn.2d 467, 479, 869 P.2d 392 (1994). Under CrR 5.1(c), the defendant must object to venue as soon after the initial pleading is filed or when the defendant has knowledge upon which to make an objection. *Id.* at 480.

In April 2017, Morgan affirmatively waived his right to venue in Thurston County for acts against R.C. by stipulating to venue in Pierce County. One month later, the State moved to join Morgan's cause number involving A.D. and his cause number involving R.C. and S.D.-F. Morgan's counsel objected to joinder of his two cause numbers.

Morgan argues that the record establishes deficient performance because his trial counsel objected to joining all counts pertaining to the three children for one trial but failed to challenge venue, "the one point that would guarantee a separate trial for the offenses related to R.C." Br. of Appellant at 30. However, this is a mischaracterization of the record because his counsel objected only to joinder of the counts involving A.D. charged in one cause number with the remaining counts involving R.C. and S.D.-F. charged in a separate cause number.

Counsel's objection to joinder does not demonstrate an absence of tactical reasoning for counsel's stipulation to venue in Pierce County for R.C.'s counts. Rather, counsel's decision to endure trial in only one county was likely strategic. By electing a single trial as opposed to three, Morgan was in the position to take advantage of any deficiencies in the State's presentation of its case. Multiple trials give the State multiple opportunities to correct any deficiencies and refine its arguments, while also creating risks and exposing a defendant to increased public condemnation and ridicule. Morgan's counsel likely knew of the high probability that the State could admit evidence of Morgan's other molestation and rape charges or convictions at any later separate trial, and Morgan had one common defense—a general denial. Moreover, if Morgan obtained sentences in two separate proceedings, he risked receiving consecutive sentences for each count. *See* RCW 9.94A.589.

The strategic decision not to challenge venue in this case was reasonable. Therefore, we hold that Morgan does not show that his counsel performed deficiently. Because Morgan does not show deficient performance, we decline to address prejudice and hold that Morgan's claim fails.

III. LEGAL FINANCIAL OBLIGATIONS

Morgan challenges the trial court's imposition of a criminal filing fee, DNA collection fee, and nonrestitution interest accrual provision. The State concedes that the DNA collection fee and the criminal filing fee should be stricken from Morgan's judgment and sentence, however the State does not address the trial court's imposition of the nonrestitution interest accrual provision.

The legislature recently amended the laws regarding LFOs, including the challenged fees and interest accrual provision. LAWS OF 2018, ch. 269, § 17. These amendments apply prospectively to cases on direct appeal when the law changed. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

The State concedes that under the new law, which is applicable here, the DNA collection fee and criminal filing fee should be stricken on remand. We accept the State's concession.

The court also imposed interest on the nonrestitution LFOs from the date of judgment, February 23, 2018. But RCW 10.82.090(1) now provides that as of June 7, 2018, "no interest shall accrue on nonrestitution [LFOs]." Again, the amended version of RCW 10.82.090(1) applies to Morgan. *Ramirez*, 191 Wn.2d at 747. Because the statute now prohibits interest on nonrestitution LFOs "[a]s of June 7, 2018," the nonrestitution interest provision in Morgan's judgment and sentence must be stricken to the extent it applies to nonrestitution LFOs after June 7, 2018. RCW 10.82.090(1).

CONCLUSION

We hold that the trial court did not abuse its discretion when joining Morgan's 10 counts from two cause numbers for a single trial. We further hold that Morgan fails to demonstrate that he received ineffective assistance of counsel based on his counsel's decision to not challenge venue for the charges related to R.C. We therefore affirm Morgan's convictions, but remand to the trial

court to strike the criminal filing fee, DNA collection fee, and the nonrestitution interest provision for interest on nonrestitution LFOs accruing after June 7, 2018 from Morgan's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

WORSWICK, J.

LEE, A.C.J.