

FILED
February 26, 2016
Court of Appeals
Division I
State of Washington No. 73452-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DOMINGO MONTAR-MORALES

Appellant.

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

BRIEF OF APPELLANT

MICK WOYNAROWSKI
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT.....1

B. ASSIGNMENTS OF ERROR.....2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....3

D. STATEMENT OF THE CASE.....5

 1. **Pretrial motion to suppress evidence**.....5

 2. **Motion to sever two child sex offenses from the three nonviolent property crimes**.....9

 3. **Half-time and post-trial motions to dismiss the rape charge for insufficient evidence**.....9

E. ARGUMENT.....11

 1. **Because Mr. Montar-Morales was arrested without probable cause the motion to suppress evidence should have been granted**.....11

 a. Brief investigatory stops conducted on less than probable cause must be limited in duration, as to place, and remain investigatory in purpose.....11

 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.16

 c. Reversal is required because evidence of theft from 1912 Harrison Street should have been suppressed.....20

 2. **The denial of the motion to sever deprived Mr. Montar-Morales of his right to a fair trial**.....21

 a. As joinder is inherently prejudicial, severing even related offenses may be necessary to preserve a fair trial.....21

b.	<u>Mixing the nonviolent property crimes with the child sex offenses prejudiced Mr. Montar-Morales’ right to a fair determination of guilt or innocence on all the charges</u>	23
	1. <i>Strength of the evidence</i>	23
	2. <i>Clarity of defenses</i>	24
	3. <i>Instructions</i>	25
	4. <i>Cross-admissibility of evidence</i>	29
c.	<u>Mr. Montar-Morales’ right to a fair trial outweighed any judicial economy interest in trying the counts together</u>	33
d.	<u>Reversal is the proper remedy for the denial of the motion to sever</u>	34
3.	<u>The State did not prove beyond a reasonable doubt that Mr. Montar-Morales raped Y.J</u>	35
a.	<u>Due process required the State prove each element of every offense beyond a reasonable doubt</u>	35
b.	<u>The State failed to prove rape</u>	36
	1. <i>Y.J. never testified she was raped</i>	36
	2. <i>The prosecutor insists</i>	38
	3. <i>Where “inside”?</i>	39
	4. <i>Under settled Washington law, touching of the inside of the buttocks is not rape</i>	41
	5. <i>Other states concur</i>	43
c.	<u>The Court should reverse Mr. Montar-Morales’ conviction for rape</u>	47
F.	<u>CONCLUSION</u>	49

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Davis, 152 Wn.2d 647, 101 P.3d 1 (2004) 23

Matter of Guardianship of Hamlin,
102 Wn.2d 810, 689 P.2d 1372 (1984)..... 16

Matter of Welfare of Colyer, 99 Wn.2d 114, 660 P.2d 738 (1983)..... 16

State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989)..... 26

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)..... 36

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010)..... 12

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009);..... 20

State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950) 32, 35

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 47

State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980) 11

State v. Jones, 101 Wn.2d 113, 677 P.2d 131 (1984)..... 26

State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993)..... 21

State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984)..... 30

State v. Kinzy, 141 Wn.2d 373, 5 P.3d 668 (2000) 11

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995)..... 31

State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008)..... 31

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 36

State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982) 22, 26

State v. Wheeler, 108 Wn.2d 230, 737 P.2d 1005 (1987) 14, 15, 19

State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984) 12, 14

State v. Z.U.E., 183 Wn.2d 610, 352 P.3d 796 (2015) 11

Washington Court of Appeals Decisions

State v. A.M., 163 Wn. App. 414, 260 P.3d 229 (2011)..... 5, 41, 42

State v. Bray, 143 Wn. App. 148, 177 P.3d 154 (2008) 17, 18, 19

State v. Briejer, 172 Wn. App. 209, 289 P.3d 698 (2012)..... 32, 33

State v. Bryant, 89 Wn.App. 857, 950 P.2d 1004 (1998) 21, 34

State v. Grier, 168 Wn. App. 635, 278 P.3d 225 (2012)..... 31

State v. Harris, 36 Wn. App. 746, 677 P.2d 202 (1984)..... 22, 25, 26

State v. Lewis, 59 Wn. App. 834, 801 P.2d 289 (1990) 13

State v. Lund, 70 Wn. App. 437, 853 P.2d 1379 (1993)..... 12, 14

State v. Mutchler, 53 Wn. App. 898, 771 P.2d 1168 (1989) 31

State v. Ramirez, 46 Wn.App. 223, 730 P.2d 98 (1986) 21, 29, 33

State v. Rodriguez, 163 Wn. App. 215, 259 P.3d 1145 (2011) 23

State v. Sinclair, __ Wn.App. __, __ P.3d __ (Decided Jan. 27, 2016,
Div. I No. 72102-0-I) 49

State v. Tharp, 27 Wn.App. 198, 616 P.2d 693 (1980) 31, 32

State v. Trickler, 106 Wn.App. 727, 25 P.3d 445 (2001) 32

United States Supreme Court Decisions

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	35
<u>Coolidge v. New Hampshire</u> , 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).....	11
<u>Dunaway v. New York</u> , 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).....	13
<u>Florida v. Royer</u> , 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).....	12, 13, 18
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	35
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	36, 47
<u>Kaupp v. Texas</u> , 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003),.....	13
<u>Missouri v. Frye</u> , 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).....	34
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).....	47
<u>Terry v. Ohio</u>	passim
<u>United States v. Sharpe</u> , 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985).....	19
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	20

Federal Court of Appeals Decisions

<u>Centanni v. Eight Unknown Officers</u> , 15 F.3d 587 (6th Cir.1994)	20
<u>Gallegos v. City of Los Angeles</u> , 308 F.3d 987 (9th Cir.2002).....	19
<u>United States v. Bravo</u> , 295 F.3d 1002 (9th Cir.2002)	15
<u>United States v. Chamberlin</u> , 644 F.2d 1262 (9th Cir.1980)	17
<u>United States v. Charley</u> , 396 F.3d 1074 (9th Cir.2005)	14
<u>United States v. Juvenile (RRA–A)</u> , 229 F.3d 737 (9th Cir.2000).....	15
<u>United States v. Miles</u> , 247 F.3d 1009, (9th Cir.2001).....	12
<u>United States v. Parr</u> , 843 F.2d 1228, (9th Cir.1988)	13
<u>Washington v. Lambert</u> , 98 F.3d 1181, (9th Cir.1996).....	15

Washington Constitutional Provisions

Article I, Sec. 3	21
Art. I, Sec. 7	3
Article I, section 22.....	21

Federal Constitutional Provisions

Fourteenth Amendment 21, 35
Fourth Amendment 3, 11, 20
Fifth Amendment 47

Statutes

RCW 9.94A.507..... 49
RCW 9A.44.010..... 5, 41, 42
RCW 9A.44.076..... 41

Rules

CrR 4.4..... 21, 23
ER 401 9, 31, 32
ER 403 9, 32
ER 404(b)..... passim

Other Authorities

Carter v. State, 321 Ga. App. 877, 743 S.E.2d 538 (2013)..... 45
State v. Gallagher,
286 N.J. Super. 1, 15, 668 A.2d 55 (N.J. Super. Ct. App. Div. 1995)..... 44
State v. O'Neill, 134 N.H. 182, 589 A.2d 999 (1991)..... 43
State v. Tapia, 347 P.3d 738 (N.M. Ct. App. 2015) 46
State v. Wells, 91 Ohio St. 3d 32, 740 N.E.2d 1097 (2001)..... 45

A. SUMMARY OF ARGUMENT

A cascade of judicial errors dispossessed Domingo Montar-Morales of the most basic protections our criminal justice system has to guarantee every accused. There was a trial, but not a fair one.

The police arrested Mr. Montar-Morales without probable cause. Rather than remedy the illegality of the warrantless seizure, the trial court agreed with the State that what the police did to Mr. Montar-Morales – he was handcuffed for half-an-hour and driven away from the suspected crime scene – was just an investigatory detention.

In closing, the prosecutor argued that Mr. Montar-Morales was guilty of all he was charged with because he is an opportunistic criminal equally willing to rape a child as he is to steal: “his intent was clear that night, to take advantage of the situation that had arose to him, whether it be child on the floor or theft from inside a building.” IVRP 76-77.

The trial court’s refusal to sever child rape and molestation charges said to occur in one apartment, from three nonviolent property charges said to occur in another, allowed the State that freedom. But, the ruling, based on a misapplication of the *res gestae* doctrine, correspondingly denied Mr. Montar-Morales’ right to a fair trial.

When the State failed to establish rape – because there was no physical evidence of any such act and the thirteen year-old complainant did not testify she was penetrated as alleged – the trial judge punted on the key question of whether sexual intercourse actually occurred.

This most serious conviction for which there is insufficient evidence violates Mr. Montar-Morales’ right to due process and should be set aside. The other convictions should be reversed for a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in accepting the State’s assertion that Terry v. Ohio¹ authorizes the police to keep a suspect handcuffed for half an hour and against his will drive him away from the alleged crime scene to a hospital for treatment he refused, all under the guise of an investigatory detention. CP 150; CL#5, 9.

2. The trial court erred in concluding that the police acted with due diligence, where they did not bring Mr. Montar-Morales and any eyewitness together to attempt an identification. CP 150; CL#8.

3. The trial court erred in failing to acknowledge the police subjected Mr. Montar-Morales to a full custodial arrest for which there was no probable cause. CP 150; CL#5, 9.

¹ 392 U.S. 1, 88 S.Ct. 186, 820 L.Ed.2d 889 (1968).

4. The trial court erred in denying the defense motion to suppress evidence under the Fourth Amendment and Art. I, Sec. 7. CP 150; CL#10.

5. When ruling on Mr. Montar-Morales' motion to sever, the trial court failed to consider the relevance and prejudice of the evidence it deemed fully cross-admissible as *res gestae*.

6. The trial court denial of the defense motion to sever deprived Mr. Montar-Morales of his right to a fair trial.

7. The trial court erred in denying the mid- and post-trial motions to dismiss the rape charge for insufficient evidence.

8. In the absence of proof beyond a reasonable doubt of sexual intercourse, Mr. Montar-Morales's conviction for rape of a child deprives him of due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A Terry stop must be investigatory in its purpose, limited in duration, and limited as to place. A detention exceeding these limits morphs into an unlawful arrest.

Acting on less than probable cause to arrest, the police handcuffed Mr. Montar-Morales, went through his pockets, put him in the back of a patrol car, and made him go to a hospital as their ward.

Eyewitnesses were two blocks away, but the police did not use the detention to find out if they could identify Mr. Montar-Morales.

Was it error for the trial court to conclude this half-hour seizure and unwanted transport away from the alleged crime scene was a detention of limited duration, scope, and purpose as what is authorized under Terry v. Ohio?

2. “Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition.”² Mr. Montar-Morales had to defend against both nonviolent property crime charges and factually weaker – but inflammatory – child sex offense charges. The allegations were said to occur close in time and place, but involved different victims, assorted acts, and varying mental states.

The trial court relied on the *res gestae* doctrine to deny the defense motion to sever. In turn, taking advantage of the trial court’s indiscriminate ruling, the State argued that Mr. Montar-Morales was equally guilty of all that he was charged with because he was an opportunistic criminal. Did the denial of severance violate Mr. Montar-Morales’ constitutional right to a fair trial?

² State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

3. Whenever the State alleges rape, it must prove sexual intercourse, which is defined as “penetration of the vagina or anus.” RCW 9A.44.010. Touching or penetration of the buttocks is not rape.³

The State took on the burden of proving that Mr. Montar-Morales digitally penetrated Y.J.’s anus, but Y.J. never testified that she was so raped, there was no physical evidence of rape, and out-of-court, Y.J. denied that her vagina or anus had been penetrated. If due process requires that the State prove every element of a crime beyond a reasonable doubt and the prosecutor “didn’t clarify with respect to whether it was penetration just of a buttock,”⁴ should the rape of a child conviction be set aside for insufficient evidence of sexual intercourse?

D. STATEMENT OF THE CASE

1. **Pretrial motion to suppress evidence.**

The State filed four successive charging documents. CP 151-52, 6-9, 209-11, 10-12. In each, it was alleged that on July 19, 2014, Mr. Montar-Morales committed a sex offense against a sleeping 13 year-old girl Y.J. at 1916 Harrison Street, Mount Vernon, Washington, in Elizabeth Ramirez Flores’ apartment, and then a burglary at 1912

³ State v. A.M., 163 Wn. App. 414, 421, 260 P.3d 229 (2011)

⁴ IIRP 151.

Harrison Street in Margarito Lopez's apartment. CP 10-12.⁵ Mr. Montar-Morales was staying that night at 1916 Harrison Street after going drinking with a resident, his friend Noel Lopez. IIRP 28-33.

Mr. Montar-Morales moved to suppress evidence of the burglary at 1912 Harrison Street discovered by the police on his person. CP 171-176. His motion described how police found him being held down by two men who had chased him and beat him. CP 172. The police ordered him to stay on the ground, then handcuffed him, made him sit on a patrol car bumper, and then searched him. CP 172.

At the suppression hearing, Officer McCloud testified he handcuffed Mr. Montar-Morales' wrists behind his back. IRP 41. Mr. Montar-Morales was not free to leave. IRP 57. When Officer McCloud searched him, he emptied Mr. Montar-Morales' pockets, going so far as to pull out bank cards. IRP 52, 58.

Mr. Montar-Morales was bleeding about his head. Aid responded and 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.

⁵ 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.

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 trial court's findings of fact note that the men who took Mr. Montar-Morales to the ground told the police that he "had done something... perhaps molested a sister." CP 148; FF#4-6; IRP 8. These findings confirm that 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.

The police found and handcuffed Mr. Montar-Morales in the "1800 block of South Second Street" of Mount Vernon. IRP 6. While the two men who had beat Mr. Montar-Morales were not clear on what had happened, the alleged crime scene was around the corner: "1916 Harrison Street, which was about two blocks away." IRP 16 (emphasis added); CP 148, FF#4-5.

Officer Curry went there but did not bring Mr. Montar-Morales. CP 148; FF#7. The police never brought Mr. Montar-Morales to the

alleged scene and they never brought any eyewitness to him, either to South Second Street or to the hospital. IRP 35-36.

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.

Mr. Montar-Morales argued that the level of police restraint exerted over him was an arrest. CP 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” and also concluded that Mr. Montar-Morales’ injuries were no basis to detain. CP 150; CL#2-3. The trial court denied the motion to suppress, ruling that what occurred was a “permissible Terry detention.” CP 150; CL #9. At trial, the State introduced items seized from Mr. Montar-Morales that belonged to the residents of 1912 Harrison Street.

2. 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 State opposed his motion to sever. CP 224-30.

Mr. Montar-Morales was concerned about the prejudicial impact of the charges, particularly that the jury would view him as having a general criminal propensity. IRP 83-84. The State argued that the offenses were *res gestae* to each other because they occurred close in time and place. CP 229. Defense replied that even the *res gestae* exception requires ER 401 and ER 403 balancing. CP 125-26. The trial court denied the defense motion. IRP 85-86; CP 197-98.

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

Y.J. never identified the person 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.

Several times, Y.J.'s direct examination was stopped. At one such interruption, the trial court remarked: "when asked point blank about whether or not any part of the person's body went into her body, she said no." IIRP 95.

Over defense objections, the prosecutor pressured Y.J. to keep talking about the incident. (E.g. "Are you going to sit here and not answer the question?" IIRP 103). The witness was given a diagram to draw on and marked where she was touched. IIRP 105; Ex. 37; Supp. CP __. The mark is on top half of the left buttock. Y.J. said "halfway the knuckle" on a finger on the hand that touched her went "inside." IIRP 105-06. The State did not ask her to explain the change in her testimony or to provide any additional detail.

Defense moved to dismiss for insufficient evidence, the prosecutor admitted he "didn't clarify with respect to whether it was penetration just of a buttock," yet the motion was denied. IIRP 151.

But in the end, the testimony that [the prosecutor] elicited from her was that this incident, whatever it was, happened on the spot that she marked on the diagram, and that something went, quote, inside of her, halfway to the first knuckle. By my definition that amounts to penetration. It's, I suppose, an inference that could be drawn the other way, but the words "inside of you," to me, mean the same thing as penetration. Whether they mean the same thing to the jury or not is for them to decide.

IIRP 153-54 (emphasis added).

Discussing the lack of physical evidence, the prosecutor said in closing “we just don't have evidence about whether or not there was something that happened to her anus... we have a lack of evidence.” IVRP 27-28. The jury convicted of rape and the trial court denied a post-trial motion to arrest judgment. IVRP 27-28, 109; CP 233.

E. ARGUMENT

1. Because Mr. Montar-Morales was arrested without probable cause the motion to suppress evidence should have been granted.

- 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)). 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. at 21.

“[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... A Terry stop must be 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.

The original Terry stop involved a seasoned officer spotting three men of “casing” a store. Terry v. Ohio, 392 U.S. at 6. The officer, “[d]eciding that the situation was ripe for direct action... approached the three men, identified himself... and asked for their names.” Id. at 6-

7. When the men he did not know “mumbled something,” he “spun” Terry around to pat down his clothes, whereupon he felt a revolver. He patted the other two, over their clothes, discovered one more gun, and arrested all three for carrying concealed weapons. Id. That brief investigatory detention was justifiable on less than probable cause.

However, “involuntary transport to a police station for questioning is ‘sufficiently like arrest[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). Safety and convenience can be a consideration. E.g. State v. Lund, 70 Wn. App. at 448 (holding police made a reasonable request that a Terry detainee leave an open corridor and go “to a nearby visitor’s reception area” to talk to them).

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 to Cloverdale Street,” the scene of the break-in, and asked that an eyewitness attempt an identification. Id. The police acted swiftly: “The time from detention to identification was from 5 to 10 minutes.” Id.

The Wheeler Court described the amount of physical intrusion in the case as significant, but not excessive. Id. at 235. Citing to State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984), our Supreme Court named

three factors to be considered in determining whether an intrusion on an individual is permissible under Terry or must be supported by probable cause: (1) the purpose of the stop; (2) the amount of physical intrusion upon the suspect's liberty; and (3) the length of time the suspect is detained.

Id. at 235.

The Wheeler Court 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. Officer McCloud noted in his report that Mr. Montar-Morales was once let out of one handcuff so his blood pressure could be checked. IRP 61. There was a period of time that two officers guarded over 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.⁶ 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 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

⁶ The trial court found that “The injuries were not a basis to detain him, because they were not life threatening.” CP 150, CL#3.

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.)

Below, the State and the trial court relied heavily on this Court's 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. But, the trial court's latching-on to the fact that Bray's detention lasted 30 to 35 minutes was short-sighted.

Critically, Bray's detention was executed for a true investigatory purpose and involved no change of location. The police who found him, ordered he stay while they called for fellow officers to come and

investigate further. Those additional officers promptly searched the area and discovered “an open and empty storage unit with a cut lock across from Mr. Bray's parked van.” Id. at 151. 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.

However, in deciding Bray, this Court 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 in the “1800 block of South Second Street.” IRP 6. The alleged crime scene was around the corner, at “1916 Harrison Street... about two blocks away.” IRP 16 (emphasis added).

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);

Instead, the police drove Mr. Montar-Morales to a different part of town. IRP 45-46. As Bray involved no transport, it is inapplicable.

While the line between a reasonable Terry “stop” and de facto arrest is often unclear, it is quite apparent that there is no such

thing as a Terry “transportation.” Rather, the removal of a suspect from the scene of the stop generally marks the point at which the Fourth Amendment demands probable cause.

Centanni v. Eight Unknown Officers, 15 F.3d 587, 591 (6th Cir.1994).

Here, the only conclusion that can be made about what the police did with Mr. Montar-Morales is that he was arrested, not detained, and that the arrest was without probable cause.

- c. Reversal is required because evidence of theft from 1912 Harrison Street should have been suppressed.

[I]f a higher court determines that this ruling is inaccurate, and that the arrest was in fact instigated at the original scene, then of course everything from that arrest -- the property found at the hospital and the property on his person at the jail would all be suppressed.

IRP 80.

If 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. The denial of the motion to sever deprived Mr. Montar-Morales of his right to a fair trial.

- a. As joinder is inherently prejudicial, severing even related offenses may be necessary to preserve 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).

Court rules provide that severance of offenses “shall” be granted whenever “severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” 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). Further, severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. State v. Sutherby, 165 Wn.2d at 883. 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).

Prejudice may also occur when the accused is confounded in presenting separate defenses. State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989). “A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” State v. Harris, 36 Wn. App. at 750.

To assist courts in protecting the defendant’s right to a fair trial, the Supreme Court set out four “prejudice-mitigating” factors that a court should consider when deciding whether the potential for prejudice calls for severance of counts: 1) the strength of the State’s evidence on

each count; 2) the clarity of defenses as to each count; 3) the court's instructions to consider each count separately; and 4) the admissibility of evidence of other charges even if not joined for trial. State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1968); Russell, 125 Wn.2d at 63; State v. Rodriguez, 163 Wn. App. 215, 228, 259 P.3d 1145 (2011).

Fundamentally, the exercise of discretion regarding severance 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).

- b. Mixing the nonviolent property crimes with the child sex offenses prejudiced Mr. Montar-Morales' right to a fair determination of guilt or innocence on all the charges.

1. *Strength of the evidence.*

Severance is warranted where the strength of one count bolsters a weaker count. Russell, 125 Wn.2d at 63-64. Here, the State's allegations that Mr. Montar-Morales burgled 1912 Harrison Street were far stronger than the allegation that he molested Y.J. at 1916 Harrison Street. The rape allegation was weaker still.

Property belonging to the 1912 Harrison Street homeowners was found on Mr. Montar-Morales and admitted against him. IIRP 81,

112, 117, 126, 138-39. Both residents testified they knew him and said they recognized him as the burglar of their home. IIRP 131, 137;

In contrast, there was no physical evidence to suggest that Mr. Montar-Morales molested or raped Y.J. In fact, Y.J. initially thought that she was touched by a different person staying at the apartment, Nicodemo Lopez, because he had touched her before. IIRP 109.⁷ In the end, Y.J. never made any identification and the State's case on the sexual assault counts was a circumstantial one.

The relative inequality in the strength of the State's case against Mr. Montar-Morales favors overturning the trial court's ruling.

2. Clarity of defenses.

Joinder actually prejudiced Mr. Montar-Morales' ability to defend against the property crime allegations. The 1912 Harrison Street homeowner, Mr. Lopez-Ramirez, first thought that it could not have been Mr. Montar-Morales in his home, because he thought that Mr. Montar-Morales was in jail. IIRP 136.

Defense counsel considered the impact of this information, and out of prudent fears that the jury deciding whether Mr. Montar-Morales

⁷ Mid-trial, both parties learned that Noel Lopez-Flores, who brought Mr. Montar-Morales to the apartment, was previously prosecuted for an unrelated sexual assault. IIRP 163. The trial court excluded this evidence. IIRP 175-76.

had committed a child sex offense would be seriously prejudiced against him if they heard that he was known as someone who goes to jail, gave up that line of attack. IIRP 149.

But for the erroneous joinder ruling, Mr. Montar-Morales would not have had to make that Hobbesian choice.⁸ The joinder ruling took away Mr. Montar-Morales' ability to fully contest the property crime allegations.

3. Instructions.

The jury was instructed: "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 the other count." CP 40 (Instruction No. 6). Though no limiting instruction was likely to cure the inevitability of prejudice, certainly the curt and uninformative instruction given was insufficient. See, e.g., State v. Harris, 36 Wn. App. 746. ("despite an instruction to consider the counts separately, there was extreme danger that the defendants would be prejudiced").

⁸ Defense counsel's competent strategy was for naught. Even though the motion had been granted, on the State's direct examination, Mr. Lopez-Ramirez still testified that he thought that Mr. Montar-Morales was "incarcerated" on that date. IIRP 136. The prosecutor moved to strike that answer and the trial court told the jury to disregard it. IIRP 136. The bell that was supposed to have been silent, had been rung, signaling loud and clear that people who know Mr. Montar-Morales expect him to be in jail. Mr. Montar-Morales' ensuing CrR 8.3(b) motion to dismiss was denied. IIRP 145-49.

The instruction given does not say that evidence from one count cannot be used in determining the verdict on the other count. The instruction does not warn against concluding that Mr. Montar-Morales has a general criminal predisposition because he is accused of both rape and burglary.

Even if a more comprehensive instruction had been given, the joint trial would still have caused the jurors to have a “latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” Harris, 36 Wn. App. at 750. This factor weighs in favor of severance, in part because the introduction of multiple counts into one proceeding is not all that different than presenting information about a past offense and “[s]tatistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record.” State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989). And, joinder can be particularly prejudicial when the alleged crimes are sexual in nature. State v. Saltarelli, 98 Wn.2d at 363.

What made this worse was that the prosecutor misused the evidence on one count to argue that Mr. Montar-Morales was a

generally opportunistic criminal. Before closing argument, defense counsel attempted to limit how the evidence of the property crimes could be used to prove-up charges at the other residence. IVRP10-11; 17-18.

The prosecutor argued “this is a type of *res gestae* evidence, which is entirely appropriate in a case like this, and does not fall within ER 404(b).” IVRP 12. Unfortunately, the trial court agreed that “[u]nder the *res gestae* or same transaction exception to [ER] 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for evidence close in both time and place to the charged crime.” IVRP 16-17; 19-20.

With this ruling, the prosecutor began closing argument by clumping the accusations together:

As I stated in my opening statement, this is a case where the defendant took advantage of the situations that came in front of him on that early morning of July 19th of 2014, and they occurred at the apartment building with these young families with their children in the homes.

IVRP 23-24 (emphasis added).

Prosecutor argued that Mr. Montar-Morales “running away” from the scene was proof not only that the police found the right man, but also “that these offenses occurred.” IVRP 25.⁹

The prosecutor ended his closing argument with another propensity argument:

And you're deciding whether or not defendant was the one who committed these offenses, decide them each separately, but to an extent in this particular case, they're connected by the facts, they're so close in time to what occurred. It shows what his intent was that particular night. It was to take advantage of the circumstances he came across. The evidence that was presented proved that the defendant committed Rape of a Child in the Second Degree, Child Molestation in the Second Degree -- Residential Burglary, Theft in the Second Degree of an Access Device, Theft in the Third Degree, and Attempted Residential Burglary. We ask you to return verdicts of guilty on each of these charges because the evidence supports that.

IVRP 47 (emphasis added).

In rebuttal, the prosecutor again told the jurors that they could consider evidence that Mr. Montar-Morales burgled and stole at 1912 Harrison Street in deciding that he raped Y.J. at 1916 Harrison Street:

You have to decide each count separately. But that doesn't mean you can't take the evidence that exists in relation to that count and make a decision about whether that evidence supports that the other counts occurred. The same facts that support that there was a theft of the access device shows that there was a burglary. And for that same reason, the information that you

⁹ The State's ‘flight equals guilt’ argument should have been, at best, limited to the question of identity.

have that supports that he was in this building, on one side, burglarizing and taking the access device and stealing the property there is the same reason he is at the window later for Elizabeth, to go in to commit another theft inside that building. His intent was clear that night, to take advantage of the situation that had arose to him, whether it be child on the floor or theft from inside a building.

IVRP 76-77 (emphasis added).

The crux of the matter is that the trial court should not have been so permissive with its *res gestae* ruling on cross-admissibility. This factor weighs in favor of reversing the severance denial.

4. *Cross-admissibility of evidence.*

Cross-admissibility considerations involve evaluating whether the evidence of various offenses would be admissible to prove the other charges if each offense was tried separately. State v. Ramirez, 46 Wn. App. at 226.. “In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence.” State v. Sutherby, 165 Wn.2d at 887 (internal citations omitted) (appellant received constitutionally ineffective assistance of counsel because his lawyer did not move to sever a child pornography possession charge from child rape and molestation charges).

Cross-admissibility of evidence is analyzed under ER 404(b). Traditionally the State may not introduce evidence of a defendant’s

prior bad acts, because "such evidence has a great capacity to arouse prejudice." State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984).

In determining whether evidence is admissible under ER 404(b), courts must (1) identify the purpose for which the evidence is to be admitted; (2) determine that the evidence is relevant and of consequence to the outcome; and (3) balance the probative value of the evidence against its potential prejudicial effect. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here, the trial court accepted the prosecutor's suggestion that everything that allegedly occurred that night was cross-admissible as *res gestae*. And, in denying the motion to sever, the trial court invented the idea that sexual motivation linked both sets of offenses and that this was reason to keep all the counts joined:

I would say, when you look at the overall circumstances of both the proximity of the two addresses to each other, the time frame of the chase, and the apprehension, that I would deem all of the accounts as almost equally strong, because they're so intertwined, and they are right next door to each other. There's also sexual motivation potential in each of the residences, so there's a similarity not only of criminal activity, but of location and time involving both potential thefts and potential sexual misconduct at each of the locations.

IRP 85 (emphasis added).

However, the State had not alleged that the 1912 Harrison Street offense was a sex offense or a sexually motivated offense and did not assert there was any common scheme or plan at play. In any event, such unfounded suspicions would weigh against cross-admissibility and have been reason to sever, not join. Accord State v. Mutchler, 53 Wn. App. 898, 901-02, 771 P.2d 1168 (1989) (holding that in a rape trial, trial court erred in admitting under a *res gestae* theory testimony of a different potential target of sexual assault).

Res gestae evidence is said 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); State v. Tharp, 27 Wn.App. 198, 204, 616 P.2d 693 (1980), aff’d, 96 Wn.2d 591, 637 P.2d 961 (1981). It may not even be ER 404(b) prior misconduct evidence, but simply relevant evidence under ER 401. State v. Grier, 168 Wn. App. 635, 646-48, 278 P.3d 225 (2012) (holding, in part, that accused’s pre-murder possession of a gun was relevant to the close-in-time shooting).

“The purpose of ER 404(b) is to prevent a jury from convicting a defendant based on propensity or character evidence.” State v. Magers, 164 Wn.2d 174, 195-96, 189 P.3d 126 (2008). “The ultimate test of

admissibility is whether the relevance and necessity of the evidence outweighs its prejudice to the defendant.” State v. Tharp, 27 Wn. App. at 205-06, citing State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950).

Even if admissibility of *res gestae* evidence is governed under the general rule of relevance (ER 401) and not the prior misconduct rule (ER 404(b)), weighing of prejudice under ER 403 is critically required. State v. Briejer, 172 Wn. App. 209, 227, 289 P.3d 698 (2012) (holding trial court abused its discretion and committed reversible error in admitting evidence under a *res gestae* theory but without properly considering ER 401, ER 402, ER 403, and ER 404(b)). The trial court failure to meaningfully engage in this balancing was error.

In State v. Trickler, 106 Wn. App. 727, 733, 25 P.3d 445 (2001), a prosecution for possession of a single stolen credit card, the State, relying on *res gestae*, introduced into evidence other items the defendant had in his possession when the (charged) stolen credit card was discovered. Applying the abuse of discretion standard, this Court reversed because “it was not shown that Mr. Trickler's possession of other allegedly stolen items was an inseparable part of his possession of the stolen credit card, which is the test commonly used in this state.” Id. at 734 (emphasis added). Here, the allegations that Mr. Montar-Morales

burgled and stole at 1912 Harrison Street – after leaving 1916 Harrison Street – were not “an inseparable part” to the earlier-in-time sex offense charges. But, the two sets of allegations – one strong, the other weak – most certainly amplified the inference that he was guilty of both.

Like in Briejer, the alleged *res gestae* evidence “ultimately operated as propensity evidence.” 172 Wn. App. at 227.

The joint trial of these separate offenses created an improper impression that Mr. Montar-Morales has a “general propensity” toward criminal acts. Ramirez, 46 Wn. App. at 227; see also Watkins, 53 Wn. App. at 272 (trial court’s failure to properly analyze cross-admissibility element constitutes abuse of discretion). The trial court opened the door to this type of argument and the State marched right through it. This factor also weighs most heavily in favor of reversing the convictions for the wrongful denial of the severance motion.

- c. Mr. Montar-Morales’ right to a fair trial outweighed any judicial economy interest in trying the counts together.

The interest in judicial economy is served where testimony would be repeated in separate trials. For example, in Russell, 125 Wn.2d at 68, the court noted that judicial economy was served by joinder where the crimes were uniquely similar and the testimony of

witnesses acquainted with the defendant during the time of the crimes would be repeated if counts were severed. On the other hand, when charges are inflammatory, and the risk of prejudice is significant, the defendant's right to a fair trial should come first. Accord State v. Sutherby, 165 Wn.2d at 886.

“[N]inety-four percent of state convictions are the result of guilty pleas.” Missouri v. Frye, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012). In the aggregate, holding a separate trial on the property crimes allegedly occurring at 1912 Harrison Street would have been minimally costly to the system, but invaluable to Mr. Montar-Morales.

This factor also weighs in favor of reversing the trial court's severance ruling.

- d. Reversal is the proper remedy for the denial of the motion to sever.

Where a trial court erroneously denies a motion to sever, the proper remedy is reversal, unless the error was harmless. Bryant, 89 Wn. App. at 864; Ramirez, 46 Wn. App. at 228.

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. Certainly the question of whether Y.J. was raped – as opposed to molested – was

such a close call that 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 trial court failed to adequately analyze the cross-admissibility of the evidence. Because of this error, the State ended up being in the position to ask the jurors to convict of rape, because there was evidence that Mr. Montar-Morales stole. The error was harmful and reversal for a new trial is required.

3. The State did not prove beyond a reasonable doubt that Mr. Montar-Morales raped Y.J.

Setting the above errors aside, the State failed to prove rape because the State failed to prove penetration.

- 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); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). 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).

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). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

b. The State failed to prove rape.

The State failed to prove rape because the State presented insufficient evidence of anal penetration.

1. Y.J. never testified she was raped.

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).

At another pause in the proceeding, the trial court noted:

[S]he has testified specifically, no portion of that person went inside her body, and there was no touching under her clothes, under the bottom, the hand went to the front and back of her shirt, underneath her shirt, back and forth for a few minutes.

IIRP 87 (emphasis added).

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:

First of all, we have a witness who has testified that certain things happened and certain things didn't happen. She's also testified on occasion, particularly this morning, that there were certain things she couldn't recall. But 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).

2. *The prosecutor insists.*

When the examination resumed, Y.J. again testified about sensing a hand on her stomach, and her back, under her bra, and she demonstrated this for the jury. IIRP 99-100. But, when the prosecutor asked: “Have you been able to show us yet where that hand went,” Y.J. said “no.” IIRP 101-102. She agreed to draw on a diagram.

The prosecutor led her: “So the hand went from somewhere else after it come back around your body --.” IIRP 102. The trial court sustained defense counsel’s objection. IIRP 102.

Even though the examination had already covered where, and how, Y.J. was allegedly touched, the trial court overruled “asked and answered” objections to the following questions: “Do you remember where the hand went after it was on the front part of your body?” and “Was that to another place on your body?” IIRP 102-103.

“No,” Y.J. responded, when asked if she can say whether the hand went somewhere else. IIRP 103. The prosecutor fired-off:

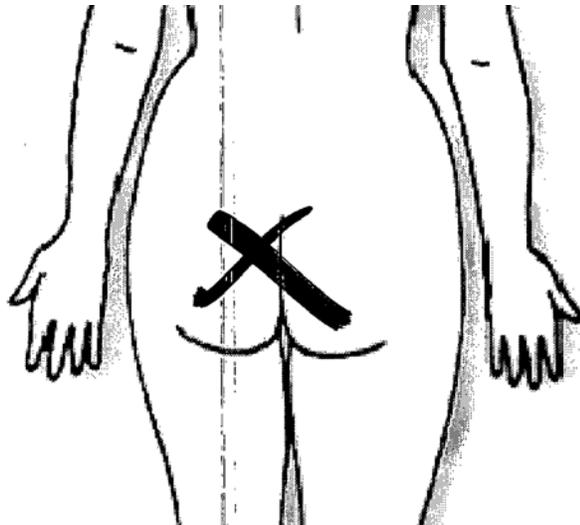
And why can't you answer that question? Is there a reason why you can't answer that question? Can you tell me why you can't answer that question? Are you going to sit here and not answer the question?

IIRP 103 (emphasis added).

The child said “no,” but the prosecutor kept at it – “What?” – and the child again said “no.” IIRP 103. The prosecutor demanded once more “Can you tell me where on your body the hand went?” IIRP 103. The trial court overruled another “asked and answered” objection from the defense and called for a recess. IIRP 103.

3. *Where “inside”?*

After a ten minute off-the-record recess, the prosecutor 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, 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.

The prosecutor did not ask for any detail about where “inside” Y.J. was touched. The prosecutor ended the direct examination by asking “What happened after that went inside of you? Did you stay there?” IIRP 106. Y.J. testified that she got up and went to the bathroom. IIRP 106.

Responding to a defense halftime motion to dismiss the rape charge for insufficient evidence, the prosecutor acknowledged the State failed to present direct evidence of anal penetration:

I didn't clarify with respect to whether it was penetration just of a buttock, because I believe you could draw the inference from the way she testified that it was inside of her anus. Her familiarity with the term anus has to the [sic] been established before the jury that they could draw this inference, and what we have a child, based on her demeanor and her reluctance to testify about the matter suggest that there was more penetration than just a knuckle inside the buttocks.

II RP151 (emphasis added).

The record shows Y.J. was familiar with the term “anus.” She testified that at a pretrial interview, she said “no” when directly asked if anything went into her “anus” or “vagina.” IIRP 110-11. In that pretrial

interview, like at the beginning of her testimony, she said that nothing had entered her body. IIRP 110; IIRP 82.

Without resolving the key question of where Y.J.'s was touched, the trial court denied the motion to dismiss:

But in the end, the testimony that [the prosecutor] elicited from her was that this incident, whatever it was, happened on the spot that she marked on the diagram, and that something went, quote, inside of her, halfway to the first knuckle. By my definition that amounts to penetration. It's, I suppose, an inference that could be drawn the other way, but the words "inside of you," to me, mean the same thing as penetration. Whether they mean the same thing to the jury or not is for them to decide.

II RP153-54 (emphasis added).

4. Under settled Washington law, touching of the inside of the buttocks is not rape.

Touching of the buttocks is not rape. Touching of the inside of the cleft separating the buttocks is not rape. “[P]enetration of the buttocks, but not the anus, does not meet the ordinary meaning of ‘sexual intercourse.’” State v. A.M., 163 Wn. App. at 421. Here, because the State alleged that Mr. Montar-Morales raped Y.J., the State had the burden of proving, beyond a reasonable doubt, that he engaged in sexual intercourse with her. RCW 9A.44.076; CP 41 (Instruction No.7). The State took on the burden of proving that Y.J.'s anus was penetrated. RCW 9A.44.010(1); CP 42 (Instruction No.8).

In A.M., a teenage boy was charged with rape of a child, and in the alternative, with child molestation. A.M. had allegedly put his penis into a younger boy's "butt." The conviction for rape was reversed for insufficient evidence of sexual intercourse as the element is defined by statute. RCW 9A.44.010(1); 163 Wn. App. at 421.

The complainant first said that A.M. "stuck his wiener in my poop-butt" and "it felt bad." Id. at 417. But, asked to explain, he did not say that A.M.'s "wiener" went into his anus. The opinion quotes from that trial record:

Q. Okay. Where did it go?

A. It just touched the outside of the part where it's almost inside.

Q. Okay. I didn't understand that. Can you say that a little louder and help me?

A. The part where it almost inside but outside a little.

Q. Okay. You know you have two butt cheeks, right?

A. Uh-huh.

Q. Was it outside the butt cheeks or was it inside the butt cheeks?

A. Outside but up—it was—it was almost inside.

Id. at 417-18.

On this account, the trial judge found there "was penetration of the buttocks, but not the anus." Id. However, the trial judge ruled that penetration of the buttocks – or the cleft between them – was sufficient to prove intercourse and sustain a rape charge. Id.

This Court reversed the rape charge for insufficient evidence. “[P]enetration of the buttocks, but not the anus, does not meet the ordinary meaning of ‘sexual intercourse.’” *Id.* at 421.

5. Other states concur.

Other jurisdictions set aside convictions in rape cases lacking conclusive proof of penetration of the anus, as opposed to the buttocks. In State v. O’Neill, 134 N.H. 182, 183, 589 A.2d 999 (1991), a boy said that his father had “stuck his fingers in my bum.” Much as the prosecutor in Mr. Montar-Morales’ trial failed to clarify Y.J.’s “inside” reference, the prosecutor in O’Neill also left the ambiguous testimony unexplained:

When asked by the prosecutor to point to his bum, he either pointed to the area of his buttocks, or placed his hand on his buttocks. The prosecution did not ask more detailed follow-up questions, and no charts or dolls were used to aid this testimony. Because the reporting of these incidents occurred long after the event, no physical evidence was available.

Id.

The O’Neill jury was instructed that in New Hampshire, proof of rape requires proof of “any intrusion however slight by any part of the defendant's body ... into the anal opening of the victim's body.” Id. The jury convicted, but the trial judge set aside the verdict for insufficient evidence. Id. at 184.

Rejecting a State's appeal, the New Hampshire appellate court agreed with the trial judge that despite the child's testimony that the accused "stuck his fingers in my bum," "no rational trier of fact could find guilt beyond a reasonable doubt" that the "anal opening" had been penetrated. Id. at 185.

The O'Neill court saw it was possible the child was referring to his anus by the term "bum," but such a possibility was not enough to base a criminal conviction on. "The mere chance, without more, that the witness meant 'anus' by the term 'bum' does not support the conclusion sufficient to meet the reasonable doubt standard." Id. at 187.

Y.J.'s testimony – and the diagram with a mark on top of a buttock – was even less supportive of anal rape. The State conceded there was ambiguity. IIRP 151. The motion to dismiss should have been granted. The conviction cannot stand.

In State v. Gallagher, 286 N.J. Super. 1, 15, 668 A.2d 55 (N.J. Super. Ct. App. Div. 1995), an adult female victim of sexual assault clarified that "there was no anal penetration, but there was penetration against my buttocks." On review, the New Jersey Court of Appeals held the trial court erred in instructing the jury that "insertion of the penis into the crevice formed by the left and right buttocks to any

degree” constituted penetration. Id. at 13. In New Jersey, like in Washington,

Anal intercourse requires penetration, however slight, into the anus... While insertion of the penis between the left and right buttocks may be sufficient to prove sexual contact in that there is a touching of the victim's intimate part, it is not sufficient to prove anal intercourse.

Id. (emphasis added).

Accordingly, Gallagher’s “aggravated sexual assault by anal penetration” conviction was reversed: “the failure to prove penetration is fatal to that charge.” Id. at 15.

A few years later, a unanimous Ohio Supreme Court also agreed that the crime of anal rape absolutely requires proof of penetration of “the victim’s anus.” State v. Wells, 91 Ohio St. 3d 32, 34, 740 N.E.2d 1097 (2001). “If the evidence shows that the defendant made contact only with the victim's buttocks, there is not sufficient evidence to prove the defendant guilty of the crime of anal rape.” Id.

Of course, if the State offers physical evidence confirming anal penetration, ambiguity in a child’s testimony about the critical distinction between rape and molestation becomes moot. E.g. Carter v. State, 321 Ga. App. 877, 880, 743 S.E.2d 538 (2013) (sufficient evidence of anal rape presented where a physical examination revealed

healed scars, which the examining expert opined was consistent with penetration by a penis.)

Here, however, no sexual assault examination was done. IIRP

113. In closing argument, the State acknowledged that there was a dearth of physical evidence but asked the jury to overlook that failure:

Don't just automatically, however, take the lack of evidence on something to mean that something didn't happen. It's just because the 12-year-old girl does not want to have a rape exam done on her anus in the middle of the night when she's up here from California with her family does not mean necessarily that that did not -- that these did not occur; we just don't have evidence about whether or not there was something that happened to her anus. The same thing applies to the defendant, of whether or not he had an examination done of his hands to determine whether there was any DNA on there. Same thing, we have a lack of evidence, but that doesn't mean you can't make a decision based on the other evidence that you have.

4RP 27-28 (emphasis added).

Notably, children can use plain language to give testimony that establishes anal rape. See State v. Tapia, 347 P.3d 738, 743 (N.M. Ct. App. 2015) cert. denied, 348 P.3d 695 (N.M. 2015) and cert. denied, 348 P.3d 695 (N.M. 2015) (sufficient for child to have testified defendant “got his private part and put it up where I go poop.”).

Here, Y.J. understood formal words for parts of the body and correctly used them to convey she had not been raped. In a pretrial

interview she said that nothing had gone inside her. IIRP 110. She said that nothing had been put into her “anus” or “vagina.” IIRP 110-11.

- c. The Court should reverse Mr. Montar-Morales’ conviction for rape.

As in any case involving insufficient evidence, the absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). As in any case reversed for insufficient evidence, the Fifth Amendment’s Double Jeopardy Clause bars retrial. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

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, because:

- There is no physical evidence of rape and the State conceded this. IIRP 113; IVRP 27-28.
- Y.J. repeatedly testified the touching was around her midsection and nowhere else. IIRP 74-75, 99-100.
- She testified that she was being truthful in that account. IIRP 75.
- She specifically denied any touching inside her. IIRP 82.

- The change in her testimony came after the prosecutor pressed her to say more. IIRP 103. (“Are you going to sit here and not answer that question?”).
- When told to diagram something else, the witness drew an “X” on the top half of a buttock. Ex. 37; Supp. CP ___.
- The assertion that half a knuckle went “inside” contradicts her earlier testimony that nothing went inside her, but the State left this contradiction unclarified. IIRP 82, 106.
- In court, she was not asked whether anything went inside her anus or vagina even though she understood those terms. IIRP 106, 110-11.
- Y.J. said that nothing was put inside her anus (or vagina) when she was interviewed out-of-court and she vouched for that statement in court. IIRP 110-11.

To somehow find this evidence sufficient, the State would have the Court ignore Y.J.’s sworn in-court assertions that the touching was only on her stomach and back, her initial sworn in-court assertion that nothing went into her body, ignore her out-of-court assertion that nothing went into her body, ignore her specific out-of-court assertion that her anus was not penetrated, ignore her affirmation that what she said out-of-court was the truth, ignore how Exhibit 37 shows she was touched on the top half of her left buttock, ignore the fact that Y.J. was

not asked in-court whether her anus was penetrated, and also ignore the utter lack of physical evidence.

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.

E. CONCLUSION

For all of the reasons set out above, Mr. Montar-Morales' rape of a child in the second degree conviction should be reversed and dismissed. The other convictions should be reversed for a new trial.¹⁰

DATED this 26th day of February 2016.

Respectfully submitted,

/s Mick Woynarowski

Mick Woynarowski – WSBA #32801
Washington Appellate Project
Attorneys for Appellant

¹⁰ Mr. Montar-Morales is indigent and was assigned a public defender at trial and on appeal. His indigency is presumed. RAP 15.2(f). In the event that he were not to prevail, Mr. Montar-Morales respectfully requests that the Court exercise its discretion and not impose any appellate costs. State v. Sinclair, __ Wn.App. ____, __ P.3d ____(Decided Jan. 27, 2016, Div. I No. 72102-0-I).

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 73452-1-I
)	
DOMINGO MONTAR-MORALES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|---|----------------------------|--|
| <p>[X] ERIK PEDERSEN, DPA
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |
| <p>[X] DOMINGO MONTAR-MORALES
380591
AIRWAY HEIGHTS CORRECTIONS CENTER
PO BOX 2049
AIRWAY HEIGHTS, WA 99001</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF FEBRUARY, 2016.

X _____


Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711