

original

Comm

No. 34138-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN D. BOONE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Ronald Culpepper,
The Honorable Katherine Stolz, Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to sever the counts for separate trials.
2. The prosecutor committed flagrant, prejudicial misconduct and the court erred in denying the motion for mistrial.
3. Irrelevant, prejudicial evidence was improperly admitted.
4. The “automatic decline” portion of RCW 13.04.030 violates binding international law

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying a motion to sever counts arising on a different day with a different victim from counts on another day with a number of other victims where the defendant was prejudiced by having all of the counts tried together?

Further, where the court’s initial denial of a motion to sever was based in part upon its belief that certain testimony would be admitted as to all of the charges which would render fairly equal the otherwise unequal evidence on the various counts and that testimony did not occur?

2. Mr. Boone’s former co-defendant was called as a witness by the prosecution but testified that he did not know Mr. Boone and that he did not remember the days of the incident, talking to police, or why he was himself in custody. In rebuttal closing argument, the prosecution emphasized its theory that Mr. Boone, not the co-defendant, was the “leader” and perpetrator of the incidents, then argued that the co-defendant’s sudden memory loss could be attributable to the people in the courtroom. The people in the courtroom were largely African-American,

as is Mr. Boone, and they appeared to be supporters of Mr. Boone.

Did the trial court err in denying a motion for mistrial where this misconduct clearly implied that Mr. Boone and/or his family had done something to cause the co-defendant to testify as to a false loss of memory and thus were suborning perjury? Further, was a mistrial required because the argument impugned Mr. Boone for exercising his rights to be present at trial and to an open, public trial?

3. At trial, over defense objections, the prosecution was permitted to introduce evidence of something Mr. Boone said after his arrest, during interrogation. More specifically, an officer testified that he told Mr. Boone how the investigation had led them to him and what he was accused of doing, including the murder, and Mr. Boone responded, “[e]xplain it to someone who cares.”

Did the trial court err in admitting this evidence over defense objection where the evidence was completely irrelevant to anything other than “bad character?” Further, is reversal required where the effect of admitting the improper evidence was to taint the jury against Mr. Boone based upon the perceived callousness of his comment?

4. Both the International Covenant on Civil and Political Rights (ICCPR) and the U.N. Convention on Rights of the Child (CRC) require that minors be treated in a manner which takes into account the needs of people their age and the possibility of reintegration into society in criminal cases, with incarceration only a punishment of last resort, and, under the ICCPR, separate from adults. Those provisions have reached the status of binding customary international law. Does RCW 13.04.030,

the “automatic decline” statute used in this case, violate those provisions?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Stephen Boone, a juvenile, was charged in Pierce County superior court by information with felony murder with a robbery predicate, attempted first-degree kidnapping, first-degree kidnapping, attempted first-degree robbery, second-degree unlawful possession of a firearm, and three counts of first-degree robbery. CP 1-8; RCW 9A.10.040; RCW 9A.28.020; RCW 9A.32.030(1)(c); RCW 9A.40.020; RCW 9A.56.190; RCW 9A.56.200 All of the counts except for the unlawful possession were charged with firearm enhancements. CP 1-8. The charges would have been filed in juvenile court if the portions of RCW 13.40.030 which amounted to the “automatic decline” statute, had not applied.

After motions before the Honorable Katherine M. Stolz on June 29 and August 17, 2004, trial was held before the Honorable Ronald E. Culpepper on September 7-8, 12-15, 22-23 and 26-28, 2005.¹ After deliberating, the jury found Mr. Boone guilty as charged and of committing all the crimes except the unlawful possession while armed with a firearm. CP 127-143.

At sentencing on November 18, 2005, Judge Culpepper ordered

¹The verbatim report of proceedings will be referred to as follows:
June 29, 2004, and August 17, 2004, as “1RP”;
September 8, 2005, as “2RP”;
the 8 chronologically paginated volumes containing the trial and sentencing of
September 7-8, 12-15, 22-23, 26-28, and November 18, 2005, as “3RP.”

Mr. Boone to serve 932.25 months (77.7 years) in custody. RP 899; CP 178-192. Mr. Boone appealed, and this pleading follows. CP 200-201.

2. Overview of facts²

The allegations at trial involved incidents which occurred on separate days. On Friday night, June 11, 2004, close to midnight, a man named Jin Kim was getting his mail when two black men approached and one pointed a gun, demanding money and threatening to kill Mr. Kim. 3RP 168-75. The man with the gun demanded Mr. Kim's car keys, searched him, took his wallet while the gun was still pointing at Mr. Kim, and took out somewhere between \$40-60. 3RP 175-77. That man told Mr. Kim to take him to his apartment, but Mr. Kim said he did not live at the building they were at and was just picking up the mail for someone. 3RP 178.

Mr. Kim was ordered into the car to drive the stick shift and he drove towards "the Hilltop," taking the back ways as instructed. 3RP 178-86. The man in the front seat had the gun pointed at Mr. Kim and "bumped" him a couple of times with it. 3RP 187. The man also made a phone call to "meet up" with someone. 3RP 188. He told Mr. Kim to turn into a Union '76 gas station and, once there, gave the gun to the other man and went inside, apparently talking to someone. 3RP 189. A few minutes later, the man came out, got the gun back, took Mr. Kim into the gas station store and ordered him to get money out of the automatic teller machine. 3RP 189-92. Two other black people the man referred to as his

²More detailed discussion of the facts relevant to the issues is contained in the argument section of this brief, *infra*.

aunt and uncle came in and they all started talking when Mr. Kim could not get any money out of the machine. 3RP 191-92. Mr. Kim told them there were no funds in his account but they kept trying. 3RP 193-94. The woman with them said they should take Mr. Kim to the bank to make a fake deposit so they could get money. 3RP 193-95. Ultimately, the woman told Mr. Kim to "just go." 3RP 195. The men had already gotten into some black car and left. 3RP 196.

In a photographic montage he saw four days after the incident, Mr. Kim identified Stephen Boone, then 16 years old, as one of the two men who approached him that night and the one who had the gun. 3RP 171, 181, 195, 198, 341-44. Mr. Kim also identified Mr. Boone at trial. 3RP 171, 181, 195, 198. A man working at the gas station that night remembered seeing the men but did not identify anyone. 3RP 135-39.

A little before 4 p.m. on Sunday, June 13, 2004, Ericka Dillman was walking up a hill to catch her bus at when two young black men drove up in a green Mustang and the passenger asked her something about money. 3RP 294-320. She told him she did not have any and he climbed out of the passenger door window, said, "let's see what you do have," showed a gun and went through the pockets of her sweat jacket and jeans. 3RP 299-301. He stole her cigarettes and her lighter and took her purse which had \$5 in it. 3RP 301-303. He then climbed back into the car, which drove off. 3RP 303.

Ms. Dillman gave the license plate number to the police. 3RP 305. At trial, she was asked if she got a "good look" at the person who robbed her and, once she said "yes," whether she recognized "anybody in the

courtroom today.” 3RP 306. She pointed out Mr. Boone, but was never asked where she had seen him or from where she recognized him. 3RP 307. She picked Mr. Boone out of a photographic montage she saw two days to a week later at her home, and maintained that the man who had robbed her had braids in his hair. 3RP 307-312, 320, 341-42.

Ms. Dillman was so upset during the incident that her already high blood pressure caused problems and she had to get medical treatment. 3RP 314-15.

A short time later, at a nearby Circle K grocery store/gas station, Mr. Dong Won was shot. 3RP 328-29. Through an interpreter, Mrs. Yong Yi, his wife, described stopping at the store to get milk, going into the store while her husband pumped gas, and coming out of the store to find a black man standing next to her husband. 3RP 674-76. Her husband said the man had a gun and the man told her and her husband to get into the car while the man got into the back. 3RP 676-77. Mrs. Yi told the man she had no money, handed him her purse, watched him take \$2 out of her purse, and watched her husband repeat the process when asked. 3RP 678. There was only \$15 in her husband’s wallet. 3RP 678.

At the man’s direction, they pulled out a little into the street and the man told Mrs. Yi’s husband to stop the car and get out. 3RP 67-85. He did so, as did the man, but when Mrs. Yi started to do the same she was told to get back into the car. 3RP 678-85. The men were on the driver’s side of the car and facing her, and Mrs. Yi said her husband looked at her while the gun was pointed at his head and motioned with his eyes for her to run away. RP 685-86. She saw her husband reach up and grab the gun

and then she ran, hearing the report of a gunshot before she reached the store. 3RP 686.

At trial, Mrs. Yi recognized the person in the back seat of the car that day as Mr. Boone. 3RP 691. However, much closer to the incident, she was shown pictures of the suspects and could not pick anyone out of a photo montage. 3RP 692. She testified that, in the pictures she saw, the people all had different hair, so she did not pick “exactly” one but recognized him. 3RP 692. What she most remembered was the “hair,” but she did not know the English term for what it was and could not answer if it was “braided.” 3RP 693. She admitted she had a “difficult time” with the identification because the photographs were for men who appeared younger than the man in the car. 3RP 696. She also said the pictures of the young black males “all looked similar to me then.” 3RP 697.

An officer to whom Mrs. Yi described the incident confirmed that Mrs. Yi said the man involved was a young black male with braided hair. 3RP 421, 527.

A number of witnesses testified about various aspects of the incident, including one who saw two young black men in a car throwing cards and things out the window and seeming to have an “arrogance” which made him suspicious. 3RP 241-45. He had followed them a little, then turned around, then heard a shot and saw the guy who had been riding in the car get into the passenger seat of the Mustang where it was parked at a pump. 3RP 241-45. He also followed the car and got a license plate. 3RP 258-62.

A man across the street who did not have a clear view of the Circle K saw an African American running to a car after the sound of a shot, and testified that he heard the running man yell, "I just shot him in the head," and "we got to get out of her" as he got into the car, possibly through the window. 3RP 357-59. He never told police, however, that he heard any such things. 3RP 367.

People driving by and inside the store heard a gunshot or gunshots. 3RP 382-85, 395, 402-405. A man across the street saw the victim lying in the street and saw an Asian woman running to the Circle K and another person also running. 3RP 456-58. The manager of the Circle K store said she was outside having a cigarette break and saw someone throwing cards out the passenger window when the green Mustang drove into the parking lot. 3RP 560. The car pulled up to pump four and the passenger, a black young man with braided hair, got out. 3RP 562-65. A different man, wearing a Cowboys jacket, came inside and paid \$4 for gas. 3RP 563. A shot was heard about three minutes after that man left. 3RP 563-67.

Another person was sure that the man who came inside and paid for the gas for the Mustang was a light skinned black man with "corn rows" in his hair. 3RP 332. About three minutes after he left there was a gunshot. 3RP 333. She saw someone running across the parking lot waving a gun but did not get a good look at him. 3RP 333.

When the car believed to have been involved was later found by police, there were several cards inside with the name "Ericka Dillman" on them. 3RP 371-73, 424-26. Many of the items found in the car came up positive for fingerprints, but none of those prints belonged to Mr. Boone.

3RP 428-431. The car's passenger door would not open. 3RP 631.

After the incident, pictures from the surveillance camera at the Circle K were sent to local officers and one recognized the person inside the convenience store as either Marquis or Demarco McGown, who he thought were friends of Stephen Boone. 3RP 494-500. Mr. Boone's 28 year-old sister, Tamika, saw both Mr. Boone and Demarco McGown on the Monday after the incident and that on that day Mr. Boone did not have his hair in braids but Mr. McGown did. 3RP 731-34. In fact, Mr. McGown had "white-like beads at the end of his hair" that day, and Mr. Boone does not wear his hair in braids. 3RP 731-34.

Amina Boone, Mr. Boone's sister, was there when police raided her apartment looking for Mr. Boone on June 15, 2004. 3RP 225-30. An officer described having to use pepper spray canisters to get Mr. Boone to reveal his whereabouts and come out. 3RP 449-52. Ms. Boone testified that she asked for permission to hug her brother and clean up his face a little before he was taken away. 3RP 225-30. She knew an officer there from an incident involving her boyfriend years ago. 3RP 228. In that case, she had thrown away a pistol for her boyfriend and the officer approached her and reminded her of it. 3RP 228. The officer told her they were looking for a gun and she told them they would not find a gun in the apartment because Mr. Boone would never have brought a gun around kids and there were kids living there. 3RP 229. She did not remember saying, "[h]e already threw the gun away" and did not remember the officer asking him that. 3RP 230. The officer testified that Ms. Boone told him they would not find the gun in the apartment and he asked her

how she knew. 3RP 289-91. She said she had just asked Mr. Boone. 3RP 291.

An officer who interviewed Mr. Boone described it as “not a very productive interview” and stated that once he was advised of his rights and officers had “laid out” why they had arrested him and what they knew, they “did not get any response really from Mr. Boone.” 3RP 651-61. He appeared “disinterested,” slouched “way down,” had his eyes closed and did not appear to be falling asleep but just seemed not to want to talk. 3RP 662. Mr. Boone told them he had never robbed anyone and had not been in any green Mustang. 3RP 662. When the other detective told Mr. Boone how the investigation led to him, Mr. Boone’s response was “[e]xplain it to someone who cares.” 3RP 663.

That same officer later admitted that, in fact, Mr. Boone had fallen asleep just after the interview. 3RP 655.

Mr. Wong died from the injuries he suffered. 3RP 362-71, 606-626.

D. ARGUMENT

1. THE TRIAL COURT’S REFUSAL TO SEVER PREVENTED THE JURY FROM MAKING A FAIR DETERMINATION ON EACH COUNT AND COUNSEL WAS INEFFECTIVE

Joinder of offenses is deemed “inherently prejudicial.” State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). As a result, CrR 4.4(b) requires that severance of offenses “shall” be granted when it will “promote a fair determination of the defendant’s guilt or innocence of each offense.” See State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154

(1990). While a court's ruling on a motion to sever is usually reviewed for abuse of discretion, joinder may not be used to prejudice a defendant and, if the defendant can demonstrate substantial prejudice, reversal will be required. See Ramirez, 46 Wn. App. at 226.

In this case, this Court should reverse, because the trial court's refusal to sever the offenses which occurred on Friday night in a different place and with a different victim from the offenses which occurred on Sunday afternoon was in error and that ruling prevented the jury from fairly determining guilt or innocence on each count.

a. Relevant facts

The CrR 3.5 hearing and initial motions were discussed on September 7, 2005, and, the following morning, counsel moved to sever counts VI, VII and VIII, the counts involving the incidents on June 11th, with Mr. Kim as the victim, from all of the other counts. 2RP 1. Because the charges happened on different days, with different victims at different times in different places, he argued, "it would be difficult for a jury in considering Counts I through V to divorce themselves from an incident that occurred some 30 hours earlier with Mr. Kim." 2RP 3-4. He pointed out that the jury would be more likely to believe that Mr. Boone had committed the later crimes because of the "strong identification" by Mr. Kim of Mr. Boone as the perpetrator in the unrelated incident. 2RP 4.

The prosecutor objected that the motion "comes very late in this trial," and claimed the acts all were part of a "single scheme or plan." 2RP 4. He declared the evidence would be "cross-admissible" and that "judicial economy" favored a single trial. 2RP 5.

Counsel argued that a motion to sever can be brought any time, even “just prior to deliberations.” 2RP 5. He agreed that it was more costly and difficult to hold two trials but stated that it was important that the events were days apart and that the jury was more likely to find Mr. Boone guilty of the four very serious offenses for which the prosecution’s evidence was weak “because they believe that the identity of Mr. Kim is very strong.” 2RP 6.

In denying the motion, the court stated it was only relying “partly” on the fact that the motion was “very late in the game” and the prosecution had prepared with anticipation of going to trial on all of the counts. 2RP 11. The court stated it would be concerned if the identification was strong on the incidents involving Mr. Kim and “real weak” on the others, but thought that identification was irrelevant because Mr. McGown would testify as to Mr. Boone’s involvement in both incidents. 2RP 12. Counsel disputed that there was no “identity issue” for the crimes which occurred on Sunday and urged the court not to make Mr. Boone “suffer for the timeliness or lack of timeliness of the motion, but rather have it decided upon the merits[.]” 2RP 13.

Later, when the prosecution rested, counsel renewed the motion to sever the counts, stating it was his belief that the evidence as it had been given made it clear that the counts should be severed. 3RP 726. The court again denied the motion, saying it was “more efficient to try them together” and that the motion was “brought relatively late.” 3RP 726.

b. The court erred in denying the motions

Even where joinder is legally permissible, the trial court should not

join offenses if that joinder prejudices the accused. See State v. Bryant, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017 (1999). A court abuses its discretion in denying a motion to sever if the defendant has demonstrated that joinder would create prejudice against him despite curative instructions. State v. Redd, 51 Wn. App. 597, 603, 754 P.2d 1041, review denied, 111 Wn.2d 1007 (1988).

In this case, the trial court abused its discretion in denying the motions to sever. As a threshold matter, Mr. Boone renewed the motion for severance as required under CrR 4.4(a)(2) and the issue is therefore preserved. See CrR 4.4(a)(2).

On review, this Court should reverse. In reviewing a court's denial of a motion to sever in a criminal case, the reviewing court examines whether the defendant was prejudiced by the joint trial by looking at 1) whether the jury would have had the ability to "compartmentalize" the evidence on each count or were likely to confuse them, 2) the strength of the prosecution's evidence on each count and any disparity between them, 3) the "cross-admissibility" of the various counts if separate trials had been held, and 4) whether the jury was instructed to decide each count separately and 5) issues of judicial economy. See State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). Prejudice exists if trying all of the counts in a single trial invites the jury to cumulate the evidence to find guilt or to decide based upon "criminal disposition." State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989). In addition, the accused is prejudiced when he is embarrassed or "confounded" in presenting separate defenses. Id. Finally, there may be an equally pervasive element of

prejudice of a “latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

In this case, in ruling on the issue before trial, the court recognized that severance would likely be proper if the identification by Mr. Kim was stronger than identifications for other counts. The court found no issue on that point, however, because Mr. McGown was expected to testify about Mr. Boone’s involvement in both days’ events. And the main reason for the court’s decision was clearly the “lateness” in bringing the motion. 2RP 1-13.

“Lateness,” however, is not a valid ground for denying a severance which is required in order to prevent prejudice to the accused. Indeed, CrR 4.4(a)(1) specifically provides that, while a motion for severance “must be made before trial,” a motion may also be made “before or at the close of all of the evidence *if the interests of justice require.*” CrR 4.4(a)(1)(emphasis added); see Harris, 35 Wn. App. at 748-49. Thus, the rule specifically contemplates a situation where a late motion may be brought when necessary to ensure the defendant receives an unprejudiced trial.

Further, counsel made it clear that it was his error, not his client’s, in bringing the motion to sever late and that it would be prejudicial to his client to deny the motion. Indeed, he urged the court not to effectively punish his client by going forward with all of the counts in one trial simply because of counsel’s error. Even if counsel’s failure to bring the motion earlier was in error, that error was clearly unprofessional and prejudicial to

his client, “ineffectiveness” under both the Washington and federal constitutions. See, e.g., Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. Where counsel is clearly at fault in bringing a late motion to sever but the defendant would just as clearly be prejudiced by failing to sever the counts for trial, the “interests of justice” would support granting the motion, even though late. If nothing else, justice must require that counsel’s unprofessional failure to timely make a crucial motion should not be allowed to so prejudice his client as to require him to be tried in a prejudiced trial.

In any event, even if the court had properly denied the motion to sever based upon counsel’s unprofessional lateness in bringing the motion, the court should have granted the motion when it was renewed. Even where a pretrial motion to sever is not timely brought, it is error to deny a later motion to sever during trial where the result is a trial at which the defendant was prejudiced by the joinder. See Harris, 35 Wn. App. at 750.

Here, in denying severance again at the close of the state’s case, the court again referred to the “lateness.” 3RP 726. This time, however, the court was wrong. CrR 4.4(a)(2) provides that the motion *must* be renewed during trial or it is waived. It was not “late” to bring the motion when the rule permits.

Further, to the extent the court was referring back to the “lateness” that it relied on in denying the motion pretrial, that reliance was in error, because the very rationale for the court’s decision had been proven false. The court noted that any prejudice caused by the relative strengths and

weaknesses of the state's case on the various counts was going to be eliminated by Mr. McGown's testimony about Mr. Boone's involvement with all the crimes. 3RP 12.

At the time the court again denied the motion after the prosecution rested, however, Mr. McGown had already testified. See, 3RP 730-73. And when he took the stand, he said he did not know Mr. Boone, he did not know anything about the incidents, and he did not recall the weekend in question. 3RP 721-22.

Thus, at the time the motion was renewed, the relative strength of the prosecution's case on the various counts and the possible prejudice which would result from using a single trial had completely changed. Yet the court undertook no new analysis or evaluation of the question, instead only relying on a "lateness" which was no longer valid under the rule.

Had the court properly considered severance at that time, it should have been granted, because an examination of the relevant factors shows the prejudice Mr. Boone suffered from the joined trial. First, severance should have been granted because the prosecution's case on the counts involving Mr. Kim was far stronger than the case on the other counts. In cases where the evidence is not uniformly strong, severance may be the only way to ensure a fair trial. See State v. Hernandez, 58 Wn. App. 793, 800, 794 P.2d 1327 (1990), review denied, 117 Wn.2d 1011 (1991), overruled in part on other grounds by, State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991); see State v. Russell, 125 Wn.2d 24, 63-64, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Thus, in Hernandez, where the defendant was charged with having robbed three different

businesses on different days and the eyewitness identifications for each count were of different levels of reliability, the Court reversed based upon the denial of the motion to sever. 58 Wn. App. at 798-800. There was significant prejudice which likely resulted from the joinder of the offenses, because it was apparent that:

where the prosecution tries a weak case or cases, together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case.

58 Wn. App. at 801.

Here, the evidence regarding the counts involving Mr. Kim was stronger than the evidence for the other counts, at least as to the incident at the Circle K. Mr. Kim positively identified Mr. Boone both in the photographic montage and at trial. In contrast, although she identified him at trial, Mrs. Yi could not pick out Mr. Boone from a montage, and was sure her assailant had braided hair, as Mr. McGown but *not* Mr. Boone had.

In addition, Mr. Boone was especially prejudiced here because the evidence was of the kind the jury was likely to use to infer “criminal disposition” and not be able to “compartmentalize,” because of its emotional impact. It is well-recognized that a jury is far more likely to use evidence of other crimes as improper “propensity” evidence and convict based upon “character” if the evidence is of crimes similar to or the same as the crimes currently charged. See, e.g., State v. Hardy, 133 Wn.2d 701, 712, 946 P.2d 1775 (1997). The Washington Supreme Court has noted that “joinder of counts similar in nature - - here, robberies committed with

a weapon - - creates a greater danger of prejudice than the joinder of two defendants charged with the same crime.” Bythrow, 114 Wn.2d at 723. Here, Mr. Boone was charged with committing a first-degree kidnapping, first-degree robbery and attempted first-degree robbery on Friday night, and an attempted first-degree kidnapping, three first-degree robberies and a murder committed while committing a robbery on Sunday. It would be almost impossible for a juror to fail to be prejudiced in fairly deciding the counts on Sunday after hearing the evidence of similar but completely unrelated counts involving Mr. Kim the Friday before. Where, as here, a general instruction to decide counts separately is given, it may still be insufficient if the prejudice is such that such an instruction would not have cured it. See Hernandez, 58 Wn. App. at 801.

Further, the evidence of the counts regarding Mr. Kim were not cross-admissible. Evidence of a count is only cross-admissible if it would be admitted as part of the evidence to prove the other counts at a separate trial. Ramirez, 46 Wn. App. at 226. The admission of “other crimes” at trial is governed by ER 404(b), which excludes evidence of other crimes for proof of “character” or acting in conformity with character in a particular instance. Bythrow, 114 Wn.2d at 719. There are some permissible uses of such evidence, including the ground the prosecutor cited below, that of “common design or plan.” But to establish a common design or plan, the evidence of the other acts must not merely establish a similarity of results but also so many common features of the conduct “that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the

individual manifestations.” State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

Here, despite their gravity, these crimes were not part of some greater general plan. They were just common crimes allegedly committed by the same person. The evidence was not the same. The civilian witnesses were not the same. The stores were not the same. Only a few police witnesses were the same.

These facts also indicate that trying the counts separately would not cause a serious duplication of testimony or a waste of resources in having separate trials.

The trial court erred in denying the motion to sever, and the result was a trial at which the jury could not have fairly determined guilt or innocence on each separate charge. This Court should so hold and should reverse.

2. THE PROSECUTOR COMMITTED FLAGRANT,
PREJUDICIAL MISCONDUCT AND THE COURT
ERRED IN FAILING TO GRANT THE MOTION FOR A
MISTRIAL

As “quasi-judicial” officers, prosecutors have special duties not imposed on other attorneys, including the duty to seek justice instead of acting as a “heated partisan” in an effort to win a conviction. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor fails in this duty, he or she not only deprives the defendant’s of the due process right to a fair trial but also denigrates the integrity of the

prosecutor's role. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. at 18.

Prosecutorial misconduct compels reversal where there is a substantial likelihood the misconduct affected the verdict. State v. Reed, 102 Wn.2d 140, 144, 684 P.2d 699 (1984). Even if the misconduct is not objected to below, reversal is still required if the misconduct is so flagrant and ill-intentioned that it could not have been cured by a limiting instruction. See Stith, 71 Wn. App. at 18.

In this case, the prosecutor committed serious prejudicial misconduct in effectively telling the jury that Mr. McGown's sudden memory loss had something to do with the people who were in the courtroom, most of whom were clearly associated with Mr. Boone.

a. Relevant facts

In rebuttal closing argument, when arguing that Mr. Boone was guilty, the prosecutor declared:

What about Tennyson and [the] SWAT team? Who do they find first? Who surrendered immediately? Mr. McGown surrendered. You ask yourself, you know, who had more to lose? *Mr. McGown tells us an awful lot [about] what was going on that weekend without saying anything. Okay?* He doesn't recognize himself. He doesn't know the defendant, Mr. Boone. He wasn't there. But you know what? He was. Mr. Boone's sister lets us know that Mr. Boone and Mr. McGown were friends. Von Narcisse lets us know that Mr. McGown and Mr. Boone are friends.

Mr. Mc[G]own has trouble recalling, you know, anything that happened in his life at that point, or during that weekend. *You*

know what? Maybe he did truly forget what had happened that weekend, maybe he really would like to forget what happened that week[end] even, or maybe the fact that this gallery was packed full of people caused him to lose some of his memory.

Don't remember or don't want to remember.

3RP 841 (emphasis added).

Shortly after the jurors were sent to deliberate, counsel moved for a mistrial based on prosecutorial misconduct for the comments about why Mr. McGown had suddenly had a “lapse of memory.” 3RP 846. He noted that the vast majority of people in the room were people of color, as was Mr. Boone, and that the comments suggested that Mr. Boone “might support perjury.” 3RP 846. He argued that the prosecutor’s comment amounted to an allegation that Mr. McGown’s lapse of memory or “election not to testify” could be directly attributable to Mr. Boone and that the prosecutor had asked the jury to speculate on that as “misconduct.” 3RP 847. He also told the court Mr. Boone now could not get a fair trial. 3RP 847.

The prosecutor stated that it was established that family members were in the courtroom and that a curative instruction could be given, and counsel responded that it was irrelevant that they were there, the prosecutor was suggesting that there was something wrong with them being here and the jury could only draw the inference that “this young man and/or his family are somehow present to get this guy to say nothing.” 3RP 847. The court then stated that Mr. McGown had “fairly poor recall,” and that the prosecutor’s comment “might have been somewhat speculative as an explanation for McGown,” but held it was simply a

comment and argument in closing argument.” 3RP 848. Counsel again reiterated his concern that the jury would know that the only person who could benefit from Mr. McGown not testifying would be Mr. Boone and there were clearly lots of African-Americans in the courtroom in support of Mr. Boone at that time so the jury would speculate that Mr. Boone or his family did something to prevent Mr. McGown from testifying. 3RP 848. The court agreed that there were a large number of African-Americans in the courtroom at the time but did not reverse its ruling. 3RP 848.

b. The arguments were misconduct and the mistrial should have been granted

The court abused its discretion in denying the mistrial, because the prosecutor’s misconduct was so flagrant and prejudicial it could not have been cured and nothing short of a new trial would have ensure that Mr. Boone receive the fair trial to which he was entitled. A mistrial should be granted where a defendant’s constitutional right to a fair trial requires it. See State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). At the outset, it is not inconceivable that a juror would perceive the prosecution’s comment as a comment on Mr. Boone’s presence in the courtroom. He was, of course, one of the people in the courtroom at the relevant time. But he had a right to be present at his own trial, obviously, and it is serious misconduct for a prosecutor to draw a negative inference from a defendant’s exercise of a constitutional right, or to tell a jury it should do so. State v. Rupe, 101 Wn.2d 664, 706-707, 683 P.2d 571 (1984). Further, it is not only misconduct but also a violation of due process for a

prosecutor to argue in a way which would tend to chill the exercise of a constitutional right. State v. Johnson, 80 Wn. App. 337, 339-40, 908 P.2d 900, review denied, 129 Wn.2d 1016 (1996).

Regardless whether a juror might have perceived the comments as commenting on Mr. Boone's exercise of his right to be present at trial, no juror could have failed to pick up the prosecutor's underlying accusation that Mr. Boone or someone close to him had somehow done something improper to cause the "memory loss." And the prosecutor was clearly inferring something negative about the "packed courtroom" which was filled with African-American's clearly perceived as there in support of Mr. Boone. Again, however, Mr. Boone had a constitutional right to an open, public trial under both the Sixth Amendment and Article I, § 22. See State v. Easterling, ___ Wn.2d ___, ___ P.3d ___ (June 29, 2006) (2006 Wash. App. LEXIS 502).

Further, the prosecutor introduced absolutely no evidence to support its declaration. The court itself agreed that declaration was merely "speculative." 3RP 848. It is misconduct to argue facts not in evidence, and this is especially true where, as here, the "facts" are designed to imply commission of yet another crime, suborning perjury, and the existence of those "facts" necessarily leads to a conclusion of guilt.

Notably, the prosecutor's comments cannot be interpreted as anything other than improper attempts to malign Mr. Boone, when taken in context. Not only was Mr. Boone the only person who could benefit from Mr. McGown's lack of "memory" or his decision to claim such a lack. In addition, the prosecutor *used* that lack of memory as evidence that Mr.

Boone was guilty in another way, because it argued that Mr. McGown's lack of memory proved he was just a flunky and Mr. Boone was the leader, the one in control and the one who committed the crimes, as the prosecutor had declared. Indeed, the prosecutor told the jury that Mr. McGown's silence at trial effectively *proved* that point, declaring it "tells us an awful lot [about] what was going on that weekend without saying anything." 3RP 841. The prosecutor's later comment about whether Mr. McGown had actually forgotten, would like to forget, or had lost his memory because of the people in the courtroom referred back to this point again when he declared, "[d]on't remember *or don't want to remember.*" 3RP 841 (emphasis added).

Taken in their entire context, the prosecutor's comments were not a harmless reference to potential nervousness that any witness would have at testifying in front of a lot of people. They were a clear insinuation that Mr. Boone or members of his family or friends had somehow done something to suborn perjury from Mr. McGown and make him "forget" what happened. And the prosecutor exploited that misconduct not only to imply this completely unproven allegation but also to "prove" that Mr. Boone was a "leader" and thus guilty of the charged crimes. No instruction could have cured this highly emotional, improper and prejudicial misconduct, which occurred just before the jury went to deliberate. Improper comments are especially difficult to cure when they are made in rebuttal closing argument, just before the jury begins its deliberations. See State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992).

The trial court erred in denying the motion for mistrial under these circumstances. This Court should so hold and should reverse.

3. IRRELEVANT, PREJUDICIAL EVIDENCE WAS ADMITTED WHICH DEPRIVED MR. BOONE OF A FAIR TRIAL

Evidence is only admissible if relevant to some question at issue. ER 401, 402. Further, even where evidence is found relevant, it must be excluded if its probative value is outweighed by its capacity for prejudice. See ER 403. In addition, evidence of other crimes, wrongs or bad acts is inadmissible to prove “character” and that they acted “in conformity therewith.” ER 404(b); see State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984).

In this case, the trial court erred in allowing the prosecution to elicit testimony, over defense objection, that Mr. Boone told the officers to “explain it to someone who cares” when told how officers had investigated and decided to arrest him and what they thought he had done.

a. Relevant facts

After his arrest, Mr. Boone was interviewed by police and made a few comments after refusing to sign a waiver form. 3RP 72-74. One of those statements was made when police were telling him about how they had discovered him as a suspect and what he was charged with, and he said, “[e]xplain it to someone who cares.” 3RP 71. There was an ongoing discussion at trial because the prosecutor wanted to elicit that Mr. Boone had made that statement through testimony from Officer Davis. 3RP 641. The parties argued over whether the “rule of completeness” applied and would allow the admission of the rest of the statement to make him seem

less callous. 3RP 641-42.

Counsel was concerned about the potential prejudice admission of the evidence would bring. He argued that the “insensitivity and arrogance” of the statement “paints Mr. Boone more of a, quote, bad guy, unquote.” 3RP 644. The prosecutor did not say why he wanted the evidence but just said it was “with respect to winding up the investigation as it led to Mr. Boone.” 6RP 645.

The court initially ruled the statement was excluded, because it was “somewhat marginal to the State’s case” and admitting it was obviously creating big issues and problems. 3RP 645, 647. After further discussion, however, without explanation, the court reversed itself, stating the prosecutor wanted it in, it was admissible under ER 801 and 802, and [w]hether it’s a good idea for him to get it in, I guess, is another question.” 3RP 649-50. The court then ruled it would allow the prosecutor to elicit the statement and the defendant to ask about the other statements if it chose. 3RP 650.

At trial, the prosecution elicited testimony that, when the detective told Mr. Boone how the investigation led to him and what he was charged with, Mr. Boone’s response was “[e]xplain it to someone who cares.” 3RP 663. In cross-examination, established he went to sleep right after the end of the interview. 3RP 665.

The prosecutor began closing argument by first saying good morning to the jurors, then going on:

‘Explain it to someone who cares.’ ‘Explain it to someone who cares. That’s what Stephen Boone told the detectives when they were talking to him about their investigation. I am going to take

him up on that, I am going to explain it to all of you.

3RP 769.

b. The evidence was improper and its admission compels reversal

The trial court erred in admitting this evidence. First, the prosecution failed to provide any reason why this evidence was necessary to prove anything of relevance to the prosecution's case. But these statements were clearly other "bad acts," i.e., callousness in the face of being told that you have been arrested for the brutal murder of another human being. And "bad acts" evidence must not only be relevant but also "necessary to prove an essential ingredient of the crime." State v. White, 43 Wn. App. 580, 587-88, 718 P.2d 841 (1986).

The prosecution's failure to provide a legitimate reason for introducing the evidence is telling because the only thing the comments might possibly prove is bad "character" and propensity to have committed the charged crimes. It is improper to admit evidence of other bad acts for the purpose of proving "propensity." See, e.g., Suarez-Bravo, 72 Wn. App. at 364-65 (act of being in a high crime neighborhood improperly allows "propensity" conviction because it allows inference that a person committed a crime because "he lives in a building where other crimes are committed"). There was no other reason to tell jurors about Mr. Boone's comment - it added nothing to the investigation except making Mr. Boone look bad.

Further, the evidence was highly prejudicial to Mr. Boone's ability to receive a fair trial. It is difficult to believe a person would kill another,

or commit violent acts such as kidnapping solely for money, especially when that person is a child.. That belief was surely made much easier to swallow here by the jury hearing the shocking statement of not caring attributed to Mr. Boone.

Reversal is required. Where, as here, a court erroneously admits improper evidence, the error is not harmless unless the Court can conclude that, within reasonable probabilities, the outcome of the trial would have been the same had the error not occurred. See State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). While the result might have been the same on the counts involving Mr. Kim because of the strength of the identifications, it likely would not have been the same on the counts where many witnesses saw the man involved with braids and Mr. McGown, not Mr. Boone, was sporting braids that day. The introduction of the evidence at the joined trial was clearly prejudicial to Mr. Boone and in error. This Court should so hold and should reverse.

4. RCW 13.40.030, THE “AUTOMATIC DECLINE”
STATUTE, VIOLATES BINDING INTERNATIONAL
LAW

In addition, reversal is required because Mr. Boone was 16 at the time of the crime and was tried as an adult under a statute which violates binding international law. The “automatic decline” statute was enacted in 1994. See Laws of 1994, 1st Sp. Sess., ch. 7. Under that statute, juveniles who met certain conditions were no longer entitled to a “decline” hearing and all the protections such a hearing affords before being transferred out of juvenile court. RCW 13.04.030(1)(v). Instead, children who are 16 or 17 when they commit their offense and commit certain serious or serious

violent offenses are now automatically deprived of the benefits of juvenile court jurisdiction, despite their youth, because the statute provides “exclusive original adult court jurisdiction over juveniles who commit certain violent crimes.” In re Boot, 130 Wn.2d 553, 925 P.2d 964 (1996).

This Court should reverse, because Mr. Boone should have been tried as a juvenile and the failure to do so and application of the “automatic decline” statute violated binding international law contained in the Convention on Civil Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR).

Under the so-called “Treaty Clause” of Article VI of the U.S. Constitution, once a treaty has been ratified it is considered the “supreme law of the land.” See United States v. Dion, 476 U.S. 734, 738, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986). Where a treaty is not “self-executing,” i.e., if its provisions do not act directly but instead are a “pledge” of the “faith” of the United States to take certain actions, enacting legislation is usually required to effectuate the treaty’s mandates. See Kane v. Winn, 319 F. Supp. 2d 162, 196 (D. Mass. 2004). But even when such legislation has not yet been passed, however, a ratified treaty is still binding upon the courts in the sense that they must “strive to interpret statutes to conflict with the international obligations” set forth in the treaty. Id.; see Murray v. Schooner Charming Betsy, 2 Cranch 64, 6 U.S. 64, 118, 2 L. Ed. 208 (1804).

In addition, treaties are not the only binding international law applicable to Washington courts. “Customary” international law, the law generated by the consensus of civilized nations, becomes binding upon

countries even in the absence of ratification of a treaty, under certain circumstances. See The Paquete Habana, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed.2d 320 (1920). Where there is sufficient evidence of state practice and when there is *opinio juris*, i.e., evidence that the practice is being followed out of a sense that there is some legal obligation to do so, there is customary international law. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993). Evidence of customary international law is found in the general usage and practice among nations, the works of jurists and writers, and judicial decisions recognizing and enforcing that law. See Paquete Habana, 175 U.S. at 700.

In fact, treaties may themselves be evidence of state practice and *opinio juris*, as may some resolutions of the General Assembly of the United Nations. Siderman de Blake, 965 F.2d at 719 (holding the Universal Declaration of Human Rights is a “powerful and authoritative statement of the customary international law of human rights”). In this way, even if a treaty is not self-executing, or even if it is not ratified by a country, the country may ultimately be bound by some of its terms if those terms have become customary international law. See Filartiga v. Pena-Irala, 630 F.2d 876, 882, 883 n.9 (2nd Cir. 1980) (recognizing that non-self-executing treaty may be evidence of “binding principles of international law”).

The ICCR is a signed, ratified treaty of the United States. See 58 Fed. Reg. 45934 (1993); Charming Betsy, 6 U.S. at 118. And the CRC has already been signed by the U.S., and only waits for ratification.

Further, as a source of an expression of customary international law, both the ICCPR and the CRC are relevant for a court faced with a statute inconsistent with their provisions. Filartiga, 630 F.2d at 882.

Indeed, the Supreme Court has itself recognized that it is important to acknowledge when there is an “overwhelming weight” of international opinion about a particular practice, in examining whether that practice is proper. Roper v. Simmons, 543 U.S. 551, 1198-1199, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In Simmons, the Court specifically found such opinion contained in both the CRC and the ICCPR. And the Court noted that the CRC has been ratified by every nation in the world, save for the U.S. and Somalia. Simmons, 543 U.S. at 1194, 1199. Courts which have not found the ICCPR as law have ignored the binding nature of customary international law. See, e.g., Beazley v. Johnson, 242 F.3d 248, 264-68 (5th Cir. 2001), overruled by Simmons, supra.

Thus, both the ICCPR and the CRC here apply. And Washington’s “automatic decline” statute is inconsistent with and violation of the international law those agreements describe. The ICCPR provides that, in the penitentiary system, “[j]uvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.” Article 10, § 3, 31 I.L.M. 648 (1992). Article 14, § 4 also requires that the procedure used in criminal cases involving juveniles “shall be such as will take into account their age and the desirability of promoting their rehabilitation.”

Similarly, the CRC provides protection to children, defined as human beings below the age of 18 or the age of majority, requiring that

children shall be arrested, detained and imprisoned only as a “measure of last resort and for the shortest appropriate period of time.” See CRC, Article 37(b), 28 I.L.M. 1448 (1989). Further, every child deprived of liberty is to be treated “in a manner which takes into account the needs of persons of his or her age,” and “shall be separated from adults unless it is considered in the child’s best interest not to do so.” CRC, Article 37(c), 28 I.L.M. 1448 (1989). And the CRC recognizes the right of every child accused of a crime to be treated in a way which “takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.” CRC, Article 40.1, 28 I.L.M. 1448 (1989).

“Automatic decline” is simply inconsistent with and in violation of these customary international norms. See Thomas, *Comment: ‘Rogue States’ Within American Borders: Remediating State Noncompliance with the International Covenant on Civil and Political Rights*, 90 Cal. L. Rev. 165 (2002) (California’s automatic decline equivalent violates international law and ICCPR); see also, Baird and Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, 5 J.L. & Policy 177, 184-95 (1996) (international law concerns about transfer provisions). The Washington statute automatically deprives children under the age of 18 of the possible benefits of juvenile court jurisdiction based solely upon the acts they have committed without any inquiry into the child’s ability to understand those acts or appreciate their wrongfulness or any of the other factors previously deemed relevant to determine if a child was mature enough to be treated as an adult by the courts. See, e.g., Kent v. United

States, 383 U.S. 541, 566-67, 16 L. Ed. 2d 84, 86 S. Ct. 1045 (1966); State v. Holland, 68 Wn.2d 507, 517, 656 P.2d 1056 (1983). This Court should hold that the “automatic decline” statute, applied in this case to Mr. Boone, violates binding customary international law, and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 19 day of July, 2006.

Respectfully submitted,



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