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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,
Respondent,
vs.
RAFAEL RIVERA,
Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Richardd D. Hicks, Judge
Cause No. 05-1-01484-2

BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>State of Washington</u>	
<u>State v. Bythrow</u> , 114 Wn.2d 723, 790 P.2d 154 (1990).....	6
<u>State v. Dawkins</u> , 71 Wn. App. 902, 863 P.2d 124 (1993).....	9
<u>State v. Hernandez</u> , 58 Wn. App. 793, 794 P.2d 1327 (1990).....	8
<u>State v. Kalakosky</u> , 121 Wn.2d 525, 852 P.2d 1064 (1993).....	7, 8
<u>State v. Ramirez</u> , 46 Wn. App. 223, 226, 730 P.2d 98 (1987)	6
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994)	6
<u>State v. Sanders</u> , 66 Wn. App. 878, 833 P.2d 452 (1992)	7
<u>State v. Smith</u> , 74 Wn.2d 744, 446 P.2d 571 (1968).....	7
 <u>Federal Cases</u>	
<u>Drew v. United States</u> , 331 F.2d 85 (D.C. Cir. 1964)	7
 <u>Statutes</u>	
RCW 9A.44.083	1
 <u>Rules</u>	
CrR 4.4(b)	6

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENT OF ERROR	1
B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT.....	5
THE TRIAL COURT ERRED IN DENYING RIVERA’S MOTION TO SEVER COUNTS I AND II, III AND IV, AND V, WHICH WOULD HAVE RESULTED IN SEPARATE TRIALS FOR EACH OF THE RESPECTIVE THREE ALLEGED VICTIMS	5
E. CONCLUSION.....	10

A. ASSIGNMENT OF ERROR

The trial court erred in denying Rivera's motions to sever the charges.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial court abused its discretion in denying Rivera's motions to sever the charges?

C. STATEMENT OF THE CASE

01. Procedural Facts

Rafael Rivera (Rivera) was charged by second amended information filed in Thurston County Superior Court on April 3, 2006, with five counts of child molestation in the first degree, contrary to RCW 9A.44.083. [CP 33-34].

Trial to a jury commenced on April 4, the Honorable Richard D. Hicks presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 04/05/06 281]. The jury returned verdicts of guilty as charged, Rivera was sentenced within his standard range, and timely notice of this appeal followed. [CP 113-117, 135, 155-165].

02. Substantive Facts

02.1 Counts I and II: 08/04/05 M.F.M. (04/27/95)

On August 4, 2005. M.F.M. (dob 04/27/95) was dropped off at her mother's house when her father went to work. [RP

04/04/06 59-61]. Sometime during the day, while sitting on the couch in the living room, Rivera sat down next to her and began to kiss her between her legs but on top of her skirt. [RP 04/04/06 83, 85]. M.F.M. also explained that Rivera had put her legs between his legs in the groin area, like on his lap, again over her clothes. [RP 04/04/06 90]. Later that night, she told her father what had happened after she had returned home. [RP 04/04/06 98].

Rivera, age 38, was interviewed by Detective Jeremy Knight on August 8, 2005. [RP 04/04/06 121, 127]. When asked to describe his contact with M.F.M. he said:

You know, armpit, armpit. On her - - on her knee or something maybe, you know, just kind of maybe that way, or actually I did rub her back later that day because she was whining about going to McDonald's so I did pat her on the back a couple of times. I poked her belly, and you know from - - because I flicked the cat, and she didn't like that, so she kind of hit me and I poked her. But it was in a kidding way. It wasn't in any....

[RP 04/04/06 127].

When asked if M.F.M.'s leg ever touched over his private area, Rivera responded: "I don't - - maybe, maybe. I'm not sure. Because I mean, we were just sitting there, and I'm just going to...." [RP 04/04/06 128]. When asked if he needed help for his conduct, Rivera responded:

Probably, because this is - - this is very - - you know, this is very embarrassing for one thing, and it doesn't add to the - - it doesn't make things better for me. I mean it's been very, very crappy for me.

[RP 04/04/06 131].

Rivera also admitted that his being under the influence of marijuana and methamphetamine on the in question may have clouded his judgment. [RP 04/04/06134-36]. Additionally, Rivera told Knight that in giving her version, he didn't think M.F.M. was "necessarily lying." [RP 04/04/06 135].

During cross examination, Knight admitted that Rivera never said he intentionally touched M.F.M.'s vagina or that he ever had his face in her crotch area. [RP 04/04/06 139, 144; RP 04/05/06 162-63]. During a follow-up question, Rivera told the officer that his touching of M.F.M. was not "in an angry way or sexual in any way whatsoever." [RP 04/04/06 141]. Knight also admitted during cross examination that every time he got specific, Rivera said he could see how M.F.M. might think this or that, but that's not what happened. [RP 04/04/06 146].

02.2 Counts III and IV: 01/01/04-08/01/05 T.A.T. (01/11/96)

10-year-old T.A.T., dob 01/11/96, testified that Rivera touched her more than once between her legs with his hands sometime after the Christmas before she was interviewed on August 12,

2005. [RP 04/05/06 181, 187-88, 190, 194, 197, 199, 207]. The touching was on top and underneath her dress but over her underwear. [RP 04/05/06 188-89, 208-09]. The alleged incidents occurred at Angela's house except for one time at Mariah's house. [RP 04/05/06 185, 207].

02.3 Count V: 01/01/04-08/01/05 T.M.T. (01/30/95)

11-year-old T.M.T., dob 01/30/95, testified that Rivera touched her more than once between her legs with his hands when she was nine years old. [RP 04/05/06 211, 215-16, 219-220]. The incidents occurred a couple of months apart. [RP 04/05/06 226]. The touching was underneath her underwear. [RP 04/05/06 215]. Rivera told her not to tell anybody. [RP 04/05/06 217, 226]. T.M.T. admitted during cross examination that she had told Detective Amy King that she didn't think Rivera had told her anything. [RP 04/05/06 227].

02.4 Rivera's Testimony re All Counts

38-year old Rafael Rivera denied all allegations of inappropriate sexual contact made by M.F.M. [RP 04/05/06 246], by T.A.T. [RP 04/05/06 248] and by T.M.T. [RP 04/05/06 248].

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D. ARGUMENT

THE TRIAL COURT ERRED IN DENYING RIVERA'S MOTION TO SEVER COUNTS I AND II, III AND IV, AND V, WHICH WOULD HAVE RESULTED IN SEPARATE TRIALS FOR EACH OF THE RESPECTIVE THREE ALLEGED VICTIMS.

Six-plus months before trial, Rivera objected to the filing of the first amended information, which added counts III, IV and V [CP 5-8], arguing "there are some real issues there, in terms of severance and whether these cases should be joined for trial." [RP 09/15/05 6].

And again, frankly, I haven't done a whole lot of extensive research on that yet. But however you rule, whether it is going to be my motion to sever or her (the prosecutor's) motion to consolidate, we are going to argue that, certainly, at some point.

[RP 09/15/05 8].

The court overruled the objection, advising Rivera that

at some point the court needs to address whether the cases move forward in lock step or whether they are either joined - - it's not subject of an Amended Information - - or whether they are several if they are. And it seems to me that, at least for this type of case, the better practice is to permit amendment and then determine whether severance of the counts at trial is appropriate.

[RP 09/15/05 10].

The day before trial, Rivera, reminding the court that he had reserved the issue for argument, moved to sever counts I and II, relating to

M.F.M, counts III and IV, relating to T.A.T., and count V, relating to T.M.T., which would have resulted in separate trials for each of the respective three alleged victims. [CP 16-19; RP 04/03/06 23-29, 40-41]. The court denied the motion. [RP 04/03/06 41]. Rivera again moved to sever the counts at the close of the State's case. [RP 04/05/06 238-39]. The court again denied the motion. [RP 04/05/06 239].

The trial court may sever properly joined offenses if it determines "that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). Although public policy favors joinder in the interests of judicial economy, this interest must be balanced against the even more compelling interest of judicial fairness. State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1987); State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994) (joinder of counts should never be used in such a way as to prejudice a defendant). A defendant seeking severance must show that a trial involving all counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. State v. Bythrow, 114 Wn.2d 723, 718, 790 P.2d 154 (1990). This court reviews a trial court's refusal to sever charges for an abuse of discretion. Id. at 717.

Joinder creates unacceptable prejudice where "the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime

or crimes charged(.)” or “if the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.” State v. Smith, 74 Wn.2d 744, 775, 446 P.2d 571 (1968) (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)). As noted in Drew, “(a) less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feelings of hostility engendered by the charging of several crimes as distinct from only one.” Drew, 331 F.2d at 88.

Factors that may offset any prejudicial effect include (1) the strength of the State’s evidence on each count, (2) the clarity of the defenses to each count, (3) whether the court instructed the jury to consider the counts separately, and (4) the cross-admissibility of the evidence if the cases had been tried separately. State v. Sanders, 66 Wn. App. 878, 885, 833 P.2d 452 (1992).

In reviewing a trial court’s denial of a motion to sever, this court considers (1) the jury’s ability to compartmentalize the evidence; (2) the strength of the State’s evidence on each count; (3) the issue of cross admissibility of the various counts; (4) whether the judge instructed the jury to decide each count separately; and (5) the concern for judicial economy. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

The Kalakosky factors do not support the trial court's decision. The jury could not easily compartmentalize the charges, as three female minors were involved and counts III through V, which involved two victims, allegedly occurred over a 19-month period, while counts I and II, which occurred on a single date, involved the third victim. Also, the evidence regarding all three victims was not strong, essentially leaving the jury to determine the events based on "he said, she said" testimony. And while the defense to all of the charges was a straight denial and the trial court did instruct the jury to consider the counts separately [CP 99], where, as here, three alleged victims are involved, and the State's evidence regarding counts I and II, which, as the trial court acknowledged, may have been stronger because of Rivera's admissions [RP 04/03/06 43-44], the possibility is heightened that the jury cumulated the evidence to find guilt on each count, when if considered separately it would not so find, particularly when taking into consideration the sexual nature of the charges and the hostility engendered by the charging of sexual crimes involving three victims as distinct from only one. See State v. Hernandez, 58 Wn. App. 793, 801, 794 P.2d 1327 (1990) ("It is 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.”); see also State v. Dawkins, 71 Wn. App. 902, 909-10, 863 P.2d 124 (1993).

Since the charging period, as previously stated, for three of the counts covered 19 months, and the other two counts a single date beyond the 19-month period [CP 33-34], it is a stretch to believe that the evidence in the respective counts would be cross admissible, as found by the trial court [RP 04/03/06 47]. As with most cases of this nature, credibility is a crucial factor. And it is on this point that the court’s failure to sever the counts cuts the deepest, causing prejudice, causing interference with the jury’s duty to make relevant credibility determinations, and, in the process, precluding it from making a fair determination of Rivera’s guilt or innocence. In the end, this case essentially turned on the answer to whom the jury was to believe, and the likelihood that the effect of the failure to sever having a practical and identifiable consequence on the jury’s determination of this issue is substantial. The trial involving all counts was thus so manifestly prejudicial as to outweigh the concerns for judicial economy.

Based on this record the trial court abused its discretion in denying Rivera’s motions to sever the charges.

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E. CONCLUSION

Based on the above, Rivera respectfully requests this court to reverse his convictions and remand the case for a new trial.

DATED this 26th day of October 2006.

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CERTIFICATE

We certify that we mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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