

63714-7

63779-7

NO. 63779-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MARCUS D. ANDERSON,

Appellant.

2019 MAY -7 2:10 PM '05

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Did defendant waive appellate review of his motion to sever by failing to renew that motion before or at the close of the evidence?

2. Did the trial court abuse its discretion in refusing to sever two related counts for trial where the State's case was strong on both counts, the defenses were not in conflict or confusing, the jury was properly instructed to consider each count separately, the evidence was otherwise cross-admissible, and judicial economies strongly favored a single trial?

3. Assuming the trial court erred in refusing separate trials, is retrial necessary where it is reasonably probable separate trials would have resulted in the same outcome?

## **II. STATEMENT OF THE CASE**

Defendant was charged by amended information with two counts of violating a no-contact order. The first count was alleged to have occurred on or about November 24, 2008, and was elevated to a felony by the allegation defendant had assaulted the protected party, Amanda Rae Jackson. 1CP 105-06.

The second count alleged defendant violated the order again the next day, November 25<sup>th</sup>. For this violation, however, there

was no allegation he also had assaulted Ms. Jackson, and the charge was a simple misdemeanor. 1CP 105-06.

The affidavit of probable cause, supplemented by the State's pretrial memorandum, reveals that Snohomish County Deputy Sheriff Koster arrived at Ms. Jackson's Lynnwood apartment on November 24, 2008, in response to a call that she had been assaulted. Ms. Jackson, who had gone to work, returned to the apartment once deputies arrived there. 1CP 98-100, 126-28; 2RP 18-25.

Ms. Jackson informed the deputy that in the early morning hours that day, she and defendant had argued in the apartment. At one point, defendant became upset, threw Ms. Jackson down, and repeatedly punched her in the face. Jackson begged him to stop and attempted to leave, but again, he threw her to the ground and punched her in the face until she was bleeding. Dep. Koster photographed marks and bruises on Jackson's face. 1CP 98-100, 126-28; 2RP 18-25.

Defendant prevented her from leaving until approximately 10:45 am, when she went to work. There, a coworker saw her condition and called the police. Defendant was not present at the

apartment when the deputies arrived, nor they did see him that day.  
1CP 98-100, 126-28; 2RP 18-25.

Ms. Jackson explained to Dep. Koster that defendant had been living with her at her apartment for the past two months despite a previous no-contact court order against him. Dep. Koster confirmed the existence of the order. He also took pictures of blood on the floor near the entry way where Ms. Jackson described the assault had occurred. 1CP 98-99, 126-28; 2RP 18-25.

Ms. Jackson returned to work after speaking to Dep. Koster. While there, she received a call from defendant. She thought that he was calling from a pay phone. Later that day, when she finally came home from work, defendant had returned. She did not call the police. She went to bed. 1CP 99-100, 126-28; 2RP 18-25.

Following up, Dep. Koster traveled to the apartment the next day, November 25<sup>th</sup>, to see if the defendant had returned. He was located inside, in bed. Defendant was informed he was under arrest for violation of a court order and assault and he denied both. As defendant was escorted to the patrol car, he called out to Ms. Jackson, "Nothing would happen if you didn't say anything." 1CP 98-100, 126-28, 2RP 18-25.

On June 4, 2009, the Honorable Thomas J. Wynne of the Snohomish Superior Court conducted a 3.5 hearing. The court heard testimony from Deputies Koster and Dawson (the latter having assisted Koster with the arrest) and found defendant's statements were admissible. 1RP 4-27<sup>1</sup>.

At the conclusion of the hearing, defendant lodged an oral motion to sever the counts for trial, citing CrR 4.4(b). After argument from counsel, Judge Wynne denied the motion:

It appears to me this involves a continuing course of conduct occurring a very short time from each other. They are similar in the same kinds of acts, same charge. It appears to me that he defendant would not be unduly prejudiced by having these matters joined for trial.

1RP 30-31; 1CP 104.

On the morning of June 8, 2009, the day scheduled for trial, defendant submitted a memorandum to the trial judge, the Honorable David A. Kurtz. In it, defendant renewed his motion to sever, repeating his argument from the previous hearing. 1CP 93-97.

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<sup>1</sup> The report of proceedings for the June 4, 2009, 3.5 hearing is designated herein as 1RP. The report of proceedings for the June 8 pretrial hearings and trial is designated as 2RP. The third volume of the report of proceedings, covering the continued trial on June 9<sup>th</sup> and 10<sup>th</sup> is referred to herein as 3RP.

Judge Kurtz heard the motion prior to selection of the jurors, and commencement of the trial. The evidence before the court at that time consisted of the facts outlined in the affidavit of probable cause, the anticipated testimony detailed in the parties' pretrial memorandums, and the verbal assertions of counsel. 1CP 99-100, 126-28; 2RP 17-25. In deciding the motion, the court enunciated the four part severance test found in State v. York, 50 Wn. App. 446, 454, 749 P.2d 683 (1988). It reviewed each of the four factors and its findings on the record and denied the motion to sever. 2RP 25-28.

The court went on to address other motions in limine. Subsequently, the jury was selected, and later that day, trial commenced. The State called three witnesses: Amanda Jackson, Deputy Dawson and Deputy Koster. 2RP 59-96, 3RP 1-29, 54-56; 3RP 29-53; and 3RP 56-115.

Testimony from the three witnesses was consistent with that detailed in the pre-trial memorandums. Some relevant detail was added in that Dep. Koster informed that he had also returned to the apartment on the 24<sup>th</sup> after speaking to Ms. Jackson to see if defendant had returned, but found no one home. 3RP 75. Dep. Koster also testified he took photographs of defendant on the 25<sup>th</sup>,

specifically the sizable rings he was wearing on his left hand when arrested. 3RP 83-85. This tied into the events of the 24<sup>th</sup> given that Ms. Jackson testified that when defendant was striking her in the face that day, she was being hit by the rings he was wearing on his left hand. 2RP 67.

Defendant called no witnesses and did not testify. 3RP 115. Defendant never renewed his motion to sever after trial commenced. 2RP, 3RP.

The jury was instructed both orally and in writing to consider each count separately. 3RP 121; 1CP 64. Subsequently, it returned verdicts of guilty on both counts. 1CP 54, 55.

### **III. ARGUMENT**

#### **A. DEFENDANT HAS WAIVED APPELLATE CONSIDERATION BY FAILING TO TIMELY RENEW HIS PRETRIAL MOTIONS TO SEVER BEFORE OR AT THE CLOSE OF ALL THE EVIDENCE.**

Where two offenses are joined in the same charging document, they are deemed “consolidated” and will be heard and decided in a single trial. CrR 4.3.1(a).

Under CrR 4.4, a court may nonetheless order separate trials on the counts at defendant’s request. Such motion, however, must be both timely brought and timely *renewed* or severance is waived:

(a) Timeliness of Motion--Waiver.

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. *Severance is waived by failure to renew the motion.*

CrR 4.4(a) (emphasis added)

By its plain words, CrR 4.4(a)(2) above, the requirement that a pretrial motion must be renewed "*before* or at the close of evidence," is a requirement that a pretrial motion be renewed sometime *during trial*, once evidence has begun to be presented, or at the close of evidence. This plain reading has been endorsed by appellate courts:

[Defendant] made his severance motion prior to trial, but he did not renew it *during or at the close of trial*. Under CrR 4.4(a)(2), a defendant who fails to renew a motion for severance before the end of trial waives the issue.

State v. MacDonald, 122 Wn. App. 804, 814, 95 P.3d 1248

(2004)(emphasis added).

The defendants failed to renew their severance motions *during trial*.

[Recitation of CrR 4.4(a)].

Here, whereas the defendant timely moved to sever their ... charges, it appears they failed to renew their motions before or at the close of all the evidence. Accordingly, we hold that this issue is waived[.]

State v. McDaniel, \_\_\_ Wn. App. \_\_\_\_, \_\_\_ P.3d \_\_\_ (2010 WL 1694522, pp. 13-14) (emphasis added). See also State v. Standifer, 48 Wn. App. 121, 737 P.2d 1308 (1987)(Defense counsel's failure to renew severance motion at trial reviewed under ineffectiveness of counsel claim.)

Here, the trial court denied [defendant's] pre-trial motion to sever the offenses. Because he failed to renew the motion to sever before the close of trial, Bryant waived the issue of severance and cannot raise it on appeal.

State v. Bryant, 89 Wn. App. 857, 864-65, 950 P.2d 1005 (1998).

In State v. Hernandez, 58 Wn. App. 793, 797, 794 P.2d 1327 (1990), however, this court noted that where a defendant brought his first and only motion to sever on the morning of trial instead of at the omnibus as ordered, such motion was "not a motion made 'before trial,' as that term is used in CrR 4.4(a)."

This ruling, however, does not appear to challenge the requirement a pre-trial motion to sever must be *renewed during* trial or at the close of evidence. Rather, a closer reading reveals the

decision supported the trial court's refusal to hear a late-brought *first* motion to sever under CrR 4.4(a)(1), which states a motion to sever is waived unless *first* brought *before trial* unless the interests of justice otherwise require.

That a motion to sever brought on the morning of trial despite orders to bring such at a previous omnibus hearing might be deemed insufficiently "before trial," does not call into question CrR 4.4(a)(2)'s requirement that a *renewed* motion to sever must be brought *during trial* or the motion is waived.

Here, defendant's first motion to sever was timely pursued and heard before trial at the 3.6 hearing in front of Judge Wynne. Defendant's *renewed* motion before Judge Kurtz, however, was also a *pretrial* motion, being heard, as it was, prior to trial, other motions in limine, and impaneling of the jury.

Coming when it did, this second pretrial motion to sever precluded the court from rendering a decision informed by an evidentiary record. Rather, the court's factual understanding was again limited to pretrial assertions: the probable cause affidavit; what was detailed in the trial memorandums from defendant and the State; and argument. 1CP 94, 98-101; 2RP 19-28.

The court emphasized the undeveloped evidentiary record in its review of the relevant severance factors in deciding the renewed motion:

No. 1, the strength of the State's evidence. Frankly at this point it's difficult for me to comment on since I really haven't heard any evidence. It would seem that there are representations from each side, but there is not a great deal of evidence in front of me in that respect.

1CP 27.

No. 2, the clarity of defenses, again, I have not heard from [defense counsel] on this point.

1CP 27.

And No. 4, the cross admissibility. Again, it's a little difficult for me to weigh this fully at this point not having heard the evidence.

1 CP 28.

Judge Kurtz also repeatedly emphasized the tentative nature of this second pretrial ruling, reminding defense it could renew the motion later in trial. The court so reminded defendant before its review of the facts:

**The Court:** [Defense Counsel], you are certainly entitled to reraise the issue, *and I think the case law and rules allow you to raise it again later. ...*

**[Defense]:** That's my understanding as well your honor.

2RP 19 (emphasis added).

It did so during its review of the facts:

**The Court:** As I indicate, the parties can always reraise this issue later after the evidence perhaps becomes clear.

1RP 27.

It did so after its review of the facts and *within* its very ruling:

**The Court:** So, in consideration of those four factors, I am, at least, *at this point in time* going, to respectfully deny the motion for severance.

1CP 28 (emphasis added).

Despite such counseling, defendant never renewed its pretrial motions to sever during trial. Defendant has thus waived the issue on appeal.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S PRETRIAL MOTION TO SEVER.**

As noted above, where two counts are joined in the same charging document, the presumption is they are to be tried together. CrR 4.3.1(a). This presumption reflects a predisposition in Washington against separate trials, a predilection arising from concerns of judicial economy. State v. Torres, 111 Wn. App. 323, 332, 44 P.3d 903 (2002).

This presumption, however, can be overcome where the potential for prejudice to a defendant from a single trial is sufficiently strong. The criminal rules require a court to grant a defendant's motion to sever where it determines "severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

Whether or not a fair determination requires severance depends upon a two part determination: (1) an analysis of the "potential for prejudice" in a joint trial; and (2) a weighing of that potential against the benefits of judicial economy. State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994); State v. Bythrow, 114 Wn.2d 713, 790 P.2d 154 (1990).

Washington jurisprudence has developed a four part test for assessing the "potential for prejudice":

In determining whether the potential for prejudice requires severance, relevant factors include (1) the strength of the State's evidence on each count, (2) the clarity of defenses as to each count, (3) whether the trial court properly instructed the jury to consider each count separately; and (4) the admissibility of evidence of the other crimes.

State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989); see also Russell, 125 Wn.2d at 63; and York, 50 Wn. App. at 454.

As noted above, a finding that there exists a potential for prejudice does not automatically necessitate severance. Rather, prejudice concerns must be weighed against the benefits of judicial economy in a single trial.

In determining whether the potential for prejudice requires severance, a trial court must consider [the above four part test]. *In addition, any residual prejudice must be weighed against the need for judicial economy.*

Russell, 125 Wn.2d at 63 (emphasis added).

Defendant's seeking severance must not only establish that prejudicial effects of joinder have been produced, but they must also demonstrate that a joint trial would be so prejudicial as to outweigh concern for judicial economy.

State v. Bythrow, 114 Wn.2d 713, 722, 790 P.2d 154 (1990).

The trial court's decision not to sever is reviewed on an abuse of discretion basis. Russell, 125 Wn.2d at 63 ("On review, a trial court's refusal to sever charges is reversible only where it constitutes a manifest abuse of discretion.") Proving the manifest abuse of discretion is defendant's responsibility. State v. Robinson, 38 Wn. App. 871, 881, 691 P.2d 213 (1984) ("[T]he defendant bears the heavy burden of demonstrating that the trial court's denial of severance was an abuse of discretion.")

Here, defendant cannot carry his burden of establishing that there existed a sufficiently large potential for prejudice so outweighing concerns of judicial economy that the trial court's denial of his pre-trial severance motion constituted a manifest abuse of discretion.

**1. Defendant Has Not Shown A Substantial Potential For Prejudice.**

**a. The strength of the State's evidence on each count favored a single trial.**

A great disparity in the evidentiary strength of the individual joined charges favors severance. State v. MacDonald, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004) (“When one case is *remarkably* stronger than the other, severance is proper.”) (Emphasis added.) The concern is whether “a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case.” Hernandez, 58 Wn. App. at 801.

Here, based on the evidence available pretrial, the court found there was some dissimilarity, that the second count appeared stronger, but there was not such dissimilarity so as to warrant severance:

I gathered from the counsel's comments that [defense attorney], at least, would indicate that the first count is weaker and there's some common sense to that notion. Although I am told that, at least, there is some alleged physical evidence that is observed which would tend to corroborate the State's theory regarding Count I. So I do not see this factor as really favoring severance either way at this point.

2RP 27.

Defendant challenges this finding, comparing the instant facts to those supporting the multiple robberies prosecuted in Hernandez. There, the strength of the evidence as to each separate charge varied across a wide spectrum. One count was supported by three eyewitnesses to the crime, each with a strong certainty defendant was the one they saw (certainties of 100%, 98%, and 75-80%). Another charge involving a different victim occurring a week earlier was supported solely by a single witness with only 65% certainty. Id. at 800.

Here, the evidence known to the court pretrial as to each count was of a reasonably similar and strong magnitude. With regard to November 24<sup>th</sup> charge, direct eyewitness testimony of the victim Ms. Jackson made clear defendant was both at her apartment and the one who had assaulted her. That an assault occurred there was not reasonably in question given her bruising

and the fact blood was observed and photographed on the floor in the area where she explained defendant had repeatedly punched her. Further, defendant's exhortation to Ms. Jackson "not to say anything and it will go away" the next day mid-arrest reasonably appeared to be an incriminating statement that he had committed this offense.

With regard to the charge from the 25<sup>th</sup>, the evidence consisted solely of eyewitness testimony, again Ms. Jackson's, but also that of the deputies who found defendant inside the apartment that date. While the evidence may have been stronger with regard to the second offense, it cannot be said that it was *remarkably* stronger such that it was an abuse of discretion not to sever.

Additionally, even if the quantum of the evidence as to each charge were found to be grossly disparate, the prejudicial effect is negated where, as here, the evidence would have been before the jury regardless given it was properly cross-admissible in separate trials. This further distinguishes the instant matter from Hernandez. There, the prejudicial bootstrap effect of the disparately strength of the evidence was compounded by the fact that none of it would have been cross-admissible at separate trials. Id. at 799. Here,

the evidence was cross-admissible. (Cross admissibility is addressed more fully, *infra*.)

Here, defendant has not carried his burden of showing the evidence known to the court as to each count was of such disparate strength that failure to sever constituted an abuse of discretion.

**b. The clarity of defenses as to each count favored a single trial.**

In addressing the “clarity of defense” factor, this court has noted, “mutually *antagonistic* defenses will not support a motion for severance unless the defendant demonstrates prejudice.” State v. Watkins, 53 Wn. App. 264, 270, 766 P.2d 484 (1989) (emphasis added). The court has expanded on the quantum of conflict/antagonism required for severance-worthy prejudice in the context of co-defendants’ defenses:

To warrant severance, the defenses must be mutually exclusive to the extent that one must be believed if the other is disbelieved.

State v. Medina, 112 Wn. App. 40, 53, 48 P.3d 1005 (2002).

Here, in assessing the “clarity of defenses” factor prior to trial, Judge Kurtz noted that while defendant had not yet fully

explained what its defenses were, nothing had been presented to presume they would conflict with each other.

As to No. 2, the clarity of the defenses, *again, I have not heard from [defense counsel] on this point.* I think what is significant, I do not see the fundamental disconnect that might be raised to these counts.

2RP 27 (emphasis added).

On appeal, defendant has now identified his defenses as a general denial of the November 24<sup>th</sup> charge, and a non-defense/admission to that of November 25<sup>th</sup>. Defense claims that “the conflict between the two defenses [...] likely confuse[d] the jury,” resulting in such prejudice that the court’s refusal to sever constituted an abuse of discretion. Br. of Appellant, p. 10.

These “defenses” are not mutually exclusive. Indeed it is hard to discern any conflict or antagonism between a general denial to one charge and an admission to the other. Further, even if “mutually exclusivity” or “antagonism” or even “conflict” were not the threshold severance standard, but that potential “confusion” engendered by merely differing defenses sufficed, there would be no confusion from the defenses defendant now points to on appeal.

There is nothing confusing to a jury in the claim that I am guilty of crime X, but deny Y. Indeed, most defenses involve an

admission to one or more elements of a crime, but denial of others. There is no reason to believe a jury could not employ the same understanding with regard to the greater notion of offenses.

Further, even if defendant's claim had merit - that a simultaneous concession to one charge and a general denial of the other would somehow "confuse" the jury - defendant did not inform the court he would be conceding the charge of to the 25<sup>th</sup> prior to its severance decision.

Defendant's trial memorandum notes, "Defense's argument is that there was no contact between [...] the defendant and Ms., Jackson on November 24<sup>th</sup>. It is silent as to any defense as to the charge of the 25<sup>th</sup>. Given this, the court specifically asked for more information:

**The Court:** Could I just inquire, [Defense counsel], if you wish, you needn't respond to this question, but did you wish to tell me anything more about the respective defense on the respective counts.

**[Defense Counsel]:** Your Honor, with regard to November 24<sup>th</sup>, the defense is essentially denying it.

[...]

With regards to Count II, it is very clear that he was in violation of the order because he was at her residence, and there will really be no factual dispute as to that.

2RP 24-25.

The above is not a statement that there would be *no defense* to the November 25<sup>th</sup> charge, only that defendant would not deny he was at the apartment. If the above were intended as a concession of guilt, why, the trial court would have necessarily wondered, did defendant not enter a plea of guilty to that charge? After all, pleading guilty pretrial to that charge would have put defendant in a better posture to argue that the events of the 25<sup>th</sup> should not be put before the same jury reviewing those of the 24<sup>th</sup> - the sole remaining charge. Arguments of judicial economy would then have then been in favor of *excluding* testimony as to 25<sup>th</sup> and admissibility would be resolved solely under an ER 404(b) review.

Further, there were a number of defenses still available despite an admission to being in the apartment on the 25<sup>th</sup>. These include a claim that defendant was unaware he was subject to the restraining order. On appeal, defendant claims that he never made this mens rea argument at trial. At the time of the pretrial motions, however, the court had no knowledge this was to be the case. No assertion that there would be no mens rea defense was before it. Br. of Appellant, p. 13; 2RP 1-30.

Ultimately, what would have been certain to the trial court was that defendant had *some defense*, though defendant had yet to explain what it was. That the trial court assumed such can be seen in its subsequent findings as to this prong: “As to ... the clarity of the defenses, again, I have not heard from [defense counsel] on this point.” 2RP 27.

In short, the court, when presented with defendant’s pretrial motion for severance was not properly informed as to what defendant’s defense was with regard to November 25<sup>th</sup> despite its request. Moreover, even if it had been informed defendant was conceding the charge, there was no confusion created for the jury in separating an admission to the charge of the 25<sup>th</sup> from a denial of the charge regarding the 24<sup>th</sup>.

**c. The trial court properly instructed the jury to consider each count separately thus favoring a single trial.**

The jury was instructed both orally and in writing:

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.

3RP 121; 1CP 64.

In rejecting similar severance-prejudice claims, this court has pointed to this instruction and emphasized, “The jury is presumed to follow the court’s instructions.” York, 50 Wn. App. at 451.

Additionally, the expectation the jurors were able to separately address the charges is buttressed given the instant trial’s brevity and the straightforwardness of the issues:

When the issues are relatively simple and the trial lasts only a couple of days, the jury can reasonably be expected to compartmentalize the evidence.

Bythrow, 114 Wn.2d at 721.

Defendant concedes that the instruction ameliorates potential prejudice from consolidated trial on joined counts. Br. of Appellant, p. 11. He argues, however, such instruction is not dispositive, pointing to a case where this instruction was given but an abuse of discretion in failing to sever was found nonetheless: State v. Harris, 36 Wn. App. 746, 677 P.2d 202, 205 (1984).

There, however, the reviewing court took care to point out that the instruction was ineffective in light of the enhanced prejudice due to the blatant cross-inadmissibility of the evidence had there been separate trials:

In any event, the prejudice-mitigating factor that evidence of each rape would be admissible in a separate trial for the other, is glaringly absent. This

being so, there is a clear violation of the rule prohibiting use of evidence of other crimes or misconduct in order to convict. ER 404(b).

Id. at 750.

Where this cross-inadmissibility factor is not “glaringly” present, appellate courts have more comfortably rejected prejudice claims pointing to the counterbalancing effects of this instruction:

[Defendant] contends, additionally, that the trial court's limiting instruction to the jury failed to ameliorate any prejudice that may have resulted from joinder of the charges, and that evidence on each count would not have been admissible had the two counts been tried separately. We are satisfied that the trial court's instruction to the jury was sufficient to eliminate any prejudice.

State v. Cotton, 75 Wn. App. 669, 688, 879 P.2d 971(1994).

Here, the evidence was cross-admissible. See *Infra*. Any remaining potential for prejudice in a consolidated trial was sufficiently ameliorated by the court's instruction above, the relative straightforwardness of issues, and the presumption that the jury followed this instruction.

**d. The cross-admissibility of the evidence favored a single trial.**

The issue presented under this factor concerns “the admissibility of the evidence of the other crimes ... if they had been

tried separately[.]” State v. Gatalski, 40 Wn. App. 601, 607, 699 P.2d 804 (1985).

Admissibility at separate trials of other crimes or wrongs is governed under ER 404(b):

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

Defendant, on appeal, argues that close calls under this standard should result in exclusion of the evidence, quoting State v. Sutherby, 165 Wn. 870, 887, 204 P.3d 916 (2009). Br. of Appellant, p. 13. The predisposition toward exclusion in a normal 404(b) analysis, however, is tempered in a cross admissibility-*severance* analysis:

A ruling on a motion to sever is based on a weighing of the probative value of any cross-admissible evidence against the prejudicial effect of evidence the jury would not otherwise hear, but in the weighing process the beneficial results of joinder are added to the probative value side. Therefore a defendant seeking *severance must make an even stronger showing* of prejudicial effect than would be required in determining whether to admit other-crimes evidence in a severed trial.

Bythrow, 114 Wn.2d at 722.

Here, defendant cannot show the court abused its discretion in refusing to sever as the evidence was cross admissible for reasons of proving “res gestae,” common plan or scheme, and identity.

**i) The evidence was cross-admissible under the Res Gestae or “Same Transaction” exception to ER 404(b).**

Defendant argues “the court abused its discretion by refusing to consider this matter” citing to J. Wynne’s statement that “whether the statements are admissible as to both or only one is a mater to be taken up by the trial judge.’ 6/4/09RP 30.” Br. of Appellant, p. 15.

This claim, however, entirely ignores Judge Kurtz’s subsequent and more thorough pretrial severance review. Here, the court specifically addressed each of the four “potential for prejudice” prongs on the record. 2RP 26-28. In addressing “cross admissibility,” Judge Kurtz noted it was difficult to decide before actually having heard the evidence, but nonetheless held:

Based on the representations as I have already alluded to, this is an instance where, if not an ongoing matter, at least, they would have been very close in time, separate by a day, and they involve the same alleged victim. I think it would be very difficult for the jury to conclude, considering this in a vacuum, that at least, to some degree, I would expect that the evidence in the case would be cross admissible.

2RP 28.

The court's analysis above is more formally a recognition the evidence was cross-admissible under "res gestae" or the "same transaction" exception. Here:

A defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events. Under 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 events close in both time and place to the charged crime.

State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004).

The general notion [of res gestae admissibility] is that other misconduct is admissible if it is so connected in time, place, circumstances, or means employed that proof of such other misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged.

5 Karl B. Tegland, WAPRAC § 404:18 (2007).

In the instant matter, defendant committed a string of connected crimes. He violated the same order protecting the same victim by his presence in the same place over a short period as discovered in a single uninterrupted investigation by the same deputy. To have severed the evidence by date would have

fragmented the State's case, precluding relevant information from one date that was inextricably intertwined with the crime of the other date.

The events of the 24<sup>th</sup> are necessary to a fair understanding of the events of the 25<sup>th</sup>. Absent the events of the 24<sup>th</sup>, a jury deciding the charges of the 25<sup>th</sup> would have had no understanding as to why Deputy Koster arrived at Ms. Jackson's apartment that date, asking her for permission to search. The remaining evidence would have painted Dep. Koster as some overzealous official, randomly seeking to enter residences to ensure court orders were not being violated.

Further, the events of the 25<sup>th</sup> were relevant and necessary to give context to and understand those of the 24<sup>th</sup>. Defendant's denial that day of the previous assault was relevant. Also relevant and necessary from that day was defendant's pleading admission to Ms. Jackson upon being taken into custody: "If you didn't say anything, nothing would happen."

Defendant claims the latter statement was inadmissible as to the events of the 24<sup>th</sup> because "there is no evidence that the statement referred to the felony on November 24." Br. of Appellant, p. 14.

The proper standard in relevance-admissibility foundational determinations follows:

The judge determines only whether the proponent has made a *prima facie* showing that the... evidence is relevant. The evidence should be admitted if the foundation evidence is sufficient to support a finding of the fulfillment of the condition.

5 Karl B. Tegland, WAPRAC § 104:7 (2007); see also ER 104(b).

Here, evidence of the circumstances surrounding the statement sufficiently established a *prima facie* showing defendant was referring to the events of the 24<sup>th</sup>. The statement was made after defendant was informed he was under arrest for violation for the order and for assault. It cannot refer to a violation of the order on the 25<sup>th</sup> because whether or not *the victim* admitted defendant was in her apartment on the 25<sup>th</sup> was facially irrelevant to defendant - he had *just* been found inside the apartment in violation of the order that date by numerous deputies. Given this, whether or not the *victim* "didn't say anything" as to his presence there on the 25<sup>th</sup> could not have been meant by him to mean "nothing would happen" as a violation of the order for being in the apartment on the 25<sup>th</sup>. Indeed, it is difficult to understand this statement as referring to something *other* than the events of the 24<sup>th</sup>, specifically the assault that was not directly witnessed by the law enforcement officers.

Moreover, the statement cannot be separated from the context in which it was uttered – in the presence of and directed to Ms. Jackson - a violation of the no-contact in and of itself. Thus, the circumstances necessary to give the statement meaning necessarily entailed evidence of defendant's continued violation of the order.

While defendant goes on to claim that these crimes were too far separated in time to be cross admissible, the Supreme Court has upheld admission of a variety of crimes across a 48 hour period under res gestae. See e.g. State v. Lane, 125 Wn.2d 825, 834, 889 P.2d 929 (1995).

In Lillard, the time span was even greater. There defendant was charged with possession of stolen property, being found with sweaters stolen from a department store. Citing res gestae, this court admitted evidence as to defendant's involvement in a large scale fraud of the store involving illegally altered gift cards and merchandise returns extending back, apparently, a month prior to his possession of the stolen sweaters. Id. at 425-32.

Here the events were closely related in time, place, and shared relevant facts. Providing the jurors a non-fragmented exposition of the continuing events favored cross-admissibility.

**ii) The evidence was cross admissible under the Common Plan or Scheme, Identity, and Opportunity exceptions to ER 404(b).**

Evidence otherwise inadmissible may become admissible where it tends to establish a greater plan or common scheme in which defendant is charged with one or more crimes that are also a part of that greater scheme. State v. Lough, 125 Wn.2d 847, 855, 889 P.2d 487 (1995).

Here, defendant's overall plan was one of residing with the victim, living with her at her apartment on the dates in question and the previous two months despite a court order prohibiting such. The separate dates charged are simply individuated instances of that one overall plan, with an assault also occurring on the first charged date.

The relevance of this overall residential plan is compounded by the fact defendant's central challenge to the charge of the 24<sup>th</sup> was one of identity – that he could not have been the individual who assaulted her in her apartment in light of its defense “that there was no contact between [...] defendant and Ms. Jackson on November 24, 2008.” 1CP 95.

Testimony from Ms. Jackson and photos of the blood tended to establish that the assault she obviously suffered occurred in the

early morning hours at her apartment. If defendant was, in fact, living with her on the 24th, he was more likely to have the one present despite his claim of no contact with her. Defendant's request for separate trials would have resulted, for a separate trial as to the 24<sup>th</sup>, in no evidence being before the jury (aside from her claim) that defendant was *ever* in her apartment.

Proof of defendant's residential plan and his presence there on other occasions also tended to prove defendant would have had the "opportunity" to commit the assault inside the apartment in the early morning hours.

[E]vidence may be relevant to show opportunity if the evidence demonstrates the ability of a defendant to commit a crime because of the favorable combination of circumstances, time, and place that serves to identify the defendant.

5 Karl B. Tegland, WAPRAC § 404:19 (2007).

The fact of his residential plan and his presence in the apartment on the 25<sup>th</sup> tends to establish his presence in Ms. Jackson's apartment in the early morning hours of the 24<sup>th</sup>, a fact central to the case given his defense that he had no contact with the victim on that date and thus did not commit the assault. None of this evidence was admitted to show he had a criminal propensity or character tending to violate court orders – the reason for

excluding other act evidence in separate trials. Evidence of the residential plan was relevant to prove identity, and opportunity to commit the offense, specifically the assault. “[I]f evidence is relevant to the issue, it is not to be excluded because it may tend to show that the accused has committed another and different crime.” State v. O'Donnell, 195 Wash. 471, 474, 81 P.2d 509 (1938).

## **2. Concerns Of Judicial Economy Outweighed Any Potential For Prejudice.**

As detailed *supra*, even if a potential for prejudice in consolidated trial was present, defendant must still show such prejudice so outweighed the benefits of judicial economy in a single trial such that the court's denial of the motion constituted an abuse of discretion. Russell, 125 Wn.2d at 63; Bythrow, 114 Wn.2d at 722.

The judicial economies of a single trial were addressed in Bythrow:

A single trial obviously only requires one courtroom and judge. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is significantly reduced when the offenses are tried together. Furthermore, the reduced delay on the disposition of the criminal charges, in trial and through the appellate process, serves the public. We find these considerations outweigh the minimal likelihood of prejudice through joinder of the charges in this case.

Id. at 723.

Here, those factors favored a single trial. Additionally, judicial economy was particularly favored in this case. Separate trials would have necessitated calling the exact same witnesses a second time. Ms. Jackson obviously had to testify as to both dates. The same is true for Deputy Koster, responding to the apartment on both dates, taking photos on the 24<sup>th</sup>, arresting defendant on the 25<sup>th</sup>. Even Deputy Dawson, involved only with the arrest on the 25<sup>th</sup>, would have to have given testimony in the trial of the 24<sup>th</sup> (given his testimony was primarily that of recounting defendant's statement to the victim that if she "did not say anything, nothing would happen" referred to the events of the 24<sup>th</sup>.)

Defendant attempts to counter the above by claiming that if there had been separate trials, he may well have pleaded guilty to the charge or asked for a bench trial. The former assertion is dubious, given he did not in *actuality* plead to the charge before the trial here, despite the incentives to do so, as detailed *supra*.

The latter assertion, while saving labor associated with picking a jury, nonetheless results in largely the same duplication of

time, effort, and expenses for the Court, the State and all the witnesses.

Even if defendant had shown a potential for prejudice in a single trial, defendant cannot show such prejudice so outweighed the judicial economies of a single trial particularly present here as to render the trial court's decision not to sever an abuse of discretion.

### **C. HARMLESS ERROR.**

Even where a defendant has shown a trial court's decision not to sever constituted an abuse of discretion, such abuse does not necessitate retrial where such error is harmless.

[W]e conclude that the denial of the severance motion amounted to a manifest abuse of the trial court's discretion.

Despite the error, we must consider whether the trial court's error was harmless. Where, within reasonable probabilities, the outcome of the trial would not have been different had the charges been severed, the error is deemed harmless.

State v. Hernandez, 58 Wn. App. 793, 800-01, 794 P.2d 1327 (1990).

With regard to the charge of the 25<sup>th</sup>, any error in a joint trial was harmless. Defendant was found by multiple law enforcement officers at the protected party's residence in violation of the order.

Defendant on appeal even concedes the case here was sufficiently strong that if tried separately defendant may well have entered a plea of guilty to this charge. Br. of Appellant, p. 16.

With regard to a separate trial as to the events of the 24<sup>th</sup>, even if the court's decision to sever constituted an abuse of discretion, given the photographs of the injuries and the uncontested testimony of the victim that defendant was responsible, it is reasonably likely that the outcome of a separate trial on that charge would have resulted in the same verdict. Retrial on either charge is not warranted.

#### **IV. CONCLUSION**

For the foregoing reasons, defendant's appeal should be dismissed.

Respectfully submitted on May 5, 2010.

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