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NO. 68024-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN DUBLIN,

Appellant.

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CLERK OF COURT  
COURT OF APPEALS  
DIVISION I  
SEATTLE, WA  
68024-2-I



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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Here, the defendant was charged with burglarizing the home of a 12-year-old girl and attempting to rape her. The victim testified that she was asleep in her room when she was awakened by an intruder who demanded that she remove her clothes and “bend over” and said that he had already killed her older sister. The victim testified that when she heard the defendant’s voice in a police lineup, its familiarity as the voice of her attacker stunned her. The defendant knew the victim’s older sister, though he apparently did not realize she was not at home on the night of the attack. The characteristics of this burglary and attempted rape closely matched many signature characteristics of other completed rapes in the same area, after which the defendant’s DNA was obtained from those victims’ persons. Was the evidence, viewed in a light most favorable to the State, sufficient to establish the defendant’s guilt?

2. To prevail on a claim of ineffective assistance, a defendant must show that his counsel’s performance was deficient and that

there is a reasonable possibility that it altered the outcome of the proceedings. Failure to satisfy either prong defeats a claim. Here, the defendant claims that his trial counsel provided ineffective assistance because he failed to renew a pretrial motion to sever certain counts from others at the close of the State's case-in-chief. However, the defendant cannot demonstrate that joinder of the counts created the risk of unfair prejudice to him, and all of the factors to be taken into account when considering a severance motion would have supported denial of that motion at the conclusion of the State's case. Given his inability to demonstrate that a severance motion would have been granted had it been renewed, does the defendant fail to establish ineffective assistance?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The appellant, Brian Dublin, was charged by amended information with the first-degree burglary and rape of E.P. on January 10, 2010 (Counts I and II); the first-degree burglary and attempted rape of G.G. on July 2, 2006 (Counts III and IV); the first-degree burglary and rape of A.B. on October 8, 2003 (Counts V and VI); and attempted indecent liberties with regard to C.B. during

a period of time intervening between January 1, 2009, and February 19, 2010 (Count VII). CP 172-75.

By jury verdicts rendered on September 29, 2011, Dublin was convicted on all charges other than Count VII, on which the jury was unable to reach a unanimous decision. CP 196-203, 251.

## 2. SUBSTANTIVE FACTS

At approximately 3:30 a.m. on January 10, 2010, 16-year-old E.P. was suddenly awakened in her darkened bedroom at her parents' home on Vashon Island by a man who was on top of her. 11RP 1617, 1638.<sup>1</sup> E.P. reached up to touch the man's face, suspecting that the man might have been her boyfriend, Shane Gable. 11RP 1639, 1656. When she felt a beard, she knew he was not the clean-shaven Gable. 11RP 1639.

In a distinctive voice, the man told E.P. not to make a sound or he would kill her. 11RP 1640. Terrified, E.P. "froze" as the man removed her underwear and digitally penetrated her vagina. 11RP 1639-40. He then penetrated E.P. with his penis. 11RP 1640-41. When he finished raping E.P., the attacker demanded to know if he

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<sup>1</sup> The verbatim report of proceedings consists of 18 volumes, referred to in this brief as follows: 1RP (8/29/11); 2RP (8/30/11); 3RP (8/31/11); 4RP (9/7/11); 5RP (9/8/11); 6RP (9/12/11); 7RP (9/13/11); 8RP (9/14/11); 9RP (9/15/11); 10RP (9/19/11); 11RP (9/20/11); 12RP (9/21/11); 13RP (9/22/11); 14RP (9/26/11); 15RP (9/27/11); 16RP (9/28/11); 17RP (9/29/11); and 18RP (12/2/11). Pagination through volumes 1RP through 16RP is consecutive.

“needed to come back” and warned E.P. not to tell anyone he had been there, or he would be forced to return. 11RP 1641.

The attacker then left E.P.’s bedroom; E.P. waited until she heard the home’s front door, which the family usually left unlocked, close, and then got up to run to her parents’ room. 11RP 1592, 1642-43. E.P. was so traumatized by her victimization that she urinated on herself before she could make it to her parents’ room. 11RP 1642-44. She awakened her parents, who called 911. 11RP 1644-45.

E.P. told the officers who responded to her house, which was in a wooded, isolated location far from other residences, that she suspected her attacker was Dublin, who was then in his late-twenties, and who had been sending her numerous text messages inviting her to parties. 11RP 1629-30, 1644-45. E.P. explained that at one party she had attended at Dublin’s house the previous summer, she had awakened alongside Dublin in his bedroom; she was wearing only her underwear, and had no recollection of anything that had occurred after having a few sips of her first beer upon her arrival there. 11RP 1624-28.

E.P. had also briefly seen Dublin earlier on the night of January 9-10, 2010, when he arrived at a party that E.P. was

attending. 11RP 1634-35. Dublin had a beard and was wearing a dark pullover at the party. 11RP 1644-45. Surveillance film obtained from a bar on the island showed a bearded Dublin, wearing a dark sweatshirt, ordering drinks. 6RP 739-743. Dublin closed his tab at the bar at 1:51 a.m. on the morning of January 10. 6RP 746.

DNA obtained from E.P.'s rape examination matched male DNA obtained from an unsolved rape case on the island in 2003. 14RP 1985. At approximately 3:00 a.m. on October 8, 2003, 16-year-old A.B. was asleep in her bedroom in her parents' home -- located in a wooded, isolated area, and a home in which the external doors were generally left unlocked -- when she awakened to a man standing next to her bed. 5RP 551, 579. In a low, raspy whisper, and brandishing a knife, the man told A.B. to shut up and take off her shirt. 5RP 584-86. The man said that he had already tied up A.B.'s family; he added that if A.B. later talked to the police or to The Beachcomber, a local newspaper on the island, he would return and kill A.B. 5RP 586.

A.B. disrobed, and the attacker began to orally penetrate A.B.'s vagina. 5RP 586. He then vaginally raped A.B., asking her how "it" felt; A.B. told him that it was "bad and degrading." 5RP

588. After what she believed to be about 20 minutes, the attacker left A.B.'s room. 5RP 590. Once she saw him in the backyard, walking away from the home, A.B. ran for her stepfather and called 911. 5RP 592-94. She was taken by police to Harborview Medical Center in Seattle for a rape examination. 5RP 595.

The male DNA obtained from A.B. and E.P. matched Brian Dublin. 6RP 696, 699, 710-11. A.B. knew Dublin's sister, but did not know Dublin well; she testified that she may have seen at local events on the island. 5RP 597-98, 602.

Investigators saw numerous similarities between Dublin's attacks on A.B. and E.P. and another then-unsolved incident on Vashon Island in 2006. On the night of July 2, 2006, at approximately 3:00 a.m., 12-year-old G.G. was asleep at her parents' home in an isolated, wooded area. 10RP 1260, 1311. Like E.P.'s and A.B.'s parents, G.G.'s parents usually left the doors to the home unlocked. 10RP 1245. G.G. was sleeping in bed with her younger sister, S.G., and they were in the bedroom that had until recently belonged to their older sister, F.G. 10RP 1311, 1378.

G.G. awakened to a man telling her to "get the fuck up." 10RP 1311-12, 1314. In a low, rough whisper, the man told G.G. that he would kill her and that he had already stabbed her older

sister. 10RP 1317, 1325. G.G. complied and left the bedroom with the attacker. 10RP 1315.

The man led G.G. into the darkened family room, at which time he grabbed her crotch and asked her, "Who are you sleeping with?" 10RP 1319-21. G.G. told him that she wasn't sleeping with anyone, explaining that she was only 12 years old. 10RP 1319-20. The man told G.G. to take off her clothes and to bend over. 10RP 1323. When he released his grip from her, G.G. bolted from the room and raced to her parents' room. 10RP 1324-28. The attacker fled before police arrived. 10RP 1266-67.

Though G.G. did not know Dublin, her older sister, F.G., did, having socialized with him years earlier when they were in high school together on the island. 10RP 1368-69. Dublin had been to the family's home on several occasions to pick F.G. up; she would typically leave through the door in her bedroom (the one occupied by G.G. in 2006) and meet Dublin outside. 10RP 1371-72. F.G. explained to the jury that she was living in California in July 2006. 10RP 1365.

King County Sheriff's Office detectives obtained a search warrant for Dublin's home in May 2010. 8RP 1123-24. In the course of the search, detectives recovered, among other items, a

notebook in a loft near Dublin's bed. 8RP 1137-38, 1144-45. In the notebook, the full names of A.B. and E.P. had been written down, along with G.G.'s initials. 8RP 1146-47.

Detectives presented Dublin at a lineup in December 2010 that G.G. attended. 11RP 1509. Each of the participants in the lineup was told to say aloud, "Shut up or I'm going to fucking kill you," "Your sister is all stabbed up," and "Who are you sleeping with?" 11RP 1513-14. When informed of the statements, Dublin blinked and swallowed hard. 11RP 1514-15. Although G.G. was unable to definitively identify Dublin, she told the investigators that he and another individual most closely resembled the person she had seen in her darkened home four years earlier. 11RP 1523. She also testified that hearing Dublin's voice "brought back a lot" and made her afraid again, much more so than when other lineup participants said the same words. 10RP 1336, 1338.

Dublin testified in his own case-in-chief. He admitted knowing E.P., A.B., and G.G.'s sister, F.G. 14RP 2113. He said that he had consensual sex with A.B. in his truck after they left a party in 2003, and that he had also had sex in his truck with E.P. during a party in 2010. 14RP 2115, 2127-28. He admitted knowing where A.B. and E.P. lived, and that he had often spent time with

F.G. in high school, though their relationship was platonic. 14RP 2114, 2120. Dublin denied authorship of the contents of the notebook found in his home. 14RP 2140-41

**C. ARGUMENT**

**1. THE EVIDENCE WAS SUFFICIENT TO SUPPORT DUBLIN'S CONVICTIONS**

Dublin challenges his convictions for burglarizing the home of G.G. in July 2006, when she was 12 years old, and attempting to rape her. He asserts that the State lacked sufficient evidence to prove his guilt. Brief of Appellant, at 6-11.

To be clear, Dublin is not challenging the sufficiency of the State's proof that G.G.'s home was indeed burglarized around 3:00 a.m. on July 2, 2006, and that the culprit did, in fact, creep into the bedroom that G.G. shared with her younger sister, terrorized her, and attempted to rape her before she escaped to her parents' bedroom. He only contends that the State failed to establish that he was the person who committed these shocking crimes. His claim should be rejected.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. State v. Hendrickson, 129 Wn.2d 61, 81, 917

P.2d 563 (1996). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999). All reasonable inferences from the evidence are drawn in favor of the State and against the defendant. Finch, 137 Wn.2d at 831. Direct evidence and circumstantial evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

When viewed under the appropriate standard, the State's proof here was ample. The evidence demonstrated that this was not a spontaneous attack by a stranger who barged into the home without forethought or planning. KCSO Detective Decker explained to the jury that the assailant skulked through the vegetation to the rear of G.G.'s home and clambered up a tree that afforded a clear view directly into the bedroom she was sharing with her younger sister. 8RP 998-1004. The size of the shoes that left the tracks found by Decker matched the size of Dublin's feet. 8RP 1014-20.

Also, the attacker knew that G.G. had an older sister – he terrorized G.G. by telling her that he had already stabbed her to death. 8RP 1055; 10RP 1338. In fact, G.G.'s older sister, F.G., was not at home on the night of July 1-2, 2006. She explained that she was working in California at that time. 10RP 1365. F.G. did,

however, know Dublin: they had been friends while in high school together, and Dublin had been to her home on multiple occasions. 10RP 1370-71. In several of those instances, F.G. would meet up with Dublin by sneaking out of her house's back door, near her bedroom, and then return the same way. 10RP 1371-72. That bedroom became G.G.'s after F.G. moved to California. 10RP 1378.

G.G. explained that during the attack, the assailant repeatedly threatened her, using a distinctive, deep voice. 10RP 1325. In December 2011, Dublin, along with other members of a police lineup, repeated some of the threats that G.G. reported hearing. 10RP 1334-36. G.G. told the jury that when she heard Dublin's recitation of the threats – "I'm going to fucking kill you" and "Your sister is all stabbed up" -- it triggered a strong response inside her, significantly different than when she heard the other participants in the lineup repeat the same words. 10RP 1336. KCSO Det. Tompkins added that when Dublin was asked to state those threats during the lineup process, he reacted nervously, blinking and swallowing hard. 11RP 1514-15. Tompkins also explained that Dublin initially denied knowing where F.G. and G.G.

lived, but later admitted that he had been to their house for a party and following a car accident. 11RP 1500-02.

The State's case against Dublin on these charges also relied on the distinctive parallels between his attempted rape of G.G. and his completed rapes of E.P. and A.B., immediately after which Dublin's DNA was found in and on those victims. In his appeal, Dublin does not challenge the trial court's determination, under ER 404(b), that the jury could properly consider these three events as indicative of a common scheme or plan and as probative of the identity of the assailant.

The episode involving G.G. and the victimizations of A.B. and E.P. bear striking similarities. Each involved an attack in the middle of the night in which the assailant entered through an unlocked door into a home sited in a rural, isolated area. 5RP 551, 579; 10RP 1245, 1260, 1311; 11RP 1592,1617, 1638, 1642-43. In each instance, a number of individuals were inside, asleep, yet the assailant chose to attack a single girl, taking care to avoid arousing the other residents. 5RP 584-86; 10RP1317, 1325; 11RP 1640. In each instance, Dublin knew the victim, or, in G.G.'s case, knew her older sister, who had previously lived in the bedroom that the attacker entered. 5RP 596-98, 602; 10RP 1368-72; 11RP 1624-28;

14RP 2120. In each case, the attacker spoke in a distinctive rough whisper, threatening to kill his victim if she made a sound. 5RP 584-86; 10RP 1317, 1325; 11RP 1640.

Dublin denied raping A.B. and E.P., claiming that the discovery of his DNA inside them was the result of the fact that they had each engaged in consensual intercourse with him at locations other than their homes. The jury was entitled to disbelieve Dublin's accounts, and conclude that he had in fact raped them by sneaking into their bedrooms as they slept and terrorizing them into submission. Dublin does not contest the trial court's conclusion that the specific characteristics of those crimes were so similar to G.G.'s victimization that the jury could consider them as probative of the identity of G.G.'s attacker. Those facts, in combination with G.G.'s description of her attacker, the evidence gathered outside G.G.'s home, her response at Dublin's police lineup, and Dublin's duplicity during his police interrogation, all supported the jury's determination that Dublin was, indeed, G.G.'s attacker. Viewing this abundant evidence in a light most favorable to the State, the jury's determination cannot be deemed unjustified.

**2. DUBLIN WAS NOT DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.**

In his appeal, Dublin also challenges the trial court's denial of his pretrial motion to sever the charges involving G.G. from the counts related to his crimes against A.B. and E.P. Brief of Appellant, at 11-17. He correctly notes that his trial counsel failed to renew the severance motion either during trial or at the conclusion of the State's case-in-chief. Brief of Appellant, at 19-20.

Failure to renew a motion to sever before the close of trial waives the issue of severance, and thus cannot be raised on appeal. CrR 4.4(a)(2); State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Undoubtedly recognizing this well-established rule, Dublin alternatively frames the issue as one of ineffective assistance of counsel, i.e., that his attorney deprived him of competent service by declining to raise the severance motion anew. Brief of Appellant, at 18-20.

To prove ineffective assistance of counsel, an appellant must show (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness, and (2) that the deficient performance prejudiced him. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); see generally Strickland v.

Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a claim of ineffective assistance can be resolved on one prong of this test, the appellate court need not address the other prong. State v. Staten, 60 Wn. App. 163, 171, 802 P.2d 1384 (1991). In this context, counsel's failure to make a severance motion does not support an ineffective assistance claim unless the appellant can show that the motion would have properly been granted had it been made. State v. Price, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005).

A severance motion should be granted only if the defendant carries his burden of demonstrating that a trial involving all of the joined counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Prejudice may result from joinder if "use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition." State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994). Factors to be taken into account during consideration of a severance motion include the strength of the State's evidence on each count, the clarity of defenses as to each count, whether the jury is to be instructed to consider each count

separately, and the cross-admissibility of evidence among the counts. Id. at 63.

Dublin's concern is limited to the alleged imbalance between the strength of the State's case involving victim G.G. and its cases involving victims A.B. and E.P. He contends that due to this "great disparity... there was a reasonable probability the jury bootstrapped the evidence from the stronger counts, which had they not, Mr. Dublin would have been acquitted." Brief of Appellant, at 20.

While it is undoubtedly true that the State's case on the counts concerning G.G. would have been even stronger if Dublin's DNA had been recovered at the scene and evidence of that fact offered at trial, it is incorrect to say that the jury's verdict was somehow the product of bootstrapping dependent on Dublin's "criminal propensity." As discussed supra, the State had significant evidence implicating Dublin as G.G.'s assailant based on her own recounting of the attack and her participation in the ensuing police investigation, evidence of Dublin's familiarity with her house and her family, physical evidence found outside the home, and Dublin's behavior during his encounters with investigators.

Moreover, as also mentioned supra, Dublin is not contesting the trial court's conclusion that evidence of his acts against A.B.

and E.P. was admissible under ER 404(b) in the State's case concerning G.G. Thus, the trial court, had it been presented with a renewed severance motion, would have recognized that much of the same evidence with regard to the attacks on E.P. and A.B. would have properly been admitted at a *separate* trial on G.G.'s counts in order to prove his identity as her attacker.

Under such circumstances, it is difficult to conclude that a severance motion would have been granted had it been made. Accordingly, Dublin fails to satisfy the "prejudice prong" of the Strickland test, and his claim of ineffective assistance should be rejected.

**D. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm Dublin's convictions for his attempted first-degree rape of G.G. and for committing the first-degree burglary of her home.

DATED this 29<sup>th</sup> day of October, 2012.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BRIAN DUBLIN, Cause No. 68024-2-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington



Date