

No. 74103-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER XAVIER BECK,

Appellant.

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FILED  
July 6, 2016  
Court of Appeals  
Division I  
State of Washington

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

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Beck's motion to sever the charges, in violation of due process.
2. The court erroneously admitted evidence of other misconduct against Mr. Beck, in violation of Evidence Rule 404.
3. The court erroneously found each alleged count to be cross-admissible against the other, in violation of Mr. Beck's right to due process.
4. The trial court erred and deprived Mr. Beck of his right to a trial before an impartial jury, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 22 of the Washington Constitution.
5. The trial court deprived Mr. Beck of his Sixth Amendment right to present a defense when it barred the admission of relevant evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In a motion for severance, the defendant must show that the prejudice of trying the matters together would outweigh the judicial economy of doing so. However, evidence of other offenses is presumptively inadmissible to show action in conformity, and the State

bears a substantial burden to demonstrate admissibility for another purpose. The trial court must analyze the admissibility on the record, resolving doubtful cases in favor of exclusion. If admitted as part of a common scheme or plan, there must be marked similarities between the incidents showing they were the result of design. Did the trial court abuse its discretion in denying severance, admitting evidence of other crimes against different victims for purposes of common scheme or plan, where the other offenses lacked marked similarities?

2. The Sixth and Fourteenth Amendments to the United States Constitutions, as well as Article I, §§ 3 and 22 of the Washington Constitution, guarantee a defendant the right to a trial by an impartial jury. These rights require a trial court to excuse a juror who has an actual bias against the defendant. Here, the trial court denied a defense challenge for cause and permitted a juror to sit on the jury, despite the juror's admission that he was biased and was concerned about his ability to be fair. Did the trial court deprive Mr. Beck of his right to an impartial jury?

3. The Sixth Amendment to the United States Constitution guarantees an accused person the right to present a defense and meet the charges against him. Here, the trial court barred Mr. Beck from

introducing evidence relevant to the credibility and motive to lie of an alleged victim. Did the court deprive Mr. Beck of his right to present a defense?

C. STATEMENT OF THE CASE

Christopher Beck is a well-groomed and articulate young man from Puyallup, who moved to Pierce County after graduating from high school. 9/9/15 RP 1482.<sup>1</sup> In the spring of 2015, Mr. Beck began to solicit prostitutes and so-called erotic massage therapists, seeking sexual gratification. Id. at 1485-86.

a. 7<sup>th</sup> and James incident

In February 2015, Mr. Beck contacted C.Q., a prostitute doing “happy ending” massages. 8/25/15 RP 512, 625-33; 8/26/15 RP 671, 732-42; 9/9/15 RP 1486. C.Q. ran this business out of her apartment at 7<sup>th</sup> and James, unbeknownst to her neighbors in the building, and attempted to keep the hallway noise down, to avoid detection. 8/25/15 RP 644. Mr. Beck found C.Q. on a website called classygoddess.com, on which she was listed as “Miss Scarlett.” 9/9/15 RP 1486. The

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<sup>1</sup> The verbatim report of proceedings consists of 19 volumes, which are largely consecutively paginated. They are referenced by date and page number, with an occasional (AM) or (PM) designation.

madam who started C.Q. in the business, Rainbow Love, put Mr. Beck in touch with C.Q. and set the appointment. Id.

C.Q. provided a service to her clients which she called a massage followed by an “energetic release.” 8/25/15 RP 626. When asked to further describe this massage, C.Q. flatly stated, “I give hand jobs at the end.” Id. C.Q. testified that when Mr. Beck arrived for his appointment with C.Q. at her 7<sup>th</sup> and James apartment, his session went smoothly; she did not recall anything unusual, and he did not push any boundaries with her; he used his own name and was even slightly reserved in demeanor. Id. at 634-39.

When a discrepancy was noted in his payment – he had used a debit card, rather than cash – he emailed with Rainbow Love in order to rectify this issue. Id.; 9/9/15 RP 1490-94. Ms. Love arranged a second session for Mr. Beck with C.Q., so that he could bring the money he owed. 9/9/15 RP 1494-95. When Mr. Beck went back to the 7<sup>th</sup> and James apartment for the March appointment with C.Q., they had another sexual encounter, in addition to Mr. Beck offering his debit card again. Id. at 1497.

C.Q. later stated that Mr. Beck had not only failed to settle his previous bill, but had forced her to perform oral sex and that he had

threatened and choked her, as well as taking gift cards and cell phones.

8/25/15 RP 647-53. C.Q. did not call the police for a few days,

however, and there was no forensic evidence of her alleged injuries.

8/25/15 RP 686-68.

b. Georgetown incident

In March 2015, Mr. Beck saw an ad in the Casual Encounters section of Craigslist. 9/9/15 RP 1499. Mr. Beck was seeking a sexual partner, and C.F. had stated in the ad that she needed money to pay her rent. Id. at 1499-1500. Mr. Beck used his own name and email address, as he felt he had no need to conceal his identity. Id.

At trial, it was revealed that C.F. was a heroin addict, eating from dumpsters, turning tricks to get money for drugs and food. 9/1/15 RP 835-37, 925-30. C.F. was on a three-day drug binge, during which she periodically posted Craigslist ads to lure men to the seedy Star Motel, where she and her friends would do anything from sexual favors to selling their soiled underwear for cash. 9/1/15 RP 835-37. C.F.'s friend April Bucklin testified that sometimes C.F. would contact men and promise sexual favors; then when the men would show up, C.F. would lie and tell the men she was underage, so they would be afraid of

getting arrested. 9/1/15 RP 837 (“she [C.F.] thinks of really good ideas”).

Mr. Beck agreed with C.F. to exchange a hand job for \$100. 9/9/15 RP 1501. He drove C.F. to a parking lot, where they engaged in this transaction, at her suggestion. Id. at 1503. When C.F. increased the interaction to oral sex, and then to intercourse, Mr. Beck willingly agreed. Id. at 1503-07. Although the two had a disagreement about wearing a condom and where ejaculation should occur, the intercourse was entirely consensual, and no force whatsoever was involved. Id. C.F., still high and now upset, ran out of Mr. Beck’s car, and got a ride back to the Star Motel, where she told her friends she had been assaulted by Mr. Beck. 9/1/15 RP 938.

c. Westin Hotel incident

A.M. is a high-end dominatrix, with a day-job as a claims adjuster for State Farms. 9/8/15 (AM) RP 1356-81. A.M. also solicited clients on BackPage, but used a more discreet business model, servicing clients for only a week, booking a room downtown at the Westin. 9/8/15 (AM) RP 1368-69. A.M. also admitted to the fact that she catered to the discerning fetishist, and her clientele generally did

not include black men, whom she preferred to exclude. 9/9/15 RP 1396-98.<sup>2</sup>

Mr. Beck booked a session with A.M., which was rescheduled by A.M. and then re-booked. 9/9/15 RP 1512-15. A.M. testified at length that she specialized in various fetishes, including prostate massage and the use of different devices for this purpose.<sup>3</sup> According to Mr. Beck, he and A.M. engaged in consensual sexual relations, and then became engaged in a dispute over the fee. Id. at 1520-21. This dispute, which Mr. Beck termed “haggling,” arose from the fact that the sexual experience had expanded past the terms of original agreement, which had not included the use of all of the “toys” in A.M.’s possession, nor full intercourse. Id. When A.M. called Mr. Beck a racial epithet, he shook his head and walked out of the hotel room without paying. Id. at 1520-22.<sup>4</sup>

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<sup>2</sup>A.M. testified she was surprised to look out her peephole at Mr. Beck and to see “a young black face.” 9/9/15 RP 1402. When pressed, A.M. acknowledged this was because he wrote articulately, he did not self-identify as black, and because “he was dressed nicely. He wasn’t dressed like a punk or a juvenile delinquent.” Id. at 1402-03.

<sup>3</sup> For the sake of discretion, details are not provided here; they can be found at 9/8/15 (AM) 1356-71.

<sup>4</sup> Mr. Beck stated that A.M. said, “You know, only a n -- would be the one to stiff somebody on a quick f --.”

A.M. did not call the police, nor hotel security, for several hours. 9/8/15 (PM) RP 27. Rather, she continued to service the clients she had scheduled for the day. Id. at 27-30. When A.M. finally spoke to police, she told them Mr. Beck had also taken her cash. 9/8/15 RP 26.

d. Trial Proceedings

Mr. Beck was charged with two counts of rape in the first degree, one each as to C.Q. (7<sup>th</sup> and James) and C.F. (Georgetown), and one count of rape in the second degree, as to A.M. (Westin). CP 65-66 (Second Amended Information). Mr. Beck was also charged with two counts of robbery in the second degree, for the 7<sup>th</sup> and James and Westin incidents. CP 65-66.

At trial, Mr. Beck objected to joinder and moved for severance of the counts. 8/12/15 RP (AM) 12-13; 8/12/15 (PM) 3-12. Mr. Beck renewed this motion several times, including at the conclusion of the State's case, and by mistrial motion, stating his right to a fair trial had been violated. 9/9/15 RP 1448-66.

Following a jury trial, the jury convicted Mr. Beck of the three counts of rape, as well as the 7<sup>th</sup> and James robbery. CP 361-64. Mr. Beck was acquitted of the robbery at the Westin. CP 365.

Relevant facts are discussed in further detail in the pertinent argument sections below.

D. ARGUMENT

1. THE TRIAL COURT ERRONEOUSLY DENIED MR. BECK'S MOTION FOR SEVERANCE OF COUNTS, AND THUS ALLOWED ADMISSION OF UNDULY PREJUDICIAL EVIDENCE, IN VIOLATION OF THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL, AND IN VIOLATION OF CrR 4.4(b).

- a. A defendant is entitled to severance of counts where joinder prevents a fair determination of guilt or innocence.

A defendant has the constitutional right to due process and a fair trial. U.S. Const. Amend. XIV; Wash. Const. art. I, sec. 3. To this end, separate counts must be severed when joinder would prevent a fair trial.

CrR 4.3 provides, in pertinent part:

- (a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
- (1) Are of the same or similar character, even if not part of a single scheme or plan; or
  - (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

However, joinder should never be used in such a way as to deny a defendant a substantial right. State v. Weddel, 29 Wn. App. 461, 464,

629 P.2d 912 (1981) (citing State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1968), vacated on other grounds sub nom., Smith v. Washington, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972)). Thus, where joinder is technically proper but would result in unfair prejudice, the counts must be severed. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998); State v. Gatalski, 40 Wn. App. 601, 606, 699 P.2d 804 (1985).

CrR 4.4 provides, in pertinent part:

(b) Severance of Offenses. The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

CrR 4.4(b) includes the term “shall,” which creates a mandatory duty. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Severance is necessary where it prevents undue prejudice. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Undue prejudice includes the risk that a single trial invites the jury to cumulate evidence or to infer a guilty disposition. State v. Sanders, 66 Wn. App. 878, 885, 833 P.2d 452 (1992); State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989).

Washington courts have articulated four specific concerns regarding improper joinder: 1) a defendant may be confounded or embarrassed in presenting separate defenses; 2) the jury may use evidence of one crime to improperly infer a defendant's criminal disposition; 3) the jury may cumulate evidence of several crimes to find guilt when, if it considered the crimes separately, it would not find guilt; and 4) the jury may feel a latent hostility against the defendant engendered by charging several crimes as distinct from a single charge. Smith, 74 Wn.2d at 754-55 (citing Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)); State v. York, 50 Wn. App. 446, 450-51, 749 P.2d 683 (1988).

To assist courts in weighing these concerns, our Supreme Court set forth the following "prejudice-mitigating" factors that a court must consider when determining whether the potential for prejudice requires severance: 1) the strength of the State's evidence on each count; 2) the clarity of defenses as to each count; 3) the court's instructions to the jury to consider each count separately; and 4) the admissibility of evidence of other charges even if not joined for trial. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994); accord State v. Rodriguez, 163 Wn. App. 215, 228, 259 P.3d 1145 (2011).

A trial court's decision on a motion to sever is reviewed for manifest abuse of discretion. Bryant, 89 Wn. App. at 864.

b. Mr. Beck was entitled to severance of the counts.

The foregoing concerns and the lack of prejudice-mitigating factors mandated severance of the three counts of rape.

i. *Strength of the evidence.*

Severance is warranted where the strength of one count bolsters a weaker count. Russell, 125 Wn.2d at 63-64. Here, the relative strength of certain counts bolstered the weaker accusations – precisely the situation meant to be prevented by severance.

To establish Counts I and II, those involving the 7<sup>th</sup> and James prostitution ring, the State was forced to rely on the credibility of the masseuse herself, C.Q., but also that of the erotic photographer, Carmen Garcia. RP 621-30, 1314. The jury heard testimony about an apartment used as a rotating work-space for prostitution activity, and the jury was confronted with witnesses whose credibility was entangled in this lifestyle.

By contrast, to establish Count III, the count involving the Georgetown heroin addict, C.F., the State relied exclusively on the credibility of admitted drug addicts and thieves. 9/1/15 RP 834-37,

925. In the Georgetown case, C.F. and her friend April Bucklin admitted that they were homeless drug users, and that C.F. would regularly lie and manipulate to get drugs and money. 9/1/15 RP 835-37, 925.

Lastly, in Counts IV and V, involving A.M., the dominatrix at the Westin Hotel, there was a several hour delay in reporting the alleged rape. During this delay, A.M. serviced additional clients, which diminished her credibility. 9/8/15 RP 27-30. In addition, A.M. made troubling racist comments in her defense interview, which she repeated during her testimony at trial. 9/8/15 RP 66-70; 9/9/15 RP 1396-98. A.M.'s testimony corroborated Mr. Beck's claim that A.M. had fabricated the rape allegation, following an argument related to her fee, fueled by a racist comment. 9/10/16 RP 1605-09.

In light of the comparative weakness of the evidence to establish each individual count, joinder invited the jury to cumulate the evidence and to infer criminal disposition, rather than to look closely at the lack of evidence as to each count and the lack of credibility of the individual alleged victims.

*ii. Clarity of defenses.*

A defendant's desire to testify on one count but not on another count requires severance where the defendant has important testimony to give on the one count and a strong need to remain silent on the other count. Russell, 125 Wn.2d at 65 (citing Watkins, 53 Wn. App. at 270).

Here, although Mr. Beck asserted a general denial defense for each count, he asserted different theories as to each alleged victim's motive to fabricate the allegations of rape and robbery. For the 7<sup>th</sup> and James incident, Mr. Beck noted C.Q.'s motive to lie in order to cover losing money to Mr. Beck for nonpayment for services. Mr. Beck also argued that C.Q. was in a vulnerable position, based on her subservient role in the prostitution ring run by Rainbow Love, C.Q.'s mentor in the business, who had recently been arrested and charged with promoting prostitution. 9/8/15 RP 1432.

For the Georgetown incident, Mr. Beck argued C.F. was simply incredible and a habitual liar, as was her friend April Bucklin, a fellow heroin addict. 9/1/15 RP 835-37, 925. As to the Westin incident, A.M. testified she was unable to pay her hotel bill at this high-end downtown

hotel; as such, she was motivated to add a robbery accusation to her rape allegations. 9/8/15 RP 27-28.<sup>6</sup>

Mr. Beck argued that because he needed to testify about certain counts, but not others, the court's denial of his severance motion violated his right against self-incrimination under the Fifth Amendment and Article I, section 9. U.S. Const. amend. V; Wash. Const. art. I, sec. 9; State v. Hart, 180 Wn. App. 297, 303, 320 P.3d 1109 (2014); 9/9/15 RP 1465-66, 1471-74. Moreover, the jury was needlessly and prejudicially informed of Mr. Beck's prior criminal history, as to the counts about which he testified.

Despite the trial court's erroneous ruling, Mr. Beck did make the requisite showing of prejudice, in that the jury would learn of his prior convictions if he testified, even if his testimony pertained only to some counts, and not to all. See Hart, 180 Wn. App. at 303.

*iii. Instructions.*

Although the court instructed the jury to consider each count separately, instructions alone could not overcome the improper bolstering resulting from joinder, the confusion of defenses, the prejudice resulting from Mr. Beck's need to testify to present his

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<sup>6</sup> Mr. Beck was acquitted of the robbery of A.M (Count V). 9/15/15 RP 1780-92.

defense theory on certain counts and his equally compelling need to remain silent on others, and the admission of evidence that was not otherwise cross-admissible.<sup>7</sup>

*iv. Cross-admissibility of evidence.*

Cross-admissibility of evidence is analyzed under ER 404(b). Bythrow, 114 Wn.2d at 722; Gatalski, 40 Wn. App. at 607; York, 50 Wn. App. at 453. ER 404(b) provides:

(b) Other Crimes, Wrongs, or Acts. 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.

In determining whether evidence is admissible under ER 404(b), courts must “(1) identify the purpose for which the evidence is to be admitted; (2) determine that the evidence is relevant and of consequence to the outcome; and (3) balance the probative value of the evidence against its potential prejudicial effect.” State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

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<sup>7</sup> Mr. Beck objected to the court’s limited purpose instruction as inadequate, emphasizing that the multiple counts should have been severed. 9/10/15 RP 1624.

With little analysis, the court found the several counts were cross-admissible, over Mr. Beck's repeated objection. 8/12/15 RP 5-8.<sup>8</sup> The trial court's finding is not supported by the record. First, the court erred in its interpretation of what constitutes a common scheme or plan. Two different types of common schemes or plans have been recognized by our courts. "One is where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan." Lough, 125 Wn.2d at 855. Only the second type is at issue here: "The other situation arises when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." Id.

The State failed to prove the second type of plan, that Mr. Beck devised a plan and used it repeatedly. Lough, 125 Wn.2d at 855. Such a plan is found when the defendant's scheme creates the opportunity to commit the crimes. In Lough, for example, the defendant created the opportunity to rape his prior and current victims by drugging them and rendering them unconscious. 125 Wn.2d at 850-51. The Court held the

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<sup>8</sup> Mr. Beck timely objected to joinder and moved for severance, renewing this motion repeatedly throughout the trial. 8/12/15 (AM) RP 12-13; 8/12/15 (PM) RP 5-12, 28-31; 8/13/15 RP 102-05; 8/24/15 RP 363; 9/2/15 RP 1025; 9/8/15 (AM) RP 1294, 1320-21; 9/9/15 RP 1432, 1448-60 (halftime and mistrial motions).

prior act evidence “evidences a larger design to use [the defendant’s] special expertise with drugs to render [his victims] unable to refuse consent to sexual intercourse. A rational trier of fact could find that the Defendant was the mastermind of an overarching plan.” Lough, 125 Wn.2d at 861.

Similarly, in State v. Gresham, a defendant created an opportunity to fondle his child victims when, in two prior cases and the charged offense, the defendant took a trip with young girls and while the other adults were asleep, fondled the girls. 173 Wn.2d 405, 422, 269 P.3d 207 (2012). The Court found the instances were “naturally to be explained as ‘individual manifestations’ of the same plan.” Id. quoting Lough, 125 Wn.2d at 860.

In State v. DeVincentis, the defendant created an opportunity for his crimes by getting his victims used to seeing him nearly naked before initiating physical contact. 150 Wn.2d 11, 13, 74 P.3d 119 (2003). There, the current victim testified that, prior to touching her, the defendant arranged opportunities to be alone with her over a period of weeks, when he would wear suggestive underwear. DeVincentis, 150 Wn.2d at 13-14. A prior child victim testified to being accustomed to spending three or four nights a week at the defendant’s

house when he would wear only a g-string or a bikini before he sought physical contact. 150 Wn.2d at 15. The Court held “the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative.” Id. at 17-18.

As these cases show, a scheme or plan is established by facts showing similarity between how the defendant devised the opportunity to commit the prior acts and the charged crimes. Accord State v. Kennealy, 151 Wn. App. 861, 889, 214 P.3d 200 (2009) (agreeing “the common features here show a plan or design to gain access to children in order to repeatedly sexually abuse young children”).

If it were primarily the shared elements, alone, of the crimes, that were significant, most crimes of the same type would involve a common scheme or plan. After all, all robberies involve an unlawful taking; all rapes involve sexual intercourse; and all harassment charges involve threats.

Accordingly, the trial court misapplied the common scheme or plan test when it held the common scheme or plan here was that each of these three incidents involved the following: online or email communication in response to an ad, followed by a meeting and a sexual act; and verbal threats, with two of the incidents involving choking.

8/12/15 RP 12-17. The court also specifically acknowledged that the ruling on cross-admissibility of multiple counts would be “very prejudicial.” Id. at 16. However, the court ruled that the probative value of the multiple counts outweighed the risk of prejudice. Id.

This ruling was reversible error. In fact, for a common scheme or plan to be found in Mr. Beck’s case in the same manner it was shown in Lough, Gresham, DeVincentis, and Kennealy, the court would have had to find Mr. Beck followed a common plan in creating the opportunity to rape and rob three unrelated women, in various parts of Seattle; in other words, that he somehow lay in wait for these women to advertise their prostitution services, so that he could respond, thus planning a way to meet alleged victims and to thus commit his crimes.

There was insufficient evidence shown of a common pattern or plan. Far from establishing Mr. Beck was “the mastermind of an overarching plan”<sup>9</sup> to troll the internet for vulnerable women who were unlikely to report a crime, as the prosecutor argued, the evidence showed Mr. Beck met and had sex with three different women under three very distinct sets of circumstances. Indeed, far from devising and following a common scheme or plan to hurt these women, Mr. Beck

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<sup>9</sup> Compare Lough, 125 Wn.2d at 861.

was lured by these women with advertisements and emails that were purposely misleading, dishonest, and designed to exaggerate and distort. 8/26/15 RP 704-05; 9/1/15 RP 837-38, 949; 9/8/15 (AM) RP 1376-81.

Mr. Beck did not initiate the communication with any of these women, but was the respondent to each of their advertisements. He reached out in response to their ads, and so began separate conversations with each woman, during which he never concealed his name or identity, as he had no intention of hurting or stealing from any of them. Mr. Beck visited C.Q., C.F., and A.M., each time introducing himself and emailing with his complete name, and never concealing his identity in any way, as he had nothing to hide. 8/25/15 RP 641, 645-46; 9/1/15 RP 925-29; 9/8/15 (PM) RP 7-8, 15-16.

Without evidence Mr. Beck engineered the situations that made the multiple acts possible, and without evidence that the acts were in any way unique, the State failed to prove a common scheme or plan. Although the State argued Mr. Beck's use of electronic communications was sufficient to show a common scheme or plan, the contexts of these email communications were completely different. As Mr. Beck argued at trial, communication by email or social media are hardly unique features;

indeed, “using the telephone to call somebody is using the most common means of communication in our modern society.” 8/12/15 RP 8-9.

A common design or plan is found only if “significant” similarities exist between the prior acts and the charged crime indicating “the conduct was directed by design.” Lough, 125 Wn.2d at 860. Notably, a mere “similarity in results” is insufficient to prove a common scheme. Gresham, 173 Wn.2d 405, 422, quoting Lough, 125 Wn.2d at 860.

Under ER 404(b), the evidence for the five counts was not cross-admissible under the court’s limited analysis, finding that because each of the counts involved Mr. Beck’s use of electronic communication and threats, the counts were cross-admissible.

In State v. Hernandez, the defendant was convicted of three counts of robbery, based on separate incidents that occurred in a ten day period of time, in which the robber entered a store, displayed a gun, asked for money, and fled upon receiving the money. 58 Wn. App. 793, 799, 794 P.2d 1327 (1990), disapproved on other grounds, State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). On appeal, the State argued the counts were properly joined because the evidence of all three incidents would have been cross-admissible at separate trials to

establish identity. 58 Wn. App. at 798. The appellate court disagreed and ruled that, although the stores that were robbed were similar, the manner of robbery was not so unique as to create a high probability that the same person committed all three crimes. 58 Wn. App. at 799. See also State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) (“Here, despite an instruction to consider the counts separately, ... 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.”).

Similarly here, there was no showing that the rapes were committed in a particularly unique manner to justify cross-admissibility, and the lower court’s finding to the contrary is unsupported by the record.

c. The prejudice of joinder outweighed the need for judicial economy.

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

would be repeated if counts were severed. See also York, 50 Wn. App. at 453 (multiple offenses that occurred on school campus involved testimony of school's physical layout and schedule, and contact between the defendant and victims which would be repeated if counts were severed).

Here, the testimony for Counts I and II (C.Q.) would not need to be repeated at a separate trial for Count III (C.F.), or for a separate trial for Count IV (A.M.). The incidents occurred in separate locations, and they involved separate alleged victims, unknown to each other. The only overlap in witnesses would occur due to the police department's decision to enlist the same detective to investigate. 8/25/15 RP 591. Under these circumstances, joinder of the counts did not promote judicial economy.

d. The proper remedy is reversal.

Where a trial court erroneously denies a motion to sever, the proper remedy is reversal, unless the error was harmless. Bryant, 89 Wn. App. at 864; State v. Ramirez, 46 Wn. App. 223, 228, 730 P.2d 98 (1986). The error was not harmless here. As discussed, given the disparate relative strength between the counts, the differing defense theories, the lack of factual similarity in the counts, the inherent

prejudice of joining unrelated charges, and the difficulty in compartmentalizing the evidence relevant to each count, the error was not harmless.

In the absence of prejudice-mitigating factors as well as the lack of judicial economy, the trial court's failure to sever the counts was an abuse of discretion. Reversal is required.

2. MR. BECK WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO TRIAL BY AN UNBIASED JURY.

- a. The state and federal constitutions guarantee a criminal defendant a trial before an impartial jury.

The Sixth and Fourteenth Amendments to the United States Constitution, as well as article I, sections 3 and 22 of the Washington Constitution guarantee a defendant the right to a trial by an impartial jury. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061 (1988). These protections entitle a defendant to a jury of twelve jurors, free of bias, such that there are no "lingering doubts" as to the fairness of the trial. State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969), overruled on other grounds,

State v. Fire, 142 Wn.2d 152, 165, 34 P.3d 1218 (2001).<sup>10</sup>

Where a challenge for cause is denied, a defendant may raise the issue on appeal, even where he did not exercise a peremptory challenge against the juror in question. Fire, 142 Wn.2d at 158.

[I]f a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

Id. (citing United States v. Martinez-Salazar, 528 U.S. 304, 315-16, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)).

Martinez-Salazar specifically rejected the government's urging to adopt a rule requiring that a defendant exhaust all or some specified number of peremptory challenges prior to raising the issue on appeal. 528 U.S. at 315. Thus, even though Mr. Beck did not exercise a peremptory challenge against Juror 106, he can assert on appeal that he was denied his state and federal rights to an unbiased jury.<sup>11</sup>

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<sup>10</sup> Fire overruled Parnell to the extent that Parnell required reversal of a conviction even where the challenged juror was excused following a peremptory challenge, and thus where no biased juror actually sat on the jury.

<sup>11</sup> Mr. Beck's ability to raise this issue on appeal is even clearer than in Martinez-Salazar, since Mr. Beck did exhaust his peremptory challenges.

- b. Because Juror 106 demonstrated actual bias, the trial court erred in denying Mr. Beck's for-cause challenge.

While the denial of a challenge for cause is within the trial court's discretion, State v. Witherspoon, 82 Wn. App. 634, 637, 919 P.2d 99 (1996), if a potential juror demonstrates actual bias, the court must excuse the juror for cause. Otis v. Stevenson-Carson School Dist. No. 303, 61 Wn. App. 747, 754, 812 P.2d 133 (1991). Actual bias is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). A challenge for cause should be granted where a prospective juror's views "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions or oath." Id.

In State v. Gonzales, the Court found a prospective juror exhibited actual bias where the juror admitted she had a bias and indicated the bias would likely persist throughout the trial. 111 Wn. App. 276, 281, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003).

In Mach v. Stewart, the Ninth Circuit reversed a trial court's denial of a motion for a new venire, due to a prospective juror's comments about her bias during voir dire. 137 F.3d 630 (9th Cir. 1997). The trial court struck the juror, but denied a motion for a new panel. Id. Reversing, the Ninth Circuit reasoned the statements made by the prospective juror were directly connected to guilt, and that "the court should have [, at a minimum,] conducted further voir dire to determine whether the panel had in fact been infected by [the prospective juror's] expert-like statements." Id. at 633. "Even if 'only one juror is unduly biased or prejudiced,' [by the prospective juror's comments] the defendant is denied his constitutional right to an impartial jury." Mach, 137 F.3d at 633 (quoting United States v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979)). The remedy was to begin anew with a fresh jury pool.

The questioning of Juror 106 revealed a similarly strongly-held bias, and the court wrongly denied the challenge. 8/24/15 RP 493-95. Juror 106 candidly acknowledged his bias in response to the defense's questions in voir dire. Id. Juror 106 expressed his concerns with the multiple counts, and stated frankly that the number of counts against Mr. Beck was "shocking." Id. at 493. When asked to elaborate, Juror

106 stated the following:

What I believe I'm hearing is based on the accusations coming from the government or State that with the preponderance of that evidence, that those charges must be true in order for them to make an accusation.

So with the culmination of the amount of accusations, for me, it was shocking. So it's overwhelming for me to be unbiased as to how I feel whether or not Mr. Beck is guilty or not but persuaded to be more so than if he is guilty based on those type of accusations.

Id. at 493

Based upon Juror 106's initial statements of bias due to the multiple counts, Mr. Beck moved to challenge the juror for cause. Id. at 497. Following the juror's response that despite his bias, the juror "believe[d]" he could "make an unbiased decision," the challenge was denied without prejudice. Id. at 497.

Nothing in the subsequent voir dire, however, dispelled the actual bias shown by this juror's initial statements. Following this round of voir dire, Mr. Beck challenged the entire panel for cause, arguing that approximately two-thirds of the prospective jurors had raised their hands when asked if they would be biased by the multiplicity of counts. 8/24/15 RP 504. The court denied what it termed a "group challenge for cause," instructing Mr. Beck to make individual cause challenges. Id. at 505.

Due to the court's denial of defense counsel's cause challenge, the trial ultimately proceeded with Juror 106 as a sworn Juror. Id. at 547.

c. The remedy is a new trial with an impartial jury.

Where a biased juror sits on the jury, the defendant is denied his Sixth Amendment and article I, sections 3 and 22 rights to a jury trial, and the only remedy is to remand the matter for a new trial. Martinez-Salazar, 528 U.S. at 316; Fire, 142 Wn.2d at 158. In light of the showing of actual bias here – and particularly because Juror 106's bias was regarding an issue as important as the multiple counts and the presumption of innocence -- the trial court had no discretion but to excuse Juror 106 for cause. Otis, 61 Wn. App. at 754.

For these reasons, Mr. Beck's convictions should be reversed, and he should be granted a new trial with an unbiased jury. Fire, 142 Wn.2d at 158.

3. THE TRIAL COURT DENIED MR. BECK HIS  
RIGHT TO PRESENT A DEFENSE BY  
EXCLUDING RELEVANT EVIDENCE.

a. Mr. Beck properly attempted to offer evidence  
establishing the alleged victim's bias and motive to lie.

Mr. Beck made an extensive offer of proof, detailing the ongoing investigation of Rainbow Love, the madam of the prostitution

ring for which C.Q. worked, and how this undermined C.Q.'s credibility and provided a motive to fabricate the rape allegation, since C.Q. was an employee facing criminal liability. 8/26/15 RP 724-30.

The prior bad acts of C.Q. and her role in the larger prostitution ring were relevant to her credibility, but moreover, C.Q.'s vulnerability as a minor player in this organization supported her motive to lie about Mr. Beck, in order to protect Rainbow Love, as well as herself. Id. at 732-41.

The court initially agreed with Mr. Beck, acknowledging that to limit further inquiry in this area would be reversible error. Id. at 742. The court then abruptly reversed itself, stating that the evidence related to Rainbow Love did not provide C.Q. sufficient motive to lie. Id. at 773. The court ruled the evidence was not sufficiently related to C.Q.'s credibility to be more probative than prejudicial, excluding evidence concerning the Rainbow Love investigation and limiting cross examination of C.Q. Id. at 773-75; 9/8/15 (AM) RP 1320-21.

- b. The court's exclusion of relevant evidence and limiting cross-examination denied Mr. Beck his right to present a defense.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to

present a defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct 1727, 164 L.Ed.2d 503 (2006); U.S. Const. Amends. VI, XIV. Article I, section 22 of the Washington Constitution provides a similar guarantee. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide “where the truth lies.” Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”

Washington, 388 U.S. at 19

*i. The evidence was relevant.*

Relevant evidence tends to make a material fact more or less probable. ER 401. Relevant evidence is generally admissible. ER

402. Evidence of C.Q.'s involvement with a large prostitution ring, now facing felony prosecution, was plainly relevant.

C.Q. acknowledged that she had been taught the tricks of the prostitution trade by Rainbow Love, who had brought her into the massage business years before. 8/25/15 RP 623-25, 708-09. C.Q. had learned the business from Ms. Love, had been instructed by her, had been housed by her for years, and had finally gone into business for herself. Id. at 623-25. Although the State may suggest Ms. Love's connection was remote in time, at least two witnesses testified that on the day of the incident with Mr. Beck, Rainbow Love was contacted by phone by C.Q.'s friend Carmen Garcia, as well as by C.Q., to resolve Mr. Beck's payment. Id. at 639; 8/26/15 RP 686-87, 785; 9/8/15 (AM) RP 1314-17. Ms. Love was clearly running C.Q.'s business, and she was on-hand for any business disputes, such as the one represented by Mr. Beck and his faulty debit card. 8/26/15 RP 785.

Due to the trial court's ruling excluding the Rainbow Love evidence, however, the jury was left with the inaccurate impression that C.Q. was just a small-time working girl, posting ads on BackPage and Craigslist, rather than part of a massive, vice-squad-worthy network of prostitutes, reaching its tentacles from Seattle to Marysville. 8/26/15

RP 776-77. The jury did not hear an accurate rendition of C.Q.'s lifestyle, as the trial court was well aware, but due to the court's erroneous ruling, the jury was left with a false impression of C.Q.'s business, her credibility, her criminal liability, and therefore the context in which she made her accusations of rape and robbery against Mr. Beck.

The fact that C.Q. had a motive to lie, when Mr. Beck refused to pay for her sexual services, as well as a bias against the accused, was a fact that made her credibility questionable.

Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.

U.S. v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984)

(citations omitted).

Because the proffered evidence about the Rainbow Love investigation tended to establish the alleged victim's bias and her motive to fabricate the rape and robbery allegations, it was highly relevant and should have been admitted.

“Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment.” State v. Clarke, 143 Wn.2d 731, 766, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001) (citing State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980)). The alleged victim’s credibility, her bias, and her motivation to lie were highly relevant to the State’s case. The proffered evidence was powerful impeachment evidence. The trial court abused its discretion in excluding it.

*ii. The evidence was properly offered under ER 404(b).*

The defense properly offered evidence of the alleged victim’s prior acts pursuant to ER 404(b). 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.

ER 404(b) (emphasis added).

A prior bad act may be introduced against a witness, not to show conformity with that act, but in order to, as here, explain motive. State v. Cummings, 44 Wn. App. 146, 152, 721 P.2d 545 (1986); ER 404(b).

More recently, in State v. Jones, the Supreme Court considered a defendant whose consent defense was excluded at his sexual assault trial. 168 Wn.2d at 721. The Jones Court held that for evidence of high probative value, “it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.” Id. at 720 (quoting State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)). The Jones Court held that where the trial court had excluded “essential facts of high probative value,” the defendant was “effectively barred ... from presenting his defense,” in violation of the Sixth Amendment. Id. at 721.

c. The trial court’s refusal to admit relevant evidence requires reversal of Mr. Beck’s conviction.

Because the court’s exclusion of relevant evidence denied Mr. Beck his Sixth Amendment right to present a defense, the error requires reversal of his convictions unless the State can prove beyond a reasonable doubt that it “did not contribute to the verdict obtained.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Neder v. U.S., 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Jones, 168 Wn.2d at 724. The State cannot meet this burden.

There were significant inconsistencies in the accounts told by C.Q. and her friend Carmen Garcia, and the unexplained delay in

reporting the alleged sexual assault was never adequately explained, when Ms. Garcia admitted she was holding a cell phone. The unimpeached testimony of C.Q. lent credence to the State's theory that Mr. Beck had suddenly attacked and raped her for no reason, when the background of the prostitution ring would have given the incident much needed context – specifically, C.Q.'s motive to fabricate.

Without the evidence of C.Q.'s involvement in the underground network of Rainbow Love, the jury could draw no other conclusion but that Mr. Beck had committed the acts of which he was accused, as to the counts involving C.Q. But had the evidence of C.Q.'s acts of dishonesty, theft, and manipulation as “Scarlett” on [classygoddess.com](http://classygoddess.com) been revealed -- as well as the liability she faced due to the Love investigation -- the impact of C.Q.'s testimony would have been greatly reduced.

The State cannot prove beyond a reasonable doubt that the exclusion of relevant evidence, nor that the limitation of Mr. Beck's cross examination of C.Q. on these subjects were harmless. This court must reverse Mr. Beck's convictions on Counts I and II.

E. CONCLUSION

For the above reasons, Mr. Beck respectfully asks this Court to reverse his convictions and grant a new trial.

Respectfully submitted this 6<sup>th</sup> day of July, 2016.

s/ Jan Trasen

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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 74103-9-I
v.	)	
	)	
CHRISTOPHER BECK,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF JULY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] CHRISTOPHER BECK 330693 MCC-INTENSIVE MANAGEMENT UNIT PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF JULY, 2016.

X \_\_\_\_\_ 

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