

NO. 74103-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER XAVIER BECK,

Appellant.

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Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

BRIEF OF RESPONDENT

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A. ISSUES

1. A defendant seeking severance of charges must establish that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy. Here, the trial court found that Beck's rapes of three women were sufficiently similar to show that Beck utilized a common plan when committing the individual rapes. The three rapes occurred over a 15-day period; the victims were all sex workers whom Beck contacted in response to their online advertisements; Beck isolated his victims and then strangled and raped each of them. The trial court found that the three incidents would be cross-admissible if separate trials were held. Has Beck failed to show that the trial court's refusal to sever the counts was an abuse of discretion?

2. A prospective juror must be excused for cause when it is shown that actual bias would prevent the juror from trying the case impartially and without prejudice to the substantial rights of the defendant. Here, a prospective juror admitted that he was troubled by the fact of multiple charges and would be more inclined to think Beck guilty, but repeatedly stated that he would be able to be unbiased and would decide the case based on the evidence presented. Has Beck failed to show that the trial court abused its discretion by denying his motion to excuse the juror for cause?

3. Application of an evidence rule abridges a defendant's constitutional right to present a defense only when it infringes on a weighty interest of the defendant and is arbitrary or disproportionate to the purpose it was designed to serve. Here, the trial court limited Beck's cross-examination of an alleged rape victim, who was a known prostitute, by not allowing inquiry into the witness's knowledge of approximately 15 persons mentioned in a prostitution investigation into another person. Has Beck failed to show that the trial court deprived him of his constitutional right to present a defense? Has he also failed to show that the trial court's application of ER 403 and 404(b), finding that the cross-examination would result in minimally relevant evidence, if any, and would confuse the issues and waste time, was an abuse of discretion?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Christopher Beck was charged by second amended information with five felony counts relating to three female victims. CP 65-66; 8/12/15 RP¹ 4, 11. Count 1, rape in the first degree, and count 2, robbery in the second degree, alleged that Beck committed those offenses against C.Q. on or about March 4, 2014. CP 65. Count 3, rape in the first

¹ Citations to the record in this brief follow the convention established by the Appellant, referencing the verbatim report of proceedings by date and page number.

degree, alleged that Beck committed that offense against C.F. on or about March 13, 2014. CP 66. Counts 4 and 5, charging rape in the first degree and robbery in the second degree, alleged that Beck committed those offenses against his third victim, A.M., on or about March 19, 2014.

CP 66.

The trial court denied Beck's pretrial motion to sever the counts, which asked that the offenses be tried separately for each of the three victims. 8/12/15 (a.m.) RP 12-17. The pretrial order denying severance was based on an extensive offer of proof that included police reports detailing the investigations of the charged crimes. CP 42-279. Beck renewed his motion to sever at various points throughout the case, including at the conclusion of the State's case. 9/9/15 RP 1448-66.

The jury found Beck guilty on counts 1 through 4, and not guilty on count 5. CP 361-65.

2. SUBSTANTIVE FACTS

a. Counts 1 And 2: Beck Raped And Strangled C.Q. After Responding To An Online Advertisement.

C.Q., in February and March, 2014, was a massage therapist who provided services at her apartment in downtown Seattle. 8/25/15 RP 625-26, 634. C.Q. was always naked when she provided the massages, and at the end of the massage she would give the client a "hand job,"

which she also referred to as an “energetic release” or “manual release.” 8/25/15 RP 625-26, 633. C.Q. attracted her clients through advertisements she placed on the website Backpage.com. 8/25/15 RP 628, 630. The advertisements included her telephone number, and her first contact with clients was when they called her in response to the Backpage ads. 8/25/15 RP 630. Clients had the option of choosing massages of varying duration: 30, 60, or 90 minutes. 8/25/15 RP 630-31. Although C.Q. testified that she accepted only cash, she acknowledged that there were some occasions when she would accept a credit card. 8/25/15 RP 632. When she accepted payment by credit card, the transaction was processed by her friend, Rainbow Love.² 8/25/15 RP 632. C.Q. testified that she never allowed clients to touch her and she never provided any sexual service other than a manual release, despite efforts by some clients to barter for more. 8/25/15 RP 633-34.

Christopher Beck contacted C.Q. by phone in response to her Backpage advertisement. 8/25/15 RP 635. He set up an appointment for a 90-minute massage and, because he wanted to pay with a credit card, C.Q. told him how to pay online through Rainbow Love’s account. 8/25/15 RP 635-37. Beck came in for his massage, which C.Q. described as a “normal

² C.Q. also admitted that when Love referred clients to her she paid Love a \$20 “scheduling fee.” 8/26/15 RP 672.

appointment” that ended with a manual release. 8/25/15 RP 637-38. She said that Beck was quiet and reserved and asked for nothing more than the massage with manual release. 8/25/15 RP 637-38.

Sometime after the appointment, C.Q. learned that Beck’s credit card payment had been rejected. 8/25/15 RP 636. Rainbow Love contacted C.Q. and told her to contact Beck because he “was trying to make it right.” 8/25 RP 639. Subsequently, C.Q. and Beck had an email exchange in which he arranged to come to her apartment and give her cash. 8/25/15 RP 639-43. When Beck arrived he immediately asked to use her bathroom. 8/25/15 RP 646. When he came out of the bathroom he walked up to C.Q. and told her he was not going to pay her, and “he was laughing about it, almost.” 8/25/15 RP 647. He then grabbed her by the throat and covered her mouth. 8/25/15 RP 647. She tried to fend him off, but he grabbed her by the neck and choked her to keep her from screaming. 8/25/15 RP 648. He told her he was going to have intercourse with her without a condom. 8/25/15 RP 649. He said he was going to make her his “dirty whore.” 8/26/15 RP 679. He made her take her clothes off and he took his pants down. 8/25/15 RP 649-50. He forced her to perform fellatio. 8/25/15 RP 650. C.Q. testified that she kept telling him that she was a prostitute and had diseases so that he would not rape her vaginally. 8/25/15 RP 651. During the attack he strangled her;

she couldn't breathe and believed she passed out at one point. 8/25/15 RP 651.

C.Q. had been expecting a friend, Carmen, to arrive to take pictures of her for Backpage.com. 8/25/15 RP 643-44. During the attack, C.Q.'s phone kept ringing until Beck made her unlock the phone and then he texted "one sec" from her phone. 8/25/15 RP 652-53. When she knew her friend was on the other side of the door, C.Q. ran for the door but Beck held her and put his knee against her head. 8/25/15 RP 653. Soon after Carmen began knocking on the door, Beck left with C.Q.'s purse, some prepaid Visa cards³, and her three cell phones. 8/25/15 RP 654. Before leaving, he told C.Q. that if "she tried to come after" him, he would kill her. 8/25/15 RP 655.

Carmen Garcia testified that she arrived at C.Q.'s building and tried several times to reach her by phone, but the calls went unanswered. 9/8/15 (a.m.) 1300-01. Finally, she received a text back that said, "just a sec," which she thought was odd. 9/8/15 (a.m.) 1301. After a doorman let her in, Garcia went upstairs and knocked on C.Q.'s door. 9/8/15 (a.m.) 1302. Nobody answered her knock, but she heard sounds of a struggle just behind the door, and then she heard a voice say, "call 911."

³ When Beck was arrested on March 21, 2013, he had Visa gift cards in his wallet that were identified by C.Q. as the ones that Beck had stolen. 8/26/15 RP 807-10.

9/8/15 (a.m.) 1302. The female voice sounded as if she were being choked. 9/8/15 (a.m.) 1302-03. Rather than calling 911, Garcia ran through the hallway banging on apartment doors and yelling for help.

9/8/15 (a.m.) 1304-05. C.Q.'s door then opened and Beck (identified by Garcia in court), looking "scared," came out and ran to the elevator.

9/8/15 (a.m.) 1305. Garcia went inside and saw that C.Q. was a "complete mess" and had red marks and scratches on her neck and shoulders. 9/8/15

(a.m.) 1306-07. Garcia saw that a large vase had been knocked over and the contents of a purse had been dumped on the floor. 9/8/15 (a.m.) 1306.

b. Count 3: Beck Raped And Strangled C.F. After Responding To An Online Advertisement.

Twenty-one year-old C.F., an admitted heroin addict, testified that she lost her job waitressing at a strip club, lost her apartment, and moved into a cheap motel in Seattle. 9/1/15 RP 919, 922, 924. Sometimes C.F. posted advertisements on Craigslist offering to sell her underwear. 9/1/15 RP 925. Beck responded to an advertisement by emailing C.F., who replied by directing Beck to come to the motel.⁴ 9/1/15 RP 926-27. C.F. met Beck in the motel parking lot where he asked her to get into his car to remove her underwear. 9/1/15 RP 929. C.F. testified that she refused to

⁴ Beck testified that he was looking for a sexual partner and had responded to an advertisement that was placed by C.F. in the "Casual Encounters" section of Craigslist.

get into his car and Beck left. 9/1/15 RP 929-30. The two then traded insults by email. 9/1/15 RP 930.

A short time later, Beck sent a text or email apologizing to C.F. and offering to buy her food. 9/1/15 RP 930. C.F. testified that she was wary of someone who had just insulted her, but that she was “desperate” because she had not eaten for three days and was about to be evicted from the motel. 9/1/15 RP 930-31. Beck returned, C.F. got into his car, and Beck drove to a McDonald’s restaurant that had closed for the night. 9/1/15 RP 931-33. C.F. testified that as soon as Beck parked the car he grabbed her behind her neck and pushed her head down toward his penis. 9/1/15 RP 936. When C.F. resisted, Beck began strangling her with both hands, causing her to nearly lose consciousness. 9/1/15 RP 936, 940. Beck said: “Bitch, you know what I want? I’ll fucking kill you right here. Get in the fucking back seat.” 9/1/15 RP 937. Beck then vaginally raped C.F. in the car while she pleaded with him to take her home. 9/1/15 RP 937-38. After the rape, C.F. fled from the car wearing only her shirt and shoes, leaving her cell phone and other clothes in Beck’s car. 9/1/15 RP 938-39. She was picked up by a stranger who took her back to her motel. 9/1/15 RP 939.

At the motel, C.F.’s friend April Bucklin immediately called 911. 9/1/15 RP 845, 940-41. Bucklin saw that C.F. was crying and hysterical,

and C.F. told her she had been raped. 9/1/15 RP 842-43. A responding police officer saw that C.F. was very upset; she was crying, breathing heavily, and speaking quickly. 9/1/15 RP 883. She was naked from the waist down but was wrapped in a blanket. 9/1/15 RP 883.

Analysis of a sexual assault “rape kit” conclusively showed the presence of Beck’s DNA in semen from a cervical swab collected from C.F. 9/2/15 RP 1107, 1111.

c. Counts 4 And 5: Beck Raped And Strangled A.M. After Responding To An Online Advertisement.

A.M. testified that she was an independent insurance claims adjuster and a corporate trainer for a large insurance company. 9/8/15 (a.m.) RP 1359. Her work as a claims adjuster tends to be dependent on catastrophic weather events. 9/8/15 (a.m.) RP 1360. She supplements her income by working “in the adult industry doing erotic massage.” 9/8/15 (a.m.) RP 1361. A.M. lives in Florida but travels around the country providing erotic massages in cities where she does not also work in the insurance industry so that she will not run into colleagues or clients. 9/8/15 (a.m.) RP 1368, 1374. She places ads with Backpage.com promising “erotic massage with prostate stimulation and related anal stimulation-type play.” 9/8/15 (a.m.) RP 1368-69. She communicates

with the men who respond to her ads solely by email. 9/8/15 (a.m.) RP 1372.

In March, 2014, A.M. came to Seattle. 9/8/15 (a.m.) RP 1374. She booked a room at the downtown Westin Hotel and placed an ad in the “domination and fetish” section of Backpage. 9/8/15 (a.m.) RP 1375-77. Beck responded to her ad with an email. 9/8/15 (p.m.) RP 6. By email a meeting was arranged at the Westin for March 19, 2014. 9/8/15 (p.m.) RP 12. Beck arrived for the appointment, the two hugged, A.M. gave her standard “scripted” explanation of what he could expect with the specific type of massage that she provides, and Beck then undressed and went into the bathroom. 9/8/15 (p.m.) RP 14-18. A.M. testified that when Beck came out of the bathroom he repeatedly tried to confirm the rate, which made her uncomfortable, and she declined to do so. 9/8/15 (p.m.) RP 18-20. According to A.M., when she refused to confirm the rate, “it happened really fast”; Beck moved into her space and A.M. tried to cancel the appointment by saying something like, “let’s just shake hands and part friends.” 9/8/15 (p.m.) RP 20-21. Beck said at least two times, “I’m going to get what I came for,” and then put his hands around A.M.’s throat and strangled her until she blacked out. 9/8/15 (p.m.) RP 21.

A.M. testified that when she regained consciousness she was on the bed with Beck straddling her as he tried to pull off her dress. 9/8/15

(p.m.) RP 22. Beck was angry as he struggled to pull her clothes off, and A.M. told him she would do anything he wanted and took off her dress. 9/8/15 (p.m.) RP 23. Beck then orally and vaginally raped A.M. 9/8/15 (p.m.) RP 23-24. After he finished, Beck talked to her as if nothing had happened; "he was so cool and so cold, so unemotional." 9/8/15 (p.m.) RP 24-25. He told her twice: "You don't have to be scared. I am not going to hurt you anymore." 9/8/15 (p.m.) RP 25. He stayed and looked around the room, and continued talking to her in such an oddly calm way that she believed he was going to kill her. 9/8/15 (p.m.) RP 24-25. Finally, Beck left after taking the cash that A.M. had made from earlier appointments and had put under her laptop. 9/8/15 (p.m.) RP 26.

A.M. considered calling 911 immediately but did not; she knew what she was doing was illegal and was concerned she would be treated badly. 9/8/15 (p.m.) RP 27. She had never before interacted with police in her capacity as a sex worker. 9/8/15 (p.m.) RP 48. Also, Beck had taken all the money she had. 9/8/15 (p.m.) RP 27. A.M. had two more clients scheduled for that afternoon, one of whom was waiting downstairs. 9/8/15 (p.m.) RP 28. She tried to go through with both appointments but was unable to. 9/8/15 (p.m.) RP 28-29. After her second client left, A.M. contacted hotel security and then met with Seattle police officers. 9/8/15 (p.m.) RP 29. When the officers arrived they found her to be

visibly distraught, with shaking hands and quivering lower lip. 9/2/15 RP 1132.

A.M. had a sexual assault examination done at Harborview Medical Center. 9/8/15 (p.m.) RP 30. DNA analysis established that Beck's semen was on a vaginal swab collected from A.M. 9/3/15 RP 1232.

C. ARGUMENT

Beck raises three claims on appeal. First he argues that the trial court abused its discretion by denying his motion to sever the counts relating to the three different victims. Beck's claim fails because the trial court properly found that the three rapes were sufficiently similar to indicate that Beck acted on a common plan, and that, therefore, the incidents would be cross-admissible under ER 404(b) if they were tried separately. Other factors do not overcome the strong concern for judicial economy.

Beck next claims that a potential juror should have been excused for cause. The juror acknowledged that the multiple charges caused him concern and that he was more inclined to think Beck guilty because of the number of counts. But, after making those statements, the juror three times assured the court that he could be unbiased and would decide the case based on the evidence presented. Beck cannot show that it was an

abuse of discretion for the trial court, who was present and able to observe the demeanor of the juror, to deny his motion to excuse the juror for cause.

Finally, Beck argues that the trial court deprived him of his constitutional right to present a defense by limiting cross-examination of victim C.Q. The admitted testimony established that C.Q. worked as a prostitute when she was raped by Beck, but Beck sought to cross-examine her about as many as 15 persons identified in a prostitution investigation of Rainbow Love. The trial court properly excluded the proposed cross-examination under ER 404(b), finding it would result in evidence of minimal relevance compared to the likely confusion of issues and waste of time. This proper evidentiary decision did not undermine any fundamental element of Beck's defense and was not, therefore, a deprivation of his right to present a defense.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTION TO SEVER WHERE BECK REPEATEDLY ENACTED A COMMON PLAN TO CONTACT AND ISOLATE SEX WORKERS SO THAT HE COULD RAPE THEM.

Beck contends that the trial court erred by refusing to sever the counts relating to the three different victims. This claim should be rejected.

Separate trials are not favored in Washington, and a defendant seeking severance of offenses must establish that a joint trial would be so

manifestly prejudicial as to outweigh the concern for judicial economy. State v. Grisby, 97 Wn.2d 493, 506, 647 P.2d 6 (1982); State v. Israel, 113 Wn. App. 243, 290, 54 P.3d 1218 (2002). The decision of the trial court not to sever counts is reversible only upon a showing of manifest abuse of discretion. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993) (citing State v. Bythrow, 114 Wn.2d 713, 717-18, 790 P.2d 154 (1990)). Thus, to prevail on appeal, a defendant must prove that “no reasonable person would have decided the issue as the trial court did.” State v. Russell, 125 Wn.2d 24, 78, 882 P.2d 747 (1994).

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.

To determine whether severance of charges is necessary to avoid prejudice to a defendant, a court considers “(1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.” State v. Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009).

- a. The Trial Court Properly Determined That Under ER 404(b) Evidence Of Each Of The Rapes Would Have Been Cross-Admissible At Separate Trials.

Here, the State will first address the fourth Sutherby consideration, since the trial court properly found evidence of the rapes would be cross-admissible even if not joined for trial, and because that finding renders the other severance considerations less significant. The trial court determined that the prior rapes were admissible under the common plan or scheme exception to ER 404(b). 8/12/15 (p.m.) RP 12-17. Our supreme court has held:

Proof of such a plan is admissible if the prior acts are (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.

State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

In Lough, on which the trial court relied, the supreme court noted that two scenarios give rise to the common plan or scheme exception to ER 404(b): (1) “where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan” and (2) “when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.” 125 Wn.2d at 855. Here, the trial court correctly determined that evidence of the three rapes was cross-admissible under the

second theory. In determining whether ER 404(b) evidence is admissible for this purpose, Lough held that in order to be a common scheme or plan, the other crimes must show “such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.” 125 Wn.2d at 860.

Lough observed “the results in these kinds of cases will be largely dependent on the facts of each case.” 125 Wn.2d at 856. In Lough, in which the defendant was charged with attempted rape and indecent liberties relating to a single victim, the Court upheld the trial court’s admission of evidence of multiple prior rapes, stating:

The evidence that this Defendant rendered four other women, whom he had relationships with, unconscious with drugs and then raped them is not admitted to establish that the [d]efendant has a criminal disposition or a bad character; it is admitted to show that he committed the charged offense [drugging and raping a woman while on a date] pursuant to the same design he used in committing the other four acts of misconduct. The evidence is admitted to show plan, not propensity.

Lough, at 861.

Beck misunderstands the test that determines the admissibility of other crimes to show that a defendant acted in accordance with a common plan. He argues that the trial court erred because “there was no showing that the rapes were committed in a *particularly unique manner* to justify

cross-admissibility.” Brief of Appellant at 23 (emphasis added). But uniqueness is required only when the evidence of other acts is used to establish the perpetrator’s identity, not when the evidence is used to prove simply that the crime occurred. State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003), interpreting and applying Lough, held:

[W]hen identity is at issue, the degree of similarity must be at the highest level and the commonalities must be unique because the crimes must have been committed in a manner to serve as an identifiable signature. In contrast, the issue in the present case was not the identity of the perpetrator, but whether the crime occurred. Although a unique method of committing the bad acts is a potential factor in determining similarity, uniqueness is not required.

In DeVincentis, a prosecution for child molestation, the supreme court upheld the trial court’s admission of evidence of a prior child molestation to prove the charged crime. The similarities between the charged offense and the other crime that supported the admissibility of the ER 404(b) evidence included the defendant (1) wearing only bikini or g-string underwear; (2) asking both victims if they minded his lack of clothes; (3) asking both girls to remove their clothes; (4) asking both victims for massages and to masturbate him until he ejaculated; and (5) asking both victims not to tell. DeVincentis, 150 Wn.2d at 22.

Here, as with Lough and DeVincentis, identity was not at issue; the defense theory was consent. The evidence that Beck was acting on a

common plan in committing the three rapes was used to prove that the crimes occurred, i.e., that the sexual acts were committed by force, rather than with the consent of the victims. As Beck repeatedly pointed out at trial and on appeal, he did nothing to conceal his identity from the women; he used his true name and email accounts that identified him.⁵ His argument was that the three women were sex workers who consented to the sexual acts. Because identity was not the issue, there was no requirement of uniqueness to support the determination of cross-admissibility, only sufficient similarities between the three incidents to show that Beck was acting on a common plan. Under DeVincentis, the trial court “need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.” Id. at 13.

In State v. Gresham, 173 Wn.2d 405, 423, 269 P.3d 207 (2012), the supreme court held that the trial court did not abuse its discretion by admitting four prior acts of child abuse pursuant to ER 404(b) to show that defendant Roger Scherner acted in accordance with a common plan in committing the charged offenses of child molestation against victim M.S.

The court stated:

With respect to evidence of Scherner’s abuse of Williamson and Kahn, the implementation of the crime was markedly similar to the charged crime: Scherner took a trip

⁵ Beck conceded below that identity was not in question. 8/12/15 (p.m.) RP at 10.

with young girls and at night, while the other adults were asleep, approached those girls and fondled their genitals. Though there are some differences (e.g., the presence of oral sex), these differences are not so great as to dissuade a reasonable mind from finding that the instances are naturally to be explained as “individual manifestations” of the same plan. Though the abuse of Spillane and Oducado took place in Scherner’s home, the remaining details share such a common occurrence of fact with the molestation of M.S. that we cannot say that the trial court abused its discretion in determining that these were merely individual manifestations of a common plan.

Gresham, at 422-23 (citations omitted). In upholding the trial court, the supreme court cited Lough and DeVincentis, stating “we are not inclined to retreat from our holding in DeVincentis that the relevant commonality need not be ‘a unique method of committing the crime.’” Id. at 423 (citation omitted). The Court rejected Scherner’s argument “that evidence of prior misconduct admitted for the purpose of showing a common scheme or plan must be distinct from common means of committing the charged crime.” Id. Under Gresham, even common means of committing a crime, when repeated, may be evidence of a common plan and therefore admissible.

Here, the trial court reasonably found that under ER 404(b) the three charged rapes would be cross-admissible to show a common plan even if they had not been joined for trial, thus severance was not appropriate. The three rapes committed by Beck bore “marked

similarities,” such that each of the rapes was an “individual manifestation” of a “general plan.” Beck’s overarching plan was to target sex workers who advertised online, whom he could isolate easily, who would be less likely to report a sex offense, and who, because prostitution is illegal, would have inherent credibility issues. To facilitate each of the rapes, Beck responded to advertisements of sex workers on Backpage and Craigslist. After the initial response, Beck arranged to meet alone with each victim in an isolated location. In each instance, Beck strangled his victim into submission before raping them; two victims testified they had lost consciousness and the third said that she had nearly blacked out. In properly seeing the individual rapes as part of a common plan, it is highly significant that the rapes occurred over a span of only 15 days. Lough, at 860.

The trial court did not abuse its discretion in finding that the three rapes would be cross-admissible. That the court carefully exercised its discretion is made clear by the fact that the court determined that evidence of another rape was not admissible under ER 404(b). The trial court held that Beck’s alleged rape of J.C. in Kitsap County was not admissible because the assault of J.C. included multiple rapes over a five-hour period and was in the presence of a child. 8/13/15 RP 104-08. The court found both that the Kitsap County crime was insufficiently similar to be

considered part of the common plan, and also that the prejudicial effect would substantially outweigh the probative value of the evidence. 8/13/15 RP 104-08.

b. Considerations Other Than Cross-Admissibility
Also Did Not Weigh In Favor Of Severance.

Regarding the first severance consideration, relating to the strength of the State's evidence on each count, Beck's argument that the counts should have been severed "in light of the comparative weakness of the evidence to establish each individual count" is without merit. The reason trial courts should consider the strength of the State's evidence on each count is to assess whether weaker counts would unduly benefit from the evidence of stronger counts. Russell, 125 Wn.2d at 63-64 (upholding trial court's determination that counts were not sufficiently dissimilar to merit severance). Beck argues the evidence was weak on all counts.

However, the trial court found the evidence of rape of each victim to be "strong." 8/12/15 (p.m.) 15. Given the limited nature of Beck's defense, where he did not contest identity but claimed each victim had consented to the sexual activity, there was no clear difference in the strength of the State's case for each rape. With the rape of C.Q., a witness saw Beck leaving the apartment, then observed the victim's injuries and saw that her apartment showed signs of a struggle with the overturned

vase and strewn purse contents. With the rape of C.F. the victim's distraught condition was observed by her friend April Bucklin immediately after the rape, and by responding police officers. Regarding the rape of A.M., responding police officers also found her to be visibly distraught with shaking hands and quivering lower lip. Although there was DNA evidence linking Beck to C.F. and A.M., but not C.Q., that had no impact on the relative strength of the evidence since the defense was consent. Each rape count depended largely on the jury's assessment of the credibility of the testifying victim relative to Beck's testimony. There was no dissimilarity in the relative strength of the evidence that would merit severance of the counts.

Regarding the second severance consideration, the clarity of defenses as to each count, Beck's argument also fails. In State v. York, 50 Wn. App. 446, 749 P.2d 683 (1987), a case very similar to the instant case, this Court reviewed the trial court's refusal to sever four counts of sex crimes committed by an employee of a beauty school against four students of the school. This Court held that the counts were cross-admissible under ER 404(b) as a common plan or scheme and were therefore properly joined for trial. York, at 454-58. In upholding the trial court's denial of severance, this Court rejected York's clarity of defenses argument for severance because his defense to all counts was either general denial or

consent. York, at 451. York held, therefore, that the defendant “was not embarrassed or confounded in presenting his defenses.” Id. Here, likewise, Beck did not seek to present inconsistent defenses to the charges; his defense to each of the counts was general denial or consent. He was not embarrassed or confounded in presenting his defenses by the lack of severance.

Beck also contends that he “needed to testify about certain counts, but not others,” and, therefore, the counts should have been severed. BOA 15. His claim is unconvincing. “A defendant’s mere desire to testify only to one count is an insufficient reason to require severance.” State v. Weddel, 29 Wn. App. 461, 467, 629 P.2d 912 (1981). Severance is only required “if the defendant makes a convincing showing to the trial court that he has important testimony to give concerning one count and a strong need to refrain from testifying about the other.” Id. at 468; Russell, 125 Wn.2d at 65. Here, Beck made no such showing to the trial court. Beck did not even specify on which counts he felt the need to testify, or which counts he believed it necessary to refrain from testifying, let alone make a “convincing showing.” Beck’s citation to the record (9/9/15 RP 1465-66, 1471-74) does not support his argument. The record shows that Beck argued only that *if* he decided to testify, and *if* he testified regarding some (unspecified) counts but not others, the trial court should limit cross-

examination to the counts on which he testified. 9/9/15 RP 1465-66, 1471-74. At most, the record shows only that Beck may have had a desire to testify as to some counts but not as to others; there was no showing of “a strong need to refrain from testifying” as to some counts. That does not warrant severance.

Regarding the third severance consideration, the court instructed the jury to consider each count separately. Beck acknowledges that the jury was properly instructed.⁶ Beck argues that trying the joined counts was so prejudicial that the instruction would have been ineffective. But as argued herein, Beck has not shown that joinder was improper.

c. Beck Has Not Established That Joinder Resulted In Manifest Prejudice That Outweighed The Concern For Judicial Economy.

Separate trials are not favored in Washington, and Beck has failed to show that the joint trial was so manifestly prejudicial as to outweigh the concern for judicial economy.

Given the trial court’s correct determination that the three rapes would be cross-admissible if separate trials were to be held, the concern for judicial economy was paramount and severance would have been

⁶ Jury instruction No. 7 read: “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 any other count. When deliberating on a particular count, you may consider evidence related to other counts for the limited purpose of determining whether or not there exists a common scheme or plan, if any.” CP 336.

improper. Beck's argument that joinder of the counts did not promote judicial economy is fallacious because it presupposes that the three rapes were not cross-admissible. BOA 24. He argues that in separate trials the testimony relating to the counts involving the different victims would not need to be repeated. In fact, given the cross-admissibility ruling, denial of the severance motion had an enormous favorable impact on judicial economy, since severance would have resulted in essentially holding the same trial three times, including testimony from all three victims, responding officers who observed the demeanors of the victims, different case detectives, sexual assault nurses who performed examinations of the victims, and separate forensic experts who analyzed the DNA connecting Beck to two victims.

Given the cross-admissibility of the charges, Beck has failed to show that any other considerations were sufficient to override the importance of judicial economy. He has not established a manifest abuse of discretion, as it cannot be said that no reasonable judge would have declined to sever the charges.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING BECK'S MOTION TO EXCUSE THE JUROR FOR CAUSE.

a. Voir Dire.

In voir dire, Beck's attorney asked whether jurors were concerned "that because there are more charges, that the probability each one of them occurred is now greater in your mind than if it were a single charge?"

8/24/15 RP 449. Two-thirds of the venire members raised their hands.

8/24/15 RP 449. Juror No. 106 was among those who indicated that the number of accusations made him more likely to believe the defendant was guilty. 8/24/15 RP 449.

When Beck's attorney followed up, Juror No. 106 said:

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.

8/24/15 RP 493-94. Then there was the following exchange:

[Beck's attorney]: If I heard you correctly, what I heard you say is, with more people saying he did something wrong, you believe it's more likely that he did something wrong. And right now, you have heard that there are more than one person making an accusation. So you think it's more likely that he did what he is charged with?

JUROR NO. 106: Correct. **But I would still want to hear the proof that has to be given in order for me to say that he is guilty.**

8/24/15 RP 494 (emphasis added).

When Beck's attorney challenged Juror No. 106 for cause, rather than ruling immediately, the trial court invited additional questioning from the prosecutor. 8/24/15 RP 496. The prosecutor then referred back to the juror's previous comment that he would nonetheless require proof of guilt, and the following exchange occurred:

[Prosecutor]: Do you think your bias would prevent you from being open-minded in listening to the evidence and making a decision whether or not the State has proven beyond a reasonable doubt the charges?

JUROR NO. 106: **No. I believe I could still make an unbiased decision.**

[Prosecutor]: Thank you. I don't think that's cause, Your Honor. It won't be easy for anybody.

THE COURT: He wasn't quite done.

[Prosecutor]: My apologies. I didn't mean to interrupt you.

JUROR NO. 106: **No, I agree with being able to make an unbiased decision based on the evidence.**

THE COURT: Thank you.

[Prosecutor]: We would object to the challenge for cause, Your Honor.

THE COURT: I'll deny it without prejudice to renew.

[Beck's Attorney]: Thank you, Your Honor.

8/24/15 RP 497 (emphasis added).

Beck's attorney made no further inquiries of Juror No. 106.

b. Actual Bias On The Part Of Juror No. 106 Was Not Established.

The right to trial by an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). To protect this right, a juror will be excused for cause if his views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)). 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).

The Supreme Court has acknowledged the “traditionally broad discretion accorded to the trial judge in conducting *voir dire*.” Mu’Min v. Virginia, 500 U.S. 415, 423, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991). “Despite its importance, the adequacy of *voir dire* is not easily subject to appellate review. The trial judge ... must reach conclusions as to impartiality and credibility by relying on [his or her] own evaluations of demeanor evidence and of responses to questions.” Mu’Min, 500 U.S. at

424, 111 S. Ct. 1899 (quoting Rosales-Lopez v. United States, 451 U.S. 182, 188, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981)).

A trial court's ruling on a challenge for cause is reviewed for manifest abuse of discretion. State v. Gregory, 158 Wn.2d 759, 814, 147 P.3d 1201 (2006). "The reason for this deference is that the trial judge is able to observe the juror's demeanor and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial." State v. Gentry, 125 Wn.2d 570, 634, 888 P.2d 1105 (1995). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

Here, Beck has failed in his burden to show actual bias. In his brief, Beck failed to acknowledge that Juror No. 106, after having expressed concerns about the multiple charges upon defense counsel's prompting, three times assured the trial court that he could give Beck an unbiased trial and determine guilt based on the evidence presented. It is well-settled that "equivocal answers alone do not require a juror to be removed when challenged for cause, rather, the question is whether a juror with preconceived ideas can set them aside." State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991); State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987); State v. Latham, 100 Wn.2d 59, 64, 667 P.2d 56 (1983).

More than a possibility of prejudice must be shown. Noltie, at 840.

Although Juror No. 106's initial responses indicated some degree of potential bias due to the multiple charges, he repeatedly indicated to the trial court that he could put that notion aside and give Beck a fair trial based on the evidence.

Beck relies on State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002), in which, the court of appeals reversed the defendant's convictions, finding an abuse of discretion by the trial court in refusing to excuse a juror for cause after a motion by the defense. In Gonzales, under questioning by defense counsel, the juror admitted a strong bias in favor of believing police testimony, said that she would presume the testimony of a police officer to be true if it conflicted with testimony from the defendant, and would not give an assurance that she could afford the defendant the presumption of innocence. Gonzales, at 278-79. Gonzales held that it was an abuse of discretion to deny the defendant's motion to dismiss the juror for cause. Id. at 282. Gonzales provides no support to Beck. Here, unlike in Gonzales, the juror repeatedly assured the trial court that he would render an unbiased verdict based on the evidence presented.

In situations like this, great deference must be given to the trial court, since the court was in a position to observe the juror's demeanor and evaluate the juror's responses in light of those observations. It was

not an abuse of discretion by the trial court to deny the motion to excuse Juror No. 106 for cause.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING EVIDENCE RELATING TO AN INVESTIGATION INTO RAINBOW LOVE.

Beck argues that the trial court violated his constitutional right to present a defense by limiting his cross-examination of C.Q. pursuant to ER 404(b). Beck sought to question C.Q. about a law enforcement investigation into prostitution-related activities of Rainbow Love. Beck's claim is without merit. The trial court's limitation of the cross-examination did not violate Beck's constitutional right to present a defense because it did not significantly undermine any fundamental element of his defense. Moreover, the court's limitation of the cross-examination was a proper use of ER 404(b). C.Q., in her testimony, admitted that she advertised her services online, that she engaged in acts of prostitution, and that she was associated with Rainbow Love. Allowing cross-examination of C.Q. regarding a law enforcement investigation into Rainbow Love would have confused the issues and wasted time, and would have resulted in little or no evidence relevant to the rape incident.

State courts have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. State v. Donald, 178 Wn.

App. 250, 263, 316 P.3d 1081 (2013) (citing United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1988)). However, a criminal defendant's constitutional right to "a meaningful opportunity to present a complete defense" limits this latitude. Id. at 263 (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)).

An evidence rule abridges this right when it infringes upon a weighty interest of the defendant and is arbitrary or disproportionate to the purpose it was designed to serve. Id. at 263 (citing Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). But the defendant's right to present a defense also has limits. The defendant's right is subject to reasonable restrictions and must yield to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Id. at 263-64 (quoting State v. Finch, 137 Wn.2d 792, 825, 975 P.2d 967 (1999)).

In Donald, a defendant convicted of first degree assault and attempted robbery argued that application of ER 404(b) to exclude his proffered evidence was a deprivation of his right to present a defense. 178 Wn. App. at 253-54. Donald had sought to admit evidence of his codefendant's history of violence to argue that his codefendant was solely responsible for the crimes. Id. This Court held that the trial court properly

used ER 404(b) to exclude the propensity evidence, and that doing so was not a constitutional violation of Donald's right to present a defense.

Excluding [the codefendant's] criminal history did not significantly undermine any fundamental element of Donald's defense. It did not exclude any witness with knowledge of any fact of the alleged crimes or any part of that witness's testimony. It did not exclude any testimony from Donald. He still could present all of the facts relevant to Leon's involvement in the assault upon [the victim]. ER 404(b) prevented him only from presenting propensity evidence the common law generally excludes because it is distracting, time-consuming, and likely to influence a fact finder far beyond its legitimate probative value.

Id. at 268.

Here, as with Donald, the trial court's use of ER 404(b) to preclude cross-examination of C.Q. on the investigation into Rainbow Love "did not significantly undermine any fundamental element" of Beck's defense. The investigation into Rainbow Love's prostitution activities was not relevant to Beck's rape and robbery of C.Q. Beck's argument seems to be that prostitutes who have provided sex and then had a pay dispute with a client have a motive to make a false allegation of rape in order to use law enforcement to assist in recovering stolen money. First, this premise is faulty, as prostitutes are likely to be less inclined to contact law enforcement when they are engaged in an illegal transaction. Here, C.Q. testified that she had not called 911 right after the rape because she thought she "might be getting myself in trouble" because of "what I do for

work.” 8/26/15 RP 781.⁷ Second, even if there were truth to the premise, the jury knew that C.Q. was engaged in prostitution when she was raped. How would allowing cross-examination on an investigation into the prostitution activity of someone else provide some additional relevant information? The trial court pressed Beck on this very point:

Mr. Peale, what would this witness [C.Q.] be trying to conceal? How is evidence of other prostitution activity a motive to lie if, in this case, she is already admitting to the prostitution activity? What would she gain by concealing that?

It goes all the way back to the first issue. It’s really a 404(b) issue.

How does this evidence show a motive to lie?

8/26/15 RP 752. Beck has failed to answer this question adequately, at trial or on appeal.

The truth of the matter is that Beck sought to cross-examine C.Q. on the prostitution investigation into Rainbow Love in order to introduce propensity evidence—more evidence that C.Q. was a prostitute. As the prosecutor argued:

Mr. Peale simply wants to -- he said it best -- point out that she is a lying whore.⁸ That’s his intention here, to spend

⁷ Similarly, A.M. did not call 911 after she was raped because she knew that what she was doing was illegal and thought she would be treated badly by the police. 9/8/15 (p.m.) RP 27.

⁸ The prosecutor’s use of this term was quoting Beck’s attorney, who argued that C.Q.’s characterization of the act she performed in exchange for money as “therapeutic massage,” was so that “she can make the distinction between being a whore and a therapist.” 8/26/15 RP 718.

time to make her look as bad as he can and abuse her on things that she has already admitted she has done.

8/26/15 RP 723-24. Beck's attorney admitted that it was his intention to cross-examine C.Q. regarding all 15 persons who were mentioned in the Rainbow Love investigation.

THE COURT: Okay. So you are asking the Court to allow you to ask [C.Q.] questions about her knowledge of the about 15 people who are mentioned in the investigation?

MR. PEALE: Yes.

8/26/16 RP 732.

Beck's reliance on State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), in arguing that the trial court's limitation of the cross-examination was a constitutional deprivation, is misplaced. In Jones, the supreme court held that the trial court violated the defendant's right to present a defense when it excluded "essential facts of high probative value" related to the circumstances surrounding an alleged rape. 168 Wn.2d at 721. In Jones, the defendant was prepared to testify that the victim had consented to sex during an all-night drug-induced sex party. Id. The trial court erred by precluding the testimony pursuant to the rape shield statute. The supreme court stated:

This is not marginally relevant evidence that a court should balance against the State's interest in excluding the evidence. Instead, it is evidence of extremely high probative value; it is Jones's entire defense. Jones's evidence, if believed, would prove consent and would

provide a defense to the charge of second degree rape. Since no State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value, the trial court violated the Sixth Amendment when it barred such evidence.

Id. Here, the trial court's ruling did not exclude evidence of "extremely high probative value" that amounted to Beck's "entire defense." The trial court excluded evidence of no relevance to avoid confusion of issues and waste of time. This was a run-of-the-mill application of ER 404(b).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Evidence that is relevant may nonetheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Under ER 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove character or conformity with it, but it may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Here, the trial court found, under ER 404(b), that the proposed cross-examination of C.Q. into the Rainbow Love investigation would not “sufficiently provide a motive to lie” and that it would not “be more probative than prejudicial.” 8/26/15 RP 773. The court stated that Beck’s “theory of admissibility” did not “outweigh the concern for basically waste of time and prejudice.” 8/26/15 RP 774.

The trial court did not err. Given the testimony of C.Q. that had already been admitted relating to her prostitution activities, allowing cross-examination into a prostitution investigation into Rainbow Love would have resulted in testimony of minimal if any relevance. The jury already knew that C.Q. advertised her services on Backpage.com, and that she provided massages while naked and that ended with a “hand job.” 8/25/15 RP 625-26, 628-30. Her advertisements on Backpage.com included pictures of her exposed buttocks and upper thighs. 8/26/15 RP 704. The jury also heard that C.Q. was trained to do the naked massages by Rainbow Love (8/25/15 RP 624); that for a year or two before C.Q. became more independent she lived and worked with Love and Love scheduled all of her clients (8/25/15 RP 624-25); that even after C.Q. became independent, Rainbow Love processed credit card transactions for her (8/25/15 RP 632); that it was Love who processed Beck’s credit card

(8/25/15 RP 632); and that even after C.Q. became more independent, she paid Love \$20 any time Love referred a client (8/26/15 RP 672).

As argued above, pursuant to Donald, supra, the trial court's limitation of the cross-examination of C.Q. was not a constitutional deprivation of Beck's right to present a defense. This was simply an evidentiary ruling to be reviewed for abuse of discretion. State v. Garcia, 179 Wn.2d 828, 846, 318 P.3d 266 (2014). In State v. Aguirre, 168 Wn.2d 350, 361-62, 229 P.3d 669 (2010), the supreme court held that the trial court's limitation of the cross-examination of a rape victim about her relationship with another man was reviewed for abuse of discretion. Here, the trial court did not abuse its discretion by limiting the cross-examination of C.Q., where testimony already established C.Q.'s involvement in prostitution and the defendant sought to examine her regarding 15 persons named in an unrelated prostitution investigation. It cannot be said that no reasonable judge would have concluded that the resulting evidence would have been of minimal relevance and would have involved confusion of issues and waste of time.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Beck's judgment and sentence.

DATED this 5 day of October, 2016.

Respectfully submitted,

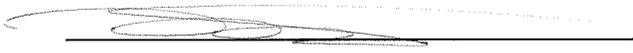
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Jan Trasen, containing a copy of the Brief Of Respondent, in STATE V. CHRISTOPHER XAVIER BECK, Cause No. 74103-9-1, 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.



Done in Seattle, Washington

Date : Oct.5, 2016