

FILED
SUPREME COURT
STATE OF WASHINGTON
1/27/2025 1:49 PM
BY ERIN L. LENNON
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**Supreme Court No. 103765-1
COA No. 39322-4-III**

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent

v.

NATHAN NASH,
Defendant/Petitioner.

ANSWER TO DEFENDANT'S PETITION FOR REVIEW

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I. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

II. STATEMENT OF RELIEF SOUGHT

Defendant has filed a petition for review. Respondent seeks denial of Defendant's petition for review of the opinion issued by the Court of Appeals on September 27, 2024, hereinafter cited as "Op."

III. ISSUE PRESENTED

Whether this Court should grant review under RAP 13.4(b)(3) or (b)(4) where Nash's constitutional claims of error were not properly raised or adequately argued in the Court of Appeals, where he fails to establish the trial court abused its discretion in granting joinder or excluding evidence, and where he further fails to demonstrate his petition presents an issue of substantial public importance?

IV. STATEMENT OF THE CASE¹

Nathan Nash was accused of raping two women while on duty as a Spokane police officer. After the case involving T.P. had been pending for some time, victim K.T. reported a separate incident, occurring before the alleged rape involving T.P. CP 243. Nash was alleged to have come into contact with both victims while taking police reports, giving them his contact information, and, purportedly conducting follow-up investigation with the victims that should have been conducted by a corporal or by other means; Nash then purposefully signed out of his police computer system² at the precinct, leaving his

¹ Court reporter Weeks prepared a three-volume, consecutively paginated transcript of trial, referred to as “RP.” Weeks also prepared a separate transcript of certain pretrial motions, including severance, referred to as “2RP.” Court reporter McMaster prepared a transcript of certain pretrial motions, including the ER 404 hearing, referred to as “3RP.”

² Closing out of the New World program results in lack of transmission of any location data to dispatch, and no record of location data in the New World server. RP 1210. This could

whereabouts unknown and violating department policy, and travelled to the victims' residences alone, without his body worn camera activated, where he then raped the women. RP 382-93, 417-20, 451-457, 459, 495, 460-62, 465-476, 642, 651, 752-55, 761, 811-12, 965-67, 996-99, 1185.

1. Joinder and Severance.

The State sought and was ultimately granted joinder. CP 249-69, 556-63. Before granting joinder, the trial court reviewed all affidavits and exhibits offered by the parties. CP 249-316, 560; 3RP 180. It found the State's evidence for both counts, and the strength of that evidence, was similar. 3RP 181-82; CP 557-58, 561. As to the clarity and nature of the defenses, the court found that a consent defense for T.P. and a consent or general denial defense for K.T. were simple concepts unlikely to

result in the program continuing to reflect the officer's last transmitted location. RP 1210.

be confused. 3RP 183; CP 558, 561. The court found appropriate instructions³ could be given to the jury, if proposed by the parties, which would mitigate against any prejudice. 3RP 184; CP 558-59, 561.

The court “carefully looked at” and “scrutinized” the fourth factor, cross-admissibility. 3RP 184-85. With regard to K.T.’s credibility, the court found corroborating facts which supported her account of the events, including police tracking data, and found she had no motive to fabricate the allegations, observing K.T. was “somewhat protective” of Nash. 3RP 185-86; CP 559. Under the ER 404(b) analysis inherent in the joinder analysis, the court found the conduct occurred by a preponderance of the evidence. 3RP 186; CP 559, 561.

The court referred to a chart prepared by the State, CP 265, demonstrating similarities between the two cases, and the court

³ Nash did not request a limiting instruction at trial. RP 1410.

“independently verified those comparisons” by reviewing the probable cause statements, incorporating them into its ruling. 3RP 187; CP 265, 559-60. From those similarities, the court found ER 404(b) exceptions related to preparation, plan, knowledge, intent, and modus operandi had been met. 3RP 187; CP 560, 562. The court also applied an ER 403 balancing test and determined the probative value of the evidence was not outweighed by the danger of unfair prejudice. 3RP 187; CP 562.

After the two cases were joined, Nash moved for severance, which was denied before trial; the court ruled, upon the State’s ER 404(b) motion, that the offenses were cross-admissible as evidence of common scheme or plan. CP 628-35, 841; 2RP 38-62. Nash did not renew his request for severance during trial. RP at *passim*.

2. *K.T.'s mental health.*

K.T. was diagnosed with anxiety, severe depression, obsessive/compulsive disorder, post-traumatic stress disorder, and, according to her, potentially bipolar II. RP 1015-16. K.T. made multiple police reports alleging her neighbor assaulted her and vandalized her property; she was frustrated that nothing was being done about her complaints. RP 1030-31. It was an allegation of conflict with her neighbor that brought K.T. into contact with Mr. Nash for the first time. RP 752-55.

After K.T.'s charges were filed, and after the court had granted joinder, in December 2021, Nash moved for an order releasing K.T.'s mental health records from her treatment provider to explore her credibility. CP 569, 571. The court ordered release of two years of her records. CP 713-15; 911-1009.

During pretrial motions, the State sought rulings on the admissibility of K.T.'s mental health. CP 832-35; 2RP 10. The court opined, "I think the diagnosis is important and then the way that diagnosis could reveal itself. But the specifics about a prior assault, or statements from her parents or prior abusive relationships aren't relevant to that. It's more about generalities. So hopefully [the defense has] a chance to speak with the provider who can narrow that in." 2RP 12. It further ruled:

The Court's also going to exclude any specifics about the type of contact between [K.T.] and Mr. Chapman, [K.T.'s neighbor,] and whether there's physical evidence to support her claims as to what occurred. She could be suffering some type of Schizoaffective disorder on July 5th when these acts occurred between [her] and Mr. Chapman. That doesn't mean on July 6th she was under the same type of condition. There would be speculation if that were the case. So any of the conflict between those two will be excluded except the general nature that there was a call regarding her neighbor, Mr. Chapman.

2RP 19-20.

However, the court permitted the defense to inquire about K.T.'s mental health, observing K.T. "may not have been suffering any of the symptoms of that condition on that date, but, apparently, there is medical documentation to show that perhaps she was, and there is expert testimony that would lay out exactly how that would reveal itself." 2RP 20-21.

At the conclusion of the pretrial hearing, defense counsel acknowledged he had not yet been able to speak to the treatment providers directly. 2RP 33. The court left open the potential that "further decisions" may need to be made on the admissibility of the mental health providers' testimony. 2RP 34. At no point during the motions in limine did defense counsel seek to procure a ruling on the admissibility of K.T.'s March 2019 statement that she was Jesus. 2RP at *passim*; RP 1239; CP 985.

K.T.'s mental health professionals did not engage in witness interviews outside of their sworn testimony. RP 1175.

The parties agreed to a hearing, outside the presence of the jury, to conduct their interviews mid-trial. RP 1175-76.

Relevant here, Dr. David Potter began treating K.T. on October 16, 2020; K.T. had been seen at Frontier Behavioral Health “off and on” since 2015; yet, Dr. Potter saw K.T. only four times over the phone due to Covid-19 protocols. RP 1232-33, 1235-36. Dr. Potter’s case notes included no notes between April 25, 2019, and October 2020.⁴ RP 1269. However, Dr. Potter noted that, in March 2019, K.T. had delusions and/or hallucinations about her neighbor, and believed she was Jesus, thought she was dead, and was transporting herself to the future; these comments occurred while K.T. was on the phone with a different provider.⁵ RP 1232-33, 1237, 1240-41. Dr. Potter could

⁴ The rape involving K.T. was alleged to have occurred on July 6, 2019. RP 761, 996-997.

⁵ This specific testimony was not heard by the jury.

not testify whether the Jesus comment was, in fact, a delusion, or whether K.T. was upset or sarcastic. RP 1242. Dr. Potter never observed K.T. suffering delusions. RP 1238.

At the conclusion of the midtrial hearing, defense counsel argued:

I think I should have the ability to at least get her diagnosis in, let the doctor explain what that means, as indicated here, what hallucinations mean, what delusions mean as he described here. And that's really my general intent.

... I really want to get into the diagnosis and what that means and in general terms was there any indication that she suffered from delusions and/or hallucinations between the dates that we have the records for.

RP 1254-55.

In response, the State agreed K.T.'s diagnosis was admissible but expressed concern with the admission of "specific instances" of K.T.'s conduct, especially the March 2019 Jesus comment. RP 1256-57. Defense counsel argued the Jesus

comment should be “fair game” without offering why it was legally admissible. RP 1257-58.

The court ruled:

As far as Dr. Potter is concerned, generally a witness’s mental health diagnosis wouldn’t be admitted because it is really not relevant if she has PTSD, OCD, anxiety or depression. Here it’s because of the schizoaffective disorder that the Court has allowed. The way that that could manifest itself is to hallucinations and delusions. And if there were hallucinations or delusions that impacted what she perceived was occurring, the jury should know about that.

So the Court will allow Dr. Potter to testify about her diagnosis, when she was diagnosed, what she was diagnosed with and how those diagnoses, or the symptoms of those diagnoses and what may be used to treat those diagnoses. As far as the specifics of her manifesting those diagnoses, the Court’s going to exclude that. I think, as can be seen in that telephone call, there really isn’t any way to know whether she was just being sarcastic in the phone call or whether or not she really thought that she was Jesus and she was in the future. And then it becomes a secondary issue, which, again, would confuse the issues. Perhaps the State would bring her back in on rebuttal and start asking her questions about that particular incident.

Also, as far as her neighbor goes, she was continually talking about her neighbor during her testimony. Dr. Potter seemed to think that she had delusions about her neighbor causing her harm or something to that effect. I understand there's a third-degree assault charge.⁶ I didn't look it up. I don't know what happened to that. I also understand she had at least a temporary anti-harassment order, and if the Court were to allow the portion about her neighbor to come in, then once again, we're going to confuse the issue and this trial is going to turn into whether or not her neighbor really was causing her problems or harming her or whether or not she was just having delusions of that.

So to simplify this, the Court will allow Dr. Potter to testify as to [K.T.'s] diagnosis, how that diagnosis might manifest itself and what's being done to possibly treat that diagnosis, again, it's somewhat outside of the time frame. He did indicate that it relates back to possibly 2015, but the real pertinent times here are July of 2019 and July of 2021, and it doesn't seem that she was seen by any of those providers exactly on those times, but rather since the beginning of 2021. I think he last saw her beginning of 2021. So that will be the limitation on that testimony.

RP 1258-60 (footnote added).

⁶ K.T. pepper-sprayed her neighbor. CP 975.

The jury acquitted Nash of second degree rape (count 1, victim T.P.), and unlawful imprisonment (count 4, victim K.T.). CP 766, 769. However, it convicted Nash of third degree rape against T.P. and second degree rape against K.T., finding the aggravating circumstance that he used a position of trust to facilitate the commission of the crime. CP 767-70. Based on the aggravating circumstance, the court imposed an exceptional upward sentence of 172 months to life for count 3. CP 851, 904-05.

3. Court of Appeals proceedings.

In his original briefing to the Court of Appeals, Nash claimed the trial court abused its discretion by granting joinder of the offenses and by limiting evidence of one victim's mental health condition. App. Br. at 69-89. Nash's assignments of error were: (1) "The joinder of the two unrelated cases unduly prejudiced appellant by giving the appearance of propensity to

commit sexual assault while on duty” and (2) “the exclusion of evidence that K.T. had delusions that could have led to prior false accusations was an abuse of discretion and constitutionally prejudicial.” App. Br. at 7.

Nash’s opening brief did not argue the trial court erred by denying his severance motion, even though his argument supporting his claim of error relied heavily on the evidence later introduced at trial. App. Br. at *passim*, Resp. Br. 54-56. His brief also failed to assign error to the trial court’s separate ER 404(b) ruling, entered months after the joinder motion was granted, specifically finding the evidence surrounding each rape was cross-admissible to demonstrate a common scheme or plan. App. Br. at 1-2.

To prevail on the claims that were raised in the original briefing, the State argued Nash was required to demonstrate the trial court abused its discretion, or that no reasonable judicial

officer would have ruled as the trial court did. Resp. Br. at 48-80. The Court of Appeals found Nash had failed to meet this burden for either alleged error. Op. at 1, 7, 9, 17, 24-25. The Court of Appeals also found the trial court's findings of fact on the joinder motion were verities on appeal because Nash did not assign error to them. Op. at 11; *and see* Resp. Br. at 49-50, 57.

Notably, Nash's opening brief did not argue his constitutional rights were violated by either ruling. The State argued Nash's assignment of error, alleging a constitutional violation in the exclusion of some of K.T.'s mental health evidence, did not adequately analyze the issue, and, therefore, he had abandoned that claim. App. Br. at *passim*; Resp. Br. at 62-65. The Court of Appeals' opinion did not discuss any constitutional claim, instead confining itself to those arguments that were adequately raised and briefed by Nash. Op. at *passim*.

After the Court of Appeals affirmed Nash's convictions, he filed a motion for reconsideration, arguing claims of constitutional error for the first time, and claiming error in the trial court's factual findings entered after its joinder ruling. *See e.g.*, Mot. for Recon. at 6, 10, 14, 33-35, 36-42. The State responded, arguing a motion for reconsideration was too late to raise new arguments. Resp. to Motion for Recon. at *passim*. The Court of Appeals denied the motion to reconsider. Order Denying Recon. (Dec. 3, 2024). Nash has filed a petition for review.

V. ARGUMENT

This Court should deny Nash's petition for review. Nash raises new issues and arguments for the first time in his petition and fails to demonstrate any of the RAP 13.4 criteria support this Court's grant of review.

1. Nash's petition fails to demonstrate any of the RAP 13.4 criteria has been met.

Although Nash recognizes RAP 13.4's considerations govern whether this Court should grant review, Pet. for Rev. at 32, his petition fails to meet any of those criteria.

This Court accepts a petition for review only where a petitioner demonstrates at least one of the following RAP 13.4(b) considerations has been met: (1) the decision is in conflict with a decision of this Court; (2) the decision is in conflict with a published decision of the Court of Appeals; (3) a significant question under the Washington or federal constitution is involved; or (4) the petition involves an issue of substantial public interest.

Nash alleges his petition meets RAP 13.4(b)(3) and/or RAP 13.4(b)(4). Pet. for Rev. at 32. His constitutional questions, however, were not raised in the trial court or in his original

briefing to the Court of Appeals, and he fails to demonstrate how his petition involves any issue of substantial public interest.

2. This Court should not accept a petition that raises issues not litigated below.

New issues may not be raised for the first time in a petition for review. *See Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998); *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993).

Here, Nash raises multiple constitutional claims he did not raise in the trial court or in his opening brief, including an alleged violation of his right to present a defense. He also raises, for the first time in his petition for review, a claim of prosecutorial misconduct, alleging the State presented “false evidence” at trial; he advances this claim because some testimony at trial differed from the facts alleged in the probable cause affidavits supporting the State’s motion for joinder. Pet. at 73-77. To the extent that he wishes to raise these issues, his recourse is to file a personal

restraint petition, not to raise them for the first time in a petition for review.

3. Nash fails to demonstrate any of the RAP 13.4 criteria for the two claims he properly preserved in the trial court and adequately argued in his opening brief below.

Nash’s opening brief to the Court of Appeals adequately briefed two issues – whether the trial court erred by granting joinder and by excluding some of K.T.’s mental health issues – two claims subject to review for an abuse of discretion. *State v. Bluford*, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017) (review of a court’s decision granting joinder is for abuse of discretion, and trial courts have “considerable discretion” in this area); *State v. Jennings*, 199 Wn.2d 53, 59, 502 P.3d 1255 (2022) (evidentiary rulings are subject to abuse of discretion review). Those rulings are subject to reversal only if the trial court’s decision was manifestly unreasonable or based on untenable grounds or made for untenable reasons; in other words, the decision is subject to

reversal only if the trial court adopted a position that no other reasonable jurist would take. *Jennings*, 199 Wn.2d at 60; *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

As to the trial court's joinder ruling, Nash's opening brief never assigned error to the trial court's findings of fact; they are therefore verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In reviewing a pretrial joinder motion, this Court only reviews those facts known to the trial court at the time of the motion, and a trial court cannot abuse his or her discretion based on facts that do not yet exist or may develop later during the course of trial. *Bluford*, 188 Wn.2d at 310. When considering a pretrial joinder motion, the court should "balance the *likelihood* of prejudice to the defendant against the benefits of joinder in light of the particular offenses and evidence at issue." *Id.* (emphasis added).

Here, Nash’s allegation that some of the facts that were presented during the joinder motion were not borne out during trial is the very reason that a defendant must seek severance once cases are properly joined. “[W]hen a court considers a pretrial motion to sever, it is generally considering the *potential* for prejudice. The purpose for the requirement for renewal [of a severance motion during trial] is to give the court an opportunity to assess whether there is *actual* prejudice based on the evidence presented or proffered” during trial. *State v. McCabe*, 26 Wn. App. 2d 86, 94-95, 526 P.3d 891 (2023) (emphasis added). Testimony that is not yet known to the court at the time it rules on a severance motion “is not relevant to [this Court’s] review for prejudice.” *Id.* at 96. Nash did not reraise his severance motion during trial, waiving any claim that the evidence developed during trial (and not as predicted prior to trial) resulted in prejudice. No constitutional issue is involved in

this claim and it is not subject to review as a matter of substantial public interest – it is well-settled that prejudice is measured only by the evidence known to the court at the time it considers joinder or severance. *Bluford*, 188 Wn.2d at 310.

Similarly, Nash’s opening brief in the Court of Appeals argued only evidentiary error in the trial court’s exclusion of some of K.T.’s mental health history. That evidentiary ruling is not subject to RAP 13.4(b)(3), as it is not a constitutional question. Nash also fails to establish how the evidentiary claim presents a question of substantial public importance such that this Court should grant review. The trial court was within its discretion to exclude some evidence of K.T.’s mental health disorder where the only witness offered to testify to her Jesus comment had not actually heard the statement, was not treating K.T. at the time the statement was made, and where the admission of the statement could confuse the issues. ER 403.

The numerous issues raised in Nash's petition exceed those raised in the trial court or adequately argued in the Court of Appeals. It is too late for Nash to raise them in his petition for review. As to the issues adequately raised and argued in the trial court and Court of Appeals, those rulings were subject to reversal only where the trial court abused its discretion, which Nash has failed to demonstrate. Nash's petition does not meet either RAP 13.4(b)(3) or (b)(4), and, therefore, this Court should decline review.

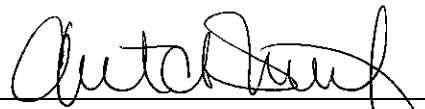
VI. CONCLUSION

For the reasons stated above, Respondent requests the Court deny the petitioner's request for review.

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Respectfully submitted this 27 day of January 2025.

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A handwritten signature in black ink, appearing to read 'Gretchen E. Verhoef', is written over a horizontal line.

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WASHINGTON

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NATHAN ROBERT NASH,

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NO. 103765-1-III

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I certify under penalty of perjury under the laws of the State of Washington, that on January 27, 2025, I e-mailed a copy of the Answer to Defendant's Petition for Review in this matter, pursuant to the parties' agreement, to:

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