IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

NATHAN ROBERT NASH

Petitioner,

vs.

STATE OF WASHINGTON

Respondent.

PETITION FOR REVIEW

Court of Appeals No. 39322-4-III

Spokane County Superior Court Case No. 19-1-04462-32

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A. IDENTITY OF PETITIONER

Nathan Robert Nash ("Mr. Nash") is the Petitioner in this Petition for Discretionary Review. Mr. Nash, currently in the custody of the Department of Corrections, is serving a sentence for convictions of second- and third-degree rape, and asks this Court to accept review of the Court of Appeals decision.

B. COURT OF APPEALS DECISION

Mr. Nash seeks this Court's review of the decision of the Court of Appeals, Division III, in Case No. 39322-4-III, dated September 27, 2024, affirming Mr. Nash's convictions. A true copy of the Court of Appeals' decision is appended hereto as Attachment "A".

C. ISSUE PRESENTED FOR REVIEW

Mr. Nash seeks review of the Court of Appeals' decisions pursuant to RAP 13.4 based on the following issues:

1. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S IMPROPER JOINDER UNDER AN INCORRECT SET OF

FACTS AND WITHOUT CONSIDERATION OF THE PARTICULARLY PREJUDICAL EFFECTS OF JOINING CHARGES OF A SEXUAL NATURE.

2. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE SUPPRESSION OF K.T.'S MENTAL HEALTH HISTORY BECAUSE IT DEPRIVED MR. NASH OF HIS RIGHT TO A DEFENSE.

3. WHETHER PROSECUTORIAL MISCONDUCT SO INFECTED THE TRIAL AS TO DEPRIVE MR. NASH OF HIS RIGHT TO A FAIR TRIAL.

D. STATEMENT OF THE CASE

Trial and Sentencing

The State charged Mr. Nash with second degree rape, third degree rape, and official misconduct on November 26, 2019. (Clerk's Paper [CP] 1CP 6) The charges derived from allegations that Mr. Nash, while investigating a domestic violence complaint, committed acts against complainant T.P. on October 23, 2019. (1CP 8-9; McMaster VRP 75) The State would then move to join a second Information on August 5, 2021, involving allegations from complainant K.T for events he

allegedly committed on July 6, 2019. (1CP 249; McMaster VRP 136)

In 2019, Mr. Nash was a patrol officer for the Spokane Police Department (SPD). (3 Weeks VRP 1349.) On July 5, 2019, K.T. contacted SPD claiming that her neighbor had assaulted her. Officer Nash and another officer responded to the call, but he observed no injuries and informed K.T. he would need to speak with her neighbor about the incident anyway. (2Weeks VRP 995; 3 Weeks VRP 996, 1347, 1381; Appellant's Opening Brief, 63) Mr. Nash did not have an SPD-issued business phone and gave K.T. his personal cellular phone number with directions to call if her neighbor returned since the neighbor was unavailable for an interview that day (this was a common practice among officers because many did not have their own business phones). (3 Weeks VRP 1342-43) Mr. Nash's Facebook profile was set to public at this time, and his public profile included pictures of him, his tattoos, and his family. (3 Weeks 1385-86)

The following day, on July 6, 2019, Mr. Nash was on patrol from 6:00 a.m. until 6:30 p.m. (3 Weeks VRP 1349). At approximately 3:00 p.m., SPD announced an officer-involved shooting over the police radios. (Appellant's Motion for Reconsideration, 2; 3 Weeks VRP 1349-50)

At around 5:15 p.m. July 6, 2019, Mr. Nash returned to COPS NW (a place for officers to meet up and write reports) after his New World inter-officer chat feature had malfunctioned. (3 Weeks VRP 1350-52). Mr. Nash shut down the entire GPS program, remained at COPS NW for about an hour, or until around 6:20 p.m. (when his shift would end), and then he left to go home. (3 Weeks VRP 1352-5). He did not see K.T. that day. (3 Weeks VRP 1354).

On August 12, 2019, K.T. called Mr. Nash and asked him when he was going to arrest her neighbor for the alleged assault, and what Mr. Nash was "going to do for her as far as that situation." (3 Weeks VRP 1356; Appellant's Opening Brief, 64) Mr. Nash replied via phone call, and later reiterated

in a text, that he intended to help her. (3 Weeks VRP 1385) By September 21, 2019, after numerous other texts of the same nature, Mr. Nash's wife asked him to block K.T.'s number, and Mr. Nash did so. (3 Weeks VRP 1358; Appellant's Opening Brief, 64-65)

K.T. suffers from a schizoaffective disorder, bipolar type, where she experiences mania, depression, and psychotic symptoms such as paranoid delusions and hallucinations. (3 Weeks VRP 1232-33; 1236) In March 2019, K.T. contacted a behavioral health center, believing that she was Jesus, that she was dead, and that she had transported herself into the future. (3 Weeks VRP 1237, 1240-41) By July 2019, the behavioral crisis center recorded that K.T. was once again struggling to discern reality from delusions. (3 Weeks VRP 1237, 1240-41) K.T. had made "105 calls to crime check and 911, and that record is replete with examples of her stating things that simply aren't occurring, and she had a long history of claiming her neighbor was assaulting her." (McMaster VRP 165) By August 2020,

K.T.'s condition continued to worsen, and she even pepper-sprayed an elderly neighbor (who relied on oxygen-assisted breathing) because she believed the elderly woman was stalking her; and K.T. was subsequently arrested for the incident. (1CP 509; McMaster VRP 166-68) In some calls, K.T. claimed that her arms were bruised and swollen, but officers investigating those allegations would find no injuries or evidence of the assaults she alleged. (McMaster VRP 167) K.T. was again treated in August 2020 for her disorder. (3 Weeks VRP 1249-50) But due to COVID restrictions in 2020, K.T. was treated via the phone, but doctors and psychiatrists made detailed and thorough notes about K.T.'s hallucinations and her continuing mental health struggles. (3 Weeks VRP 1230-32; 1235) K.T. continues to suffer from paranoid delusions especially focused on imagined assaults and was prescribed Zyprexas (an antipsychotic and mood stabilizer) and Zoloft (for panic and depression) to alleviate the symptoms. (3 Weeks VRP 1234-35, 1238).

In September 2020, K.T. learned from the news of rape allegations involving Mr. Nash. (3 Weeks VRP 1362-63, 1486-87). K.T. would again call Mr. Nash on September 26, 2020, only a month after her arrest for pepper spraying her elderly neighbor, and he placed his phone on speaker phone in front of his wife. (1CP 509, 512-13; 3 Weeks VRP 1361-62; Appellant's Opening Brief, 64) K.T. wanted to know if Mr. Nash would help her with her neighbor. (VRP 1362, 1386) Mr. Nash confirmed that allegations had been made and that he had been placed on unpaid administrative leave due to the allegations. (3 Weeks VRP 1362-63, 1486-87) But Mr. Nash said he was no longer a police officer, and he could not help her. (3 Weeks VRP 1363, 1386-87) On February 11, 2021, the State allowed K.T., in lieu of facing the third-degree battery charges against her neighbor, to attend the Spokane County Mental Health Diversion Program. (1CP 538-39)

K.T. called Mr. Nash once more in July 2021, but he missed her phone call. (3 Weeks VRP 1364) Soon thereafter,

she made an allegation of rape against him for the day of July 6, 2019. (3 Weeks VRP 1364) K.T. made these allegations two years after the alleged incident when, she once again, wanted 911 to investigate her neighbor.

In her allegations, K.T. claimed that on July 6th, 2019, Mr. Nash had returned to her apartment sometime in the morning hours, and that he had forcibly trapped her in her home by claiming that she could not be outside due to the officer-involved shooting, and then raped her. (1CP 379-80, Appellant's Opening Br. 40). She also believed that her neighbor had colluded with Mr. Nash to get her raped. (3 Weeks VRP 1060). She also claimed he returned a month later in August of 2019 where they allegedly had consensual sexual intercourse. (3 Weeks VRP 1021, 1043). Neither of these things were true. (3 Weeks VRP 1340, 1360, 1365).

Back on October 15, 2019, another woman, identified as T.P., lived with her mother in a two-bedroom apartment. T.P. and her boyfriend had a domestic violence incident, to which

Officer Nash responded and took her statement. (1 Weeks VRP 452, 492) Mr. Nash called for a corporal to take photographs of any potential bruises and instructed T.P. to contact the YWCA or Crime Check with any future questions. (1 Weeks VRP 453-54) On October 23, 2019, T.P. noticed more bruising, attempted to contact domestic violence detectives, but they failed to return her call. (1 Weeks VRP 457, 2 Weeks VRP 536, 542) T.P.'s father called the SPD Headquarters and asked them to contact Mr. Nash specifically, and SPD told Mr. Nash to check up on T.P. (1Weeks VRP 447, 453-54, 457, 495-96, 506-07, 512-1; McMaster 171-73) Mr. Nash called T.P., who said she had taken some pictures of bruises and wanted them taken care of. (1 Week VRP 458-59; 461) T.P. alleged that "Mr. Nash said that he could take the photographs now, and T.P. suggested meeting at her apartment because she expected him to look at her bruises on the inside of her hip near the pubic region." (Appellant's Opening Brief, 28-29; 1 Weeks VRP 459, 494; 518) Mr. Nash agreed to her request to review the pictures she

had taken on her cell phone, and Mr. Nash suggested she meet him at the NW COPS shop where he was already heading. (CP 325-326, 3 Weeks VRP 1391). T.P. insisted Mr. Nash come to her apartment expecting that he would need to look at pictures of her bruises. (1 Weeks VRP 459, 494, 518). Before hanging up on the call, T.P. asked Mr. Nash if he could *not* activate his body camera once he arrived, and he agreed to her request. (3 Weeks VRP 1365-66).

While enroute to T.P.'s apartment on Oct. 23, 2019, Mr. Nash's New World GPS system had stopped transmitting data between 10:39 a.m. and 11:15 a.m., due to a GPS system issue on his own laptop that caused him to shut it down. (3 Weeks VRP 1392-93). This was a system issue the State's witnesses admitted was frequently a problem. (2 Weeks VRP 952-953, 955, 1077-78). Mr. Nash's initial GPS location showed him at COPS NW, and it came up once more around the Cenex/Zip Trip gas station, before it stopped transmitting between 10:39 a.m. and 11:15 a.m. when Mr. Nash arrived at T.P.'s apartment.

(2 Weeks VRP 804, 811-12) Mr. Nash's cell phone location showed Mr. Nash at T.P.'s apartment at 10:52 a.m. (Appellant's Opening Brief, 48; 2 Weks VRP 808-09)

T.P. initially testified, at trial, that while Mr. Nash was observing her bruises that he had removed her pants and underwear. (2 Weeks VRP 465). However, T.P. admitted to previously telling investigators that she had removed her own pants and underwear under the guise of showing him a bruise on her lower right hip. (Appellant's Opening Br. 30-31) (See also 2 Weeks VRP 510-11).

T.P. further claimed that once her pants and underwear were pulled down that Mr. Nash stuck two fingers inside her vagina thrusting them in and out for thirty seconds to one minute, until she discontinued the physical contact with him by saying "okay, that's enough." (2 Weeks 465-66, 468, 470, 473-74, 521). That evening, T.P.'s father visited SPD to report the incident. (Appellant's Opening Brief, 35)

However, DNA forensic expert, Dr. Monte Miller, stated the evidence did not support the allegation as described by T.P.. (3 Weeks VRP 1303-16, 1329-30, 1335-37). Mr. Nash stated T.P. had pulled down her own pants and underwear, then maneuvered his hand toward her pubic region where the bridge of his finger came into contact with her private region for approximately one second (3 Weeks VRP 1366, 1394, 1396). Dr. Miller stated the DNA evidence showed proximity perhaps a brief hand-to-hand contact, but the absence of her DNA under his fingernails indicated a lack of penetration. (3 Weeks VRP 1303-16, 1329-30, 1335-37). This significant finding supported Mr. Nash's testimony. (3 Weeks VRP 1303-16, 1329-30, 1335-37).

After the alleged sexual assault, T.P. asked him to do her two favors. The first was to call her father regarding a domestic violence order protection violation, and the second was to retrieve a car key from her ex-boyfriend's mother's house where the October 15th domestic violence incident took place.

(CP 325-26, 2 Weeks VRP 535-39). Mr. Nash provided her with his personal phone number before leaving the apartment so she could check on the status of her follow-up requests later. (AOB 33, See also 1 Weeks VRP 477-78, 487-88, 2 Weeks VRP 516). After receiving his phone number, T.P. told him "[i]t was time for him to go" and escorted him out of the apartment. (1 Weeks 475-76, 2 Weeks VRP 520).

Mr. Nash was charged with the incident against T.P. Then, on August 5, 2021, the State moved to join the second Information with the first. (No. 21-1-01948-32; 1CP 249, McMaster VRP 136) The second Information included K.T.'s allegations, and the State argued that joinder was appropriate as permitting spillover evidence from both cases revealed a common scheme or plan and was not so manifestly prejudicial as to outweigh the potential for prejudice. (McMaster VRP 136, 138; 2CP 722-23.)

To aid its application for joinder of these two charges, the State offered the court a grid of "similarities" of the evidence it

intended to proffer at trial. (1CP 265) The grid showed that (1) "Victim is the complaining party in a domestic violence call with alleged injuries"; (2) "Defendant responds to initial call as patrol officer with the Spokane Police Department"; (3) "Victim and Defendant had not met prior to Defendant's response to 911 call;" (4) "Defendant provides Crime Victim card with his phone number to victim;" (5) "Defendant has subsequent phone call with victim to arrange viewing her injuries at her home as part of a 'follow-up' for case;" (6) "Defendant is on-duty, armed and in uniform at time of 'follow-up' contact;" (7) "Defendant closed out of his New World Computer system prior to driving to victim's home so that his location cannot be tracked;" (8) "Defendant does not notify anyone in his agency via phone, computer or radio that he is responding to the victim's home;" (9) "Defendant is alone with victim in her home;" (10) "Defendant does not activate his department issued body camera at any time during contact;" (11) Defendant begins viewing victim injuries;" (12)

"Defendant does not attempt to take any photos of or otherwise document victim injuries;" and (13) "Defendant uses physical closeness of purported injury examination to perpetrate sexual assault while armed and in uniform." (1CP 265) To justify its use, the State argued State v. Kennealy, 151 Wn. App. 861; 214 P. 3d 200 (2009), to validate its use of the grid by arguing such acts reinforced one another. (1CP 265-66)

Defense counsel opposed the joinder, pointing out that judicial economy can never supersede prejudice to a criminal defendant. (McMaster VRP 163; CP 320-321, 325-26, 379-80) Defense counsel stated that K.T.'s evidence included (1) that Mr. Nash responded to her complaint on July 5, 2019, about her neighbor and (2) "some circumstantial evidence." (McMaster VRP 163-64) Defense counsel insisted that the grid was highly inaccurate. (CP 320-21, 325-26, 379-80). For example, as to factor one: K.T. was involved in an alleged assault and not a domestic violence incident. (1CP 289)

Defense counsel also objected to joinder because T.P.'s case had physical DNA evidence showing she and Mr. Nash at least had proximity, whereas no physical or phone satellite evidence existed in K.T.'s case to confirm Mr. Nash's presence. (Appellant's Opening Brief, 8-10; McMaster VRP 169-70)

Defense counsel also objected on the grounds that there was no common scheme or plan. (Appellant's Opening Brief, 9-10) As to factor five of the State's proposed grid of shared evidence, it was T.P.'s father, not T.P., who contacted Mr. Nash, through the police department headquarters indicating that the Police Headquarters would know Mr. Nash was at T.P.'s home. (1CP 265; McMaster VRP 171-73) As to factor eight, Mr. Nash's agency told, and was thus aware, that Mr. Nash was visiting T.P. for further inspection of her injuries. (1 CP 265) In K.T.'s case, Mr. Nash was simply never there on July 6, 2019. The prejudicial issue of joinder was only further complicated by K.T.'s description of when the alleged rape occurred, which was vastly different than what the State

claimed as merely corroborating circumstantial evidence. (3 RP 164, CP 320-21, 379-80). Moreover, T.P. did not have Mr. Nash's cellular phone number until after the alleged rap occurred—directly contradicting the State's grid. (1 CP 272, CP 325-326)

Defense counsel also objected to joinder because joinder would be highly prejudicial and asked for the cases to be tried separately. (AOB, 10; McMaster VRP 173-74) However, the trial court believed that the State's grid of "similar descriptions" of the evidence, including the presence (or lack thereof) of the New World GPS police vehicle tracking software, made both cases similar enough to permit the risk of prejudice. (AOB, 10; McMaster 180-81) The trial court also did not believe the jury would have trouble understanding the difference between the charges and their defenses as to K.T. and the T.P., and stated that it would offer limiting instructions for the jury to consider the distinctions. (AOB, 11; McMaster, 182-84) However, the trial court failed to give that important limiting instruction.

The trial court also raised its own Motion in Limine to limit introduction of K.T.'s mental health history and history of accusations as anything other than "some additional impeachment evidence" that did not "substantially change the nature between the similarities of the strengths of the evidence." (AOB, 10-11, 16; McMaster 182) The trial court used the State's "table of similarities," but added that it "independently verified that those comparisons were applicable and the Court, again, incorporate[d] [the grid] in articulating the similarities" between the two cases over defense counsel's multiple objections to the factual errors included in the grid. (McMaster 187-88; 191)

During the trial, the trial court excluded the "specifics of [K.T.] manifesting" her schizoaffective disorder, claiming that it was unsure if she was being sarcastic and that it would confuse the jury. (3 Weeks VRP 1259) Instead, the defense was limited to asking if there were "signs just in a general nature of her suffering from delusions in 2019." (3 Weeks VRP 1260-61)

This was despite Dr. Potter, K.T.'s psychiatrist, having already testified outside the presence of the jury that there was nothing to suggest she was being sarcastic, and in fact it was consistent with her delusional episodes. (3 Weeks VRP 1237, 1240-43)

Ultimately, the jury convicted Mr. Nash of third-degree rape as to T.P., and, as to K.T., the jury acquitted Mr. Nash of unlawful imprisonment but convicted him of second-degree rape. (3 Weeks VRP 1492; Appellant's Brief at p. 68)

The Appellate Proceedings

Following sentencing, Mr. Nash timely filed his direct appeal seeking reversal on the grounds that: (1) the trial court's granting the motion for joinder of the charges involving each complainant 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 revealed false prior accusations was an abuse of discretion.

The Court of Appeals rejected Mr. Nash's claims and affirmed his sentence. (See Attach. A.) The Court of Appeals

decided that the trial court's findings of fact were untouchable on appeal because the Appellant "did not assign error to any of the court's findings of fact[,]" (Slip op. at 11) The Court of Appeals further believed that in both cases, "evidence was comprised of statements from the alleged victims, as well as corroborating circumstantial evidence that Nash logged out of the location tracking software and turned off his body camera during the time the victims alleged that he contacted them." (Slip Op. at 12)

As to the potential prejudice of joinder, the Court of Appeals also stated that:

> "[w]hile we agree that a jury is less likely to believe that two women accusing Nash of similar misconduct are unstable, this is not the type of prejudice a court considers when deciding a motion for joinder. At the time of the motion for joinder, Nash did not demonstrate that his defenses were complex or antagonistic, or that he anticipated testifying in one case but not the other."

(Slip Op. at 13) (emphasis added).

The Court of Appeals also found that, at the time of joinder, Mr. Nash failed to provide evidence refuting the trial

court's factual conclusions on the cross-admissibility of the two charges. (Slip Op. 15-16) Finally, the Court of Appeals disagreed that the trial was required to, and subsequently failed to, consider the inherently prejudicial nature of joining multiple sex crimes into a single trial. (Slip Op. 16-17) The Court of Appeals likewise deemed the Appellant's argument for severance had not been timely renewed, so it was not preserved for consideration. (Slip Op. 8-9)

As to the preclusion of specific acts by K.T., the Appellate Court reiterated that "'decisions to admit evidence using an abuse of discretion standard.'" (Slip Op. 23) (citing State v. Quaale, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). Further, the Appellate Court believed that the psychiatrist who wrote the note needed to have testified, and they did not, so it was hearsay. (Slip Op. 25)

Mr. Nash now respectfully requests this Court's review of the Court of Appeals' decision pursuant to RAP 13.4.

E. ARGUMENT

1. The Trial Court and the Court of Appeals erred by permitting and affirming joinder and denying review of severance because the trial court based its rulings on incorrect and misrepresented facts rendering those decisions clearly erroneous.

Rather than try Mr. Nash on the merits of the individual cases as between K.T. and T.P., the State chose to bolster the evidence in both cases through joinder. The special nature of sexual assault cases demands they not be treated as any other cases. Furthermore, the trial court approved joinder based on incorrect facts and the Court of Appeals affirmed. The trial court and the Court of Appeals both failed to consider the individual facts of each case, failed to discern the correct facts of each case in its decisions, failed to consider the especially prejudicial nature of sexual offenses, and judicial economy can never overcome such resulting prejudice.

This deprived Mr. Nash of his constitutional right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 3, 21, and

22 of Washington's Constitution. U.S. Const. Amends. VI, XIV §1; Wash. Const. art. I, §§ 3, 21, 22; Chambers v. Mississippi United States, 410 U.S. 284 (1973); United States v. Lane, 474 U.S. 438, 446 n.8 (1986).

i. Controlling Standards

This Petition involves both a significant question of law and is of substantial public interest. This Court must resolve the issues presented per RAP 13.4. RAP 13.4(b) allowing the Supreme Court to accept a Petition for Review if the:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.
>
> "Separate trials are not favored in this State."

Washington v. Moses, 372 P.3d 147, 193 Wash.App. 341. However, Washington, RCW 10.58.020 guarantees that "[e]very person charged with the commission of a crime shall

be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt," and no procedural laws may interfere with that solemn protection.

Joinder and even a subsequent denial of severances will rise to a constitutional violation when prejudice great enough to render the trial fundamentally unfair arises. Grisby v. Blodgett, 130 F.3d 365, 370 (9th Cir. 1997). There exists a "high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." United States v. Lewis, 787 F.2d 1318, 1322 (9th Cir. 1986) (internal citations omitted). While no clearly established federal law setting forth the standards for improper joinder and denials of severance, the fundamental question for all courts though that must be addressed is whether joinder deprived the defendant of a fair trial. Collins v. Runnels, 603 F.3d 1127, 1132 (9th Cir. 2010) (referencing federal AEDPA

thought with similar policy concerns as here); See Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004).

Washington's CrR 4.3 allows joinder of both offenses or defendants. "If properly joined under CrR 4.3(b), the charges are consolidated for trial unless the court orders severance. CrR 4.3.1(a)." State v. Martinez, 541 P.3d 970 (Wash. 2024). Importantly, after joinder, "[s]everance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." People v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). As to charges between co-defendants, which serves the same judicial economy policies as the joinder of charges as to the same defendant, joinder must be corrected after a showing that the:

> "potential for prejudice requires severance, [and to justify a denials,] a trial court must consider (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. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994) (emphasis added). Additionally, and essentially, "any residual prejudice must be weighed against the need for judicial economy" when joining charges. Russell, 125 Wn.2d at 63 (emphasis added).

"A trial court's decision on a pretrial motion for joinder is reviewed for abuse of discretion." State v. Martinez, 541 P.3d 970 (Wash. 2024) (referring to State v. Bluford, 188 Wash.2d 298, 305, 393 P.3d 1219 (2017)). Failure of a trial court to deny joinder or sever counts afterward is reversible error when "showing that the court's decision was a manifest abuse of discretion." State v. Bythrow, 114 Wn.2d 713, 717-18, 790 P.2d 154 (1990).

ii. Joinder of sexual assault cases must be disfavored because the differences in the evidence spillover impermissibly bolstered the State's allegations and the defenses were distinct.

The nature of the charges, the different evidence presented, and the distinct defenses to each case as between

T.P. and K.T. were too dissimilar to warrant joinder without the court being aware of the extreme risk of prejudice that ultimately did occur during Mr. Nash's trial. "The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each charge." Russell, 125 Wn.2d at 64. That likelihood is "very small" where a defendant's defense to both charges are identical on each charge. Russell, 125 Wn.2d at 64. Here, however, the defenses were not the same. See United States v. Foutz, 540 F.2d 733, 739 (4th Cir. 1976) (error when joinder of robbery charges where defendant had alibi defense to one charge but not to the other and risked introducing evidence of criminal propensity); Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964) (prejudicial error to join when differences in trial strategies).

Moreover, the State cannot circumvent that prejudice by merely claiming that similar charges are of a common scheme or plan. Instead, "[w]hen determining the existence of a

common plan, we should look to factors such as whether the events all occurred in the same place, within a short time period, and with the same modus operandi." United States v. Scott, 413 F.2d 932, 935 (7th Cir. 1969). "There must be such a substantial overlap in the evidence that it would be difficult to separate proof of one offense from the other." Martinez, 541 P.3d 970 (Wash. 2024); (referring to Jackson v. United States, 623 A.2d 571, 581 (D.C. 1993)). Ultimately, the proof, not merely the charges, must overlap.

This danger "can be *particularly prejudicial* when the alleged *crimes are sexual* in nature." Sutherby, 165 Wn. 2d at 922 (referring to See State v. Saltarelli, 98 Wash.2d 358, 363, 655 P.2d 697 (1982) (emphasis added). This danger of particularly prejudicial joinder remains even when the court includes a jury instruction. See State v. Harris, 36 Wash.App. 746, 750, 677 P.2d 202 (1984). "[J]oinder should not be allowed . . . if it will clearly cause undue prejudice to the defendant." Bluford, 188 Wash.2d at 307, 393 P.3d 1219.

Here, the trial court permitted joinder of two rape charges against Mr. Nash, failed to include a limiting instruction, and even failed to sever when presented with the clear prejudice defense counsel warned of in its pretrial motions. Rape is a crime of a sexual nature which, as Sutherby teaches, "can be particularly prejudicial" to a defendant. Sutherby, 165 Wn. 2d at 922. Even the federal circuit courts "have recognized that the risk of undue prejudice is particularly great whenever joinder of counts allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible." Sandoval v. Calderon, 241 F.3d 765, 771-72 (9th Cir.2001); See Lewis, 787 F.2d at 1322.

Joinder of such cases are already highly prejudicial, and Washington courts have long noted that the risk of misjoinder, and subsequent failure to sever, becomes even more dire "when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." Sutherby, 165 Wn.2d 870, 885 (2009)

(referencing Russell, 125 Wash.2d at 62-63, 882 P.2d 747 (citing State v. Watkins, 53 Wash.App. 264, 268, 766 P.2d 484 (1989)). To ensure the prohibition of procedural judicial economy endangering prejudicial joinder is not violated, ER 404(b) prohibits the use of "other acts" evidence to prove the character of a person to show that he acted in conformity with that character. State v. Smith, 106 Wash.2d 772, 775, 725 P.2d 951 (1986). Evidence that is otherwise relevant will be excluded when it is highly prejudicial. Id. at 776, 725 P.2d 951.

Importantly, here, Mr. Nash's defense counsel objected to the joinder. (CP 320-321, 325-26, 379-80) The State argued, and the trial court agreed (and the Court of Appeals later affirmed), joinder would allow evidence of 'prior bad acts' and should be permitted to show Mr. Nash's culpability. (1CP 264-65) However, that is not a permissible use of crossover evidence. R 404(b); see State v. Fisher, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). Joinder is not meant to circumvent the rules of Evidence.

Moreover, Washington courts of appeal caution trial courts against allowing evidence of other sex crimes to spill over into cases actually being tried, warning that "[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." State v. Coe, 101 Wash.2d 772, 780-81, 684 P.2d 668 (1984). Where admissibility is a close call, "'the scale should be tipped in favor of the defendant and exclusion of the evidence.'" Smith, 106 Wash.2d at 776, 725 P.2d 951 (quoting State v. Bennett, 36 Wash.App. 176, 180, 672 P.2d 772 (1983)). When multiple charges are joined together, the inherent danger the jury could bolster both charges by perceiving the crossover evidence as propensity evidence tends to reinforce the claims even where the charges and defenses appear distinct. See State v. Ray, 116 Wash.2d 531, 547, 806 P.2d 1220 (1991); State v. Ferguson, 100 Wash.2d 131, 133-35, 667 P.2d 68 (1983); State v. Medcalf, 58 Wash.App. 817, 822-23, 795 P.2d 158 (1990).

Such prejudicial danger is the exact type of danger courts are to be concerned with, despite the Court of Appeals' affirmation of the trial court's disregard of that claim. (Slip Op. 11, 13, 16-17) In dismissing the trial court's lack of addressing the especially prejudicial nature of the charges, the Court of Appeals found Mr. Nash's arguments 'unconvincing' that the trial court had not considered this because Mr. Nash's defense counsel stated that "judicial economy never trumps any prejudice to the defendant;" however, this too failed to make an attempt to balance the risk of prejudice and judicial economy. (Slip Op. 16-17) A lack of the record evidences a lack of consideration and amounts to an abuse of discretion. Yet, the order itself stated simply that it "engaged in an ER 404(b) analysis and found that because K.T. could corroborate "some of the details" which she would not have known otherwise, the joining of the cases were appropriate. (1CP 562) ER 404(b) analysis demands more and is done in conjunction with ER403, which requires that the trial court actually address the risks of

prejudice. State v. Fisher, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). Yet, the trial court never addressed or attempted to analyze the especially prejudicial nature of joining two sexual offenses together that ultimately served to improperly permit otherwise inadmissible spillover evidence.

Such prejudicial spillover included evidence of the GPS evidence, which a jury was asked to assume the lack of GPS evidence indicated a plan or mal intent by Mr. Nash and should take as more than corroborating for T.P and K.T. Yet, without T.P.'s case, the New World GPS data would be excluded in K.T.'s case because K.T.'s timeline of the alleged rape, the timing of the police shooting, and the time that Mr. Nash's New World GPS data shut down were all hours apart. There was also no crossover in proof as between the New World GPS data in KT.'s and T.P.'s case as Mr. Nash's cell phone data did *not* indicate his presence at K.T.'s apartment (unlike in T.P.'s). To fulfill its duty to perform a thorough ER 404(b), in conjunction with ER 403, the trial court was required to determine the

probative value of the joinder; however, joinder here obscured the inaccuracies in K.T.'s timeline and led to constitutionally deficient spillover evidence between T.P. and K.T.'s cases that clearly prejudiced Mr. Nash's cases.

Instead, T.P.'s case that included a corroborated timeline with GPS and cellular location data bolstered appeared highly relevant to the jury in K.T.'s case because the cases were heard together. This was not a case of Modus Operandi, as alleged by the State, but was a case of irrelevant evidence being made relevant by evidentiary spillover. Additionally, the jury in the K.T. case would not have heard the physical DNA evidence from T.P.'s case. The evidence on the grid of 'proof' the State presented when arguing for joinder would have been largely irrelevant if not for the factual misrepresentations made by the State, as addressed in the next proposition of error.

However, the Court of Appeal's opinion disagreed that this was the sort of prejudice the trial courts should be concerned with. However, that is incorrect and the trial court

had a duty to ensure it permitted joinder on legally- and factually-sound grounds (as addressed in the next prompt). Mr. Nash sought severance, and his defense counsel was aware that "'[d]efendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.'" State v. Moses, 193 Wn. App. 341, 359-60, 372 P.3d 147 (2016) (quoting State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990)). Defense counsel did so when submitting the Motion to Sever and opposed the State's Motion for Joinder.

Here, the trial court's decision to permit joinder allowed for the joining of the charged rape offenses did result in a deprivation of a fair trial because the evidence created a cumulative world of evidence that would not have otherwise existed in each separate case, and this was especially prejudicial in a rape case. Thus, the trial court, and subsequently the Court of Appeals, denied Mr. Nash of his right to a fair trial. State v.

Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), vacated in part by Smith v. Washington, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972). Washington courts have recognized that:

> One need not display an imposing list of statistics to indicate that community feelings everywhere are strong against sex offenders.... Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise. When deciding the issue of guilt or innocence in sex cases, where prejudice has reached its loftiest peak, our courts ... [offer] scant attention to inherent possibilities of prejudice. Just when protection is most needed, the rules collapse.

Coe, 684 P.2d 668, 101 Wn.2d 772 (citing Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325, 333-34 (1956)). Here, Mr. Nash's trial court utterly failed to consider the prejudice that results in two rape charges being tried against him and added to that failed when it failed to discern fact from allegation in permitting joinder and denying severance (as addressed in the next prompt).

The Court of Appeals failed to consider that there is, indeed, a special risk of prejudicial effects when it comes to

crimes of a sexual nature, and that those cases tend to reinforce and impermissibly bolster one another when a lack of shared admissible evidence exists independently as to each case. This Court must reverse the Court of Appeals' decision pursuant to 13.4 because the failure to sever the charges proved prejudicial in violation of both the United States Constitution and the Washington State Constitution.

iii. The trial court and the Appellate Court analyzed joinder under misrepresented and incorrect facts.

Here, the trial court abused its discretion when it based its decision to join Mr. Nash's charges on incorrect facts because those grounds are inherently unreasonable and untenable, and the Court of Appeals subsequently erred when it affirmed that trial court's decision over the defense's presentation of corrected facts.

Here, the State introduced a grid of proposed shared or "similar" evidence as between K.T. and T.P. that the Defense argued contained specific factual errors in its pretrial motion. (1CP 265; CP 317-329, 379-80) "[D]iscretion is necessarily

abused when it is manifestly unreasonable or based on untenable grounds or reasons." State v. Ramirez, 426 P.3d 714, 191 Wash.2d 732 (referring to State v. Stenson, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997)). "Specifically, an abuse of discretion can be found when the trial court 'relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.'" State v. Arndt, 453 P.3d 696, 194 Wash.2d 784 (quoting State v. Lord, 161 Wash.2d 276, 283-84, 165 P.3d 1251 (2007)). A trial court's decision is based on untenable reasons when "it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Here, both the trial court and the Court of Appeals based their reasoning on untenable grounds when approving joinder and rejecting severance on the incorrect facts. See Davis v. Globe Mach. Mfg. Co., 102 Wash.2d 68, 77, 684 P.2d 692 (1984).

Even if the Appellate Court found the procedure wanting, the risk to a defendant's rights is so dire that a counsel's failure to object should and will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial. State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976, cert denied, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015) (a prosecutorial misconduct case). Even more essential, states find that joinder is unacceptable when joinder of offenses results in the testimony of one witness being admissible as to one charge yet not to the other. State v. Voltz, 804 S.E.2d 760, 804 S.E.2d 760 (2017).

The Court of Appeals looked to the trial court's explanation of the strength and the cross-admissibility of the State's evidence as to each count and found that the trial court was permitted to incorporate that State's grid of similarities. (Slip Op. 10-11) It stated that the defense failed to "assign error to any of the court's findings of fact," which was patently incorrect as Mr. Nash's defense counsel did assign multiple

factual errors to the State's presented gird before the trial. (Slip Op. 10-11; CP 320-321, 325-26, 379-80)

When considering joinder, the trial court must consider "whether evidence of each count would be cross admissible under ER 404(b) if severance were granted. ER 404(b) permits evidence of other crimes to show identity, motive, intent, preparation, plan, knowledge, absence of mistake or accident, opportunity, or an alternative means by which a crime could have been committed." Russell, 125 Wn.2d at 882 P.2d 747.

Here, the trial court based its reasoning on permitting joinder on incorrect facts presented by the State as undisputed facts, thus rendering the cross-admissibility prong deficient, unreasonable, and, thus, a clear abuse of discretion. K.T.'s witness statements before and during trial undermined the State's grid of similarities overtly. K.T. claimed the alleged incident took place in the morning, yet the police shooting took place in the after (3:00 p.m.) and Mr. Nash's New World GPS data went dark in the late afternoon (5:21-6:18 p.m.). The

timing of the police shooting was essential because the State argued it was the excuse Mr. Nash used to allegedly isolate K.T. in her apartment.

Thus, without T.P.'s case and the State's use of cellphone data to verify Mr. Nash's location in the absence of the New World GPS evidence, the GPS Evidence was irrelevant to K.T.'s case. The presence of experts to validate cellphone location data in T.P.'s case and the use of an I.T. expert in T.P.'s case suggested that lack of Mr. Nash's New World GPS data could be verified by the presence of cellphone data, but that was untrue for K.T.'s case. This rendered the cell phone data, the New World GPS data, and any experts' testimony as to the location of Mr. Nash unreliable, and "unreliable testimony does not assist the trier of fact." Arndt, 453 P.3d 696, 194 Wash.2d 784 (referring to expert testimony). There is no logical way that the occurrences of the police shooting and the New World GPS shut off times occurring hours after the alleged incident could have supported K.T.'s witness statement.

Basing joinder on this set of incorrect facts was inherently untenable and unreasonable and amounted to an abuse of discretion. The trial court had access to this information, yet failed to analyze it by relying on the State's grid of 'facts.'

The spillover effect was intentional by the State, as it argued both incidents should be heard together as corroborating 'prior bad acts' in a pretrial motion. (1 CP 264-65) However, this alone is antithetical to the very purpose of joinder and an impermissible use of allegedly cross-admissible evidence because that evidence is not admissible '"to prove the character of a person in order to show action in conformity therewith'" relevance. State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (citing ER 404(b); State v. Smith, 106 Wash.2d 772, 775, 725 P.2d 951 (1986)).

The State levied the integrity of its motion for joinder when it argued that K.T. had independent verifiable information that included Mr. Nash's back tattoo, and that no social media showed Mr. Nash's tattoos. (1CP 264) That is incorrect

because, as previously discussed, Mr. Nash's Facebook profile, that showed his back tattoos and pictures of his family, was set to public in 2019.

Defense counsel did, in fact, protest more incorrect factual statements made by the State, which the trial and appellate courts dismissed despite the evidence presented. Attachment "E" from the defense's Motion Opposing Joinder was submitted at the pretrial joinder hearing in August 2021 contained a small sample of approximately two dozen of the more than 100 police contacts that K.T. was involved in within a short two to three-year time period. Mr. Nash's July 5, 2019, report was one of many such reports. In that report, K.T. accused her neighbor of a physical assault that same day, and the police report showed no injuries on K.T., in direct contradiction to the State's chart.

Further, Mr. Nash investigated K.T.'s allegations, which would be considered an assault and not a domestic violence

incident, as the State's grid alleged—both a factual and legal error by the State presented to create the illusion of similarities.

Furthermore, in Appellant's Motion for Reconsideration, it was stated that K.T. had no injuries necessitating an in-person follow-up on July 5, 2019. Yet, the State argued that Mr. Nash arranged a "viewing" of K.T.'s injuries on July 6th, 2019 (State's Br. at 16, 30). Here, the State included claims on its table of similarities (factors five through six) that lacked evidentiary support by any evidence and were even quickly rebutted by an examination of the actual evidence before trial and presented during trial. During his initial exam of K.T. on July 5, 2019, Mr. Nash found that:

> "[K.T.] was looked over for any potential marks, bruising, bleeding, or abrasions indicative of an assault. I also checked the ball of hair in her brush to determine if there was any remnants of scalp or small amounts of blood often seen with pulled hair. Nothing of an evidentiary value was found..... no PC [probable cause] exists for assault"

(Case # 2019-20124112, "Attachment E").

Simply put, the State's chart misrepresented multiple facts that misguided the trial court as it analyzes both joinder and severance. Mr. Nash never physically met with K.T. on July 6, 2019, because she had no reported injuries to view. Appellant did not see K.T. on July 6, 2019. What Mr. Nash did do is contact K.T. by phone to ask her if she had recently seen her neighbor since her accusation against him on July 05, 2019. (Appellant's Opening Br. 63). Because K.T. had no injuries from the alleged incident, Appellant needed to interview the neighbor (3 Weeks VRP 1347, 1381). But at no time did appellant contact her in-person to "view her injuries," that allegation remained unsupported by even a preponderance of the evidence other than K.T.'s testimony. Yet the trial and appellate courts took the State's grid as a list of undisputed facts.

Because the State based its chart of shared evidence for its motion for joinder on incorrect facts that could not be reconciled with witness statements or other corroborating

evidence, and the facts it sought to introduce were irrelevant to K.T.'s case, the trial court abused its discretion, and the Court of Appeals erred when it failed to find an abuse of discretion. This Court must reverse per RAP 13.4.

iv. The weaknesses in the State's case against Mr. Nash further supports reversal because joinder impermissibly bolstered the evidence of K.T.'s case.

The evidence from the State's presentation of T.P.'s case bolstered the weak evidence of K.T.'s case. Without the physical evidence from the T.P. case and T.P.'s witnesses, K.T. case's witness list would have been extraordinarily limited to K.T.'s own testimony and the New World GPS data system would have had no relevance.

Nonetheless, the weaknesses in the State's case here provides further support for reversal of Mr. Nash's case because the trial court improperly dismissed the prejudice of joinder, improperly joining the cases even when presented with a correction of facts, and those errors resulted in manifest

prejudice in Mr. Nash's case which the Court of Appeals failed to remedy.

As submitted here, the physical evidence in T.P.'s case, along with those witnesses testimonies to T.P.'s case, changed the outcome of the overall jury decision to convict Mr. Nash of both second and third degree rape. One such instance is when appropriately analyzed, the New World GPS data system was entirely irrelevant to K.T.'s case. This is because Mr. Nash's New World system was shut down between the hours of 5:21-6:18 p.m., and he spent the entire hour from around 5:15p.m. at COPS NW until the moment he got back in his patrol car and logged into the system at 6:18p.m. However, K.T. stated, and testified, that the alleged rape occurred in the morning (CP 379-80), or late morning at the latest, adding that Mr. Nash had informed her of the officer-involved shooting the morning of July 6, 2019. (AOB 41, 3 Weeks 1049-53) However, the police shooting was not until 3:00 p.m. and Mr. Nash's New World

GPS showed only missing data from 5:21 p.m. to 6:18 p.m. (States' Br. at 19)

Additionally, the jury would not have heard DNA evidence from T.P.'s case during K.T.'s trial because that was entirely irrelevant to K.T.'s case, and especially so when the DNA evidence showed only brief contact with T.P. and utterly failed to support any arguments of penetration. Yet, a jury hearing of two cases together easily conflates the two.

In fact, the State itself conflated the evidence due to the enormous amount of spillover to corroborate its arguments in support of each case. For example, the State failed to keep the two cases' fact patterns separate in their briefing. (State's Brief of Respondent, 5) In the State's Reply to Appellant's Opening Brief, it inappropriately confused K.T. for T.P. Additionally, the State regularly presumes, without evidence, that the New World GPS evidence that shut off while Mr. Nash was at T.P.'s apartment indicates that a shutdown on the day of the alleged incident with K.T. supports the same conclusion yet failed or

declined to support that conclusion with any timelines or other corroborating evidence (corroborating evidence that made the New World GPS evidence relevant in T.P.'s case and not K.T.'s). This creates a logical inconsistency: either the State believed K.T.'s testimony or disregarded it, and either the State can use Mr. Nash's cellphone GPS to locate him, or it cannot. The State cannot have it both ways when the facts fail to show relevance to each individual case and yet convict a defendant beyond a reasonable doubt with such inconsistencies.

Without the evidentiary spillover from the T.P. case, it is unlikely a reasonable person, court or jury, could have found that K.T.'s testimony had any relevance to the New World GPS system. The timeline and facts utterly fail to align in any logical way consistent with either the trial or appellate court's permissive allowance of joinder. Accordingly, not even a jury instruction could have cured the evidentiary spillover, as even the State itself fails to keep the two cases and sets of evidence separate.

Mr. Nash is entitled to reversal of his convictions per RAP 13.4 because the Court of Appeals failed to reverse the trial court's abuse of discretion that resulted in manifest prejudice to Mr. Nash's rights in violation of the United States and the State of Washington's constitutions when impermissibly permitting joinder.

v. Because the trial court permitted and the court of appeals affirmed joinder that violated Mr. Nash's constitutional rights, this Court should reverse.

A defendant facing multiple joined counts must worry about multiple types of risks: including and not limited to the presumption that the jury will assume from the multiple charges he has a criminal disposition as in United State v. Werner, 620 F.2d 922, 929 (2d Cir. 1980), and that the multiple charges will block access to certain evidence while causing confusion as to others. Drew v. United States, 331 F.2d 85, 93-95 (D.C. Cir. 1964); Bean, 163 F.3d at 1083-86.

Joinder permits two or more offenses to be charged together, leaving each offense as a separate count, only when

they are "of the same or similar character, even if not part of a single scheme or plan." CrR 4.3(a)(1). Properly joined offenses "shall be consolidated for trial unless the court orders severance . . . ." CrR 4.3.1(a). "'Severance' refers to dividing joined offenses into separate charging documents.'" State v. Bluford, 188 Wn.2d 298, 306, 393 P.3d 1219 (2017). A court grants severance when doing so "will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

The State of Washington values the policy concerns of its federal counterparts of ensuring that a defendant is not improperly prejudiced by joinder and that the potential for prejudice is minimized. State v. Bryant, 950 P.2d 1004, 89 Wn.App. 857 (1998). Reviewing courts reverse improperly joined convictions when "the joinder resulted in an unfair trial. There is no prejudicial constitutional violation unless `simultaneous trial of more than one offense . . . actually render[ed] petitioner's state trial fundamentally unfair and hence, violative of due process.'" Sandoval, 241 F.3d at 771-

72, cert. denied, 534 U.S. 847, 122 S.Ct. 112, 151 L.Ed.2d 69 (2001) and cert. denied, 534 U.S. 943, 122 S.Ct. 322, 151 L.Ed.2d 241 (2001) (quoting Featherstone v. Estelle, 948 F.2d 1497, 1503 (9th Cir.1991)) (modifications). When the level of prejudice "had a substantial and injurious effect or influence in determining the jury's verdict," federal circuit courts will reverse. Sandoval, 241 F.3d at 772 (citing Bean v. Calderon, 163 F.3d 1073, 1086 (9th Cir.1998)).

If joinder was not proper but the offenses were consolidated in one trial, the convictions must be reversed unless the error remains harmless throughout the trial. State v. Wilson, 71 Wash.App. 880, 885, 863 P.2d 116 (1993), rev'd in part on other grounds, 125 Wash.2d 212, 883 P.2d 320 (1994). Severance is also properly before this Court because even when "only the issue of joinder was preserved" because "both rules, joinder and severance, are based on the same underlying principle, that the defendant receive a fair trial untainted by undue prejudice, [and] we do not believe that the pure legal

issue of joinder can be decided in a vacuum without considering prejudice." Bryant, 950 P.2d 1004, 89 Wn.App. 857.

The trial court's decision to join the charges cannot be considered harmless error largely because of the extreme bolstering effect of the evidence and the doors it shut on the defense to present evidence. If K.T.'s testimony was taken seriously (that the alleged incident occurred in the morning) the New World GPS very well could have served as an alibi for Mr. Nash. The State's use of the New World GPS in the T.P. case hindered Mr. Nash from being able to mount a full defense against the charges in the K.T. case should he have chosen to use that data. See States v. Foutz, 540 F.2d 733, 739 (4t h Cir. 1976).

Thus, "even if joinder is legally permissible, the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant." Bryant, 950 P.2d 1004, 89 Wn.App. 857 (referencing United States v. Peoples,

748 F.2d 934, 936 (4th Cir.1984), cert. denied, 471 U.S. 1067, 105 S.Ct. 2143, 85 L.Ed.2d 500 (1985)). Here, Mr. Nash was clearly prejudiced because of how the State chose to structure the trial had a limiting effect on what Mr. Nash's defense counsel could properly use to strategize a defense.

Importantly, this concern arises when the State joins "a strong evidentiary case with a much weaker case in the hope that the cumulation of the evidence would lead to convictions in both cases." Sandoval, 241 F.3d at 772. Mr. Nash's case implicates these very concerns because K.T.'s case was bolstered by T.P.'s New World GPS system and physical DNA evidence even when K.T. gave false and conflicting testimony. Thus, because the denial of severance evidenced clear prejudice and the defense counsel's clearly articulated during pretrial the dangers of prejudice, the trial should have severed this improperly joined case, and the failure of the appellate courts to reverse demands that this Court now reverse to disincentivize such tactics by the State. This is exactly the type of evidentiary

trap that this Court should seek to prevent the State from deploying against a defendant: where one defense or series of evidence becomes unavailable as a direct result of the nature of the charges or evidence when joining charges. This Court should reverse and remand and allow Mr. Nash the opportunity to present his distinct defenses in two separate trials.

2. The trial court's exclusion of specific instances of K.T.'s mental illness deprived Mr. Nash of his Right to Present a Defense.

Mr. Nash's defense to the charges arising from K.T. centered on a defense of general denial. Because the trial court excluded specifics as to K.T.'s mental health that were relevant and important to the fact-finding mission of the jury, his defense was unconstitutionally limited to general allusions to K.T.'s mental health.

i. Controlling Standard

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S.

284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). "The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions." State v. Darden, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). While "[t]hese rights are not absolute," defendants have a right to present relevant evidence. State v. Jones, 168 Wash.2d 713, 230 P.3d 576, 580. Washington's courts of appeal note 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.'" Jones, 168 Wash.2d 713, 230 P.3d 576, 580.

Whether a trial court violated a defendant's Sixth Amendment right is reviewed de novo. Jones, 168 Wash.2d 713, 719, 230 P.3d 576 (2010). While a trial court's evidentiary rulings are subject to abuse of discretion review. State v. Yates, 161 Wash.2d 714, 762, 168 P.3d 359 (2007). The trial court

violated Mr. Nash's constitutional rights, and this Court therefore has authority under RAP 13.4 to review and reverse the court of appeal's affirmation of the trial court.

ii. K.T.'s mental health history showed an inability to discern reality and was, therefore, highly probative and relevant to the jury's fact-finding mission and was essential to Mr. Nash's defense

When invoked to evidence a propensity for lying or to embarrass, a rape victim's mental health history may be appropriately excluded. People v. Brown, 777 N.Y.S.2d 508, 510 (App. Div.) However, introducing mental health records showing that a fact witness's memory and perceptions are affected by paranoid delusions are highly relevant to the truth-finder's task. Task Force On DSM-IV, Am. Psychiatric Ass'n, Diagnostic And Statistical Manual Of Mental Disorders, 313-14, 376-81 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR] (listing cognitive deficits within such a diagnosis as schizophrenia, paranoid type, whose symptoms include delusions and hallucinations).

In Pennsylvania v. Ritchie, the United States Supreme Court held that judicial in camera review is appropriate to determine the relevance and admissibility of mental health records while ensuring the court avoids violating a defendant's sixth amendment right to confrontation. 480 U.S. 39, 61 (1987). Some courts do argue that excluding evidence of psychiatric conditions serves similar purposes to the rape shield law. People v. Espinoza, 116 Cal. Rptr. 2d 700, 718 (Ct. App. 2002) ("distrust of complaining witnesses in sex offense cases that formed the foundation for [rulings permitting psychiatric examinations] was based on antiquated beliefs that have since been disproved and discarded [by b]oth the Legislature and the California Supreme Court . . . .") This shield is largely invoked when a defendant seeks access to post-incident records. See Simon Bronitt & Bernadette McSherry, The Use and Abuse of Counseling Records in Sexual Assault Trials: Reconstructing the "Rape Shield?" 8 CRIM. L.F. 259, 263 (1997) (noting defense counsels sought mental health records for post-rape

counseling records for impeachment purposes solely). Mr. Nash sought to introduce timely pre-incident records that showed K.T. struggled to discern reality from fact.

Further, a motion in limine limiting the introduction of specific health records incidents is inappropriate when it is a matter of fact-finding. When an alleged victim cannot distinguish the difference between fantasy and reality, and especially when those fantasies include paranoid delusions that have resulted in over a hundred police reports (as K.T.'s did), with a violent assault on the subject of those delusions (as K.T.'s did when she pepper-sprayed her elderly neighbor), and results in a disconnect from reality and sense of self (as K.T.'s did when she believed herself to be Jesus), then the defense must be entitled to inform the jury of the specificities of those delusions.

K.T.'s mental health history included believing that she was Jesus, that she had died, that she was living in the future, and that her neighbor was assaulting her continuously. Paranoid

delusions can, and do, lead to a person's belief that another person has harmed them, threatening them, and means them harm. See Donald W. Black & Nancy C. Andreasen, Introductory Textbook of Psychiatry, 136-37 (6th ed. 2014). The specifics of K.T.'s delusions were extraordinarily important because they revealed that her delusions were "clearly implausible and not understandable" by others without the support of psychiatrists. DSM-5 at 87. Where paranoid hallucinations and delusions exist, so too does the potential for anti-social behavior, as in K.T.'s experience, calling Crime Stoppers over 105 times with mostly criminal allegations against others and even assaulting people. Josanne Donna Marlijn van Dongen et al., Delusional Distress Partly Explains the Relation Between Persecutory Ideations and Inpatient Aggression on the Ward, 200 Psychiatry Res. 779, 781 (2012) ("[h]igher levels of persecutory ideations predicted higher aggression.") The harm here is that those individuals may not even be able to understand the wrongfulness of their acts. See

Madison v. Alabama, 139 S. Ct. 718, 728 (2019). However, the harm of their actions remains, as it does here.

The trial court decided that introduction of the specifics of K.T.'s mental health records would confuse the jury and turn the dispute with the neighbor into a trial issue. However, that testimony and the specifics of her delusions were essential to show the extent to which K.T. would take extreme actions (quite often) in reaction to her paranoid delusions.

Informing the jury about the initial contact that introduced then-officer Mr. Nash to K.T. concerning her July 05, 2019, episode that was ultimately a part of those delusions was so close in time to the alleged sexual assault (July 6, 2019) that it was not only highly relevant, but it would have informed the jury of K.T.'s inability to perceive the events around her at that time. The general denial defense was both frustrated by this limitation and so too was Mr. Nash's ability to defend himself against a claim that ultimately had no physical evidence and conflicting testimony and prior statements.

Context is not confusing. Especially when the context is that the primary claimant has trouble discerning reality and has a strong history of violent actions based on her paranoid delusions. Confusion is asserting a witness both trustworthy in claiming a crime happened while disregarding their testimony to introduce missing GPS evidence, as the State did here and as Proposition I so details. This Court is entitled to hear this claim under 13.4 because the Court of Appeals erred in policy and purpose from the United States Supreme Court and deprived Mr. Nash of his Sixth Amendment right to present a whole defense.

3. Prosecutorial Misconduct so infected the proceedings as to deprive Mr. Nash of a fair trial.

Mr. Nash's case was highly prejudiced by an extreme miscarriage of justice, warranting raising prosecutorial misconduct. McCleskey v. Zant, 499 U.S. 467, 492–97 (1991) (permitting habeas corpus review on issues implicating either a 'case and prejudice' standard or when showing a miscarriage of justice). In Napue v. Illinois, 360 U.S. 264 (1959), the United

States Supreme Court held that because a witness's credibility is often critical in a defendant's conviction, the prosecutor's knowing failure to correct incorrect testimony, even when that testimony goes to witness credibility, amounts to prosecutorial misconduct demanding reversal and remand. To prevail on a prosecutorial misconduct charge, the prosecution's permissiveness must have "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (citation and internal quotations omitted). Such commentary is properly reversed by reviewing courts when there exists an "overwhelming probability that the jury[would] be unable to follow the court's instructions" and "a strong likelihood that the effect of the evidence would be devastating to the defendant." Greer v. Miller, 483 U.S. 756, 766 n. 8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (citations and internal quotation marks omitted)

Here, the prosecutor either failed to correct K.T.'s testimony or presented false evidence that Mr. Nash was present at K.T.'s apartment by implication of the New World GPS data that showed Mr. Nash elsewhere during the hours of K.T.'s alleged assault. The State cannot have it both ways. This Court must not permit the State to present an incorrect 'grid' of similarities where those similarities are not only filled with factual mistakes, but the trial court shows deference to the 'facts' presented by the State.

The State also has a special responsibility to ensure it presents only truthful evidence because it owes a heightened duty to aid the jury in its "search for the truth." State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (reversing when the State presented a misstatement of the law).

The State also has a duty to ensure what it presents to the jury does not conflict with its due diligence of research, including reviewing police reports and ensuring that what they present to the jury conforms to the evidence, and when their

failure results in a conviction, courts will, and must, reverse. See State v. Weiss, 2008 WI App 72, ¶ 15, 312 Wis. 2d 382, 752 N.W.2d 372.

When the prosecution prevents the introduction of evidence proving or disproving material facts being introduced by a defense counsel, a defendant's right to due process and confrontation are violated. State v. Jorgensen, 2008 WI 60, ¶ 38, 310 Wis. 2d 138, 754 N.W.2d 77; accord State v. Singh, 793 A.2d 226, 243 (Conn. 2002).

Here, the State led K.T. into testifying that "something . . . had happened with [her] neighbor." (2Weeks VRP 995). Yet, the prosecution prevented the introduction of the falsity of those accusations, which would have been testified to by K.T.'s own psychiatrist. (3Weeks VRP 1254-55) Even the trial court acknowledged that while K.T. may have had a schizoaffective episode on July 5, 2019, there existed no direct proof that she had one on July 6, 2019. (Weeks 7/23/23 VRP 20) Cf. State v. Lopez, 142 Wn. App. 341, 344, 353-54 (2007). Importantly,

that's not how schizoaffective episodes operate. It was not whether K.T. was experiencing an episode on July 6, 2019; it is whether K.T. experienced an episode any time between July 6, 2019, and the time she reported that her schizoaffective disorder would have produced a delusion centering on what was an emotionally-explosive time for K.T. around July 5-6, 2019.

Preventing the psychiatrist from testifying to that effect ultimately deprived Mr. Nash of his right to a fair trial and amounted to prosecutorial misconduct because it made material facts surrounding K.T.'s accusation less likely.

The Prosecution also presented testimony that there was no evidence that Mr. Nash's tattoos could be found on social media; however, they were readily available to the public and witnesses testified that the appellant's Facebook was set to public during 2019. (2Weeks VRP 839, 840-41, 856-57; 3 Weeks VRP 1280). Yet, with even a cursory level of research, the State justified its joinder largely on these tattoos. (1CP 264) The trial court, entrusting the State to be accurate, likewise

granted joinder on these misrepresented facts. (Weeks 7/28/22 VRP 20) Even more, K.T. claimed she learned of the tattoos from a consensual interaction and not from the July 6, 2019, rendering them irrelevant to the case-at-hand. (3 Weeks VRP 1022)

T.P. initially testified, at trial, that while Mr. Nash was observing her bruises that he had removed her pants and underwear. (2 Weeks VRP 465). However, this was untrue, and T.P. previously told investigators that she had removed her own pants and underwear to show him a bruise on her lower right hip. (Appellant's Opening Br. 30-31) (See also 2 Weeks VRP 510-11). The State failed to correct this testimony, and by doing so committed prosecutorial misconduct.

In an already emotionally-charged case involving the particularly prejudicial subject of rape, the State had a special duty to ensure it presented only facts supported by evidence to the jury, and, here, it failed to do so. But-for the Prosecution's decision to present a long list of incorrect facts to the trial court

and the jury, Mr. Nash would have had two separate trials with very distinct evidence presented and would have had a different outcome.

Although presenting a grid of 'similarities' that were factually incorrect, permitting incorrect and false testimony, and preventing the testimony of a psychiatrist that would testify to K.T.'s delusions that would undermine material facts is tempting for a prosecutor seeking to win a conviction, those actions violate both the prosecution's duty to the public, the court, and the charged. Here, the State violated Mr. Nash's constitutional rights. This Court should reverse and remand.

F. CONCLUSION

For the foregoing reasons, Mr. Nash respectfully requests that this Court grant discretionary review of the Court of Appeals' decision pursuant to RAP 13.4 and remand for a new trial.

This document contains 11,670 words, excluding the parts of the document exempted by the word county by RAP 18.17.

Respectfully submitted:

DATED: December 31, 2024

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CERTIFICATE OF SERVICE

I, the undersigned declare: I am over the age of eighteen years and not a party to the cause; I certify under penalty of perjury under the laws of the United States and of the State of Washington that on December 31, 2024, I caused the following document(s):

PETITION FOR REVIEW

To be served on the following via e-mail and/or through the Courts E-service.

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

Executed on December 31, 2024.

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APPENDIX

Tristen L. Worthen
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CASE# 393224
State of Washington v. Nathan Robert Nash
SPOKANE COUNTY SUPERIOR COURT No. 19104462 32

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ke
Attach.
c: **Email** Hon. Tony Hazel; Hon. Jeremy Schmidt (J. Cooney's case)
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FILED
SEPTEMBER 27, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. NATHAN ROBERT NASH, Appellant.	)))))))))	No. 39322-4-III UNPUBLISHED OPINION

STAAB, A.C.J. — Nathan Nash appeals his convictions for third degree rape and second degree rape of two separate victims, T.P. and K.T., arguing he was unduly prejudiced by joinder of the two unrelated cases. In addition, he argues the court abused its discretion by excluding specific instances of K.T.'s conduct that he claims demonstrated how K.T.'s mental illness affected her ability to perceive events.

We find no error and affirm.

BACKGROUND

In November 2019, Nash was charged with one count of second degree rape and one count of third degree rape of T.P. for an incident that occurred on or about October 23, 2019. At the time of the alleged incident, Nash was on duty as a Spokane Police Department (SPD) officer. While these charges were pending, another individual, K.T.,

came forward and reported that she had been sexually assaulted by Nash a few months before the incident with T.P. The State filed charges alleging Nash committed second degree rape and unlawful imprisonment against K.T. on or about July 6, 2019.

The State filed a pretrial motion for joinder and admission of ER 404(b) evidence. After hearing argument by both parties, the court granted the State's motion for joinder and entered written findings and conclusions. The motions relied on the affidavit of facts prepared in both cases as summarized below.

Incident with T.P.

The State alleged that Nash responded to a domestic violence dispute between T.P. and her ex-boyfriend on October 15, 2019. At the time, Nash told T.P. she could call Crime Check and ask to speak with him. A few days later, bruises began to appear and T.P. took photos of them. T.P. then attempted to contact Nash through the phone numbers contained on the victim's information card so that she could find out where to turn in the photos she took of her injuries. T.P. was unable to contact Nash, so she spoke with her father who called the police front desk and asked for assistance.

On the date of the alleged incident, T.P. received a call from Nash from a phone number labeled as "No Caller ID." T.P. informed Nash of her bruises, photographs, and medical paperwork she received from the hospital, and he asked if there was a "private place" they could meet to "go over" the bruises on her body. T.P. suggested they meet at

her apartment because she felt safe and was already there, although she attempted to push the meeting out after 11:00 a.m. so that her mother would be present.

Nash arrived at T.P.'s apartment around 10:45 a.m. in a marked SPD vehicle, wearing an SPD uniform equipped with a body camera. T.P. invited Nash into her apartment and led him back to her bedroom where she had a list of questions for him. T.P. began showing Nash the photographs of her bruises on her cell phone and pointed to the bruises still visible on her arms and neck. T.P. also had a bruise on her right hip, so she lowered her pants enough to show him the bruising. Nash asked if she had any other bruising "down there" and T.P. remembered a "fingerprint like" bruise on her lower hip/buttocks, so she lowered her pants a little more. Nash requested she take her pants "all the way down" and bend over the bed, to which she complied. Nash then asked "can you pull these down?" referring to her underwear. Clerk's Papers (CP) at 10. T.P. complied and Nash inserted his two fingers from his right hand into her vagina. As the assault continued, T.P. panicked and did not immediately respond. But after about 30 seconds, T.P. said, "Okay, that's enough," pulled up her pants, and said, "That's all the examining that needs to be done." CP at 10.

Nash did not have a camera with him and he did not take pictures of T.P.'s bruises or collect the photographs she had taken. While attempting to get Nash to leave, T.P. attempted to call her father but he did not answer. While leaving T.P.'s apartment, Nash provided her with his personal cell phone number.

Once Nash left, T.P. immediately called her best friend and disclosed what happened. Additionally, when T.P.'s mother called, T.P. told her what happened. After T.P.'s mother conveyed what happened to T.P.'s father, he went to the police department to file a complaint. T.P. went to Holy Family Hospital to have a rape kit performed.

Nash was interviewed by Detective Robert Satake following this incident. Nash admitted to calling T.P. about meeting at her apartment to examine potential evidence from her domestic violence call. Nash admitted leaving himself dispatched on a prior unrelated call and going to T.P.'s apartment without dispatching himself on a follow up call through any available means. Furthermore, Nash admitted he did not activate his body camera during this contact because of "privacy concerns" and the "sensitive nature of the issue." CP at 283. Nash also admitted that his fingers went into T.P.'s vagina but explained that this was because she placed his hand there.

A cursory review of the mobile client logs suggested Nash's New World system[1] had been closed or shut off at 10:39 a.m. and restarted at 11:15 a.m. During this time, Nash's location jumped from the SPD Cops NW shop and reappeared at Monroe and Wellesley where it remained for several minutes before resuming normal traffic speeds. Testing of several law enforcement laptops, including Nash's, did not reviewal any

[1] The New World Software Suite was described as several software applications including mobile computer aided dispatch (CAD), dispatch CAD, and law enforcement record management system (LERMS). The system includes GPS and AVL data.

system errors during that time. Additionally, an application on Nash's cell phone indicated that he was at T.P.'s apartment at the time of the alleged incident.

Incident Involving K.T.

Several months before the incident with T.P., on July 5, 2019, Nash, serving as an SPD patrol officer, responded to a call from K.T. reporting a physical altercation with her neighbor. Nash spoke to K.T. at her apartment and checked her face for injuries. Before leaving, Nash provided K.T. with a crime victim's card that included his phone number. Nash told her he would return the next day to take pictures.

The following day, K.T. received a call from Nash through a phone number that she did not recognize. Nash informed her that he was coming back to her apartment to take pictures of her injuries from the previous day and requested K.T. wear a dress. Nash eventually arrived at her home wearing his full SPD uniform. Nash informed K.T. that his other officers were "shut down" and had to "stay in one place." CP at 290. Later, K.T. learned there was an officer involved shooting that had occurred that day and she figured this is what Nash was referring to. During this time, Nash's New World program appeared to be closed.

Nash asked K.T. if he could take off his portable radio and she told him he could. However, K.T. could not recall whether Nash was wearing his body camera at the time. Nash and K.T. eventually moved over to the couch where he began to inspect her leg for injuries. At no point did K.T. see a camera nor did Nash attempt to take photos. Nash

pulled up her dress from her legs and began inserting his fingers into her underwear and touched her vagina. After this occurred, Nash pulled her dress over her head and pulled her underwear down. K.T. did not say anything because she was "afraid to fight" because Nash "had his uniform and gun on." CP at 291. Nash then raped K.T.

The following month, in August 2019, Nash returned to K.T.'s home. Nash and K.T. had been communicating for several weeks and she believed he was coming over to talk to her about the issues with her neighbor. Nash and K.T. ended up engaging in consensual intercourse. She explained that she noticed Nash had a tattoo that appeared to look like wings on his shoulder.

At first, K.T. did not tell anyone what had happened with her and Nash, but eventually she reported the incident in the summer of 2021. K.T. had called Crime Check regarding an anti-harassment order with her neighbor and subsequently provided information about Nash.

A forensic review of K.T.'s phone showed several phone calls and text messages back and forth with phone numbers associated with Nash in August and September 2019. The text messages culminated with a text from K.T. to Nash on September 25, 2019, that read:

> I was only really being nice to you because I know how really you are. How you treated me the day after I was beat up from my nebbor(sic) ty (Tyrus). Do you remember July 6 how you treated me? Then after I tried to be your friend so you wouldn't do that again to me again. Women shouldn't be treated like that you know. How would you like it if someone

> treated your kids like that when they grow up? What would you do if someone did that to your girl ?

CP at 307. The message appears to reference the sexual assault on July 6.

Trial

After a full trial, the jury 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 crimes. However, the jury acquitted Nash of second degree rape in count one and unlawful imprisonment in count four.

Nash appeals.

ANALYSIS

1. JOINDER

In his first issue on appeal, Nash argues that the trial court abused its discretion by joining the two cases with more differences than similarities. He contends he was unduly prejudiced by joinder of T.P. and K.T.'s cases. We disagree.

As we noted above, the State initially charged Nash with the sexual assault of T.P. for an incident that occurred on October 23, 2019. Almost two years later, and while the charges involving T.P. were still pending, K.T. came forward with allegations that Nash had assaulted her on July 6, 2019, three months before the assault on T.P. After charging Nash with the assault on K.T., the State moved to join these charges with the pending charges involving T.P.

"A trial court's decision on a pretrial motion for joinder is reviewed for abuse of discretion." *State v. Martinez*, 2 Wn.3d 675, 681, 541 P.3d 970 (2024). A trial court abuses its discretion when its decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. Barry*, 184 Wn. App. 790, 802, 339 P.3d 200 (2014) (quoting *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987)). Joinder should not be allowed if it will "'clearly cause undue prejudice to the defendant.'" *Martinez*, 2 Wn.3d at 682 (quoting *State v. Bluford*, 188 Wn.2d 298, 307, 393 P.3d 1219 (2017)). "A reviewing court considers only the facts known [at the time] . . . when the joinder motion is argued, not facts later developed [during] trial." *Id.*

Under the rules of joinder, if multiple charges were originally brought against a defendant in separate charging documents, the court may join those offenses on a party's motion. *See* CrR 4.3(a). Joinder is liberally allowed where one of two circumstances exists: if the offenses "'(1) [a]re of the same or similar character, even if not part of a single scheme or plan; or (2) [a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.'" *Bluford*, 188 Wn.2d at 310(quoting CrR 4.3(a)(1), (2)).

On the other hand, severance involves dividing joined offenses into separate charging documents. CrR 4.4(b). A court may grant severance where "the court determines that [it] will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). Generally, a party must move for severance

pretrial and if denied, "may renew the motion . . . before or at the close of all the evidence." CrR 4.4(a)(1), (2). Importantly, if the party does not timely make or renew their motion for severance, it is deemed waived. *Id.*

While Nash originally raised a pretrial motion for severance, he did not renew the motion before or at the close of all the evidence. Thus, the only issue before this court is whether the trial court properly granted the State's pretrial motion for joinder based on an abuse of discretion standard and the information before the court at the time of the motion to join the charges. On appeal, Nash contends that even if joinder was permissible under the rule, the trial court erred in determining that joinder would not cause him undue prejudice.

"After identifying whether joinder" is proper under CrR 4.3(a)(1), or (2), "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." *Bluford*, 188 Wn.2d at 310. While "judicial economy is relevant, . . . [it] cannot outweigh a defendant's right to a fair trial." *Id.* at 311 (emphasis omitted). Thus, "if joinder will cause clear, undue prejudice to the defendant's substantial rights, no amount of judicial economy can justify requiring a defendant to endure an unfair trial." *Id.* "However, where the likely prejudice . . . will not necessarily prevent a fair trial, the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of

economy and expedition in judicial administration.'" *Id.* (internal quotation marks omitted) (quoting *State v. Smith*, 74 Wn.2d 744, 755, 446 P.2d 571 (1968)).

"There are four factors to consider when determining whether joinder causes undue prejudice: '(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.'" *Id.* at 311-12 (internal quotation marks omitted) (quoting State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)). In granting the State's motion for joinder, the trial court considered each of the four factors.

A. The strength of the State's evidence on each count

In looking at evidentiary strength for purposes of a prejudice analysis under CrR 4.3, joinder may be prejudicial when the evidence on one count is "remarkably stronger" than evidence on the other. *See State v. MacDonald*, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004).

Here, the trial court found that both cases had "similar evidentiary strength." CP at 643. In both matters, the evidence comprised of statements from the alleged victims as well as circumstantial evidence of the New World computer system/data tracking software. The court found that while the case against K.T. may have had additional impeachment evidence and a different approach, this did not substantially change the nature of the similar evidentiary strength.

Nash contends this decision was so outside the bounds of reasonableness as to constitute an abuse of discretion. In doing so, Nash claims the only similarities in this case were that Nash had previously interviewed both T.P. and K.T. regarding physical injuries. We disagree with this characterization of the trial court's findings. The trial court incorporated the State's table of similarities, which listed 13 similarities between the two cases. Nash does not assign error to any of the court's findings of fact, which are treated as "verities on appeal." *See In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Regardless, the court's focus for purposes of this factor is on the strength of evidence for each charge, not necessarily the similarity of evidence for each charge.

Nash also contends that the evidence in the case with T.P. is stronger than the evidence in the case with K.T. Nash points out that there was DNA evidence in the charges with T.P. but not in the charges with K.T. He also points out that in T.P.'s case, there was corroborating evidence that Nash was at T.P.'s apartment at the time of the assault, but there is no corroborating evidence that Nash was in K.T.'s home on the day of the assault. And while the State contends that Nash turned off his body camera during contact with both victims, Nash asserts that there are different reasons for the lack of footage. Nash claims he turned his camera off at T.P.'s request while the lack of footage at K.T.'s home is because Nash was never at K.T.'s home.

The evidentiary differences pointed out by Nash do not undermine the court's determination that both cases had similar evidentiary strengths. In both matters, the

evidence was comprised of statements from the alleged victims, as well as corroborating circumstantial evidence that Nash logged out of the location tracking software and turned off his body camera during the time the victims alleged that he contacted them. The trial court acknowledged that there may have been additional impeachment evidence and a separate approach for K.T.'s case, but that did not substantially change the evidentiary strength of each charge. Moreover, the availability of DNA evidence was not known to the court at the time it decided the motion. Given the equivalent evidentiary strength, the court found factor one weighed in favor of joinder. The court did not abuse its discretion by making this finding.

B. The clarity of defenses for each count

"The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each charge." *State v. Russell*, 125 Wn.2d 24, 64, 822 P.2d 747 (1994). On the other hand, when defenses for multiple charges are complex or mutually antagonistic, severance may be required in order to avoid jury confusion that prejudices a defendant's right to a fair trial. *See State v. Nguyen*, 10 Wn. App. 2d 797, 819, 450 P.3d 630 (2019). For example, joinder may cause prejudice if "'a defendant makes a convincing showing that she has important testimony to give concerning one count and a strong need to refrain from testifying about another.'" *Id.* (quoting *State v. Watkins*, 53 Wn. App. 264, 270, 766 P.2d 484 (1989)).

Here, the court found that Nash's defense for the charges involving T.P. was consent and the defense for the charges with K.T. was general denial or potential consent. For T.P., the jury would need to consider whether Nash's claim that his hand was forced to engage in sexual contact was consensual on T.P.'s part. As it relates to K.T., the jury would have to consider whether any sexual contact occurred at all, and whether any contact was consensual. Consent and general denial are simple concepts, easy for the jury to understand, and not likely to cause confusion.

Nash does not challenge these findings on appeal. Instead, he argues that the defenses for each count were not similar and he was prejudiced by having to attack the credibility of two unstable women instead of one. While we agree that a jury is less likely to believe that two women accusing Nash of similar misconduct are unstable, this is not the type of prejudice a court considers when deciding a motion for joinder. At the time of the motion for joinder, Nash did not demonstrate that his defenses were complex or antagonistic, or that he anticipated testifying in one case but not the other.

C. The court's instructions to the jury to consider each count separately

The trial court properly considered that the jury instructions would include WPIC 3.01,[2] which instructs the jury that a separate crime is charged for each offense and they

[2] *11 Washington Practice: Washington Pattern Jury Instructions: Criminal 3.01*, at 92 (5th ed. 2021) (WPIC).

must decide each separately. Additionally, the court acknowledged that commentary to WPIC 3.01 allows for the parties to tailor that instruction to the facts of the case.

Nash argues that while the trial court properly instructed the jury that it must consider each count separately, and that the verdict on one count should not control the verdict on another, the court never gave a limiting instruction that the evidence of one crime could not be used to decide guilt for another crime. However, our review is limited to whether the trial court abused its discretion when it granted the motion for joinder, which occurred pretrial. Thus, this argument fails. And, even if it were to be considered, Nash acknowledged that the court was not required to give an instruction sua sponte and that the absence of such an instruction was not error.

D. The cross-admissibility of evidence

In analyzing the fourth factor a court must determine the admissibility of evidence of the other charges if not joined for trial. Put another way, the court determines whether evidence of the charges would be cross admissible under ER 404(b). ER 404(b) permits evidence of other crimes to show identity, motive, intent, preparation, plan, knowledge, absence of mistake or accident, opportunity, or an alternative means by which the crime could have been committed. Such evidence is normally not admissible to "prove the character of a person in order to show action in conformity therewith." ER 404(b).

As part of the ER 404(b) analysis, the court considers four factors, which include that the prior misconduct must be: "'(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. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (quoting *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)).

Here, the court found that these factors were met and the evidence of the assault on K.T. would be admissible in the case involving T.P. even if the charges were not joined. Specifically, the court found that it was more probable than not that the offense against K.T. occurred. The court found that the alleged assault on K.T. as well as the circumstantial evidence including that Nash turned off his location tracker during the alleged contact was evidence of Nash's intent, modus operandi, preparation, plan, and knowledge and was not being introduced to show propensity. Finally, the court found that there were significant similarities between the two offenses and the probative value of the alleged assault on K.T. outweighed any danger of unfair prejudice. Based on these similarities, the court determined that evidence of each case was cross-admissible under ER 404(b).

On appeal, Nash fails to challenge the trial court's findings or refute its conclusions on the cross-admissibility of the two charges. Instead, Nash points to evidence produced at trial to challenge the conclusion that the assaults were cross-admissible as evidence of a common scheme or plan. He fails to demonstrate that the

evidence produced at trial was available to the trial court at the time of the State's motion for joinder.

In his reply brief, Nash contends for the first time that the State's theory of a common scheme or plan does not establish the signature-like similarity required to show identity.[3] He claims that courts consider whether the similarities between the two crimes are unusual or distinctive. This argument fails to recognize that identity is just one of the many ER 404(b) exceptions. In fact, the trial court found, and Nash does not challenge, that the alleged assault on K.T., as well as the circumstantial evidence such as the New World computer information, went toward his intent, modus operandi, preparation, plan, and knowledge. Thus, proving the uniqueness of identity alone is not a determinative factor under the ER 404(b) analysis.

E. Balancing prejudice versus judicial economy

Beyond the four factors set forth above, Nash contends that the trial court failed to balance the prejudice inherent in joining sex crimes against the judicial economy gained from joining the charges. *See Bluford*, 188 Wn.2d at 315. He asserts that the trial court did not articulate the benefits of judicial economy and maintains that there was only one mutual witness.

[3] *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

We find this argument unconvincing. At the hearing on the motion for joinder, defense counsel focused on the prejudice side of the balancing test, arguing that "judicial economy never trumps any prejudice to the defendant." Rep. of Proc. (Aug. 16, 2021) (RP) at 163. Moreover, the trial court was cognizant of the potential for prejudice and carefully considered the evidence of assault against K.T.

Ultimately, Nash fails to demonstrate that the trial court abused its discretion in joining the two charges for purposes of trial.

2. PRECLUSION OF SPECIFIC ACTS BY K.T. AS EVIDENCE OF MENTAL ILLNESS

A. Additional Relevant Facts

In December 2021, Nash moved for an order releasing K.T.'s mental health records from a treatment provider to determine whether he should be able to review the records as part of his defense. Specifically, defense sought to show that K.T. suffered from mental health issues that may impact her ability to perceive events and/or remember them. Nash contends that in numerous instances during her interviews with the authorities, K.T. referenced her learning disabilities and PTSD/flashbacks/trauma, which she attributed to an assault by her neighbor. Nash contends that throughout these contacts with authorities, which appeared to be over 100, K.T. was referred to mental health professionals. As a result, the court found good cause for Frontier Behavioral Health (FBH) to release K.T.'s mental health records.

During motions in limine, the State sought to exclude evidence of prior bad acts of its witnesses. Nash opposed this motion. Specifically, defense stated that in 2019 when K.T. called in to report an issue with her neighbor, which was her first contact with Nash, it was not her first call to law enforcement. Defense argued that her neighbor always denied the allegations K.T. made against him. And whether K.T. suffered from hallucinations or delusions, which are referenced in the FBH records, corresponds, at least in part, to the time frame with Nash. For this reason, defense argued what happened with her neighbor and whether it happened or not was relevant to this case.

In response, the State moved to exclude evidence regarding the details of the alleged prior assault by her neighbor. The State argued that any allegation that K.T. initiated that contact, was the initial aggressor, or that she assaulted him were not relevant. Further, the July 5 date was only relevant to the extent that it was when Nash and K.T. met, but it was not when the rape occurred. Instead, the rape occurred the following day on July 6 and her neighbor was not present that day. In addition to relevance, the State argued this may turn into a "mini trial" about the incident with her neighbor, a collateral issue, which would be confusing to the jury.

Defense clarified that it was not seeking to get into the details of all the prior calls in relation to her neighbor. Instead, defense stated "it's not my intent to go through the number of calls that [K.T.] had made to the various police agencies or the details of those calls, although this, again, on July 5, I think the details are relevant from the context of

are they consistent with what the officers observed." RP (July 28, 2022) at 15. In the context of her hallucinations and delusions, which were documented during this time period, defense claimed that the calls were relevant to K.T.'s perceptions that the rape occurred. Based on this information, the defense argued that the calls would be relevant in general terms as they related to her history of contact compared to what was alleged and what was observed by the police officers.

After hearing argument by the parties, the court granted the State's motion to exclude evidence of K.T.'s claims against her neighbor:

> My concern with the introduction of evidence between any type of conflict between [K.T.] and [her neighbor] is it does create some problem with relevance. I think it's really under 403 where the jury is going to be left trying to decide did she—was she assaulted by [her neighbor]? Was she making false allegations against [her neighbor]? It's going to end up being a trial on that issue rather than a trial having to do what's being alleged in the Information. It sounds like perhaps what she claims to law enforcement occurred between she and [her neighbor] might not be supported by any type of physical evidence, but then there's an allegation, I haven't checked into it, that there was an anti-harassment order issued at a later time, which requires a course of conduct that, I guess, could date back to July of 2019. So then the State would probably seek to introduce some evidence showing that there was at least a finding by a preponderance of the evidence some of these acts had occurred. So, again, we're just confusing the issues.

RP (July 28, 2022) at 19.

Nevertheless, the court granted Nash's motion to admit evidence of K.T.'s mental health diagnosis and symptoms. It explained there was at least some evidence that K.T. may have been suffering from schizoaffective disorder at the time the event with Nash

occurred. If she was suffering from the effects of the disorder, it would have a bearing on her credibility. Therefore, the court allowed the defense to inquire into that condition because she may or may not have been suffering from symptoms on the day she met Nash. It noted there may be medical documentation to show that perhaps she was and that expert testimony could lay out exactly how that would reveal itself.

In response to the State's request for clarification, the court concluded that Nash would be able to introduce evidence of K.T.'s mental health and symptoms around the time of the alleged assault and again around the time that she reported the incident several months later, noting:

> This is going to get complicated once again because we have about a two year time span, it looks like that being July of 2019 to July of 2021, when the report was made. Again, the issue at trial isn't [K.T.'s] mental health condition. Her condition is relevant to show whether or not she's possibly fabricating this allegation or she's not correctly remembering this allegation, meaning that she was suffering from some type of hallucination or delusion or something to that effect. So her mental health condition on or about July 5 of 2019 is relevant as already discussed. But between July of 2019 and July of 2021, her mental health condition is not relevant.
>
> However, what was occurring in July of 2021 is also relevant because if she does have this psychological problem that could cause some delusions, maybe that's a basis for what was reported in 2021. So her mental health records or her psychological condition is relevant only for those two time periods.

RP (July 28, 2022) at 27. The hearing concluded with defense counsel acknowledging it had not yet been able to speak with treatment providers directly.

During a break in the trial, defense counsel stated that they had talked to the witnesses from FBH who did not want to be interviewed before testifying. The parties agreed that the solution would be to put the witnesses on the stand and essentially interview the witnesses outside the presence of the jury. The parties agreed to a hearing outside the presence of the jury to conduct their interviews mid-trial.

Later that day, outside the presence of the jury, Dr. David Potter, a psychiatrist who had treated K.T., was called as a witness by the defense. Dr. Potter indicated that he began treating K.T. in October 2020, and had diagnosed her with schizoaffective disorder, bipolar type. Dr. Potter explained that schizoaffective disorder is a condition where a person has mood symptoms of mania and/or depression with psychotic symptoms that last at least two weeks, which include delusions and/or hallucinations. Dr. Potter treated K.T. about four times.

During this questioning, Dr. Potter referenced a report from March 23, 2019, which stated "[p]atient reports she is Jesus and states she had not been prescribed medications." RP (Aug. 24, 2022) at 1240. Dr. Potter admitted he was not the one who engaged in this specific phone call with K.T. The State asked whether it was possible K.T. could have been sarcastic to which Dr. Potter responded "I don't know. I guess you would have to ask her about that. I'm not quite sure, you know, what she was thinking when she said what she said." RP (Aug. 24, 2022) at 1242. Defense counsel confirmed Dr. Potter was the lead psychiatrist and asked "[a]nd there was nothing in the note that

suggested that what she was communicating had anything based in sarcasm?" RP (Aug. 24, 2022) at 1243. Dr. Potter responded, "not that I'm aware of, no." RP (Aug. 24, 2022) at 1243.

After the interviews, the attorneys argued their respective positions to the court. Defense counsel asked that K.T.'s diagnosis be admitted into evidence along with specific instances reflecting on that diagnosis including the "Jesus" remark. The State objected, noting that it was not clear whether the comment was sincere or sarcastic. Ultimately, the court allowed defense counsel to admit evidence of K.T.'s diagnosis and symptoms, but excluded specific instances of manifestation, including the "Jesus" comment:

> 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 diagnosis, 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. 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.

RP (Aug. 24, 2022) at 1259-60.

B. Analysis

Nash contends the trial court abused its discretion in barring defense counsel from eliciting specific instances where K.T. expressed delusional thinking due to her mental illness, specifically K.T.'s complaint against her neighbor and her claim of being Jesus.

This court reviews "decisions to admit evidence using an abuse of discretion standard." *State v. Quaale*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). The proponent of evidence has the burden of establishing that the evidence is relevant. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). "Relevant evidence" is "evidence having 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. Under ER 403, "[a]lthough relevant, evidence may [still] 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."

The trial court did not abuse its discretion by granting the State's motion to exclude evidence of a conflict between K.T. and her neighbor. Evidence of the conflict with the neighbor was relevant only if Nash could show that K.T.'s allegations were untrue *and* a byproduct of her mental illness.

The trial court recognized this when it voiced its concern that under ER 403, the jury may be left trying to decide whether K.T. was assaulted by her neighbor or not. The real issue was how K.T. and Nash came into contact, which first occurred on July 5, 2019, in response to a contact with law enforcement regarding her neighbor.

Nevertheless, Nash contends there was evidence tending to show that K.T.'s allegations against her neighbor were false. Nash points out that the allegations against the neighbor occurred during the same time frame as Nash's assault on K.T., the neighbor denied the allegations, and police did not charge the neighbor with a crime. The trial court did not abuse its discretion in deciding that this information was insufficient to show that K.T.'s allegations against her neighbor were false and due to her mental illness.

In addition to the failure to show relevance, Nash fails to show any prejudice from excluding evidence of K.T.'s conflict with her neighbor. The trial court still allowed a psychiatrist to testify that K.T. was diagnosed with schizoaffective disorder bipolar type. Further, the psychiatrist testified this can cause hallucinations and delusional behavior.

From this information, Nash argued in closing that K.T.'s mental health impacted her ability to accurately perceive and recall events and the jury should not find her credible.

For the same reasons, the trial court did not abuse its discretion by excluding evidence that in March 2019 K.T. made a comment that she thought she was Jesus. The comment is only relevant if it demonstrated a firmly held belief based on K.T.'s mental illness on or near the time of the incident or the allegation. But the person to whom the comment was made did not testify, and the doctor reading the notes had no way of knowing whether the comment was made in sincerity or sarcasm. Furthermore, the comment was made nearly four months before K.T.'s encounter with Nash. As previously mentioned, the jury heard K.T.'s diagnosis and that it could manifest in delusions and hallucinations.

We find no abuse of discretion and affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Pennell, J.

Tristen L. Worthen
Clerk/Administrator

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December 3, 2024

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CASE # 393224
State of Washington v. Nathan Robert Nash
SPOKANE COUNTY SUPERIOR COURT No. 19104466232

Counsel:

Enclosed is a copy of the order deciding a motion for reconsideration of this court's September 27, 2024 opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this Court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the Court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ke
Enc.

FILED
DECEMBER 3, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NATHAN ROBERT NASH, Appellant.	)	No. 39322-4-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of September 27, 2024 is hereby denied.

PANEL: Staab, Lawrence-Berrey, Pennell

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
Chief Judge

THE APPELLATE LAW FIRM

December 31, 2024 - 10:00 AM

Transmittal Information

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