IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28985-1-III**
	)	**(Consolidated with**
Respondent,	)	**No. 28986-9-III)**
	)	
v.	)	**Division Three**
	)	
TAYLOR ROSS LANDRUM,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — This appeal follows convictions for one count of second degree rape, four counts of first degree solicitation of perjury, and one count of attempted indecent liberties. We affirm the convictions for second degree rape and attempted indecent liberties. We conclude that the unit of prosecution rule permits conviction on only one count of first degree solicitation of perjury and that the sentencing judge improperly ran the sentences consecutively. We therefore reverse three of those counts and remand for resentencing.

FACTS

Background

C.H. reported to the Kennewick police in October 2006 that Taylor Landrum made sexual advances toward her in his truck after he offered to give her and a girl friend a ride home from a bar. Her friend had passed out in the back seat of the truck; Mr. Landrum drove them to a remote location. Ms. H. reported that Mr. Landrum then leaned over, put his hands on her shoulders, pushed her down in the seat, and tried to kiss her on the neck. Ms. H. eventually struggled out from under Mr. Landrum and got herself and her intoxicated friend out of the truck and the two fled.

C.S. reported to the Richland police in October 2008 that Mr. Landrum raped her in his truck outside of a local bar. She met Mr. Landrum at the bar and later followed him to his truck to get a light for her cigarette. Ms. S. first hung her legs outside of the passenger door of his truck but put her legs in the truck after Mr. Landrum offered to turn the heater on. Mr. Landrum then sped off into an alleyway. He told her he had a knife. He grabbed her leg and shirt, tore off her undergarment, put his weight on her chest, and had sex with her against her will.

Procedure

The State charged Mr. Landrum on July 18, 2008, by information with attempted indecent liberties with Ms. H.. The State charged Mr. Landrum on October 15, 2008, by separate information with second degree rape of Ms. S. The State moved to join the two

cases. The trial court first denied joinder: "I think that trying to try these cases together I think would result in the very real possibility that the jury might look at these two matters together and say if they're charging him with two of these things then he must have committed these crimes." 1 Report of Proceedings (RP) at 82-83. The court agreed to revisit the ruling after an ER 404(b) hearing to resolve disputes over the admissibility of evidence of Mr. Landrum's prior bad acts. ER 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.").

The State amended the information to charge Mr. Landrum with the rape of Ms. S. and to add four counts of first degree solicitation of perjury. The solicitation charges followed a series of letters or notes that Mr. Landrum passed to Robert Pyke. Mr. Pyke was a fellow inmate at the Benton County Jail. Mr. Landrum wanted Mr. Pyke to lie about Ms. S. and offered cash and a pickup truck in return for Mr. Pyke's help in discrediting Ms. S.

In September of 2009, the court held a hearing to hear argument on whether to admit the evidence of Mr. Landrum's prior bad acts. Several other women came forward

and reported that Mr. Landrum had made unwanted sexual advances, including an instance of intercourse. The court concluded that the testimony was admissible to show common scheme or plan:

> Those cases, it appears to this Court, do seem to indicate a common scheme or plan where Mr. Landrum would find someone who was in somewhat of a vulnerable situation, either there is intoxication or being isolated, offering them either a ride or some other manner getting them into his vehicle and then going to someplace other than what is indicated would be the location, and then at least attempting to have sexual contact with those individuals. . . . There is at least indications of use of threat of harm to these individuals if they failed to comply.

3 RP at 448; Clerk's Papers (CP) at 149-52. The court also concluded that the evidence would be admissible in both of the separately charged counts (second degree rape/perjury and attempted indecent liberties) and therefore the counts would be joined for trial:

> The Court is going to join these two cases for trial. I think having ruled that they are in fact cross-admissible, separating those counts I think would have no practical effect on the jurors' ability to render a fair and impartial verdict. So the Court is going to join those two. Certainly in the interest of judicial economy and interest in saving resource[s] for all involved, the evidence is going to be essentially cross-admissible.

4 RP at 462. The court entered appropriate findings of fact and conclusions of law and ordered the counts joined for trial. The court later denied a motion to sever the counts. The case proceeded to a jury trial.

Trial

At trial, the State presented testimony from Ms. S. and Ms. H., Mr. Pyke, investigating officers from both incidents, and the other women who had reported Mr. Landrum's unwanted sexual advances.

Officer Mary Buchan of the Kennewick Police Department testified about her investigation of the assault of Ms. H. She discussed the matter with Mr. Landrum by phone. The State then asked Officer Buchan if Mr. Landrum had been willing to come to the station to speak with her about the incident. Officer Buchan responded: "No. I asked Mr. Landrum if he would be willing to come to the Kennewick Police Department and he said no because he was afraid I was going to arrest him and charge him with something. He also stated that he didn't trust me." 4 RP at 556. Defense counsel did not object.

Ms. S. testified that she had consumed several alcoholic beverages on the evening she was raped by Mr. Landrum. Counsel tried to ask whether Ms. S. was also taking medication at the time of the rape. The State objected. Counsel told the court that Ms. S. said during the defense interview that she was taking Diazepam and Lithium. The court ruled that counsel could not ask Ms. S. about contemporaneous use of medications, absent "some offer of proof as to how these medications that she was taking, or is taking, how that impacts her ability to either observe or to recall." 5 RP at 697.

Officer Christopher Lee of the Richland Police Department also testified about his investigation of the rape of Ms. S. The State asked Officer Lee, based on his experience, whether Ms. S. behaved consistently with victims of the type of crime she alleged, and Officer Lee responded that she did. Officer Lee had testified earlier on questioning from defense counsel that Ms. S. was very emotional, often crying uncontrollably. Defense counsel objected to the State's question and the court overruled the objection.

Mr. Pyke was the fellow jail mate of Mr. Landrum. He testified about the five notes he received from Mr. Landrum during a seven-month period starting from October 2008.

Instructions

The court's instructions to the jury included the following elements instruction:

> The defendant has been charged with three counts of solicitation to commit perjury in the first degree. To convict the defendant of the three separate crimes of criminal solicitation, each of the following elements of the crime must be proved beyond a reasonable doubt for each of the three counts:
>
> (1) That between October 11, 2008 and September 1, 2009 the defendant [setting forth elements].

CP at 60.

Verdict and Sentence

The jury found Mr. Landrum guilty of one count of second degree rape, four

counts of first degree solicitation of perjury, and one count of attempted indecent liberties. The court sentenced Mr. Landrum to terms of 160 months for the attempted indecent liberties against Ms. H. and 280 months to life in prison for the rape of Ms. S. The court ordered that the 280-month sentence run consecutive to the 160-month sentence. The court also imposed terms of 40.5 months on each of the solicitation convictions. The trial court, then, on its own motion, sealed the juror questionnaires.

DISCUSSION

Joinder and Consolidation

We review a court's decision to join separate offenses for abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). A court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Mr. Landrum argues that the joinder of the two cases and the related admission of evidence of the prior bad acts were unduly prejudicial. He argues that the jurors surely viewed him as a serial sex offender because he was charged with two separate sex offenses committed over a span of time. Mr. Landrum also contends that the evidence relating to the charged counts was not cross-admissible under ER 404(b) because the incidences involving Ms. S. and Ms. H. lack the similarity required to show a common

scheme or plan. Counsel refers to the judge's initial comments to suggest that the outcome here should have been severance. We do not read the record that way.

The court undertook the very kind of candid weighing and balancing that counsel and their clients should want a trial judge to do when faced with these discretionary decisions. And, of course, the test is not whether we would have made the same decision. We were not charged with the responsibility of trying this case in the first instance. Our job is to review for errors, here abuse of discretion, which may have resulted in insurmountable prejudice. *State v. Williams*, 156 Wn. App. 482, 500, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011 (2010). The potential for prejudice that Mr. Landrum suggests is always present with ER 404(b) evidence of this type. *See State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984) ("Careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.").

The court may join offenses in one trial if the offenses (1) are the same or similar in character, or (2) are based on the same conduct or on a series of acts that are part of a single scheme or plan. CrR 4.3(a). Similarly, the court may sever counts if doing so will promote a fair trial. CrR 4.4(b). The defendant has the burden of showing that joinder is so prejudicial that it outweighs any need for judicial economy. *Williams*, 156 Wn. App.

at 500.

The court must consider a number of factors to make the decision including: (1) the strength of the evidence on each count, (2) the clarity of the defenses on each count, (3) the court's instructions on considering each count separately, and (4) the cross-admissibility of the evidence of each count. *Russell*, 125 Wn.2d at 63.

Here, the court found that consolidation was appropriate because "the evidence is going to be essentially cross-admissible." 3 RP at 462. And the court entered detailed findings and conclusions to support that decision:

FINDINGS OF FACT

1. Attempted indecent liberties, rape, and rape in the second degree are clearly of similar character that justifies joinder in this particular case.
2. Issues of cross-admissibility may have to be determined in the future at a hearing and could certainly indicate that the Court could find that the evidence in one case may be admissible in the other.
3. The issue of cross-admissibility does not weigh sufficiently to indicate that the cases should not be consolidated for trial. This is taking into account judicial economy.
4. The court can adequately instruct the jury on the separate nature of the offenses.
5. The strength of the State's case will depend on the credibility of the witnesses that are brought to testify but that does not indicate that the cases should not be consolidated.
6. Judicial economy weighs in favor of consolidating the cases.

CONCLUSIONS OF LAW

1. Consolidation could lead to unfair prejudice to the defendant.
2. The Court initially ruled that consolidation would result in unfair prejudice to the defendant and denied joinder. Upon reconsideration the court joined these two cases for trial.

3. The evidence in these two cases is in fact cross admissible.

CP at 154-55.

Mr. Landrum's defense was the same for each victim—consent. Mr. Landrum also solicited perjury from a cell mate to bolster his defense. And, of course, the court instructed the jury to consider each count separately. We conclude that the court had tenable grounds to join the counts. There was no abuse of discretion.

Prior Bad Acts

In a related assignment of error, Mr. Landrum contends that the evidence of prior bad acts was not cross-admissible because the same evidence was highly prejudicial. Mr. Landrum argues that the admission of evidence of a violent rape in a trial on attempted indecent liberties effectively transformed his attempt to kiss a woman into attempted forcible rape. ER 404(b) prohibits using evidence of other acts to prove the character of a person in order to show that he acted in conformity with that character. *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986).

The trial court may admit evidence of a common scheme or plan to prove that the conduct actually occurred. *State v. Lough*, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Mr. Landrum cites *Lough* and suggests that the evidence of prior bad acts must show plans to perpetrate separate but very similar crimes. Br. of Appellant at 17. And

certainly, *Lough* can be read to so hold. But the holding in *Lough* has evolved into something more. *State v. Kennealy*, 151 Wn. App. 861, 887, 214 P.3d 200 (2009). Evidence of a common scheme or plan is admissible when it shows that a person committed "'markedly similar acts of misconduct against similar victims under similar circumstances.'" *Lough*, 125 Wn.2d at 856 (quoting *People v. Ewoldt*, 7 Cal. 4th 380, 399, 867 P.2d 757, 27 Cal. Rptr. 2d 646 (1994)). Proof of such a plan is admissible if (1) the State can show the prior acts by a preponderance of the evidence, (2) the evidence shows a common plan or scheme, (3) the evidence is relevant to prove an element of the crime charged, and (4) the evidence is more probative than prejudicial. *Id.* at 852.

Mr. Landrum contends that the evidence here is clearly more prejudicial than probative. Again, the court heard from counsel before ruling that the evidence would be admitted and addressed Mr. Landrum's concern in written conclusions of law:

> 3. These cases indicate a common scheme or plan where the defendant would find someone who was in somewhat of a vulnerable situation, either there is intoxication or being isolated, offering them either a ride or some other manner of getting them into his vehicle and then going to some other place other than what is indicated would be the location, and then at least attempting to have sexual contact with those individuals.
> 4. The luring of the victim into the vehicle, taking to another location, most of those remote locations, or at least to a secluded location, outside the view—or the likely view of other people, and indications of use of threat of harm to these individuals if they failed to comply, is sufficient to establish a common scheme or plan such that those acts would be admissible to establish that common scheme and plan

> in the case at issue.
>
> . . . .
>
> 6. A common scheme or plan could be very relevant to prove the forcible compulsion element of the crime charged of rape in this particular case.
> 7. Common scheme or plan involving these cases is relevant to establish the sexual compulsion and to refute the assertion that the acts were not for sexual gratification or for any sexual purpose.
> 8. The evidence is probative on the issue of sexual compulsion and to refute the claim that there was no sexual basis for the acts taken by the defendant and that it was not for sexual gratification, that he was simply kissing the individual.
> 9. *The evidence of sexual compulsion is prejudicial but not sufficiently unfairly prejudicial to outweigh its probative value.*

CP at 150-52 (emphasis added).

The court, then, weighed the probative value of the additional evidence against its potential for prejudice on the record. Mr. Landrum generally argued that the encounters were consensual, so his credibility was an important issue for the jury. The court determined that the evidence was "not sufficiently unfairly prejudicial to outweigh its probative value." CP at 152. Ultimately, all evidence is prejudicial to one side or the other. That is why it is introduced. *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). Whether evidence is unduly prejudicial is a decision not subject to mathematical certainty, varies from case to case, and is, for that reason alone, properly addressed to the sound discretion of the judge actually trying the case. Again, the court articulated tenable grounds to do what it did and there is, then, no abuse of discretion.

Admission of Evidence—Drug Use

We review decisions on the admission of evidence for abuse of discretion. *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010).

Mr. Landrum contends that the trial court should have allowed him to ask Ms. S. whether she was under the influence of prescription medications at the time of the rape. *See* 5 RP at 691 ("At this time were you taking any medications?"). He argues that evidence of her drug use was admissible to impeach her testimony.

A witness's use of alcohol or illicit drugs at the time of the events in question is admissible to show that the witness may not remember the events accurately. *Russell*, 125 Wn.2d at 83. There must, however, be a reasonable inference that the witness was under the influence of alcohol or illicit drugs either at the time of the events in question, or when the witness testified. *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991). Evidence of drug use on other occasions is generally inadmissible on the ground that it is impermissibly prejudicial. *Id.* at 344-45. And, significantly here, expert testimony is generally required to tie the drug use to the witness's ability to recall. *State v. Dault*, 19 Wn. App. 709, 719-20, 578 P.2d 43 (1978).

The judge refused to allow the inquiry, absent "some offer of proof as to how these medications that she was taking, or is taking, how that impacts her ability to either

observe or to recall." 5 RP at 691-92, 697. That ruling is based on the court's conclusion that the side effects associated with taking these prescriptive medications in combination with alcohol were not common knowledge. *Dault*, 19 Wn. App. at 719-20.

There are several problems with Mr. Landrum's argument here on appeal. The defense interview of this witness is not part of the record and so there is nothing to show that she was even using prescription drugs at the time. And next, even were we to assume that she was using them, there is no expert testimony as to what the effect would have been, if any. The jury, then, would be left to speculate. Again, we see no abuse of discretion.

Police Officer's Opinion Testimony

Mr. Landrum next contends that the prosecutor improperly elicited Officer Lee's opinion as to whether Ms. S. was behaving "consistent or inconsistent" with someone who has experienced the type of crime she alleged against Mr. Landrum. Mr. Landrum asserts that the opinion invaded the province of the jury to pass on his credibility.

The credibility of a witness is a jury question. *State v. Whelchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990). A prosecutor cannot elicit a witness's opinion on another witness's truthfulness. *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). But the State is certainly privileged to respond to evidence, including opinions

elicited by the defendant. Said another way, "[a] defendant may open the door to evidence that would otherwise be inadmissible, even if constitutionally protected, if the rebuttal evidence is relevant." *State v. Young*, 158 Wn. App. 707, 719, 243 P.3d 172 (2010), *review denied*, 171 Wn.2d 1013 (2011). And that is what happened here.

Counsel for Mr. Landrum asked Officer Lee about his impressions of Ms. S.'s demeanor: "Did you have an impression of what [Ms. S.'s] demeanor was when you were speaking with her?" 5 RP at 723. The prosecutor then predictably asked whether Ms. S. exhibited the demeanor of an individual who had suffered a traumatic event:

> Q And you've had a chance to interview victims and witnesses of traumatic events; is that fairly said?
> A Yes.
> Q Can you tell us whether or not [Ms. S.] was consistent or inconsistent with those people you've seen?
> [Defense Counsel]: I'm going to object, Your Honor.
> THE COURT: Overrule the objection.
> Q Again my question was—well how many witnesses, victims of traumatic events have you had to deal with in your years as a police officer?
> A Several. I was a detective with Pasco so it's—to give you a definitive number, I'm not positive. Specific to these types of crimes, say probably over a hundred.
> Q And [Defense Counsel] asked you about [Ms. S.'s] demeanor. And my question to you is, was it consistent or inconsistent with what you've seen in cases you've investigated?
> A It's consistent.

5 RP at 725-26.

It was not unreasonable for the judge here to conclude that Mr. Landrum opened the door to the State's questions on Ms.

S.'s demeanor. Moreover, the question was whether Ms. S. exhibited the demeanor of other victims, who had also suffered a traumatic event. It was not whether Officer Lee believed Ms. S. had been raped. The trial court did not abuse its discretion in allowing the testimony.

Refusal To Come To Police Station

Mr. Landrum had the right not to talk to police. *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). And so a police witness may not testify that a defendant refused to speak to her. *Id.* at 241. The State may not purposefully elicit testimony of the defendant's silence. *Id.* at 236. A police witness's indirect reference to the defendant's silence, however, is not error absent further comment inferring guilt. *State v. Lewis*, 130 Wn.2d 700, 705-07, 927 P.2d 235 (1996).

In *Lewis*, our Supreme Court reviewed a prosecution for rape and assault of two different women. *Id.* at 701. There, a police witness testified that he told the defendant that "'if he was innocent he should just come in and talk [to me] about it.'" *Id.* at 707 (quoting Madsen, J., concurring). The officer did not refer to any appointments the defendant made and broke. *Id.* at 704. The court held that the police witness's testimony did not constitute improper comment:

> There was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with the police, nor is there any statement that silence should imply guilt. Most jurors know that

> an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence.

Id. at 706.

Here, the State asked Officer Buchan if Mr. Landrum had been willing to come to the station and speak with her about the incident. Officer Buchan responded: "No. I asked Mr. Landrum if he would be willing to come to the Kennewick Police Department and he said no because he was afraid I was going to arrest him and charge him with something. He also stated that he didn't trust me." 4 RP at 556. Officer Buchan did not testify that Mr. Landrum refused to speak with her. The comments here do not fall within that category of comments that have been held to violate a defendant's right to remain silent. *State v. Burke*, 163 Wn.2d 204, 216 n.7, 181 P.3d 1 (2008). Indeed, Mr. Landrum did speak with the officer by phone; he just refused to come down to the station because he was afraid of being arrested.

Sufficiency of Evidence—Attempted Indecent Liberties

To convict Mr. Landrum of attempted indecent liberties, the State had to prove that he knowingly took a substantial step to cause another person, not his spouse, to have sexual contact by forcible compulsion. RCW 9A.44.100(1)(a). Mr. Landrum contends that the State did not show "sexual contact" or "non-marriage."

"Sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). Such "intimate parts of a person" can be either clothed or unclothed. *State v. Howe*, 151 Wn. App. 338, 346, 212 P.3d 565 (2009). Contact is considered "intimate" if

> "the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. Which anatomical areas, *apart from genitalia and breast*, are 'intimate' is a question for the trier of fact."

Id. (emphasis added) (quoting *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321 (2008)).

Mr. Landrum grabbed Ms. H. by the shoulders, pushed her down in the seat, and tried to kiss her on the neck. He argues, nonetheless, that the neck is not an intimate part of the body. Whether it was or not was a question for the jury. *Id.* Ms. H. had to struggle out from under Mr. Landrum to get herself and her intoxicated friend out of the truck. The State also showed that Mr. Landrum had forced himself, under similar circumstances, on other women in the past. All of this is sufficient for a rational trier of fact to have found beyond a reasonable doubt that Mr. Landrum took a substantial step toward having sexual contact with Ms. H.

Mr. Landrum argues that the State failed to show that he was not married to the victims. It was a reasonable inference here. The two had met only twice before. Ms. H. was going through a divorce the first time she met Mr. Landrum at a bar. Ms. H. next saw Mr. Landrum while she was riding a horse; he pulled up to her in his car. Mr. Landrum asked Ms. H.: "What's wrong with me[?] And why don't you date me[?]" 4 RP at 555. The jury could reasonably infer that they were not married.

Right To Public Trial—Sealing Questionnaires

Mr. Landrum contends that his federal and state constitutional rights to a public trial were violated when the court sealed juror questionnaires without first conducting a *Bone-Club* analysis. *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). This is a developing area of the law in this state and there are conflicting lines of authority within the system.[1] For the reasons stated below, we are not convinced that a posttrial sealing of

[1] *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (Division Three, 2007); *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (Division One, 2009); *State v. Waldon*, 148 Wn. App. 952, 967, 202 P.3d 325 (Division One, 2009); *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009); *In re Det. of Townsend*, noted at 157 Wn. App. 1039 (Division Three, 2010) (Unpublished); *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 180-81, 248 P.3d 576 (Division Two, 2011) *petition for review filed*, No. 85669-9 (Wash. Mar. 2, 2011); *State v. Smith*, 162 Wn. App. 833, 262 P.3d 72 (Division Two, 2011), *petition for review filed*, No. 86386-5 (Wash. Aug. 23, 2011); *State v. Tarhan*, 159 Wn. App. 819, 246 P.3d 580 (Division One, 2011), *petition for review filed*, No. 85737-7 (Wash. Mar. 16, 2011); *State v. Lee*, 159 Wn. App. 795, 247 P.3d 470 (Division One, 2011), *petition for review filed*, No. 85793-8 (Wash. Mar. 28, 2011); *State v. Brick*, noted at 163 Wn. App. 1029 (Division One, 2011) (Unpublished).

records implicates the right to a public trial. However, if the public trial right is implicated, we will follow the reasoning of Division One of this court and hold that Mr. Landrum's right to a public trial was not violated, but the failure to conduct a *Bone-Club* hearing before entering the sealing order is inconsistent with the public's right of open access to court records.

Existing cases concerning the sealing of juror records arose from rulings made during trial that were challenged on direct appeal. In other fact patterns, our courts have addressed posttrial challenges to sealing orders solely on the basis of GR 15 rather than as a public trial concern. The most recent examples are a pair of related cases, *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011), and *State v. Mendez*, 157 Wn. App. 565, 238 P.3d 517 (2010), *review granted*, 172 Wn.2d 1004 (2011).

The two cases arose from Yakima County murder prosecutions against Jose Sanchez and Mario Mendez. Appointed counsel for the two defendants submitted bills to a "budget judge" who addressed financial aspects of the cases while another judge handled trial-related matters. The records were sealed prior to trial. 157 Wn. App. at 568. Mr. Mendez eventually pleaded guilty, while Mr. Sanchez was convicted at trial and appealed. *Id*. at 568-69. After Mr. Sanchez's case was on appeal, the *Yakima Herald-*

Republic sought access to the billing records in both cases on multiple theories. The trial court declined to allow access to the records in Mr. Sanchez's case on a public records act theory. The newspaper appealed directly to the Washington Supreme Court. *Id*. at 569. In Mr. Mendez's case, the trial court allowed access to the billing records under GR 15 after unsealing them. Mr. Mendez then appealed to this court. *Id*.

In *Mendez*, we concluded that limited third-party intervention in a closed criminal case was permitted under GR 15; the trial court properly unsealed the records and allowed the newspaper access to them. *Id*. at 579-87. In *Herald-Republic*, the court ruled that the public records act did not apply to judicial records, but that GR 15 was applicable and reversed the trial court and remanded for the court to consider whether to unseal the records. 170 Wn.2d at 792-803.

We read these two cases as concluding that posttrial, GR 15 is the authority applicable to the sealing and unsealing of records in criminal cases.[2] This approach is supported by our constitution. Article I, section 10 requires, "Justice in all cases shall be administered openly, and without unnecessary delay." Nothing in that provision limits the open justice requirement only to cases that are currently pending; it applies throughout judicial proceedings. In contrast, article I, section 22 of our constitution

[2] GR 15 was found applicable to a defendant's efforts to seal the records of a vacated criminal conviction in *State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009).

provides that among the rights of the criminal defendant is "to have a speedy public *trial*." (Emphasis added.) While this provision ensures that the trial proceedings are open to the public, it does not address pretrial and posttrial proceedings. The right of public access in those aspects of a case is ensured by article I, section 10, not article I, section 22. The two provisions overlap during a criminal trial, but only article I, section 10 applies outside of trial.

Herald-Republic dictates that the remedy for addressing sealed records is to conduct a GR 15 hearing to determine if the records should be unsealed. 170 Wn.2d at 803. This case is remanded for the trial court to consider a motion to unseal.

While we believe this issue is best addressed as an open justice issue rather than as a public trial issue because the challenge here arose posttrial, unlike the challenges in the cases discussed below, the result would be the same if analyzed in that manner.

A defendant's right to a public trial is protected by both the state and federal constitutions. The Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. Article I, section 22, of the Washington Constitution provides, "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury." The public is also guaranteed the right to open court proceedings by the Washington

Constitution: "Justice in all cases shall be administered openly." Wash. Const. art. 1, § 10. This provision protects the public's and press's right to open and accessible court proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 178, 137 P.3d 825 (2006). These provisions together "assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny." *State v. Duckett*, 141 Wn. App. 797, 803, 173 P.3d 948 (2007).

The public's right to open court proceedings and the defendant's right to a public trial "serve complementary and interdependent functions in assuring fairness of our judicial system." *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). Our Supreme Court set out the standards for closing all or any portion of a criminal trial in *Bone-Club*.[3] The court must consider the same factors to assure a defendant's rights

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[3] "1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.

"2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

"3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

"4. The court must weigh the competing interests of the proponent of closure and the public.

"5. The order must be no broader in its application or duration than necessary to serve its purpose."

Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (quoting *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

under article I, section 22, and the public's right under article I, section 10, because they are interrelated. *State v. Lee*, 159 Wn. App. 795, 803, 247 P.3d 470 (2011), *petition for review filed*, No. 85793-8 (Wash. Mar. 28, 2011).

If a defendant's right to a public trial is violated, the court must devise an appropriate remedy. *Momah*, 167 Wn.2d at 149. Structural errors require reversal of the conviction and a new trial. *Id.* Error is structural when it "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). Regardless, the remedy must be fashioned in accordance with the violation. *Id.* at 150, 155-56.

In *State v. Coleman*, Division One of this court addressed whether sealing juror questionnaires violated the constitution. 151 Wn. App. 614, 621, 214 P.3d 158 (2009). *Coleman* was a prosecution for rape and multiple counts of first degree child molestation. *Id.* at 617. The venire filled out questionnaires that included questions about the details of their sexual histories. *Id.* at 618. The completed questionnaires were provided to counsel and jury selection proceeded in open court. *Id.* Three days after the jury was sworn, the court ordered the questionnaires sealed but did not conduct a *Bone-Club*

analysis before doing so. *Id.* The jury found Mr. Coleman guilty of two counts of molestation, acquitted him of a third, and failed to reach a verdict on the rape charge. *Id.*

Mr. Coleman appealed and assigned error to the court's failure to consider the *Bone-Club* factors before sealing the questionnaires. He argued that the order violated "his right and that of the public to an open and public trial." *Id.* at 619. He also argued that the violations constituted structural error, requiring a new trial. Division One concluded that the failure to conduct a *Bone-Club* analysis prior to sealing the juror questionnaires did not violate Mr. Coleman's right to a public trial under article I, section 22. *Id.* at 623-24. Rather, it violated the public's right to open and accessible court proceedings under article I, section 10:

> Under these authorities, the court should have conducted a *Bone-Club* analysis before sealing the questionnaires. Violation of the public's right to open court records requires remand for reconsideration of the order.
>
> Coleman contends that sealing the questionnaires without conducting the *Bone-Club* analysis amounted to structural error, from which prejudice is presumed and for which a new trial is warranted. On these facts, we do not agree that structural error occurred. The questionnaires were used only for selection of the jury, which proceeded in open court. The questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. Thus, the subsequent sealing order had no effect on Coleman's public trial right, and did not "create defect[s] affecting the framework within which the trial proceeds."

Coleman, 151 Wn. App. at 623-24 (alteration in original) (footnote omitted) (internal quotation marks omitted) (quoting *In re*

Det. of Kistenmacher, 163 Wn.2d 166, 185, 178 P.3d 949 (2008) (Sanders, J., concurring in part, dissenting in part)).

Division Two of this court addressed the same question in *In re Personal Restraint of Stockwell*, and came to a different conclusion on whether the defendant could assert the public's right to open court proceedings. 160 Wn. App. 172, 177, 248 P.3d 576 (2011), *petition for review filed*, No. 85669-9 (Wash. Mar. 2, 2011). There, the State prosecuted Mr. Stockwell for multiple counts of child molestation. *Id.* at 175. The venire filled out juror questionnaires containing personal questions. *Id.* at 177-78. The court sealed the juror questionnaires. *Id.* at 178. The jury found Mr. Stockwell guilty of both counts and his convictions were affirmed on direct appeal. *Id.* at 176.

In his personal restraint petition, Mr. Stockwell argued that the trial court violated his right to a public trial by sealing the juror questionnaires, and he argued that this was structural error that required a new trial. *Id.* at 177. Division Two concluded that the trial court's sealing of juror questionnaires after voir dire was not structural error and did not render the trial fundamentally unfair where Mr. Stockwell had full access to the questionnaires and benefitted from the trial court's promise to the prospective jurors that their questionnaires would be sealed after voir dire. *Id.* at 180-81. Division Two found that the assurance of confidentiality made it more likely that the jurors would candidly

reveal in their questionnaires information that the defendant could use to challenge them for cause. *Id.*

Division Two disagreed with the *Coleman* court's holding on the public's right to open and accessible court proceedings under article I, section 10. *Stockwell*, 160 Wn. App. at 179-81. Division Two held that the sealing of the questionnaires only affected the public's right to "open" justice and that our Supreme Court was unwilling to allow a defendant to assert the public's open justice rights. *Id.* at 181. Division Two relied on the concurring opinion in *State v. Strode*;[4] it would have held that "'[a] defendant should not be able to assert the right of the public . . . to overturn his conviction when his own right to a public trial has been safeguarded'" as required under *Bone-Club* or has been waived. *Stockwell*, 160 Wn. App. at 180 (alterations in original) (quoting *Strode*, 167 Wn.2d at 236) (Fairhurst, J., concurring)). The lead opinion in *Strode* noted, however, that even though the defendant had not asserted any rights belonging to the public or press concerning public trials, it still had to address the right of the public because courts retain the overriding responsibility to ensure that the public's right to open trial is protected as mandated in the fourth *Bone-Club* factor. *Strode*, 167 Wn.2d at 230 n.4.

In *State v. Smith*, Division Two reaffirmed its position on sealing juror

[4] *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009).

questionnaires after voir dire. 162 Wn. App. 833, 846-47, 262 P.3d 72 (2011), *petition for review filed*, No. 86386-5 (Wash. Aug. 23, 2011). Division Two again noted that the defendants had full access to the questionnaires and benefitted from the trial court's promise to prospective jurors that their questionnaires would be sealed after voir dire. *Id.* at 847. Division Two also found that the sealing procedure did not affect the public's right to open information because the defendants used the content of the questionnaires to question the jurors in open court, where the public could observe. *Id.* Division Two departed from Division One's analysis in *Coleman* and, instead, chose to follow a concurring opinion in *Stockwell*.[5] The concurring opinion from *Stockwell* essentially states that because the content of the questionnaires was used in open court, where the public could observe, no part of the voir dire was closed to the public. *Stockwell*, 160 Wn. App. at 183 (Van Deren, J., concurring).

The material facts here are the same as in *Coleman*, *Stockwell*, or *Smith*. Here, the trial was called with a jury pool of 65 individuals. Of those 65, there were 23 positive answers to the juror questionnaire. There is no transcript of what occurred on voir dire or

[5] "We decline to follow *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009), in which Division One of our court held that the trial court was required to conduct a *Bone-Club* analysis before sealing juror questionnaires that contained information about the jurors' sexual history. . . . We find more persuasive Judge Van Deren's concurring opinion in *Stockwell*, 160 Wn. App. at 182." *Smith*, 162 Wn. App. at 848 n.9.

what was contained in the questionnaires. On October 2, 2009, the jury returned a verdict. On October 26, 2009, the trial court sealed the juror questionnaires on its own motion. The trial court noted that Mr. Landrum had threatened to kill or injure his victims and others. There is no indication that jury selection did not proceed in open court. Nor does the record suggest that the questionnaires were used for any purpose other than jury selection, were not a part of the public proceedings during the jury selection process, or were not available for public inspection prior to the sealing order. And Mr. Landrum makes no showing of prejudice. He was not denied the right to a public trial. The question then is whether the public has been denied the right to open and accessible court proceedings under article I, section 10.

Article I, section 10 assures the public's right to open and accessible court proceedings. The *Bone-Club* standards keep in check the court's discretion to close parts of a trial, including the sealing of court documents. The fourth *Bone-Club* standard states: "The court must weigh the competing interests of the proponent of closure and the public." *Bone-Club*, 128 Wn.2d at 258-59. Our Supreme Court has recognized as much but has not addressed the appropriate remedy. *See Strode*, 167 Wn.2d at 230 n.4.

In *Smith*, Division Two held that the sealing procedure did not affect the public's right to open information because the defendants used the content of the questionnaires to

question the jurors in open court, where the public could observe. *Smith*, 162 Wn. App. at 847. But *Bone-Club* would seem to require consideration and an analysis on the record for all court closures. In other words, there is no threshold period of time that would make a proceeding open for purposes of *Bone-Club*. Even if a proceeding or document has previously been open to the public, a proposed closure would seem to trigger the need for the analysis.

We then follow the analysis set out in *Coleman*, and conclude that the court in this case violated the public's right of open access to court records by failing to conduct a *Bone-Club* hearing before sealing the jury questionnaires. We likewise agree that the proper remedy is to remand to the trial court to conduct a *Bone-Club* hearing and to reconsider the decision to seal the records.

Lee is also helpful here. In *Lee*, the members of the venire completed questionnaires that asked their attitudes toward African-Americans and firearms. 159 Wn. App. at 806. The trial court sealed the questionnaires after jury selection. *Id.* On appeal, Division One stated that the factual difference in the timing of the sealing order in the case (contemporaneous with juror swearing in) from that in *Coleman* (three days) was not material because the parties had full access to the questionnaires prior to the sealing order. *Id.* at 806-07. Division One again concluded that the failure to conduct a *Bone-*

Club analysis prior to entering the sealing order did not violate the defendant's rights to a public trial, but that it did violate the public's right of open access to court records. *Id.* at 807-12. The case was also remanded for reconsideration of the order. *Id.* at 811.

Mr. Landrum argues nonetheless that GR 31 and the Benton County Superior Court's local rule prohibit public access to court records until they are on file with the clerk. GR 31(d)(1) provides that "[t]he public shall have access to all court records except as restricted by federal law, state law, court rule, court order, or case law." The rule further states that "[a]ccess to court records is not absolute and shall be consistent with reasonable expectations of personal privacy." GR 31(a). Mr. Landrum cites to no provision of the Benton County Superior Court's local rules which would prohibit him or the public from viewing the questionnaires prior to their being sealed.

And Division One also addressed this argument in *Coleman*: "We agree . . . that GR 31 must be read in accord with GR 15 [sealing of court records], that both rules are subject to the constitutional mandate of open records, and that the presumption of juror privacy provided in GR 31 is properly considered as part of the *Bone-Club* analysis." *Coleman*, 151 Wn. App. at 623.

The trial court violated the public's right to open court records. It should have conducted a *Bone-Club* analysis before sealing the questionnaires and we therefore

remand for the analysis.

Multiple Convictions for Solicitation of Perjury

Mr. Landrum contends that his multiple convictions for solicitation of perjury were wrong for a number of reasons: (1) the jury instructions put him in double jeopardy, (2) several of the convictions were unsupported by sufficient evidence, (3) there was only a single unit of prosecution, and (4) the convictions violate jury unanimity. We review challenges to the sufficiency of the evidence to see if there was enough evidence to allow the trier of fact to find each element of the offense proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). We view the evidence in a light most favorable to the prosecution. *Green*, 94 Wn.2d at 221.

The State concedes that the solicitation of perjury convictions should have been considered one unit of prosecution, not four. We will then remand for dismissal of all but one of the convictions and for a new sentencing hearing.

The only remaining question is whether there is sufficient evidence to support even one conviction for solicitation of perjury and whether a unanimity instruction was required.

The State had to show that,

> with intent to promote or facilitate the commission of a crime, he offers to give or gives money or other things of value to another to engage in specific conduct which would constitute such crime or which would establish

> complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

Former RCW 9A.28.030(1) (1975). A person commits first degree perjury if

> in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law.

Former RCW 9A.72.020(1) (1975).

Mr. Landrum wrote at least five notes to jail mate, Richard Pyke. The State introduced each of the similar notes into evidence:

> I understand all we need is a couple guys to come forward saying that she told them that she said she was making all this up to get some cash. They could say we were told by her that she is doing this because she wants money and the sex was consen[s]ual. If they contact whomever then I could off same with the Indecent Liberties one to.

Ex. 5; 4 RP at 649. The State asked Mr. Pyke what Mr. Landrum was offering if he got the people to lie and he answered "[c]ash and a pickup that was in impound." 4 RP at 650. Failure to give a unanimity instruction was not error. The series of notes evidences a continuing course of conduct to entice Mr. Pyke to lie and the court was not then required to instruct the jury that it had to agree on one act. *State v. Beasley*, 126 Wn. App. 670, 681-82, 109 P.3d 849 (2005). Any one or all of Mr. Landrum's notes provide ample evidence to support the single count of solicitation of perjury. *Id.*

We will remand for dismissal of all but the one count and for a new sentencing

hearing.

Conflict of Interest

Mr. Landrum next contends that his lawyer had an interest that conflicted with his interests. Our review is de novo. *State v. Regan*, 143 Wn. App. 419, 425-26, 177 P.3d 783 (2008).

Generally, the court has a duty to investigate claims of attorney-client conflicts if it knows or reasonably should know that a potential conflict exists. *Id.* Reversal of a conviction is required if a defendant or his attorney makes a timely objection to a claimed conflict and the trial court fails to conduct an adequate inquiry. *Id.* at 426. Where a defendant fails to make a timely objection, a conviction will stand unless he can show that his lawyer had an actual conflict that adversely affected the lawyer's performance. *Id.*

Here, Mr. Landrum's attorney stated:

> It is true that I have a document somewhere where Mr. Pyke many, many months ago, which had nothing to do with Mr. Landrum at all, asked me to do a favor for him. And because I represent a variety of different people who are in this pod and around here, I went to each one of them, I'll do a favor, I'll go down and see if you paid your fines and then I'm out of here.
>
> I went down, found he did not pay his fines and found out no one let him put his fines together. That's all I did.

1 RP at 47-48. Mr. Landrum did not object to the lawyer's continuing to represent him.

Mr. Landrum fails to demonstrate any conflict that adversely affected his attorney's performance. Moreover, the court inquired into the circumstances surrounding any potential conflict. Mr. Landrum's attorney discussed his relationship and dealings with Mr. Pyke and the court accepted the explanation. No further inquiry was required. Regardless, any failure by the trial court to perform a sufficient inquiry is not reversible error because Mr. Landrum did not object to any conflict in the court and he cannot now show an actual conflict. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

Sentencing

Mr. Landrum next contends that the court erred when it (1) imposed consecutive terms of incarceration on Mr. Landrum's attempted indecent liberties and rape convictions, (2) imposed 160 months of incarceration on the attempted indecent liberties conviction, and (3) imposed court costs without finding Mr. Landrum had an ability to pay.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). We review the assignment of error de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). The State concedes the sentencing errors.

RCW 9.94A.589(1)(a) requires that offenses that are not serious violent offenses "shall be served concurrently." Consecutive sentences for RCW 9.94A.589(1)(a) crimes may only be imposed "under the exceptional sentence provisions of RCW 9.94A.535." A departure from the presumption of concurrent sentences for nonserious violent felonies is an exceptional sentence. *State v. Vance*, 168 Wn.2d 754, 759-60, 230 P.3d 1055 (2010).

Here, the court imposed sentences of 160 months for the attempted indecent liberties conviction and a term of 280 months to life for the second degree rape conviction to be served consecutively. The two convictions were "other current offenses" and that should be served concurrently. RCW 9.94A.525(1); RCW 9.94A.589(1)(a).

And the standard range for an attempted offense is 75 percent of the range for the completed crime. *See* RCW 9.94A.533(2) (stating the standard sentence range for attempt is 75 percent of the completed crime). Mr. Landrum was then improperly sentenced to a 100 percent sentence on the attempted indecent liberties conviction.

As for the issue of court costs, challenges to financial obligations are not ripe for review until the State attempts to enforce them. *State v. Sanchez Valencia*, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010).

Statement of Additional Grounds

Mr. Landrum contends in his statement of additional grounds that his

constitutional rights were violated when the prosecutor's office delayed filing charges for 21 months. He argues there was no reason for this since all the information was in, and no new information came forth.

Preaccusatorial delay may violate due process. *State v. Calderon*, 102 Wn.2d 348, 352, 684 P.2d 1293 (1984). There is a three-prong test for determining when preaccusatorial delay violates due process: (1) the defendant must show that he was prejudiced by the delay; (2) the court must consider the reasons for delay; and (3) if the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused. *State v. Alvin*, 109 Wn.2d 602, 604, 746 P.2d 807 (1987).

Mr. Landrum asserts the 21-month delay prejudiced him because it made it more difficult for him to defend himself. But he makes no specific showing of why or how. And his lawyer extensively cross-examined Ms. H. about the "kissing incident." She seemed to recall the details of events. And there is no showing that the State intentionally caused the delay. *Id.*

Mr. Landrum also repeats the argument from counsel's appellate brief that there was insufficient evidence to support the elements of the attempted indecent liberties. He argues that he did not attempt to force the kiss and that Ms. H.'s neck is neither a sexual

nor intimate part of her body.

Again, Mr. Landrum forced Ms. H. back in the seat of his truck by pushing his hands on her shoulders. She had to struggle from under him to get out of the truck. And while Mr. Landrum only attempted to kiss Ms. H.'s neck, the contact is considered "intimate" if a reasonable person would know that the parts attempting to be touched were intimate and therefore the touching was improper. *Howe*, 151 Wn. App. at 346. Which parts are intimate is a question for the trier of fact. *Id.*

HOLDING

We then affirm the convictions for second degree rape, attempted indecent liberties, and one count of solicitation of perjury; and dismiss with prejudice the remaining counts of solicitation of perjury. And we remand for reconsideration of the order sealing the juror questionnaires and for resentencing.

A majority of the panel has determined that 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.

_____
Sweeney, J.

WE CONCUR:

_____
Kulik, C.J.

_____
Korsmo, J.