IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63826-2-I
Respondent,	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
ANTHONY CASPER DIAS,	)	
	)	
Appellant.	)	FILED: November 9, 2009
	)	
	)	
	)	

Appelwick, J. — Dias was convicted of first degree robbery, rape, kidnapping, and burglary stemming from three separate home invasions. The State had conclusive DNA evidence for two of the invasions, and sought to prove identity for the third invasion asserting modus operandi. Dias brought a motion to sever the counts associated with the third invasion from those associated with the DNA evidence. The trial court denied his motion to sever. Finding no abuse of discretion, we affirm the trial court's decision.

FACTS

The State of Washington charged Anthony Dias with three counts of first

degree burglary, seven counts of first degree kidnapping, seven counts of first degree rape, and three counts of first degree robbery. The State alleged that Dias committed these crimes while armed with a gun. These twenty counts stem from three different home invasions.

Fircrest Incident

Nineteen year old T.H. lived with her mother in a house in Fircrest, Washington. At approximately 4:30 a.m. on August 31, 2005, T.H. awoke to find a man standing in her bedroom. He wore a mask, dark clothing and gloves, and had a gun in his hand. T.H. screamed and the intruder threatened to kill her and her family. He repeatedly asked her for her cell phone, but T.H. told him she did not have the phone. He asked for money and her wallet, from which he took $1 and her driver's license. After obtaining the money and identification, the intruder forced T.H. to remove her clothing and then repeatedly orally, anally, and vaginally raped her. He hit her in the head with the gun, kicked her several times, and bit her breasts. He forced her to consume two pills he claimed contained Ecstasy. He continued to threaten her with the gun, holding it to her head, pointing it into her mouth, and putting it in her vagina. Her assailant called her a "bitch" and other derogatory names. After a lengthy period of time, he finally allowed her to dress then dragged her to the backyard, where he let her go and then ran away. T.H. returned to her house and told her mother about the attack. They called the police.

T.H. could not identify her assailant. She never saw him without his mask. But, she could discern that the intruder was African American, with full

lips and a mustache. The skin around his eyes was "darker." He smelled like cigarettes and cologne. She estimated that he was approximately 5 foot 9 inches tall, had a medium build, and a pot belly. She also noticed that he wore dark colored boxer shorts. She described the gun as dark metal, and "western style" with a wheel that holds the bullets. T.H. reported that she believed he had been watching her, because he had knowledge about her and her life. He knew that she had a mother, a brother, and a cat. He also mentioned that she had been taking pictures with her camera that evening. He made comments about the fact that she did not date "black guys," which made T.H. think he had seen her with her friends.

The police collected deoxyribonucleic acid (DNA) evidence from both the scene and the victim.

Trafton Incident

Three women, L.V., G.C., and C.N., rented a house on South Trafton Street in Tacoma, Washington. Just after 2:00 a.m. on October 9, 2005, G.C. awoke when someone opened her bedroom door. She soon realized that the person at the door was not one of her roommates, but an intruder wearing dark clothes, gloves, and a ski hat turned into a mask by the addition of cut-out eyeholes. The intruder carried a revolver with a wooden handle. He made her kneel on the floor facing her dresser. She heard him take her cell phone off the power supply on her desk. The intruder then grabbed G.C. and held her at gunpoint. He took G.C. down the hall to L.V.'s room, where he made her wake L.V.

After waking L.V., they heard C.N., the third roommate, get up and go to the bathroom. The intruder instructed G.C. to intercept C.N. on her way down the hall. G.C. attempted to warn C.N., who ran down the stairs and tried to find the telephone, but it was not in the usual location. The man chased her. When he caught her, he put the gun to her head and brought her back to L.V.'s room at gunpoint. He had C.N. and G.C. kneel against the wall and wrapped a television cord around their necks to bind them together. He also bound their hands behind their backs. At one point, he put pillowcases over their heads. He eventually dragged C.N. and G.C. to the bathroom and left them there, but kept L.V. with him while he rummaged through the house.

While C.N. and G.C. were in the bathroom, the intruder forced L.V. to remove her clothes. When he returned to the bathroom with L.V. she was naked. He orally raped L.V., and attempted to vaginally rape her in the bathroom in front of her roommates. He moved L.V. into another room and anally, orally, and vaginally raped her multiple times. When he had finished raping her, he told L.V. to get into the shower and then forcibly washed her anus and vagina with his gloved finger. He also made her brush her teeth. Then, the intruder left.

Throughout the incident, the assailant demanded money, but did not want credit cards or valuable property. The intruder focused on the telephones throughout the ordeal. In addition to taking G.C.'s cell phone from its charger, he asked for L.V.'s phone. He made L.V. search G.C. and C.N. for cell phones. At one point during the lengthy ordeal there were sirens in the neighborhood,

and he wanted to know who had called the police. After the incident, G.C. found her cell phone in the bottom of a closet and the battery on the top shelf of that closet.

None of the women ever saw their assailant without his mask, and they could not identify him. G.C. could see that he had brown eyes and dark skin around his eyes. L.V. testified that he wore dark clothes, dark shoes, a mask, and boxers. He was a lighter skinned black man and had a stubble mustache. He smelled like musky cologne and tobacco. He used the word "bitch" and other profanity frequently.

Police recovered DNA from the scene. The same sexual assault nurse was involved in the examinations of T.H. and L.V. She believed the two cases had similarities and were connected. As a result, the nurse contacted a detective at the Tacoma Police Department. After investigating, Tacoma police believed that a serial rapist had perpetrated both home invasion rapes.

16th Street Incident

N.H. owned a condominium in a complex on North 16th Street in Tacoma, Washington. She shared the condominium with T.R. and C.J. On October 31, 2005, C.J. awoke around 4:00 a.m. when his bedroom door opened. At first, he thought his roommate, T.R., had opened the door. But, he soon realized that the person at the door had a silver semiautomatic gun in his hand and wore dark clothes, black gloves, and a ski mask. At gunpoint, the intruder told C.J. to lie face down in his pillow. The man then hog tied C.J. with duct tape. The intruder took some money from C.J.'s wallet, but left the credit cards. The man also took

C.J.'s cell phone, scrolled through the phone list, and then became agitated when he realized the prepaid phone had no minutes remaining. The intruder left and went into the room shared by N.H. and T.R.

N.H. awoke to find a man standing over her pointing a gun at her face. She thought the gun was a revolver, describing it as black with a round barrel. The intruder pulled her off the bed and then went to T.R.'s side of the bed and hit him a couple of times. He pulled T.R. out of bed and told him to lie face down on the floor. He then duct taped T.R.'s legs and hands together behind his back.

After securing T.R., the man dragged N.H. to the living room and demanded that she take off her clothes so she could not get away. He called her "bitch" and "shorty" and referred to her roommates as "niggas" and "faggots." He demanded money. N.H. offered him her credit cards, bank cards, and keys, but he only wanted cash. When N.H. said she did not have any cash, he told her to call someone to bring money or he would kill her. So, she called her sister and made the request. N.H. used T.R.'s phone to make the call, because the intruder had broken her cell phone in half. The intruder retrieved the cell phone from a kitchen cabinet so she could make the call. While waiting for N.H.'s sister to arrive with the money, the intruder made N.H. retrieve for him a brand new package of Marlboro 72 menthol cigarettes from T.R.'s nightstand. During this time, C.J. also began making noise, so the intruder used duct tape to secure a sock over his eyes. Eventually, the man told N.H. to get dressed. He duct taped her eyes and mouth, and dragged her outside to wait for her sister.

While the intruder was attempting to get cash from N.H. and her sister,

C.J. was working to free himself from his duct tape bonds. He eventually managed to loosen and then break the tape. He located T.R. face down in the closet, hog tied with duct tape. He freed T.R. and they locked themselves in the bathroom. The two men waited for an opportunity to escape, climbed out a window, and alerted neighbors to call the police. At that point, the intruder fled.

Because of the ski mask, none of the residents of the 16th Street condominium could identify the intruder. C.J. could discern several features despite the ski mask. He testified that the intruder was African American with dark skin, thick brows, and very prominent lips. C.J. also said the intruder's eyes were glossed over and red and he smelled like marijuana. N.H.'s sister described the man as black, with a flat nose and "big lips that popped out of the slit in the mask." N.H. said he had on a black jacket and black jeans sagging at the waist to reveal boxers.

The police concluded that this home invasion had many similarities to the Fircrest and Trafton incidents. They investigated the Fircrest, Trafton, and 16th Street incidents as the work of a serial rapist.

Dias was arrested during the commission of a crime in progress at an apartment in Federal Way, Washington. Responding to a call of a crime in progress, officers saw a man wearing a ski mask, dark clothing, and carrying a revolver come out onto the balcony of an apartment building. The man ran back inside the apartment, but an officer soon saw something being thrown from the apartment into a wooded area. The man eventually came back out to the balcony without the weapon or ski mask. After a chase, he was arrested and the

police found duct tape in the pocket of his pants. A canine team located the bundle that had been thrown from the apartment—a black mask wrapped around a revolver, a latex fingered glove, and a screwdriver.

The police identified the man as Dias. They searched his car and home. In his home, police found ski masks, duct tape, dark gloves, boxer shorts, and a single package of Marlboro 72 cigarettes. The police obtained a warrant for a biological sample and prepared a DNA profile for Dias. The DNA profile from Dias was consistent with the profile of the DNA recovered from the Fircrest and Trafton incidents. As a result of the evidence, police charged Dias with twenty separate counts: Counts I through VII—including first degree burglary, kidnapping, rape, robbery and their associated firearm enhancements—stemming from the Fircrest incident; counts VIII through XV—first degree burglary, robbery, kidnapping, and rape with firearm enhancements—stemming from the Trafton incident; and counts XVI through XX—first degree burglary, kidnapping, robbery and firearm enhancements—stemming from the 16th Street incident.

During pretrial hearings, Dias moved to sever counts XVI through XX, stemming from the 16th Street incidents, from the counts charged in the Fircrest and Trafton incidents. The trial court denied the motion to sever. Dias properly renewed the motion at the close of the State's case, which the court denied. The jury found Dias guilty on all counts, including firearm enhancements. Dias now appeals.

DISCUSSION

I. Motion to Sever

Under CrR 4.3(a)(1), offenses of the same or similar character may be joined even if they are not part of a single scheme or plan. Dias acknowledges that the charges against him were of a similar character and does not challenge joinder of the offenses. However, he contends that the trial court abused its discretion by denying his motion to sever the counts charged in the 16th Street incident from the counts charged in the Fircrest and Trafton incidents.

"[A] motion to sever under CrR 4.4(b) addresses the issue of prejudice to the defendant not withstanding proper joinder." State v. Gatalski, 40 Wn. App. 601, 606, 699 P.2d 804 (1985) (footnote omitted). CrR 4.4(b) requires severance if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." The defendant has the burden of demonstrating that the manifest prejudice of a single trial on the offenses outweighs the concern for judicial economy. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). The court examines several factors to ascertain the potential for prejudice, "(1) the strength of the State's evidence on each count; (2) the clarity of defenses to each count; (3) the court's instruction to the jury as to the limited purpose for which it was to consider the evidence of each crime; and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined." State v. Eastabrook, 58 Wn. App. 805, 811–12, 795 P.2d 151 (1990). If counts are properly joined, we review a refusal to sever for manifest abuse of discretion. State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). The

defendant must point to specific prejudice to support a finding that refusal to sever was an abuse of discretion. Bythrow, 114 Wn.2d at 720.

A review of the factors shows that the court did not abuse its discretion by refusing to sever the Fircrest and Trafton counts from the 16th Street incident.

A. Cross Admissibility of Evidence

The central issue is the cross admissibility of the evidence from the Fircrest and Trafton offenses to prove the identity of the perpetrator of the 16th Street offenses. Under ER 404(b), evidence of other crimes is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Here, the trial court allowed the evidence from the Fircrest and Trafton offenses to prove identity in the 16th Street offenses under the modus operandi exception.[1] Modus operandi requires that the "[t]he method employed in the commission of both crimes must be so unique that mere proof that an accused committed one of them creates high probability that he also committed the act charged." State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), abrogated on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

Several factors are relevant to determining the similarity of the crimes for the purposes of modus operandi, including geographical proximity, commission of crimes within a short time frame, and similar clothing. State v. Thang, 145

[1] The court initially found the evidence admissible under both the modus operandi and common scheme or plan exceptions to ER 404(b), but instructed the jury only as to the use of the evidence for identification. The briefing only addressed the modus operandi exception.

Wn.2d 630, 643, 41 P.3d 1159 (2002). "Even when features are not individually unique, appearance of several features in the cases to be compared, especially when combined with a lack of dissimilarities, can create sufficient inference that they are not coincidental, thereby justifying the trial court's finding of relevancy." Id. at 644. In Thang, the court allowed modus operandi evidence where the two cases involved theft of a purse and jewelry, elderly victims who were kicked, and a distinctive remark made by the perpetrator. Id. at 645. In State v. Jenkins, 53 Wn. App. 228, 237, 766 P.2d 499 (1989), a series of pipe wrench burglaries involving ground floor entries in multi-apartment complexes in South Snohomish, two perpetrators, and the appearance of brown Camaros, met the requirements for modus operandi. While these features were not "individually unique," they "create[d] similarities that [were] far from coincidental. In fact, they form[ed] a reasonable basis for the trial court's belief that appellant committed the act charged." Id. Similarly, in State v. Lynch the court allowed modus operandi evidence where the commonalities included, "the wearing of a brown wig, the apparent tampering with or at least activity at the deposit box prior to the victim's approach, the late Saturday afternoon timing, the use of a red 10-speed bicycle, displaying to the victims a gun tucked in a waistband, and obtaining the car keys of the victims." 58 Wn. App. 83, 89, 792 P.2d 167 (1990), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). Finally, the court found adequate similarity in Laureano where the crimes took place only three weeks apart and featured forcible entry of family residences occurring after dark, three perpetrators dressed in Army fatigues, one of whom was armed with

a shotgun and used the shotgun in a similar manner. 101 Wn.2d at 765.

Here, the trial court concluded, "[w]hen evaluating all the similarities employed by the defendant in all three incidents, the similarities are more than mere coincidence. . . . When viewed as a whole, the specific methods employed by the defendant are significantly 'so unique' that proof he committed one of the crimes creates a high probability he also committed the other crimes charged." The crimes occurred within a five mile radius, involved early morning home invasions, and residences with multiple occupants. All three incidents lasted prolonged periods of time. The intruder wore dark clothing, a ski mask, dark gloves, and he carried a revolver. At all three locations, the perpetrator repeatedly inquired about the victims' cell phones and asked for money. He focused his attention on one main victim at each location—a young, light-skinned female—who he forced to strip. He used derogatory language and seemed to have knowledge of his victims. In both the Trafton and 16th Street incidents, the intruder bound the occupants. The extensive similarities give a sufficient basis for the belief that the same individual committed the acts. This evidence of modus operandi would have been admissible in a separate trial for the charges stemming from the 16th Street incident. As a result, the cross admissibility of evidence weighs against severance of the offenses.

B. Strength of the State's Cases

Dias contends that the DNA evidence in the Fircrest and Trafton incidents is so strong that it caused a prejudicial "spillover" of evidence that bolstered the case on the 16th Street charges. To support the contention that "[t]he

Washington Supreme Court has also recognized the boundless power generated by mind-boggling DNA probability statistics," Dias cites State v. Russell, 125 Wn.2d 24, 64, 882 P.2d 747 (1994). There, the trial court concluded that the relative strengths of some of the counts "were not sufficiently dissimilar to merit severance, especially given the relatively low power of discrimination inherent in PCR [polymerase chain reaction] testing. The trial court specifically indicated that had the DNA testing been with RFLP [restriction fragment length polymorphism], severance would have been warranted because of its high power of discrimination." Id. But, Russell merely recounts that statement by the trial court; the Supreme Court neither analyzed nor ruled on the issue. Therefore, Russell does not stand for the proposition that the Supreme Court requires the severance of counts due to the prejudicial possibilities of DNA probability statistics in trials for joined offenses.

Without Russell, Dias only has supporting case law from outside jurisdictions to bolster his contention that the existence of DNA evidence for only some of the charged offenses is inherently prejudicial. See, e.g., Dubose v. State, 662 So. 2d 1189, 1196 (Ala. 1995) ("jurors may well be overwhelmed by such powerful identification evidence."); State v. Pennell, 584 A.2d 513, 519 (Del. Super. Ct. 1989) ("The danger of misleading a jury, confusing the issues, or of creating undue prejudice to the defendant is extremely great when probabilities in the nature of 1 in 100 billion are expressed."); State v. Houser, 490 N.W.2d 168, 183-4 (Neb. 1992) ("juries may receive probability testimony as infallible evidence."). These cases focus on case specific issues of admissibility

of the evidence or the necessity of proper scientific testimony on DNA evidence to mitigate the potential for confusion and prejudice. They do not discuss the inherent "spillover" of prejudice resulting in cases where DNA evidence exists for some offenses but not others.

In addition, Dias cites to the strict approach that Minnesota courts have taken with regard to DNA statistical evidence. That jurisdiction bars the use of population frequency statistics, because that court "remain[s] convinced that juries in criminal cases may give undue weight and deference to presented statistical evidence." State v. Schwartz, 447 N.W.2d 422, 428 (Minn. 1989). This is a limitation that Washington courts have not adopted.

While the State did not have DNA evidence for the 16th Street incident, there was circumstantial evidence linking Dias to the crimes. N.H., the primary victim at 16th Street, stated that the assailant wore a dark knit cap with holes cut out for his eyes and mouth and dark gloves. Upon searching Dias' home, the police found a dark gray wool ski mask with cut out eye and mouth holes, and gloves similar in description to the ones worn by the perpetrator of the 16th Street crimes. During her interview, N.H. also told police that the intruder had ordered her to give him a package of Marlboro menthol cigarettes from her roommate's room. In Dias' home and car, the police found multiple packs of Kool menthol cigarettes and one package of Marlboro menthol cigarettes like those taken from 16th Street. During the 16th Street incident, the victims told police they had been bound with duct tape. Rolls of duct tape were found in Dias' home. He also had duct tape in his pocket upon his arrest after fleeing the

Federal Way scene. Finally, N.H. told police that her attacker had a dark handgun. A dark revolver matching N.H.'s description was discovered with a mask, both of which were recovered nearby, after Dias threw something over the balcony at the scene of his arrest.

Here, if severance was granted and Dias was separately convicted on the first two offenses, the convictions and evidence would be cross-admissible in a separate trial on the 16th Street offenses. Further, the conviction for offenses with such extensive similarities to the events at 16th Street weighs heavily against Dias. The presence of DNA in those cases and the lack of DNA in the 16th Street case do not diminish the strength of the similarities. Severance would not prevent a jury from hearing the critical modus operandi evidence, which provides proof of identity without DNA. This weighs against severance.

C. Clarity of Defenses to Each Count

Dias employed a general denial defense as to all charges stemming from the three incidents. The court determined that Dias' "defense is clear and identical on each charge. The defendant is not prejudiced by joinder as he is not presenting conflicting defenses." The likelihood of jury confusion is very small where the defense is identical on all charges. Russell, 125 Wn.2d at 64. The trial court properly concluded that this factor does not support severance.

D. Limiting Instruction

The last factor in the analysis of potential prejudice pointing toward a need for severance is the court's instruction to the jury as to the limited purpose for which it should consider the evidence of each crime. Eastabrook, 58 Wn.

App. at 811–12. The trial court determined that "[t]o the extent there is any potential of the evidence being unfairly prejudicial to the defendant the issue will be cured by giving limiting instruction(s). The jury is presumed to follow the instructions of the court." The trial court instructed the jury on the proper use of the cross-admissible evidence:

> Evidence which has been admitted regarding the circumstances of how the crimes charged in Counts I through XV were committed may be considered with regard to Counts XVI through XX only for the limited purpose of determining the existence of a modus operandi. Evidence which has been admitted to establish the identity of the perpetrator of the crimes charged in Counts I through XV may be considered with regard to Counts XVI through XX only for the limited purpose of determining the identity of the perpetrator of the crimes charged in Counts XVI through XX.

The court also instructed the jury that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." These were proper instructions. The jury is presumed to follow instructions. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). With these jury instructions, the court minimized the likelihood that the jury would improperly consider the evidence from the Fircrest and Trafton incidents in its deliberations on the counts stemming from the 16th Street incident. This factor also weighs against severance

Given the separate victims, locations, and sequence of events, the jury could be reasonably expected to compartmentalize the evidence from each individual incident. The factors weigh heavily in favor of joinder, and Dias fails to show the specific prejudice sufficient to require severance.

The trial court did not abuse its discretion in denying the severance motion.

II. Statement of Additional Grounds for Relief

Pro se, Dias contends that the media violated a stipulated agreement prohibiting the press from photographing him in jail attire, shackles or handcuffs, or accompanied by police. Dias alleges that the media violated this agreement by showing his arrest photos and photographs from previous hearings. He claims that this publicity tainted the jury.

The record contains only the report of proceedings from the January 25, 2008 pretrial hearing on the media-related issues and the court's oral ruling. According to this oral ruling, the media could not photograph the defendant in jail garb, shackles or handcuffs, or accompanied by identifiable law enforcement. The order permitted photographs of the defendant in business attire, as long as he was not in consultation with his attorney. The ruling did not appear to address the publication of prior photographs of the defendant.

Media coverage has the potential to cause jury prejudice. "When prejudicial publicity during trial is massive and so timed as to present a high probability that the jury will encounter it, a presumption arises that actual prejudice has occurred." State v. Trickel, 16 Wn. App. 18, 29–30, 553 P.2d 139 (1976). Here, Dias makes allegations of substantial publicity, but provides no examples from after the entry of the order. He does not put forth any evidence of the media's violation of the stipulation or any evidence of media coverage during the trial. He also fails to show any juror exposure to trial publicity.

At the start of the trial the judge informed the jury, "You will not be sequestered and kept together during this trial, particularly overnight. Because of this, you are admonished not to read, view or listen to any report in the newspaper, radio or television on the subject of this trial. Do not permit anyone to read or comment on it to you or in your presence." Dias makes no showing that any member of the jury failed to heed this admonishment. In fact, "[t]here is a general presumption that jurors carry out their duties honestly and in accordance with the instructions given them by the trial judge." Id. at 27. Given the lack of evidence of widespread, prejudicial media coverage, there is no presumption or conclusion of jury taint or prejudice.

We affirm.

WE CONCUR: