

STATE OF IDAHO)
County of KOOTENAI)^{ss}
FILED _____
AT _____ O'clock _____ M
CLERK, DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,)
)
) *Plaintiff,*) Case No. **CRF 2018 85**
vs.) **CRF 2018 794**
) **MEMORANDUM DECISION AND**
FRANK EDWARD CANAVERO, III,) **ORDER DENYING PLAINTIFF'S**
) **MOTION FOR JOINDER**
)
) *Defendant.*)

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

This matter is before the Court on plaintiff State of Idaho's (State) Motion for Joinder. The State seeks to join the offenses charged in the superseding indictment in Kootenai County case no. CR-18-85 (first superseding indictment) with the offenses charged in the superseding indictment in Kootenai County case no. CR-18-794 (second superseding indictment).

On January 24, 2018, the State convened a grand jury in Kootenai County case no. CR-18-85. The State called three witnesses, including Alissa Schuster (Schuster) and Michael Zeimantz (Zeimantz).¹ Schuster testified that the defendant Frank Edward Canavero III (Canavero) is her ex-boyfriend and that they ended their relationship in August 2017. Grand Jury Tr. (CR-18-85) 10:4–13. Schuster explained that on December 31, 2017, she planned to go out to dinner with Zeimantz. Before Zeimantz arrived at her house, Schuster saw Canavero's vehicle parked outside her house. *Id.* at 11:14–21. At some point, Zeimantz arrived at Schuster's house, and they drove together in Zeimantz's

¹ In general, Zeimantz's testimony corroborated Schuster's testimony. *Id.* at 21:17–32:15.

vehicle to Capone's, a restaurant located in Hayden, Idaho. *Id.* at 12:2–13:22. While driving to Capone's, Schuster saw Canavero following them in his vehicle. *Id.* Schuster and Zeimantz arrived at Capone's at approximately 7:00 p.m. and left at approximately 8:00 p.m. *Id.* at 14:4–13. As they left Capone's, Schuster again noticed Canavero's vehicle parked nearby. *Id.* at 14:14–16. Then, as Schuster and Zeimantz tried to exit the parking lot, Canavero attempted to "T-bone [them] in the parking lot." *Id.* at 15:4–24. Schuster and Zeimantz exited the parking lot and Canavero followed them. *Id.* at 16:1:19:1. As they were driving, Canavero used his vehicle several times to try and run Schuster and Zeimantz off the road. *Id.* Schuster and Zeimantz eventually got away from Canavero and reported the incident to law enforcement. *Id.*

At the conclusion of the grand jury proceeding, the grand jury returned a true bill charging Canavero with two counts of aggravated assault, Idaho Code §§ 18-901, 19-2520, 18-905. The first superseding indictment provides:

Count I

That the Defendant, Frank Edward Canavero 3rd, on or about the 31st day of December, 2017, in Kootenai County, Idaho, did intentionally, unlawfully, and with apparent ability threaten by action to do violence upon the person of Alissa L. Schuster, with force likely to produce great bodily harm, to-wit: by swerving his vehicle in the direction of a vehicle occupied by Alissa L. Schuster, which created a well-founded fear in Alissa L. Schuster that such violence was imminent;

Count II

That the Defendant, Frank Edward Canavero 3rd, on or about the 31st day of December, 2017, in Kootenai County, Idaho, did intentionally, unlawfully, and with apparent ability threaten by action to do violence upon the person of Michael R. Zeimantz, with force likely to produce great bodily harm, to-wit: by swerving his vehicle in the direction of a vehicle occupied by Michael R. Zeimantz, which created a well-founded fear in Michael R. Zeimantz that such violence was imminent

Superseding Indictment (CR-18-85) 1–2.

The State also convened a grand jury on January 24, 2018, in Kootenai County case no. CR-18-794. The State called three witnesses, including Schuster and Schuster's

neighbor Michael Willette (Willette). Willette testified that on January 11, 2018, he saw a man attempting to break-in to Schuster's house. Grand Jury Tr. (CR-18-794) 9:23–13:1. Schuster testified that on January 5, 2018, she returned to her house to check on it and found the back door to the garage and her house unlocked.² *Id.* at 17:23–18:15. She stated that the doors should have been locked. *Id.* Schuster also noticed footprints in the snow near her house. *Id.* at 18:16–19:13. She subsequently installed a surveillance camera. *Id.* at 19:23–22:6. The surveillance camera captured Canavero attempting to break-in to Schuster's house on January 11, 2018, as well as Canavero removing the surveillance camera from Schuster's house that same day. *Id.* at 20:24–25:16. Schuster also testified that mail she had been expecting went missing. *Id.* at 25:17–26:8.

At the conclusion of that grand jury proceeding, the grand jury returned a true bill charging Canavero as follows: Count I, Stalking (first degree), Idaho Code § 18-7905; Count II, Attempted Burglary, Idaho Code §§ 18-1401, 18-305; and Count III, Petit Theft, Idaho Code §§ 18-2403, 18-2407. The second superseding indictment provides:

Count I

That the Defendant, Frank Edward Canavero 3rd, on or about the 5th day of January, 2018, and 12th day of January, 2018, in Kootenai County, Idaho, did engage in a course of conduct that seriously alarmed, annoyed or harassed Alissa Lorraine Schuster and was such as would cause a reasonable person substantial emotional distress, to-wit: by repeatedly following the victim, coming to her house, damaging her property and/or stealing her property and where the defendant's actions constituting the offense are in violation of a temporary restraining order, protection order, no contact order, or injunction, or any combination thereof;

Count II

That the Defendant, Frank Edward Canavero 3rd, on or about the 11th day of January, 2018, in Kootenai County, Idaho, did attempt to enter into a house, the property of Alissa Lorraine Schuster with the intent to commit the crime of theft or any felony;

Count III

That the Defendant, Frank Edward Canavero 3rd, on or about the 11th day of January, 2018, in Kootenai County, Idaho, did take property, to wit: a video

² After the December 31, 2017, incident, Schuster began staying at Zeimantz's

surveillance camera belonging to Alissa Lorraine Schuster with the intent to deprive the owner of the property

Superseding Indictment (CR-18-794) 1–2.

On February 22, 2018, the State filed a Motion for Joinder in Kootenai County case no. CR-18-85 and Kootenai County case no. CR-18-794. The State asks the Court for an Order joining both cases because the cases involve the same defendant, same victim, and same set of facts. Mot. and Order for Joinder 1. Specifically, the State argues that the “cases involve facts that are mutually admissible in both cases that are part of a common plan.” *Id.* The State contends that earlier aggravated assault offense informs the reasonableness of apprehension of the victim with respect to the stalking offense. *Id.* The State also contends that “the subsequent violations of no contact orders, attempted burglaries, and stalking are mutually admissible in the aggravated assault case bearing on the actus reas.” *Id.*

On March 30, 2018, Canavero filed an Objection to State’s Motion for Joinder. Canavero asks the Court to deny the State’s Motion for Joinder. Canavero contends that consolidating the cases could confuse the jury on the issues, “cumulate the evidence against him,” and given the amount of evidence that might be presented at a joint trial, the jury might conclude that he has a propensity for committing crimes and therefore find him guilty because of his criminal disposition.” Obj. State’s Mot. for Joinder 3.

A hearing on plaintiff’s Motion for Joinder was held April 12, 2018.

II. STANDARD OF REVIEW.

Whether the trial court improperly joined offenses pursuant to Idaho Criminal Rule 8 is a question of law, over which the appellate court exercises free review. *State v. Field*, 144 Idaho 559, 564, 165 P.3d 273, 278 (2007). “In contrast, an abuse of discretion standard is applied when reviewing the denial of a motion to sever joinder pursuant [Idaho

Criminal Rule] 14; however, that rule presumes joinder was proper in the first place.” *Id.* at 564–65, 165 P.3d at 278–79. To determine whether the trial court abused its discretion, the appellate court considers: “whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason.” *State v. Williams*, 163 Idaho 285, ___, 411 P.3d 1186, 1194 (Ct. App. 2018).

III. ANALYSIS.

In this matter, the State argues that joinder of the offenses in the first and second superseding indictments is proper because the offenses charged constitute part of a common scheme or plan. In response, Canavero objects to the joinder on the grounds that joining the offenses would cumulate the evidence against him and likely cause a jury to find him guilty because of his alleged criminal propensity. For the reasons set forth below, the Court denies the State’s Motion for joinder.

1. The charged offenses are properly joined under Idaho Criminal Rule 8.

Idaho Criminal Rule 13 provides that a court may order that two or more complaints, indictments, or informations be tried together if the offenses could have been joined in a single complaint, indictment or information. I.C.R. 13. When an objection to joinder of offenses is made, the first issue for the trial court is whether joinder is permitted under Idaho Criminal Rule 8. *State v. Orellana-Castro*, 158 Idaho 757, 760, 351 P.3d 1215, 1218 (2015). Idaho Criminal Rule 8 provides that two or more offenses may be charged on the same complaint, indictment or information if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. I.C.R.

8(a); *State v. Gamble*, 146 Idaho 331, 337, 193 P.3d 878, 884 (Ct. App. 2008). “Because a charging document may not contain all of the facts necessary for making a decision whether joinder complies with [Idaho Criminal Rule 8], the trial court may . . . consider information outside the charging documents.” *State v. Sanchez*, 161 Idaho 727, 730, 390 P.3d 453, 456 (Ct. App. 2017).

The Idaho Supreme Court set forth the “the proper analytical framework for determining whether offenses are part of a common scheme or plan” in *State v. Orellana-Castro*, 158 Idaho 757, 351 P.3d 1215 (2015). *Id.*

Orellana-Castro instructs us that the proper analysis in determining whether joinder is permissible requires consideration of the standards set forth in *State v. Grist*, 147 Idaho 49, 205 P.3d 1185 (2009) and *State v. Johnson*, 148 Idaho 664, 227 P.3d 918 (2010). Although both *Grist* and *Johnson* addressed the admissibility of evidence under Idaho Rule of Evidence 404(b) and not the permissibility of joinder, these cases hold that trial courts must closely scrutinize whether evidence of other bad acts truly demonstrates the existence of a common scheme or plan. “[A]t a minimum, there must be evidence of a common scheme or plan beyond the bare fact that sexual misconduct has occurred with children in the past.” The events of a common scheme or plan “must be linked by common characteristics that go beyond merely showing a criminal propensity and instead must objectively tend to establish that the same person committed all the acts.” *Id.* Essentially, “a common scheme or plan must embrace the commission of two or more crimes *so related to each other* that proof of one tends to establish the other.”

Id. at 730, 390 P.3d at 456 (citations omitted). In other words, the “question for the court . . . is whether the events are linked by common characteristics that go beyond merely showing a criminal propensity but instead objectively tend to establish that the same person committed all the acts.” *State v. Williams*, 163 Idaho 285, 411 P.3d 1186, 1195 (Ct. App. 2018).

Like *Grist* and *Johnson*, in *State v. Joy*, 155 Idaho 1, 304 P.3d 276 (2013), the Idaho Supreme Court reviewed the admissibility of evidence under Rule 404(b), specifically, whether evidence of the defendant’s other bad acts demonstrated the

existence of a common scheme or plan. *Id.* at 8–10, 304 P.3d at 283–85. In *Joy*, the defendant was charged with second degree kidnapping, felony domestic battery, and sexual penetration with a foreign object for events occurring on the night of July 28–29.³ *Id.* at 10, 304 P.3d at 285. “[T]he State offered evidence of one prior instance of sexual abuse and three instances of previous domestic violence.”⁴ *Id.* The Idaho Supreme Court held that the evidence offered by the State was not relevant to show a common scheme or plan “because it merely shows the manner in which [the defendant] has allegedly abused

³ The Idaho Supreme Court summarized the victim’s testimony related to the charged offenses, as follows:

Jennifer testified that on the night of July 28–29, 2009, an argument between Preston and Jennifer became violent. According to her testimony, Preston shoved her into a bathtub full of cold water where he repeatedly held her head under the water for several seconds at a time, punched her, and slapped her with the front and back of his hand. She testified that he gagged her with a hand towel, removed her clothes, tied both of her wrists and her left ankle together behind her back, and anally penetrated her with a sex toy. According to her testimony, Preston then dragged her to his vehicle while she was still bound, forced her into it, and drove to the back of their property where he continued to hit and slap her. She testified that he threatened to tie her to a tree and leave her there for the bears and mosquitoes to “eat alive” if she didn’t give him information about his cell phone and keys. According to Jennifer, she falsely told him she knew where those objects were, and he untied her and took her home. When Preston fell asleep in their bedroom, Jennifer called the police

Joy, 155 Idaho at 10, 304 P.3d at 285.

⁴ The evidence consisted of the following:

First, Jennifer alleges that one evening in 2009, at the end of March or beginning of April, she awoke around midnight to find Preston engaging in anal intercourse with her and that he refused to stop when she asked him to. With respect to the domestic violence charge, Jennifer alleges that on April 10, 2009, Preston straddled her on their couch, restrained her hands, and slapped her with the front and back of his open hand forty or fifty times. Next, she testified that on the evening of July 3, 2009, while she was arguing with Preston outside their home, he picked her up and threw her down an embankment, causing injuries that later required a visit to the emergency room. Finally, she testified that one evening around July 19, 2009, Preston straddled her on their bed, restrained her arms, and slapped her with the front and back of his open hand fifteen to twenty times.

Joy, 155 Idaho at 10, 304 P.3d at 285.

[the victim] in the past, and does not demonstrate a planned course of connected behavior.” *Id.*

In this case, the events of December 31, 2017, January 5, 2018, and January 11, 2018, are linked together by the fact that Canavero specifically targeted Schuster when committing each offense. Further, this matter is somewhat distinguishable from *Joy* because the alleged facts related to each charged offense demonstrate a planned course of connected behavior, and not merely the manner in which Canavero allegedly abused Schuster in the past or opportunistic conduct by Canavero. For example, the first superseding indictment charges Canavero with two counts of aggravated assault. The facts giving rise to those two charges demonstrate that Canavero located Schuster at her house, followed Schuster and her companion, Zeimantz, from Schuster’s house to a restaurant, waited for Schuster outside the restaurant, when Schuster and Zeimantz left the restaurant, resumed following Schuster, and then used his vehicle to try to force Schuster’s vehicle off the road. This series of events demonstrates that Canavero took calculated steps to find, follow, and harm Schuster. The second superseding indictment charges Canavero with stalking, attempted burglary, and petit theft. Again, the alleged facts giving rise to these three charges show that Canavero’s conduct is planned, i.e., each alleged action he took is part of a course of connected conduct designed to scare, intimidate, harass, or harm Schuster. Altogether, the alleged facts supporting each charged offense share more than just a common victim and common defendant. The alleged facts suggest that the events of December 31, 2017, January 5, 2018, and January 11, 2018, are part of Canavero’s continuing plan to scare, intimidate, or harm Schuster. Therefore, under Idaho Criminal Rule 8, joinder of the offenses is proper.

2. Even though joinder is proper, the charged offenses should remain separate because joinder of the offenses would prejudice Canavero.

Under Idaho Criminal Rule 14, if either the State or a defendant is prejudiced by the joinder of offenses, “the court may order the state to elect between counts, grant separate trials of the counts, grant a severance of defendants, or provide whatever other relief justice requires.” I.C.R. 14.

There are three potential sources of prejudice for a court to consider when considering a motion to sever based on [Idaho Criminal Rule] 14:

(1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep evidence properly segregated; (2) the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not to the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition.

State v. Williams, 163 Idaho 285, 411 P.3d 1186, 1194 (Ct. App. 2018) (citation omitted).

Here, Canavero objects to the State’s Motion for Joinder because the jury may confuse and cumulate the evidence and because the jury may conclude he is guilty of one crime and then find him guilty of the other because of his criminal disposition. First, it seems unlikely that a jury might confuse or cumulate the evidence. The two aggravated assault offenses in the first superseding indictment stem from the December 31, 2017, incident involving Canavero’s vehicle, while the stalking, attempted burglary, and petit theft offenses in the second superseding indictment stem from events occurring on January 5, 2018, January 11, 2018, and/or January 12, 2018 at or near Schuster’s home. Further, the alleged facts supporting the aggravated assault offenses are distinct from the facts supporting the remaining offenses. Thus, a jury can likely keep the evidence properly segregated given the offenses occurred on different dates and consist of different facts, albeit the offenses share the same victim and defendant.

However, the Court finds that joining the charged offenses would unfairly prejudice Canavero. The Idaho Court of Appeals considered the third potential source of prejudice in *State v. Wilske*, 158 Idaho 643, 350 P.3d 344 (Ct. App. 2015). It stated: “the ultimate question is whether the evidence of multiple offenses in a joint trial [is] unfairly prejudicial to the defendant with respect to any of the individual charges.” *Id.* at 646, 350 P.3d at 347. To make that determination, Idaho courts usually apply the Idaho Rule of Evidence 404(b) analysis. *Id.* at 645, 350 P.3d at 346; *Orellana-Castro*, 158 Idaho at 760, 351 P.3d at 1218. Thus, in general, “unfair prejudice from joinder would not be found if, with a separate trial conducted, ‘evidence of one crime could be admitted at [the] separate trial of the other.’” *Wilske*, 158 Idaho at 645, 350 P.3d at 346 (citation omitted) (alteration in original). However, if the offenses charged are “inflammatory” and “likely to cause the jury to view [the defendant] as having a criminal disposition,” then severance is warranted. *Id.* (noting that severance was not warranted because the charges were minor offenses, not inflammatory offenses).

In this matter, it seems quite likely that a jury may conclude Canavero is guilty of one of the offenses and, in turn, find him guilty of the remaining offenses based on his criminal disposition. For example, in the grand jury proceeding, the State elicited testimony demonstrating that on December 31, 2017, Canavero followed Schuster from her house to a restaurant. After Schuster left the restaurant, Canavero resumed following Schuster and eventually attempted to run her off the road. If the State elicited this same testimony at a trial in which the offenses had been joined, the jury might infer that since Canavero followed and attempted to harm Schuster on December 31, 2017, Canavero is likely the same person who attempted to break-in to Schuster’s house and stole her surveillance camera. Such an inference is what Rule 404(b) is designed to prevent. Moreover, the

offenses, when viewed together, are inflammatory and likely to cause the jury to view Canavero as having a criminal disposition. Such a result would be unfairly prejudicial to Canavero and could result in the jury finding Canavero guilty because of his propensity to commit crimes rather than on the evidence presented.

IV. CONCLUSION AND ORDER.

The Court must deny the State's Motion for Joinder.

IT IS HERBY ORDERED THAT the plaintiff's Motion for Joinder is DENIED.

DATED this 12th day of April, 2018

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of April, 2018 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Sean Walsh/Monica Rector
Prosecuting Attorney – Laura McClinton

Honorable _____

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____
Deputy