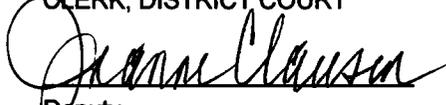


STATE OF IDAHO)
County of KOOTENAI)^{ss}
FILED 11/24/2021
AT 2:40 O'clock P M
CLERK, DISTRICT COURT


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,)
)
 vs.)
)
 PETER ODONALD CLARKE,)
)
 Defendant.)

Case No. **CR28-21-13977**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT'S
MOTION TO SEVER (FOR TRIAL)**

I. ALLEGED REDACTED FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

The matter currently before the Court is defendant Peter O'Donald Clarke's (Clarke) Motion to Sever. The case is currently set for trial on all three counts beginning December 7, 2021. Clarke has moved to sever Count III from Counts I and II filed by the State of Idaho (State) in its August 11, 2021, Criminal Complaint and in its October 4, 2021, Information filed in Kootenai County case no. CR28-21-13977. The State alleges the following facts:

COUNTS I AND II:

On January 16, 2020, [V.G.] received a ride home from her work at Qualfon from the Defendant in exchange for gas money. [V.G.] and the Defendant were co-workers at the time and the Defendant offered to give [V.G.] a ride home when the two of them spoke during a smoking break. [V.G.] was in a vulnerable state at the time due to her not having access to a working vehicle and being unable to get home to her husband and kids without a ride. As the Defendant drove her home, the Defendant exposed himself by taking out his erect penis and requesting that [V.G.] perform oral sex on him. When [V.G.] denied his request, the Defendant continued to request oral sex. The Defendant grabbed [V.G.] by the back of the neck and attempted to push her head into his lap and exposed penis. The Defendant also reached over and stuffed his hands down

[V.G.]'s pants, penetrating her vagina with his finger. At one point during the drive, the Defendant stopped in the parking lot and proposed that he and [V.G.] get in the backseat to have sexual intercourse. The Defendant grabbed [V.G.]'s arm multiple times and forced her hand into his lap and onto his penis. Before letting [V.G.] out of the car, the Defendant forcefully kissed [V.G.]. All these acts were committed by the Defendant despite [V.G.] repeatedly telling the Defendant she did not want to perform any sexual acts with him and just wanted to be taken home.

COUNT III:

On May 29, 2020, the Defendant was a party across the street from the house [M.Q.] [lived in] when the two first made contact. The Defendant was [M.Q.]'s former co-worker at Qualfon. [M.Q.] was nineteen-years-old at the time. While [M.Q.] was putting her bicycle away in her garage, the Defendant crossed the street and asked to use [M.Q.]'s bathroom. [M.Q.] said no to this initially, but after Defendant pressed her multiple times, she allowed him to use her bathroom. The Defendant then raped [M.Q.] in the garage, by pulling her pants down and pinning her arms behind her back as his penis penetrated her vagina, despite [M.Q.] repeatedly telling the Defendant "no."

Br. In Opp'n to Def.'s Mot. to Sever 3-4 [the State does not use page numbers in its brief].

On November 12, 2021, Clarke filed a Motion to Sever Pursuant to I.C.R. 8, I.C.R. 14, I.C.R. 12(b)(5) and Memorandum in Support. On November 19, 2021, the State submitted a Brief in Opposition to Defendant's Motion to Sever. A hearing on this motion was held on Monday, November 22, 2021. At the conclusion of that hearing, the Court granted Clarke's Motion to Sever, announcing that Counts I and II would be tried together and that Count III would be tried to a different jury. The Court held it was the State's decision as to which count or counts to proceed to trial first.

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). This is also known as *de novo*

review. *State v. Nava*, 166 Idaho 884, 889, 465 P.3d 1123, 1128 (2020). An appeal from a motion to sever based on I.C.R. 14 is subject to the abuse of discretion standard. *Id.*

In *Field*, there was an affirmative act by the trial court joining offenses in different complaints. *Id.* There has been no action taken by any court to join these three counts in this case. The Complaint in Clarke's case was filed containing all three counts. Clarke waived his right to a preliminary hearing on October 1, 2021, and all three counts were thus contained in the Information filed on October 4, 2021. The Idaho Supreme Court in *Nava*, 166 Idaho at 888, 465 P.3d at 1127, made it clear that in situations such as this (and as present in *Nava*), where the State had already accomplished joinder by filing all charges in one complaint, the defendant still had his or her right to challenge the joinder under I.C.R. 8 (claiming no common scheme or plan), as well as his or her right to claim joinder is prejudicial under I.C.R. 14. The Idaho Supreme Court held:

Idaho law provides for *two* independent grounds upon which a defendant may seek to have the charges against him severed. Pursuant to I.C.R. 8(a), the State may seek to join two or more charges in a single charging document where the charges "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). Idaho law permits a defendant to challenge the State's joining of two offenses by arguing that the requirements of I.C.R. 8 have not been met, e.g., the charges do not constitute a common scheme or plan. *See State v. Field*, 144 Idaho 559, 565, 165 P.3d 273, 279 (2007); *State v. Anderson*, 138 Idaho 359, 361, 63 P.3d 485, 487 (Ct. App. 2003).

In contrast, I.C.R. 14 provides a different procedural mechanism. Pursuant to I.C.R. 14, a defendant may move to sever charges, even if the requirements of I.C.R. 8 have been satisfied, if the joinder of those charges prejudiced the defendant. *See State v. Caudill*, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985) (italics added) ("Parties *properly joined* under I.C.R. 8(b) may be severed under I.C.R. 14 if it appears that joint trial would be prejudicial[.]"); *Anderson*, 138 Idaho at 361 n.1, 63 P.3d at 487 n.1 (italics in original) ("Rule 14 permits a trial court to sever defendants, or grant separate trials of counts, if a party is prejudiced by an *otherwise permissible joinder* under Rule 8(a)."). Generally, to get to the question of whether joinder was prejudicial, it is "presume[d] joinder was proper in the first place." *Field*, 144 Idaho at 564-65, 165 P.3d at 278-79 (citation omitted).

In sum, a defendant may file a motion to sever charges he contends were improperly joined under I.C.R. 8. Consequently, a motion to sever is *not* limited to I.C.R. 14. Separately, I.C.R. 14 allows a defendant to sever the charges if the joinder of the charges was *prejudicial*, regardless of whether joinder was *proper* under I.C.R. 8.

166 Idaho at 888-89, 465 P.3d at 1127-28. The Idaho Supreme Court in *Nava* clarified the standard of review for a motion under I.C.R. 8 based on the common scheme or plan theory is reviewed freely by the appellate court. *Id.* “Rules 8 and 14 must be analyzed separately with their proper standards of review.” 166 Idaho at 890, 465 P.3d at 1129. First, the court must “analyze whether joinder was permissible under I.C.R. 8.” *Id.* (citation omitted). Then, if this Court determines joinder was proper under I.C.R. 8, this Court must “turn to whether that proper joinder was prejudicial to either party[,] over which an appellate court would employ an abuse of discretion standard.” *Id.* In *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64, 421 P.3d 187, 194-95 (2018), the Idaho Supreme Court held that there is now a four-part test when determining whether the lower court abused its discretion, which requires the reviewing court to determine whether the lower court: “(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” This Court perceives the issue on severance to be one committed to this Court’s discretion, this Court feels it is acting within the outer boundaries of its discretion, is acting within the applicable legal standards and has reached its decision by the exercise of reason.

III. ANALYSIS.

Clarke contends that joinder of the first two counts with the third count was improper because the two alleged events have no connection to one another. Motion to Sever Pursuant to I.C.R. 8, I.C.R. 14, I.C.R. 12(b)(5) and Memorandum in Support 2-4 (Mot. to

Sever). Even if the joinder was proper, Clarke also argues that joinder of the offenses will prejudice him. *Id.* at 4-8.

For the reasons set forth below, the Court grants Clarke's Motion to Sever.

A. Count III was improperly joined with Counts I and II, and severance is proper under I.C.R. 8.

In finding that joinder of all three claims was improper, the Court is not critical of the State's decision to file all three charges in one complaint. The reasons given for joinder by the State in its response to Clarke's motion are understandable and have merit. In its charging document, the State implicitly alleges "common scheme or plan" due to the fact that it charges three crimes, two of which allegedly occurred together with one person, the third allegedly occurred with a different person just over four months later. However, there is a difference in implicitly charging a "common scheme or plan" and *proving* "common scheme or plan" sufficient to survive a motion to sever. As the case law demonstrates, it is a difficult burden for the State to prove common scheme or plan, especially in cases such as Clarke's. "It is a difficult burden for the State to establish that the similarities between two charges demonstrate a common scheme or plan when it comes to sexual abuse crimes." *Nava*, 166 Idaho at 892, 465 P.3d at 1131.

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).

Clarke cites to *State v. Comer*, 162 Idaho 661, 664, 402 P.3d 1114, 1117 (Ct. App. 2017), review denied (Sept. 25, 2017), and states that “[t]he allegations in the information are not based on the same act or transaction and are not connected as a common scheme or plan.” Mot. to Sever 3. The State argues that joinder is appropriate because “[t]here is a common scheme and plan in this case, as the Defendant is alleged to have sexually abused two victims on two different occasions” and “many similarities tie both allegations together as part of a common scheme of [sic] plan.” Br. in Opp’n to Def.’s Mot. to Sever 2 [the State does not use page numbers in its brief]. The State argues that joinder is permissible as the three counts constitute a common scheme or plan.

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), overruled on standard of review grounds only by *State v. Nava*, 166 Idaho 884, 465 P.3d 1123 (2020). *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.”

State v. Sanchez, 161 Idaho 727, 730, 390 P.3d 453, 456 (Ct. App. 2017) (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). As mentioned above, “[i]t is a difficult burden for the State to establish that the similarities between two charges demonstrate a common scheme or plan when it comes to sexual abuse crimes.” *Nava*, 166 Idaho at 892, 465 P.3d at 1131.

In *State v. Joy*, 155 Idaho 1, 304 P.3d 276 (2013), like in *Grist* and *Johnson*, the Idaho Supreme Court reviewed the admissibility of evidence under Idaho Rule of Evidence 404(b) and not the permissibility of joinder. Nevertheless, as in *Grist* and *Johnson*, the Idaho Supreme Court in *Joy* considered whether evidence of the defendant’s other bad acts demonstrated the existence of a common scheme or plan. Thus, the Idaho Supreme Court’s analysis in *Joy* is relevant to determining whether joinder of offenses is permissible on the ground that the offenses constitute a common scheme or plan. 155 Idaho 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, 2009.¹ 155 Idaho at 10, 304 P.3d at 285. “[T]he State offered

¹ The Idaho Supreme Court summarized the victim’s testimony about the charged offenses:

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

evidence of one prior instance of sexual abuse and three instances of previous domestic violence.”² *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 [the victim] in the past, and does not demonstrate a planned course of connected behavior.*” *Id.* (emphasis added).

The Idaho Court of Appeals in *Comer* indicated that the Idaho Supreme Court has previously determined three cases relevant to:

the inquiry into whether various sexual abuse charges are sufficiently similar to constitute evidence of a common scheme or plan[:]

. . . . First, in *State v. Schwartzmiller*, 107 Idaho 89, 93, 685 P.2d 830, 834 (1984), the Court held that the district court properly joined the charges of sexual abuse against two different fourteen-year-old male victims into a single trial. The Court reasoned that although the acts took place at different times and with different people, the facts demonstrated that the defendant had a common plan. The Court explained that the defendant “frequents areas where young boys may be found, befriends boys with no father figure in the home, entices them from their homes, lowers their natural inhibitions through the use of drugs and alcohol, and commits sex acts upon them.” Given these similarities, the Court affirmed the joinder on the basis of common scheme or plan.

In *Field*, the Court held that facts alleged by the State were insufficient to demonstrate a common plan or scheme. *Field*, 144 Idaho at 566-67, 165 P.3d at 280-81. There, the district court granted the

home. When Preston fell asleep in their bedroom, Jennifer called the police

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

² 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.

State's motion to join a 2003 charge of lewd conduct against a seven-year-old victim with a 2001 charge of sexual battery against a seventeen-year-old victim. The Supreme Court rejected the State's argument that the two offenses were connected as parts of the defendant's common scheme or plan to take advantage of underage females who came into his home to babysit or be babysat. The Court found it significant that the victims' ages were different, the type of sexual contact was different, and the incidents occurred two years apart. The Court acknowledged the similarities in the cases—that both girls were only temporarily in the household, the acts occurred in the defendant's home, and the abuse began with "innocent" touching—but the Court found those similarities insufficient to prove a common scheme or plan.

Finally, in *Johnson*, the Court again held that the facts alleged by the State were insufficient to demonstrate a common plan or scheme. *Johnson*, 148 Idaho at 669, 227 P.3d at 923. There, the defendant was charged with abusing his six or seven-year-old daughter. During trial, the district court admitted evidence of the defendant's previous, uncharged sexual conduct with his younger sister as evidence of a common scheme or plan under I.R.E. 404(b). The State maintained that the conduct with the sister was similar to the charged offense in that: "(1) both victims were about seven to eight years old; (2) both victims viewed Johnson as an 'authority figure' because he was an older brother or father; [and] (3) both courses of conduct involved Johnson requesting the victim to touch his penis." Acknowledging these similarities, the Supreme Court nevertheless held that the facts were insufficient to demonstrate a common scheme or plan. The Court explained: "These similarities, however, are sadly far too unremarkable to demonstrate a 'common scheme or plan' in [the defendant's] behavior. The [fact] that the two victims in this case are juvenile females and that [the defendant] is a family member are precisely what make these incidents unfortunately quite ordinary."

162 Idaho at 664-65, 402 P.3d at 1117-18. Three years later, in *Nava*, 166 Idaho at 891-92, 465 P.3d at 1130-31, the Idaho Supreme Court plagiarized without attribution that summary of the Idaho Court of Appeals found in *Comer*. The Court of Appeals in *Comer* found the joinder of the offenses in that case involving two victims was improper and held that the district court should have granted the defense's motion to sever the cases. It reasoned:

. . . [A]s in *Johnson* and *Field*, the similarities in the charged conduct and the victims were too unremarkable to imply a common scheme or plan. As in *Johnson*, the victims were similarly aged and the acts of abuse were

similar. And, as in *Field*, the acts occurred in Comer's home as a result of the victims being left in Comer's care. Just as the Court held that these facts were insufficient to demonstrate a common scheme or plan, we also hold these similarities are insufficient to rise to the level of showing a common scheme or plan. Unlike *Schwartzmiller*, where the defendant took affirmative steps to select and entice his victims, Comer's conduct more accurately evidences an opportunistic tendency that is unfortunately entirely unremarkable in sexual abuse cases. Because the evidence alleged by the State did not extend beyond merely showing a criminal propensity to opportunistically abuse young females entrusted to Comer's care, we conclude that joinder of the offenses against the two victims was improper.

162 Idaho at 665, 402 P.3d at 1118.

In contrast, the Idaho Supreme Court in *Nava* found that a common scheme or plan existed where:

(1) The assaults occurred in the same room of the same house; (2) the assaults occurred within one or two days of each other; (3) both victims were twelve-year-old girls; (4) they were both asleep when the assaults occurred; (5) there were other young children sleeping in the room at the time; and (6) Nava had been grooming both girls."

166 Idaho at 892, 465 P.3d at 1131. In its reasoning in *Nava*, the Idaho Supreme Court stated that:

Unlike the acts in *Field* or *Johnson* in which there were months or years between the assaults, the assaults in this case occurred within one or two days of each other. Additionally, both assaults occurred in the early morning hours. The assaults occurred in the same room of the same house. While it is true that we have previously found the fact of a similar location to be insufficient, the facts of this case present a unique set of circumstances. Here, there were several young children sleeping in the room where Nava assaulted the two girls. Nava passed over other children of various ages specifically to target J.R.R. and J.L.R. This would demonstrate a common scheme or plan connecting the two charges.

Id. The Idaho Supreme Court also emphasized that evidence suggesting "grooming" behavior is indicative of a common scheme or plan because grooming "is conduct intended to foster trust and remove defenses over time through a pattern of seduction and preparation, resulting in the child being willing and compliant to the defendant's sexual

abuse.” *Id.* (citation omitted). The Idaho Supreme Court then discussed the grooming behavior set forth by the State: that Nava had made a number of inappropriate comments regarding the girls’ physical appearance (telling them they were beautiful, telling them that he found them attractive), and that Nava would buy them drinks at a local coffee shop and treats from the gas station, but would not buy anything for the other children. 166 Idaho at 893, 465 P.3d at 1132. “This evidence suggests that Nava intended to foster trust and lower the girls’ defenses. This type of grooming behavior, paired with the other characteristics, is sufficient to constitute a common scheme or plan.” *Id.*

Clarke argues that:

The allegations in the information are not based on the same act or transaction and are not connected as a common scheme or plan. The allegations contained in Counts I and II involve [V.G.] where Count [III] involves [M.Q.]. The only similarities between the three counts is that Mr. Clarke is the defendant. Second, the allegations contained in Counts I and II occurred on January 16, 2020. The conduct alleged in Count III was over four months later on May 29, 2020. Mr. Clarke is being charged with conduct involving two separate individual months apart. Third, there are no similarities in the location of the alleged conduct. The conduct from Count I and II are alleged to have occurred in a vehicle in Athol, ID. Conversely, the allegation contained in Count III occurred at the home of [M.Q.] in Coeur d’Alene, ID.

While the allegations in the Information contain the same defendant, Mr. Clarke, they do not contain or involve the same witnesses. The charges are completely unrelated and the commission of the Forcible Penetration by a Foreign Object and Battery with Intent to Commit a Serious Felony do not establish the charge of Rape contained in Count III. Trying the counts . . . [together] merely goes to show criminal propensity especially when there was a substantial lapse in time, different locations of the offenses, and different complaining witnesses. There is nothing to show that at the time of the alleged conduct related to Count I and II Mr. Clarke also had a plan to commit an offense against [M.Q.] in Count III. Without an additional and proper showing by the State, Mr. Clarke believes there is no substantial evidence to characterize the charges of Forcible Penetration by a Foreign Object and Battery with Intent to Commit a Serious Felon as part of a common scheme or plan with the charge of Rape.

Mot. to Sever 3-4.

The State responds:

The Defendant's sexual abuse perpetrated upon his victims is part of a common scheme and plan in that *he abused his victims in a similar manner*. The victims in both instances had been the Defendant's co-workers at some point. Further, both victims were in vulnerable states which the Defendant exploited. [V.G.] was in need of a ride to get home to her husband and children, so she relied on the ride from the Defendant. [M.Q.], at the age of nineteen on the date of the rape, was considerably younger than the Defendant, who was forty-four-years-old at the time. [V.G.]'s need for a ride home and [M.Q.]'s young age placed both victims in vulnerable states at the times of the Defendant's conduct. Additionally, the locations of the incidents, while different, were similar in that they were both places where the Defendant was alone with the victims. On both occasions, the Defendant utilized physical force to sexually abuse his victims and refused to take "no" for an answer. The Defendant continually requested [V.G.] perform oral sex on him and then repeatedly requested she kiss him and have sexual intercourse with him in the backseat, despite her reaffirming her denial of his requests. The Defendant also continually asked [M.Q.] to use her bathroom despite her initial answer of "no" and then refused to respond to her repeatedly telling him "no" as he raped her. Thus, the offenses are interconnected as a common scheme and plan, and joinder is appropriate.

Br. in Opp'n to Def.'s Mot. to Sever 4 [the State does not use page numbers in its brief] (italics added). The Court is not persuaded by the State's argument that Clarke allegedly abused his victims in a similar manner. To the extent the two alleged victims were vulnerable, they were vulnerable in different ways. Repeated requests by Clarke certainly show persistence, but it is doubtful that would have much distinction in sex crimes such as this---certainly it would be an unusual set of circumstances where persistence would be evidence of a common scheme or plan. Persistent behavior is consistent with an opportunistic individual. An opportunistic individual is much different than one who engages in grooming behavior or who is predatory. Additionally, there are a plethora of differences between the facts surrounding each of Clarke's two alleged victims. The alleged victims are of different ages, V.G. was thirty-seven (Aff. in Supp. of Probable Cause 17) and M.Q. had turned nineteen only ten days before the events in question. *Id.*

at 20, 31. In V.G.'s situation, Clarke injected himself into the equation by asking for a ride. In M.Q.'s situation, at least according to Clarke's statement to police (M.Q. says Clarke invited M.Q. to the party he was at when he noticed M.Q.), Clarke says M.Q. invited him over to her house to drink wine. Affid. in Supp. of Probable Cause 23. The events occurred more than four months apart, at different locations. One occurred in a vehicle, the other occurred in a house. V.G.'s situation involved about five minutes of alleged sexual activity by Clarke, M.Q.'s throughout the night. *Id.* at 23-24. The sexual acts which allegedly occurred with the two women were different, one manual-genital contact the other vaginal sex. These differences collectively illustrate opportunistic behavior, not grooming or predatory behavior.

This Court finds the purported facts of Clarke's case are more similar to *Joy*, *Field*, *Johnson*, and *Comer* than to *Nava* and *Schwartzmiller*. As previously stated, the Idaho Supreme Court requires more than the two events "merely show[ing] the manner in which [the defendant] has allegedly abused [the victim] in the past," but rather the State must show that the two events "demonstrate a planned course of connected behavior." *Joy*, 155 Idaho at 10, 304 P.3d at 285. In Clarke's case, the State here specifically argues that there is a common scheme or plan because "he abused his victims in a similar manner." Br. in Opp'n to Def.'s Mot. to Sever 4 [the State does not use page numbers in its brief]. Even if the alleged abuse by Clarke of the two alleged victims were similar (the above shows that the abuse was similar only in that it was sexual in nature, each victim experienced different sexual behaviors by Clarke), the State falls short because the abuse claimed to be similar by the State does not demonstrate the "planned course of connected behavior" between the two alleged victims as set forth in *Joy*. 155 Idaho at 10, 304 P.3d at 285 There is no showing of a planned course of connected behavior between these two

alleged victims. The State merely alleges that Clarke performed similar acts (this Court finds the sexual acts were dissimilar) on two women who were former coworkers of Clarke. In arguing that the acts were similar, the State states that the victims were both vulnerable, the events occurred when Clarke was alone with the two victims, and that both times Clarke failed to take “no” for an answer. These characteristics are “unremarkable” under an analysis of I.C.R. 8 (nothing about these alleged facts are “unremarkable” for the alleged victims here, the characteristics alleged are certainly excruciating for the victim in each alleged crime). In most instances of sexual abuse, the victims are females who at least from a physical strength standpoint may be vulnerable. Typically sexual abuse does not occur in the presence of other individuals. Typically sexual abuse does not occur with the victim’s consent. Thus, any “similarities” between the two crimes are unremarkable in that those characteristics commonly occur. The alleged victims themselves are very different, as are the circumstances. One victim is nineteen-years-old and the other is thirty-seven. One victim requested a ride home from Clarke where Clarke allegedly forced her to touch his penis and kiss him in his car, and the other allowed Clarke to use the restroom in her home, where he allegedly raped her. There is no evidence or even the allegation of grooming here, as there was in *Nava*. Additionally, whereas the events in *Nava* occurred one or two days apart from one another, the alleged events in this case occurred several months apart from one another. Without more, the State has simply failed to meet its burden here of demonstrating the existence of a common scheme or plan. At most, Clarke is opportunistic in choosing his victims, but there is no evidence of a common scheme or plan. Accordingly, joinder of all three counts for trial is improper. Count I and II will be tried together, but Count III will be tried separately from Counts I and II. Clarke is entitled to severance of Count III from the other two counts for trial.

B. Because the Court concludes that the three counts were improperly joined, it need not address Clarke's alternative argument; but due to the different standard of review on appeal, the Court will conduct that analysis.

Clarke argued in the alternative that even if the three counts can properly be joined under I.C.R. 8, the Court should still sever the offenses because he is prejudiced by joinder of the offenses. Engaging in this analysis is appropriate. See *State v. Wilske*, 158 Idaho 643, 645 n.1, 350 P.3d 344, 346 (Ct. App. 2015) (explaining that a “defendant may be entitled to severance of the joined charges on either of two independent grounds--that the charges do not meet the criteria for joinder under Rule 8 in the first instance or that even though Rule 8 is satisfied, the joinder would unfairly prejudice the defendant.”). Also, if there is an appeal of this Court's decision, the Idaho Appellate Courts would conduct a *de novo* review of the above decision regarding I.C.R. 8, but an abuse of discretion analysis under I.C.R. 14. *Nava*, 166 Idaho at 889, 465 P.3d at 1128.

Clarke asserts that joinder is prejudicial because a jury will “confuse and cumulate the evidence, and convict the defendant of one or all crimes when it would not convict him or either if the evidence was properly segregated”; “Mr. Clarke may desire to present a different defense to the factually different scenario in for the charges he faces”; and “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.” Mot. to Sever 5-6. Clarke also argues that Idaho Rules of Evidence 404(b) would prohibit evidence from the separate trials from being admitted “had the counts been tried separately.” *Id.* 6.

The State argues that Clarke has not met his burden to convincingly show prejudicial joinder because he has failed to offer enough evidence of such prejudice. Br. in Opp'n to Defs.' Mot. to Sever 4-10. The State correctly notes that before a properly joined complaint can be severed, the defendant has the burden of showing the existence of

prejudice of the joinder. *Id.* at 4, citing *State v. Cochran*, 97 Idaho 71, 74, 539 P.2d 999, 1002 (1975). Idaho Criminal Rule 14 is captioned "Relief from Prejudicial Joinder" and the State correctly notes prejudice may occur under I.C.R. 14 when

(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 the 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 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.

Id. at 5, citing, *State v. Abel*, 104 Idaho 865, 867-68, 664 P.2d 772, 774-75 (1983), quoting *United States v. Foutz*, 540 F.2d 733,736 (4th Cir.1976). Clarke likewise uses the three criteria set forth in *Abel*. Mot. to Sever 4-8.

Regarding the first, this Court finds the likelihood of the jury being confused by evidence regarding the two separate victims, or cumulation of the evidence by the jury, to be very low. Clarke only makes the conclusory argument that trying all three counts together "would cause the jury to confuse and cumulate the evidence, and convict the defendant of one or all crimes when it would not convict him of either if the evidence was properly segregated." *Id.* at 5. Clarke does not set forth any reasoning as to why this might be the case. The facts of the two alleged victims are very different. The very reason the Court denied joinder above, that the *differences* in the alleged facts regarding the two victims, is the reason this court finds this concern of *Abel* is not at issue. Due to those distinct differences it would be a simple task for the jury to apply the separate evidence to each separate alleged crime.

The second concern of *Abel* is where the defendant may be confounded by presenting defenses to the different crimes alleged. Clarke makes the argument:

As Mr. Clarke prepares for defense of these counts it may be appropriate for him to testify regarding the Forcible Penetration by a Foreign Object and Battery with Intent to Commit a Serious Felony charges. Mr. Clarke may not wish to testify as to the allegation of Rape. Mr. Clarke cannot make an informed decision about exercising his right to remain silent until the State closes its case and he consults with defense counsel.

Mot. to Sever 6. That concern expressed by Clarke's counsel is not enough to carry

Clarke's burden on a motion to sever. As the State correctly points out:

However, "this need for severance does not arise 'until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.'" *Id.* [United States v. Archer, 843 F.2d 1019, 1022 (7th Cir. 1988)] quoting *Baker v. United States*, 401 F.2d 958, 977 (D.C.Cir.), cert. denied, 400 U.S. 965, 91 S.Ct. 367 (1970). To make a convincing showing justifying severance:

... it is essential that the defendant present enough information--regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other--to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of "economy and expedition in judicial administration" against the defendant's interest in having a free choice with respect to testifying.

Id. at 977.

Br. in Opp'n to Defs.' Mot. to Sever 6. Clarke has simply raised the potential of needing to testify as to one charge, but not the other. Again, that is not sufficient at this point.

Additionally, the State points out that even if Clarke had made such a showing:

Furthermore, severance is not mandated even where such a conflict is found to be real. "[S]everance is not mandatory every time a defendant wishes to testify to one charge but to remain silent on another. If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant." *United States v. Archer*, 843 F.2d 1019, 1022 (7th Cir. 1988), quoting *United States v. Peters*, 791 F.2d 1270, 1287 (7th Cir. 1986). Even if the Defendant had successfully made a convincing showing of such prejudice in this case, severance remains an extreme and discretionary remedy. *Baker v. United States*, 401 F.2d at 977.

Id. at 7. This Court finds that Clarke has not met his burden in proving he meets the second concern of *Abel*.

It is the third concern enumerated in *Abel*, which this Court finds has been met and which would result in severance of Count III from Counts I and II, even if joinder were appropriate. This Court finds “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.” *Abel*, 104 Idaho at 868, 664 P.2d at 775. The State has correctly stated the law in its brief, has correctly noted the factual distinction in *Abel*, but has failed to note an important distinction to the facts of Clarke’s case. The important distinction is Clarke was known to each of the two alleged victims, which was not the case regarding the two female victims in *Abel*. The State writes:

On the third consideration, a court’s analysis sometimes focuses on whether the evidence of one count would have been admissible in the trial for the other count, even if the charges are severed. *State v. Abel*, 104 Idaho 865 (1983). For example, the evidence of a severed charge might be admissible through I.R.E. 404(b). *Id.* In *Abel*, evidence of one charge would have been admissible in a trial for another charge for the purposes of identity, and therefore the third prong supported keeping the charges together.

Br. in Opp’n to Defs.’ Mot. to Sever 7. Up to this point, the Court agrees with all the State has written. The State next writes:

So too here. As stated above, the State’s theory involves the three charges being intertwined. The Defendant used physical force to take advantage of two women who denied his sexual advances repeatedly. Both victims were in vulnerable states at the time of the Defendant’s conduct and both incidents occurred at locations where the victims were alone with the Defendant. Thus, evidence of one charge could be admissible for the purpose of motive, intent, and lack of accident or mistake in proving the other charges.

Id. This Court finds that “identity”, one of the several exceptions to I.R.E. 404(b) evidence, was clearly extant in *Abel*, and that the claimed exceptions of “motive, intent, and lack of accident or mistake” are not extant in the present case, as claimed by the State.

“Identity” was clearly an issue in *Abel*, as the Idaho Supreme Court articulated the facts as follows:

During the early morning of April 28, 1979, two women were separately assaulted. Both incidents occurred in downtown Boise within approximately forty-five minutes and five blocks of each other. The first involved one assailant and the second involved two. The defendant-appellant Abel was subsequently identified by the victims as their assailant. Later regarding the two incidents, a single information charging Abel with six criminal counts was filed.

104 Idaho at 866, 664 P.2d at 773. The “identity” of Abel being the assailant in each incident was a crucial element of each crime and was crucial to the State’s theory of the case that Abel was the perpetrator of both incidents. The Idaho Supreme Court found that because Abel presented an alibi defense, Abel placed his identity at issue for both events. 104 Idaho at 869, 664 P.2d at 776. This is a permissible exception to the usual prohibition under I.R.E. 404(b) that evidence of other crimes not be allowed as it may show criminal propensity. *Abel* was written before I.R.E. 404(b) was created, but the Idaho Supreme Court engaged in the same analysis which is currently in use under I.R.E. 404(b). *Id.*

In Clarke’s case, the State claims the exceptions, “motive, intent, and lack of accident or mistake” apply (Br. in Opp’n to Defs.’ Mot. to Sever at 7) but then shifts emphasis to another exception, “common scheme or plan.” *Id.* at 8. The State argues:

In the case at bar, the 404(b) evidence is relevant to prove the Defendant’s motive, intent and lack or accident or mistake. Among these non-character purposes, particularly compelling is the common scheme or plan and intent. The Defendant may argue lack of intent or mistake or accident, but the evidence that the prior unwanted sexual contact with [V.G.] was accomplished by force, would tend to establish the Defendant’s intent, motive, and/or lack of mistake or accident during the unwanted sexual contact with [M.Q.], as accomplished by force. Thus, the evidence

is admissible under the second prong of analysis as it is relevant for non-character purposes.

Id. It is unknown at this time what Clarke's defense or defenses might be at trial.

Assuming Clarke will deny he used force in either incident (as opposed to denying that he had any contact with either alleged victim at all), and a lack of force would be indicative of consent by the alleged victim, then the State's argument has some merit. However, the facts of each set of circumstances are so different that the facts of one incident regarding force may be of little relevance to the alleged facts of the other incident regarding whether force was used. In any event, such evidence would certainly be unfairly prejudicial to Clarke. "Unfairly prejudicial" is when, as correctly noted by the State, "it appeals to the jury's sympathies, arouses its sense of horror, provokes its instincts to punish, or otherwise may cause a jury to base its decision on something other than the established proposition in the case." *Id.* at 10, citing *Carter v. Hewitt*, 617 F.2d 962, 972 (3d Cir. 1980).

The State claims "motive, intent, lack of accident or mistake" and "common scheme or plan" are the applicable exceptions to the usual prohibition of other crimes evidence under I.R.E. 404(b). The Court is unconvinced that any of these exceptions are truly applicable and at issue here. Even if any one of them were to be applicable, this Court finds that allowable purpose would be substantially outweighed by the danger of unfair prejudice. "Common scheme or plan" is exceptionally difficult to prove. The Idaho Supreme Court in *Nava* allowed it, for the reasons set forth above given the facts of that case. The Idaho Supreme Court in *Joy* held that "common scheme or plan" contemplated by I.R.E. 404(b) "is a common scheme or plan embracing the commission of two or more crimes *so related to each other* that the proof of one tends to establish the other." 155 Idaho at 9, 304 P.3d at 284. "The events 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 of the acts.” *Id.* citing *Johnson*, 148 Idaho at 668, 227 P.3d at 922. The Idaho Supreme Court in *Grist* certainly made it clear the dangers in allowing evidence of prior conduct in the trial of a subsequent sex case under the “common scheme or plan” exception, “in order to avoid the erroneous introduction of evidence that is merely probative of the defendant’s propensity to engage in criminal behavior.” 147 Idaho at 53, 205 P.3d at 1189. This Court has grave concerns that any reasonable jury would do exactly that, use evidence of Count I and/or II as proof that Clarke committed Count III, or vice-versa. As was pointed out to this Court by the Idaho Supreme Court in *Joy*, even though there were similarities between the two actions, the similarities are “general similarities” such as those found in *Johnson*, and are not sufficient to show a common scheme or plan. 155 Idaho at 10-11, 304 P.3d at 285-86. This Court has no desire to have history repeat itself were this Court to deny severance and Clarke appeal that decision.

As the Idaho Court of Appeals in *Wilske* held, “A court still must determine whether hearing such inadmissible evidence in a joined trial might lead the jury to ‘conclude the defendant is guilty of one crime and then find him guilty of the other simply because of his criminal disposition.’” 158 Idaho at 646, 350 P.3d at 347. This Court finds that even if joinder were permissible (it specifically finds joinder is not permissible), Clarke would be allowed relief from joinder under I.C.R. 14 in the form of separate jury trials; one for Counts I and II, and a separate jury trial for Count III.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, this Court finds joinder of all three of these counts was improper under I.C.R. 8. Alternatively, even if joinder were proper, Clarke would be

granted severance of his jury trials, one trial for Counts I and II and a separate trial for Count III.

IT IS HERBY ORDERED that the Defendant's Motion to Sever Pursuant to I.C.R. 8, I.C.R. 14, and I.C.R. 12(b)(5) filed in this case on November 12, 2021, is GRANTED.

DATED this 24th day of November, 2021

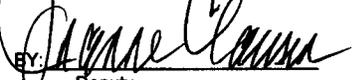

JOHN T. MITCHELL District Judge

24th CERTIFICATE OF MAILING

I hereby certify that on the 24 day of November, 2021 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Tyler Naftz *pd.naftz@kcgov.us*
Prosecuting Attorney - Laura McClinton *lmcclinton@kcpa.courts.kcgov.us*

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: 
Deputy