No. 100771-0

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JACOBI LYNN WEEKLY,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 53583-1-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 18-1-03181-0
The Honorable Bryan Chushcoff, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is JACOBI LYNN WEEKLY, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 53583-1, which was filed on February 23, 2022. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court but remanded for resentencing.

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion by denying Jacobi Weekly's motion for separate trials on the rape/assault charges and the witness tampering charges, where consideration of the requisite factors showed prejudice outweighed the desire for judicial economy?
2. Did the trial court abuse its discretion by denying

Jacobi Weekly's motion for separate trials on the rape/assault charges and the witness tampering charges, where evidence of each set of offenses would not have been admissible at a separate trial for the other set of offenses?

IV. STATEMENT OF THE CASE

A. SUMMARY OF THE CASE

A.I. met Jacobi Weekly and his girlfriend, Jasmine Vanguilder, when they struck up a conversation outside of a Lakewood convenience store. A.I.'s friend, John Ingersoll, invited Weekly and Vanguilder back to his house to hang out. Ingersoll and Weekly drank alcohol, while A.I. and Vanguilder ingested methamphetamine. After Ingersoll went to bed, Weekly, Vanguilder, and A.I. engaged in a sexual threesome. According to A.I., she was coerced into the acts after Weekly assaulted and threatened her and assaulted Vanguilder. According to Weekly and Vanguilder, A.I. was a willing and consenting

participant. When A.I. finally went home the next day, she told her husband that she had been raped and her husband called the police. Weekly made a number of telephone calls to Vanguilder while he was in jail awaiting trial, and in the recordings of those calls he discussed Vanguilder's testimony and asked her to contact A.I. and Ingersoll about their testimony. A jury convicted Weekly of rape, assault, and witness tampering.

B. PROCEDURAL HISTORY

The State charged Jacobi Weekly with two counts of second degree rape (alleged victim A.I.), one count of second degree assault (alleged victim Vanguilder), and three counts of witness tampering (alleged victims A.I., Ingersoll, and Vanguilder). (CP 19-22) The State also alleged that the crimes against Vanguilder were domestic violence offenses. (CP 20-21)

Weekly moved before trial to sever the witness tampering charges from the rape and assault charges.

(CP 40-47, 149-55; 1RP 71-80)[1] The trial court denied the motion. (1RP 80) The court also barred Weekly's DNA expert from testifying. (1RP 43-59; 3RP 272, 275; 8RP 1125-26; 12RP 1712-24; 13RP 1795-78; CP 251-64) Weekly renewed his request to sever the charges before closing arguments, but the court again refused. (14RP 1851)

The jury found Weekly guilty as charged. (15RP 2044-45; CP 340-48) The trial court rejected the State's assertion that Weekly was a persistent offender, but agreed with the State that an exceptional sentence above the standard range was appropriate. (16RP 2072-91, 2100-01; CP 854) The court sentenced Weekly to a total term of 340 months to life. (16RP 2101; CP 857)

Weekly filed a timely Notice of Appeal. (CP 874)

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[1] The transcripts labeled volumes 1 through 16 will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding.

The Court of Appeals affirmed Weekly's conviction, but reversed his sentence and remanded for the trial court to remove his unconstitutional prior convictions from his offender score and resentence him.

C. SUBSTANTIVE FACTS

A.I. and John Ingersoll were good friends and socialized together about once a week. (6RP 790-91) On the evening of August 7, 2018, Ingersoll contacted A.I. and asked her to give him a ride to the store to purchase cigarettes because he was intoxicated and could not drive himself. (6RP 791-92, 794) A.I. drove her Chevy Blazer to meet Ingersoll at his parents' house, where he was staying while they were out of town. (6RP 793-94) Then they drove Ingersoll's Jeep to a nearby market. (6RP 795)

Ingersoll struck up a conversation with Jacoby Weekly while they were waiting in line to make their purchases. (6RP 795; 13RP 1802) Weekly and his

girlfriend, Jasmine Vanguilder, were homeless at the time, so Ingersoll invited them to stay the night with him. (6RP 801) A.I. testified that it is not unusual for Ingersoll to invite strangers over to his house. (6RP 805)

The group drove together in Ingersoll's car back to his parents' house. (6RP 801) Once there, they sat outside on the patio and ate pizza. (6RP 802) Ingersoll and Weekly also drank some alcohol. (6RP 803)

A.I. left to take her car home because her husband needed it in the morning so he could get to work. (6RP 803) She returned about an hour later on her motorbike. (6RP 803-04, 807) A.I. testified that everyone was getting along well, though most of the time the two women and the two men engaged in separate conversations. (6RP 807-08)

Ingersoll and Weekly also left together for a short time. (6RP 808-09) While they were gone, Vanguilder started talking about her methamphetamine use, and she

asked A.I. if she wanted to smoke some. (6RP 810) A.I. had struggled with drug use in the past, but she took Vanguilder up on the offer and the two women smoked together. (6RP 810)

After the men returned, the group continued to hang out and talk. According to A.I., Weekly began making misogynistic comments about women, and claimed that he could order Vanguilder to have sex with him whenever he wanted. (6RP 812-13, 815) A.I. testified that she expressed disgust for Weekly's views to both him and Vanguilder, but that Weekly continued to make similar comments. (6RP 813-15)

By this time it was about 5:00 in the morning, and Ingersoll was quite intoxicated. (6RP 816) A.I. said it was time for everyone to go to sleep, and helped Ingersoll to his bedroom. (6RP 816) A.I. began getting ready to leave too, but Vanguilder asked her to stay. (6RP 822, 823) A.I. agreed because she was still "amped up" from

the methamphetamine and her debate with Weekly. (6RP 816, 817, 823) She was also suspicious that they might steal something if she left, because she noticed Weekly rummaging around the kitchen and snooping in Ingersoll's parents' bedroom (6RP 822, 824-25, 826, 828)

According to A.I., Vanguilder told her that Weekly wanted her to stay because he wanted to have sex with her. (6RP 824) A.I. told Vanguilder that she did not want to. (6RP 824) A.I. testified that Weekly called Vanguilder to come back inside the house, and they began having sex. (6RP 826, 827) A short time later, Vanguilder came back outside and again told A.I. that Weekly wanted to have sex with her. (6RP 828) A.I. again declined and Vanguilder went back inside to Weekly. (6RP 828)

Vanguilder returned a short time later and asked whether A.I. had ever engaged in a threesome. (6RP 829) A.I. replied that she was bisexual and has been part of a threesome, but that she was not interested in having

one that night with Vanguilder and Weekly. (6RP 829)

According to A.I., Weekly came out to the patio and began touching Vanguilder, who then grabbed A.I.'s breast. (6RP 829) A.I. pushed her hand away, but Vanguilder tried to touch her breast again. (6RP 829) A.I. then walked into the house. (6RP 829) A.I. testified that similar conversations about sex with Weekly and a threesome continued, and that she repeatedly explained that she was not interested. (6RP 829-30)

A.I. saw Weekly going into Ingersoll's bedroom to wake him up. (6RP 831) She followed him and they began arguing. (6RP 831-32) According to A.I., Weekly called her names, ordered Vanguilder to hit her, and threatened to hit her himself. (6RP 831, 832, 842) Weekly hit A.I. in the face, then grabbed her and pushed her to the ground. (6RP 833-34, 841, 843, 844) Weekly stood over her and yelled. (6RP 845) But A.I.'s hearing aid had fallen out of her ear when she fell, so she was

unable to hear what Weekly said. (6RP 845) Weekly also put his hand around her neck. (6RP 846-47)

Then Vanguilder got down on the floor next to her and said, “Just cooperate. It will be easier. Do what he says.” (6RP 845) A.I. testified that she was afraid Weekly would continue to hurt her if she did not cooperate, and that she was not strong enough to fight him off. (6RP 850, 852-53, 864-65) So she stopped struggling and complied. (6RP 848) Weekly helped her off the floor and Vanguilder found the hearing aid. (6RP 848, 849) Then A.I., Vanguilder and Weekly engaged in sexual acts together, including oral sex and intercourse. (6RP 861-63)

After, A.I. and Vanguilder went to the patio and smoked methamphetamine again. (6RP 866-67) A.I. testified that she wanted to leave, but the engine on her motorcycle was loud and took a long time to warm up and she did not think she would be allowed to go. (6RP 871)

She also did not call the police on her cellular telephone. (6RP 872)

A.I. and Vanguilder decided to leave together to get cigarettes and to take A.I. home, but Weekly insisted on coming with them. (6RP 868, 869) According to A.I., they drove around in Ingersoll's Jeep and Weekly made several stops to engage in drug deals. (6RP 870, 873-76) At one point, Weekly got angry with Vanguilder and grabbed her by the neck and choked her. (6RP 880) A.I. could see Vanguilder struggling for air and turning blue. (6RP 881-82) They finally went to purchase cigarettes, then returned to Ingersoll's house. (6RP 876)

Weekly parked the Jeep inside the garage and told Vanguilder to go inside. (6RP 883) Then, according to A.I., Weekly told her he wanted to have sex with her again. (6RP 884) A.I. testified that she refused, but changed her mind after Weekly threatened to "take it out on" Vanguilder. (6RP 884) Then she and Weekly had

intercourse in the Jeep. (6RP 884-85)

Afterward, she met Vanguilder on the patio and they smoked methamphetamine again. (6RP 886) Weekly had to go to an appointment with a probation officer, so he and Vanguilder left in Ingersoll's Jeep. (6RP 888) A.I. could have left or sought help, but she did not because she was concerned for Vanguilder's safety and for Ingersoll's Jeep. (6RP 889, 890, 892; 7RP 982)

So A.I. waited for them to return, and at one point sent Vanguilder a message to see how things were going at the appointment. (6RP 890-91) Weekly and Vanguilder eventually returned, and around that time Ingersoll finally woke up. (6RP 893, 894) A.I. left, drove her motorcycle home, and called her husband to tell him what had happened. (RP6 895, 896)

A.I.'s husband, Matthew Irwin, immediately called 911. (6RP 896-97; 7RP 1026) He testified that A.I. was distraught, shaking and crying when he saw her. (7RP

1023) After A.I. gave an initial statement to the police, Irwin drove her to the hospital for treatment and a sexual assault examination. (6RP 906; 7RP 1027, 1065)

Both Irwin and the sexual assault nurse noted bruising and swelling on A.I.'s neck, arms, wrist, and thigh areas. (7RP 1028, 1077) DNA collected from a vaginal swab matched Weekly. (10RP 1450)

The version of events that A.I. gave to the responding officers and to the sexual assault nurse was not entirely consistent with her testimony at trial. (7RP 976-81) For example, A.I. told the nurse that Weekly was the one who told her to cooperate, not Vanguilder. (7RP 961) She told the nurse that Weekly forced her to take methamphetamine. (7RP 1074, 1106) She did not mention to the nurse that she had sexual contact with Vanguilder that night. (7RP 1108) And she told investigators that Weekly only slapped Vanguilder in the car, not that he choked her. (7RP 976-77)

Ingersoll testified that it was A.I.'s idea to invite Weekly and Vanguilder to his house. (8RP 1232, 1234) He thought they seemed nice, and figured they would stay for a few hours and then leave. (8RP 1235) He noticed that A.I. was flirting with Vanguilder. (9RP 1303, 1332) Ingersoll also told investigators that he decided to go to bed because he thought Weekly, Vanguilder, and A.I. were going to engage in sexual activity and he did not want to be part of it. (9RP 1350)

Before going to bed, Ingersoll indicated that he wanted Weekly and Vanguilder to leave. (8RP 1243) But A.I. said she would take responsibility for getting them out, so he went to sleep and did not wake up again until the next morning. (8RP 1243, 1245-46, 1247)

He did not recall seeing Weekly at the house the next day, but noticed that certain things were out of place and it looked like there may have been a struggle. (8RP 1248, 1250, 1251, 1252-53) After A.I. told him what had

happened, Ingersoll exchanged text messages with Weekly. (8RP 1257-58; 9RP 1269-70) Ingersoll testified that Weekly asked if A.I. had contacted the police. (9RP 1272) Weekly also said that things did not happen the way A.I. had claimed, but he did acknowledge that he hit A.I. (9RP 1275, 1277, 1287)

Vanguilder testified that she and Weekly have been romantically involved on-and-off since 2010. (10RP 1480) They did not always have a stable living situation. (10 RP 1481) On the night of August 7, she and Weekly were trying to find a casino when they met Ingersoll at the convenience store. (10RP 1488, 1489) Ingersoll agreed to give them a ride to the casino, but they ended up going to Ingersoll's house instead. (10RP 1490-91, 1492) Weekly, A.I. and Ingersoll were all drinking alcohol. (10RP 1492) Vanguilder testified that she and A.I. did not smoke methamphetamine together. (10 RP 1495, 1498)

Eventually, Weekly asked Vanguilder to ask A.I. if

she would engage in a threesome together. (10RP 1504) Vanguilder resisted, but Weekly encouraged her so she finally approached A.I. about it. (10RP 1505) According to Vanguilder, A.I. initially declined because she was sleeping with Ingersoll and did not want to disrespect him in his home. (10RP 1505-06) But eventually A.I. changed her mind and agreed to participate in a threesome. (10RP 1505, 1511, 1513, 1552-53) Once they began, A.I. never indicated that she did not want to participate. (10RP 1556-57; 11RP 1625, 1627)

Vanguilder testified that when they were driving around the next day, Weekly got angry and pushed her head into the door of the car, but Weekly did not choke her. (10RP 1564, 1566-67)

Weekly called Vanguilder on several occasions from jail. (10RP 1582) Vanguilder acknowledged that Weekly explained to her what he had told investigators about the incident, and encouraged her to say the same thing.

(10RP 1586-87, 1589; 11RP 1653-54) She also acknowledged that Weekly threatened her if she did not assist him in the case. (10RP 1600-01)

In the recordings of the calls, Weekly asks Vanguilder to tell Ingersoll that Weekly's friends know where he lives, and to tell A.I. that they will tell her husband that she is using methamphetamine again if she does not "clean up" the rape accusation. (10RP 1599; 11RP 1654; 13RP 1751-52)

Weekly testified that he was alone inside the house after Ingersoll went to bed, and he could see that Vanguilder and A.I. were smoking methamphetamine together on the patio. (13RP 1813, 11815-16) He saw Vanguilder take off her shirt, then she and A.I. began touching each other sexually. (13RP 1816) He asked Vanguilder to come inside and explain what was going on. (13RP 1816) Vanguilder told him that A.I. is bisexual and does threesomes, but was not interested in having

one that night because she did not want to disrespect Ingersoll. (13RP 1817)

Weekly decided that he was ready to leave, so he went to Ingersoll's room to wake him up and ask for a ride. (13RP 1817) But A.I. followed him and began arguing with him. (13RP 1818) A.I. pushed Weekly, and Weekly pushed back to get her away from him. (13RP 1818) This caused A.I. to fall to the ground. (13RP 1818)

Then Vanguilder explained to Weekly that A.I. actually did want to participate in a threesome. (13RP 1819) Weekly was confused because A.I. was acting like she was angry with him, but A.I. explained that she was concerned that Ingersoll would see them. (13RP 1819) According to Weekly, A.I. began getting undressed, and they engaged in what he understood to be consensual three-way sexual activities. (13RP 1820)

Weekly acknowledged that he pushed Vanguilder in the car the next day, but only because she refused to stop

smoking in the car and was flailing her arms at him. (13RP 1822, 1823) He also testified that he asked A.I. if they could have sex again when they returned to Ingersoll's house, and she agreed. (13RP 1824) Finally, he testified that in the phone calls, he asked Vanguilder to help with his case but never asked her to lie or to ask others to lie. (13RP 1830)

V. ARGUMENT & AUTHORITIES

The issues raised by Weekly's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. THE TRIAL COURT ERRED IN DENYING WEEKLY'S MOTION TO SEVER THE RAPE AND ASSAULT COUNTS FROM THE WITNESS TAMPERING COUNTS.

The defense made a pretrial motion to sever the rape and assault counts (counts 1, 2 and 3) from the witness tampering counts (counts 4, 5, and 6), and

renewed the motion at the close of evidence. (CP 40-47, 149-55; 1RP 71-80; 14RP 1851) The court denied both motions, primarily on the grounds that the same evidence would be admissible at each trial. (1RP 79-80; 14RP 1851) These denials were error because the prejudice of joinder far outweighed any considerations of judicial economy.

The trial court must grant a motion to sever offenses if "severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). "Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Issues of joinder or severance of charges are reviewed for an abuse of discretion. *State v. Bluford*, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017); *State v. Russell*,

125 Wn.2d 24, 63, 882 P.2d 747 (1994). When prejudice from a joinder of charges outweighs concerns for judicial economy, it is an abuse of discretion to not sever the charges. *See Bluford*, 188 Wn.2d at 315-16.

In determining whether the potential for prejudice requires severance, a trial court must consider: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *Russell*, 125 Wn.2d at 63. No one factor is dispositive. *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245 (2010).

The Court of appeals found that here, "all four factors weigh against finding prejudice from the combined trial. It was not untenable for the trial court to deny Weekly's motion to sever." (Opinion at 13) But the Court of Appeals misapplied the law regarding severance to the

facts of this case.

B. The Strength of the State's Evidence and Clarity of Defenses

The strength of the State's evidence is not the same on the various counts. The evidence supporting the rape and assault charges rests almost entirely on the testimony of A.I., and therefore on whether the jury finds A.I.'s version of events credible. The evidence supporting the witness tampering charges is arguably stronger, as Weekly can be heard on the jail recordings telling Vanguilder to contact and threaten A.I. and Ingersoll. Weekly's defenses on each count are different as well: Weekly did not deny that sexual intercourse occurred, but asserted that it was consensual, while he asserted a general denial defense to the assault and witness tampering charges.

C. Effect of Instruction to Decide Each Count Separately

The third factor supports separate trials despite

instruction informing the jury that it must "decide each count separately." (CP 254) The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. *State v. Bythrow*, 114 Wn.2d 713, 721, 790 P.2d 154 (1990). In *Bythrow*, the court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence, different witnesses testified as to the different counts, and the issues and defenses were distinct. 114 Wn.2d at 721. On that basis, the reviewing court concluded the jury was likely not influenced by evidence of multiple crimes and refusal to sever was not error. 114 Wn.2d at 721.

Unlike in *Bythrow*, the jury in this case was unlikely to compartmentalize the evidence of the different counts. First, Weekly's trial spanned nearly three weeks, with 8 days of testimony. (6RP-15RP) Testimony on the

different counts was presented somewhat in sequence, but was also interrupted by various law enforcement and other non-participant witnesses. And sprinkled in with testimony about the charged crimes was also testimony about Weekly conducting drug deals and meeting with probation officers. (6RP 873-76, 887; 10RP 1558, 1562) The jury likely struggled with compartmentalizing evidence of the different crimes and criminal behavior.

Furthermore, "[t]he joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature." *Sutherby*, 165 Wn.2d at 884. "In this context there is a recognized danger of prejudice to the defendant even if the jury is properly instructed to consider the crimes separately." *Sutherby*, 165 Wn.2d at 884. The unique nature of sex offenses can often lead jurors to disregard the trial court's instructions. *Sutherby*, 165 Wn.2d at 884, 886-87; *State v. Harris*, 36 Wn. App. 746, 752, 677 P.2d 202 (1984) (quoting *State v. Saltarelli*, 98

Wn.2d 358, 364, 655 P.2d 697 (1982)).

The jury here was instructed that it "must decide each count separately." (CP 312) But even where the jury is instructed to consider each count separately, the jury is still free to consider evidence from one count in deciding another count. *State v. Bradford*, 60 Wn. App. 857, 860-62, 808 P.2d 174 (1991) (instruction that "The jury is free to determine the use to which it will put evidence presented during trial" was consistent with instruction that jury was to consider each count separately). The boilerplate instruction does not actually require the jury to compartmentalize the evidence. (CP 312) In addition, the jury was also instructed that in deciding whether any proposition has been proved, "you must consider all of the evidence" admitted "that relates to the proposition." (CP 309) Such an instruction gives jurors nearly limitless discretion in deciding whether evidence on one count bears on another count.

The jury was not instructed that it must not consider the evidence on any given count as evidence of a propensity to commit the other charged crimes involving different victims. See *State v. Gresham*, 173 Wn.2d 405, 423-24, 269 P.3d 207 (2012) ("An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character."). By joining the charges, the trial court gave the benefit of ER 404(b) evidence to the State without any protection against jurors using the different crimes for an improper propensity purpose. See *Bean v. Calderon*, 163 F.3d 1073, 1084 (9th Cir. 1998) (in holding joinder resulted in unfair trial, pointing out jury instructions, including instruction to consider each count separately, "did not specifically admonish the jurors that they could not

consider evidence of one set of offenses as evidence establishing the other").

The instruction to weigh each count separately does not weigh in favor of joinder due to the length and complexity of the trial, the presence of sex offenses, and the lack of a limiting instruction preventing the jury from using the multiple counts for propensity purposes.

D. CROSS-ADMISSIBILITY OF EVIDENCE

The fourth factor—cross-admissibility of evidence—also favored separate trials. When determining admissibility under ER 404(b), the trial court must: (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The trial court did not address how the evidence of

rape and assault would be admissible at a trial for the witness tampering charges only. But the court found that the jail recordings would be admissible at a trial for the rape and assault charges as admissions of a party opponent and to show consciousness of guilt. (1RP 79-80) The court also mentioned in passing that the tapes would be relevant to explain why Vanguilder's story had changed. (05/08/19 RP 204) The court was incorrect.

First, admissions of a party opponent are admissible under ER 801(d)(2) if the statement made "is in some way inconsistent with the party's position at trial." 5B K. Tegland, WASH. PRAC., EVIDENCE § 801.35, at 336 (4th ed.1999). The statements made by Weekly on the recordings are not inconsistent with his position at trial; he asserted his innocence in both circumstances.

Second, Vanguilder acknowledged in her testimony that she loved Weekly and would be "there for him no matter what." (11RP 1600, 1614) She also

acknowledged that Weekly directed her on what to say to investigators, that he has threatened her regarding this case, and that he asked her to lie for him. (11RP 1589, 1600-01, 1653-54) The tapes were unnecessary and cumulative on the issue of why Vanguilder's story may have changed over time. See ER 403 (relevant evidence may be excluded to avoid the needless presentation of cumulative evidence).

Finally, the jail recordings may have been somewhat relevant to the question of whether Weekly was demonstrating a consciousness of guilt, but only marginally so as he continually insists that A.I. consented to the sexual activity and indicates he wants her and Ingersoll to tell investigators the truth. (Exh. 16B) And relevant evidence should still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. As argued in detail below, any relevance these tapes had did not outweigh their

prejudice.

The very detailed and graphic testimony relating to the rape and assault charges simply would not have been admissible at a trial for witness tampering, and the lengthy and prejudicial jail calls would not have been properly admitted at a trial for the rape and assault charges alone.

E. JOINDER PREJUDICED THE FAIRNESS OF THE TRIAL

Misapplication of ER 404(b) in severance cases compels a new trial where there is a reasonable probability that the error affected the outcome. *State v. Watkins*, 53 Wn. App. 264, 273, 766 P.2d 484 (1989). Evidence of other misconduct is prejudicial because jurors may convict based on the belief that the defendant deserves to be punished for a series of immoral actions. *State v. Bowen*, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence "inevitably shifts the jury's

attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." *Bowen*, 48 Wn. App. at 195. The potential for prejudice "is at its highest" in sex cases. *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986) (citing *Saltarelli*, 98 Wn.2d at 363).

In *Ramirez*, this Court found that it was reversible error to try two indecent liberties offenses together because proof of one count could not have been adduced at a separate trial for the other. The Court held that "the jury may well have cumulated the evidence of the crimes charged and found guilt, when if the evidence had been considered separately, it may not have so found." 46 Wn. App. at 228 (citing *Drew v. United States*, 331 F.2d 85, 88 (D.C.Cir.1964)).

In addition to encouraging the jury to infer that Weekly had a criminal disposition, the jail recordings also

painted a picture of Weekly as a cruel, vulgar man who disrespects women and verbally abuses his girlfriend. These expletive laced recordings may not have painted an accurate picture of who he was, and instead showed him reacting to the stress of jail confinement while facing a possible lifetime in prison. But once the jury heard them, it would be nearly impossible to put them aside and come to a verdict based on the facts and testimony alone.

Under the circumstances, Weekly meets his burden of demonstrating that a single trial involving all counts was so manifestly prejudicial as to outweigh the concern for judicial economy. *Bythrow*, 114 Wn.2d at 718. To ensure a fair trial, the charges should have been severed. The convictions should be reversed.

VI. CONCLUSION

This Court should accept review, reverse Weekly's convictions, and remand his case for new, separate trials.

I hereby certify that this document contains 4926 words, excluding the parts of the document exempted from the word count, according to the calculation of the software used to prepare this brief, and therefore complies with RAP 18.17.

DATED: March 25, 2022

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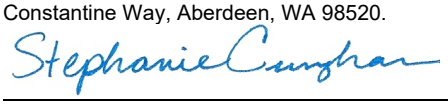
CERTIFICATE OF MAILING

I certify that on 03/25/2022, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jacobi L. Weekly, DOC# 798924, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX
Court of Appeals Opinion in *State v. Weekly*, No. 53583-1-II

Filed
Washington State
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February 23, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JACOBI LYNN WEEKLY, Appellant.	No. 53583-1-II UNPUBLISHED OPINION

GLASGOW, J.—Jacobi Lynn Weekly physically assaulted his girlfriend, Jasmine Vanguilder, and had sexual intercourse with another woman, AI, twice against her will. The State charged him with two counts of second degree rape of AI and one count of second degree assault of Vanguilder. Based on calls he made to Vanguilder from jail, the State later charged Weekly with three counts of witness tampering. The trial court denied Weekly's motions to sever the witness tampering charges, and a jury convicted Weekly of all counts. The trial court imposed an exceptional upward sentence of 340 months to life.

Weekly appeals his convictions and sentence. He argues the trial court abused its discretion by denying his motions to sever, his offender score includes unconstitutional prior convictions for possession of controlled substances, and the trial court erred by failing to enter written findings supporting the exceptional sentence. He also filed a statement of additional grounds for review (SAG).

We affirm Weekly's convictions, but we reverse his sentence and remand for the trial court to remove his unconstitutional prior convictions from his offender score and resentence him.

FACTS

A. Background

AI went to her friend John P. Ingersoll's house in August 2018. The two later drove to a store to purchase cigarettes. At the store, they encountered Weekly and Vanguilder, who did not have a permanent residence at the time. Neither AI nor Ingersoll had met Weekly or Vanguilder before. Ingersoll invited Weekly and Vanguilder to his house.

At Ingersoll's home, Ingersoll, AI, Weekly, and Vanguilder stayed up late into the night talking. Ingersoll and Weekly drank alcohol and the women used methamphetamine together. Over the course of the evening, Weekly bragged that he controlled Vanguilder, that she did whatever he asked, and that he could demand sexual intercourse with her whenever he wanted. AI argued with him about his treatment of Vanguilder.

Early the next morning, Ingersoll went to bed. The three guests remained in his house. Ingersoll was a heavy sleeper and also took medication that helped him sleep. He did not wake until late morning. AI remained at Ingersoll's home after he went to bed because she was afraid Weekly and Vanguilder might steal from Ingersoll while he was sleeping because she had seen them looking through his possessions.

Weekly told Vanguilder to ask whether AI would be interested in having sexual intercourse with both Weekly and Vanguilder. AI declined. Weekly began to move toward Ingersoll's bedroom, and when AI attempted to stop him, they engaged in a struggle that ended when Weekly pushed AI hard enough to knock her to the floor, dislodging and breaking her glasses and hearing aid. After pushing AI to the floor, Weekly had intercourse with her.

Weekly then drove Ingersoll's Jeep to the store and other errands, bringing AI and Vanguilder with him. Weekly and Vanguilder got into several arguments throughout the trip, and Weekly choked Vanguilder in the car in front of AI.

Upon returning to Ingersoll's house, Weekly parked the Jeep in the garage and Vanguilder went into the house. Weekly demanded that AI have intercourse with him, and he threatened to harm Vanguilder further if AI refused. AI complied.

Weekly and Vanguilder then left for an appointment with Weekly's probation officer, again in Ingersoll's Jeep, leaving AI in Ingersoll's house. AI eventually left Ingersoll's house on her motorcycle. Upon reaching her home, she called her husband and told him that she had been raped; her husband called 911.

After an interview with police, AI went to the hospital for a forensic sexual assault examination. She had multiple bruises and lacerations, and the nurse collected swabs for DNA testing.

B. Pretrial

The State charged Weekly with two counts of second degree rape in August 2018. At his arraignment, he was ordered not to contact Vanguilder, AI, or Ingersoll. Weekly made 140 calls from jail to Vanguilder between August 2018 and March 2019. In the calls, he asked Vanguilder to come to court to testify for him, as well as speak to police and his attorney to "[l]et the motherf[*****]s know what happened," and he asked her what she had told investigators. Clerk's Papers (CP) at 203. In one call, Weekly told Vanguilder that "you wouldn't be talking to me like this, b[****], if I was out there, because you know I would smack the fire out of you." CP at 231-32. In another call, he told Vanguilder to tell AI to "clean that s[***] up" and to threaten to tell

AI's husband that AI was having an affair with Ingersoll and using methamphetamine. Verbatim Report of Proceedings (VRP) (May 22, 2019) at 1595. Weekly also told Vanguilder to inform Ingersoll that Weekly and "'his people'" knew where Ingersoll lived. *Id.* at 1598.

The State amended the charges against Weekly on March 15, 2019 to include two counts of second degree rape of AI, one count of second degree assault of Vanguilder, and three counts of witness tampering involving Vanguilder, AI, and Ingersoll. Our record does not indicate when Weekly was arraigned on the amended information.

Weekly moved pretrial to sever the witness tampering charges from the rape and assault charges. Weekly argued that his consent defense to the rapes and his general denial defense to the witness tampering conflicted and that the evidence for the two sets of charges was not cross admissible. The State argued there would be no prejudice from trying the charges together, while severing the charges would waste resources.

The trial court denied the motion to sever, noting that the evidence relevant to the two sets of charges was cross admissible. The trial court explained that the recordings of the jail calls would be relevant to the rape and assault charges because they showed consciousness of guilt, and the recordings were admissible because they were admissions of a party opponent. The trial court concluded, "There doesn't seem to me that there is any economy saved by splitting the case up, and I don't see how there is any prejudice saved, if you will, to the defense because this information was all coming in anyway." VRP (May 2, 2019) at 80.

C. Trial

AI, Vanguilder, and Weekly all testified that AI and Weekly had a struggle that ended when Weekly shoved AI with enough force to knock her to the floor and dislodge and break her

glasses and hearing aid. AI testified that while she was on the ground, Weekly grabbed her by the throat and told her "everything was going to be okay as long as [she] just cooperated." VRP (May 15, 2019) at 848. AI testified that she did not further resist intercourse with Weekly "[b]ecause he had already overpowered [her] once, and it wouldn't have been hard for him to do it again. [She] figured the best way was to cooperate. That way [she] wouldn't be physically injured more than [she] already was." *Id.* at 864.

Vanguilder testified that when AI was on the ground, Weekly whispered something to AI that Vanguilder could not hear, at which point AI began undressing. The trial court admitted photos of bruises to AI's breast, wrist, and legs, as well as scratches on her neck, which AI's husband testified had not been present before AI went to Ingersoll's house. Ingersoll testified that he woke up the next day to a house containing obvious signs of a struggle, including damage to a kitchen cabinet that looked as if someone had been pushed into it.

Weekly testified that after some encouragement from Vanguilder, AI agreed to intercourse with him and Vanguilder and that AI's initial hesitance was because she did not want to disrespect Ingersoll. Weekly testified that he approached Ingersoll's room to ask him for a ride after AI initially declined intercourse, that AI physically intervened to keep him from waking Ingersoll, and that he only pushed AI to the ground after she grabbed and pushed him first. He testified that as soon as AI got up from the floor and found her hearing aid and glasses, she began undressing. AI then started with a sexual encounter with Vanguilder before Weekly had intercourse with AI. Weekly never asked AI for her consent because "I didn't have to. [Vanguilder] said that she would do it." VRP (May 29, 2019) at 1840.

AI testified that after the altercation with Weekly, she hoped to tell Weekly that she was out of cigarettes and wanted to go to the store to buy more, but she really intended to take Ingersoll's Jeep to her house to call the police. She testified that she did not think she would be able to leave without an excuse because Weekly "had already taken [her] phone and thrown it when [she] had tried to leave once," and he had overpowered her. VRP (May 15, 2019) at 871. In addition, AI had arrived at Ingersoll's house on her motorcycle, which required 10 minutes to warm up. "[I]t wasn't quite as simple as just getting into a vehicle and locking the doors and leaving. . . . It is very easy to just push the bike and tip [it] over." *Id*. AI's plan did not work, however, because Weekly insisted on driving Ingersoll's Jeep to the store.

AI, Weekly, and Vanguilder all testified that Weekly and Vanguilder got into an argument during the trip. AI testified that, while at a drive-through window, Weekly asked Vanguilder for money and did not believe that Vanguilder gave him all of her money. AI testified that "they went back and forth," escalating the argument until Weekly "grabbed [Vanguilder] by the throat and started strangling her," while Vanguilder was "grabbing at his hand, trying to get his grip loose." *Id.* at 880. AI testified that Vanguilder began "to turn a little blue in the face" and "was trying to catch a breath and couldn't" as she tried to remove Weekly's hand from her throat. *Id.* at 881. AI testified that after some passersby noticed the scuffle, Weekly let go of Vanguilder's neck, grabbed the methamphetamine pipe sitting in Vanguilder's lap, crushed it, and threw it out of the Jeep.

Vanguilder acknowledged that she and Weekly had an argument and that he pushed her, but she did not say he strangled her. Weekly testified that he yelled at Vanguilder for smoking methamphetamine in the car and broke Vanguilder's pipe. Vanguilder began "flailing" at Weekly, so Weekly pushed her away. VRP (May 29, 2019) at 1823.

AI testified that when they returned to Ingersoll's house, Weekly instructed Vanguilder to go into the house and then told AI he wanted to have intercourse with her again. When she declined, he threatened to "take it out on [Vanguilder], if [she] didn't cooperate." VRP (May 15, 2019) at 884. AI did not resist the intercourse because she feared Weekly would hurt Vanguilder. Weekly testified he asked AI if they could have intercourse again in the garage and "she said, yes, if you make it fast. I don't want [Ingersoll] to wake up." VRP (May 29, 2019) at 1824.

Talia Stalcup, the sexual assault nurse examiner at the hospital, testified that AI was in shock when Stalcup examined her. Stalcup took photos of bruises on AI's neck, chin, arms, legs, and breast and took DNA samples from several locations on AI's body for a rape kit. Jennifer Hayden, a forensic scientist at the Washington State Patrol Crime Laboratory, testified that the DNA profile from AI's vaginal swab was 110 nonillion times more likely to have come from AI and Weekly than from AI and a random individual.

Detective Sean P. Conlon, the primary investigator on the rape case, interviewed Vanguilder and was able to identify her voice on the phone calls Weekly made from jail to Vanguilder's phone number. Conlon testified that Weekly called Vanguilder using his own personal identification number from the jail, as well as using other inmates' numbers. Several of Weekly's jail calls to Vanguilder were played for the jury. The jury heard the portions of the jail calls described above.

Before the close of evidence, Weekly moved again to sever the witness tampering charges. The trial court stated that "how the case has played out supports the reasoning for not severing [the charges] in the first place" and denied the motion. VRP (May 30, 2019) at 1851. The jury was

instructed to decide each count separately and that the verdict on one count should not control their verdict on any other count.

D. Verdict and Sentencing

The jury found Weekly guilty on all counts. The jury answered special verdicts finding domestic violence for the assault and one count of witness tampering, both involving Vanguilder.

Weekly's criminal history consisted of 43 prior convictions, including 12 felonies. His prior criminal history included 14 points, 6 for unlawful possession of a controlled substance convictions. The trial court found that after adding his current convictions, Weekly's offender score was 24 points. The trial court ordered an indeterminate sentence of 280 months to life for the rape conviction. The trial court also ordered a concurrent sentence of 84 months for the assault conviction. The trial court imposed an exceptional upward minimum sentence, running the 60-month sentences for the three witness tampering convictions concurrently to each other but consecutive to the sentence for the rape and assault, for a total indeterminate sentence of 340 months to life. Our record does not contain written findings of fact or conclusions of law supporting the exceptional upward sentence.

Weekly appeals his convictions and sentence.[1]

ANALYSIS

I. MOTION TO SEVER

Weekly argues that the trial court erred by denying his motion to sever the rape and assault charges from the witness tampering charges. He contends that the State's evidence on the rape and assault charges was considerably weaker than the evidence of the witness tampering and that his

[1] The State filed a cross appeal that has since been withdrawn.

defenses conflicted. He also asserts the lack of an ER 404(b) limiting instruction allowed the jury to use the separate crimes for improper propensity purposes. And he argues the trial court was incorrect in ruling that the evidence from each set of charges would be cross admissible. Thus, Weekly argues that we must reverse his convictions. We disagree.

A. Severance for Separate Offenses, Generally

Two or more offenses may be joined for trial when the offenses are "of the same or similar character," "based on the same conduct," or constitute parts of a single scheme or plan. CrR 4.3(a)(1), (2). But CrR 4.4(b) provides that the trial court shall grant a motion to sever if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." Joinder and severance issues are often considered together. *State v. Bluford*, 188 Wn.2d 298, 308, 311, 393 P.3d 1219 (2017).

A trial court must weigh the potential prejudice of a combined trial against the benefits of judicial economy. *Id.*; *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). In determining whether severance is required, a trial court must evaluate (1) the strength of the State's evidence on each count, (2) the clarity of the defenses for each count, (3) the jury's instructions to consider each count separately, and (4) the cross admissibility of evidence if the charges are not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). Then any residual prejudice must be weighed against judicial economy. *Id.*

Where the trial court has refused to sever offenses for separate trials, the defendant bears the burden of demonstrating the trial court abused its discretion. *Id*.

B. Strength of the State's Evidence

This court has found that a defendant should have received separate trials on rape charges for two different victims when the strength of the State's evidence for one charge was weak and would have been further undermined by impeachment evidence. *State v. MacDonald*, 122 Wn. App. 804, 815, 95 P.3d 1248 (2004). But where the State's evidence for each charge is strong, this factor has weighed against severance because the jury need not "base its finding of guilt on any one count on the strength of the evidence of another." *Bythrow*, 114 Wn.2d at 721-22.

For example, in *State v. Wood*, Division One recently held that a trial court did not err by declining to sever the defendant's rape charges from his charges for solicitation of murder, solicitation of kidnapping, and conspiracy to intimidate a witness. __ Wn. App. 2d ___, 498 P.3d 968, 982 (2021). Division One recognized the charges were supported by evidence of equal strength. *Id.* at 981. Specifically, the rape charge was supported by undisputed evidence that the defendant and victim had intercourse, as well as the testimony of the victim, the forensic nurse's examination, and photos of the victim's injuries. *Id.* The witness intimidation charge was supported by evidence the defendant wrote a letter to a witness asking for help and identifying another witness as a "'rat'" and telephone calls between witnesses discussing recantation of a statement. *Id.*

Similarly here, the rape charges were supported by DNA evidence of intercourse, with evidence of lack of consent from the testimony of AI as well as her husband, the forensic nurse, and Vanguilder, in addition to photos of AI's injuries. The witness tampering charges were supported by multiple recorded phone calls between Weekly and Vanguilder. The assault charge had the weakest evidence, being supported solely by AI's testimony, but Weekly did not argue at

any point that the assault charge should have been separated from the other five charges. *See Russell*, 125 Wn.2d at 63. Thus, this factor weighs against severance.

C. Clarity of Defenses

The clarity of the defenses for each charge weighs in favor of severance when the defenses were mutually antagonistic "and the defendant demonstrates that presentation of the defenses resulted in prejudice." *State v. Thanh Pham Nguyen*, 10 Wn. App. 2d 797, 819, 450 P.3d 630 (2019). Severance is required "if a defendant makes a convincing showing that [they] have important testimony to give concerning one count and a strong need to refrain from testifying about another." *State v. Watkins*, 53 Wn. App. 264, 270, 766 P.2d 484 (1989). In *Wood*, Division One held Wood's defenses were not inconsistent where he argued consent in response to a rape charge and generally denied a witness intimidation charge. 498 P.3d at 981-82.

Here, Weekly does not demonstrate how his defenses to the two groups of charges were antagonistic, besides stating that the defenses were different. Additionally, Weekly testified regarding all of the charges, and he does not demonstrate that he had important testimony to give regarding one charge but "a strong need to refrain from testifying" about any of the others. *Watkins*, 53 Wn. App. at 270. Indeed, Weekly testified in support of his consent defense to the rapes, denied the assault, and explained his manner on the recorded phone calls as a frustrated, imprisoned man alarmed about his future and his girlfriend's drug use. And Weekly does not argue that he would have testified in only one trial if the charges had been severed. Thus, this factor weighs against severance.

D. Jury Instructions

"The jury is presumed to follow the instructions of the court." *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). The Washington Supreme Court has held that an instruction for the jury to consider each count separately and not let the verdict on one count control the verdict of another was proper when the "issues and defenses were simple and distinct" and the State presented strong evidence for all counts. *Bythrow*, 114 Wn.2d at 723. In *Bythrow*, although the charges were similar in nature—two robberies committed with a weapon—the Supreme Court concluded this jury instruction was effective for ensuring the jury could compartmentalize the evidence supporting each charge where the trial was short and the issues were relatively straightforward. *Id.*

Here, the trial court instructed the jury to decide each count separately. Although the jury heard eight days of testimony, the issues were distinct—whether AI consented to the intercourse on two occasions, whether Weekly strangled Vanguilder, and whether Weekly attempted to influence the testimony of Vanguilder, AI, and Ingersoll in his phone calls from jail. These issues were also straightforward and the jury is unlikely to have conflated them. The State is also correct that Weekly did not request a limiting instruction beyond that given to the jury. Thus, this factor weighs against severance.

E. Cross Admissibility

ER 404(b) provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," but such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In *Bluford*, the Supreme Court held that

the trial court abused its discretion by joining a string of seven robberies committed over two months by unidentified perpetrators, some accompanied by sex offenses, when none of the charges had cross-admissible evidence and the likely prejudice outweighed the judicial economy benefits. 188 Wn.2d at 315.

In contrast, in *Wood*, Division One held evidence of the rape charge would have been admissible under ER 404(b) as evidence of Wood's motive for the witness intimidation, while the witness intimidation would have been admissible as consciousness of guilt for the rape. 498 P.3d at 982; *see also State v. Sanders*, 66 Wn. App. 878, 885, 833 P.2d 452 (1992) ("[T]he fact of the rape charge would be relevant in a separate trial on the witness tampering to show why the tampering occurred."). Like the rape and witness intimidation charges in *Wood*, "[i]t is well settled that evidence of witness tampering is admissible as evidence of consciousness of guilt in the trial of the charge to which the witness's testimony pertains." *State v. Rodriguez*, 163 Wn. App. 215, 228, 259 P.3d 1145 (2011).

Here, the jail calls would have been admissible in a rape and assault trial as consciousness of guilt, just as the rape and assault would have been admissible in the witness tampering trial to demonstrate motive. *See Sanders*, 66 Wn. App. at 885; *Rodriguez*, 163 Wn. App. at 228. Thus, this factor weighs against severance.

In sum, all four factors weigh against finding prejudice from the combined trial. It was not untenable for the trial court to deny Weekly's motion to sever. We hold that the trial court did not abuse its discretion by denying Weekly's pretrial or renewed motions to sever.

II. SENTENCING

A. Convictions Now Unconstitutional Under *Blake*

Weekly argues we should remand for resentencing because his offender score included unconstitutional prior convictions. The State concedes the convictions are unconstitutional, but opposes resentencing because Weekly's corrected offender score will still exceed 9 points, leaving the standard range unaffected. We conclude that the trial court must correct Weekly's offender score to eliminate prior convictions for possession of a controlled substance and, as a result, Weekly should be resentenced.

1. Unconstitutional convictions

In *State v. Blake*, the Supreme Court held that Washington's strict liability drug possession statute, former RCW 69.50.4013(1) (2017), violates state and federal due process. 197 Wn.2d 170, 195, 481 P.3d 521 (2021). "A conviction based on an unconstitutional statute must be vacated" and "cannot be considered in calculating the offender score." *State v. LaBounty*, 17 Wn. App. 2d 576, 581, 487 P.3d 221 (2021). Weekly's offender score included 6 points for prior convictions for unlawful possession of a controlled substance. On remand, the trial court must vacate those convictions and correct Weekly's offender score accordingly.

2. Resentencing

Our cases have been inconsistent in determining when a reduced offender score warrants resentencing. This court has explained that "a reduced standard range, not a reduced offender score, requires resentencing on remand." *State v. Kilgore*, 141 Wn. App. 817, 824, 172 P.3d 373 (2007) (emphasis omitted) (footnote omitted). But in *State v. McCorkle*, the State failed to prove comparable foreign convictions, resulting in a miscalculation of the offender score that did not

affect the standard range. 88 Wn. App. 485, 499-500, 945 P.2d 736 (1997). We held the error was not harmless because "the record does not clearly indicate that the sentencing court would have imposed the same sentence without the [unproved prior convictions] and the resultant change in offender score." *Id.*

Weekly's corrected offender score will still exceed 9 points for each current conviction. But we also consider whether the defendant was sentenced at the bottom of the standard range. If the trial court imposed a low-end sentence and a reduction of the offender score could not result in a lower sentence within the standard range, then resentencing would not be necessary. *See State v. Johnson*, 61 Wn. App. 539, 552, 811 P.2d 687 (1991). But here, the trial court imposed an exceptional minimum sentence. We recognize the trial court has discretion to impose a different indeterminate sentence, including a lower exceptional minimum sentence or a minimum sentence within the standard range. And although the trial court was clear about its reasoning for imposing the witness tampering sentences consecutive to the rape and assault sentences, the record does not clearly indicate that it would have imposed the same sentences for each conviction if the offender scores were different. Thus, we hold that the facts of this case merit resentencing.

On remand, the trial court must strike the unconstitutional prior convictions from Weekly's offender score and resentence him with the corrected offender score.[2]

III. SAG ARGUMENTS

Weekly raises two additional issues in his SAG. First, he argues the trial court should have dismissed a juror "after catching her falling asleep." SAG at 1 (ground 2). On the second day of

[2] Weekly argues, and the State concedes, the trial court should have entered written findings of fact to support the exceptional sentence. We need not address this issue because we reverse Weekly's sentence and remand for resentencing.

trial, the prosecutor raised a concern that juror 7 was possibly closing her eyes. After observing the juror during the next period of trial, the trial judge and judicial assistant both stated that juror 7 was actively writing notes on a pad positioned at the end of her knee. But looking at her from the attorneys' angle, it might have looked like her eyes were closed when she was, in fact, taking notes. No other concerns were raised about juror 7 for the remainder of the trial. This argument is without merit.

Second, Weekly argues his time-for-trial rights were violated because his trial did not occur within 60 days, stating that he "sat in Pierce County Jail for over 11 months." SAG at 1 (ground 1). Weekly was arrested in August 2018 and trial began in May 2019. The amended information was filed March 15, 2019. Our record does not contain the arraignment on the amended information.

Under CrR 3.3(b)(1)(i), a defendant in custody pending trial must be brought to trial—meaning a trial date must be set—within 60 days of arraignment. *See State v. Nelson*, 131 Wn. App. 108, 113, 125 P.3d 1008 (2006). But continuances may be granted to extend the time period. CrR 3.3(f). A defendant waives their time-for-trial rights under the court rules if they do not timely object to the violation. *State v. Harris*, 130 Wn.2d 35, 45, 921 P.2d 1052 (1996). Our record contains no information about who requested continuances or why they were granted between August 2018 and March 2019. Our record also contains no information about whether Weekly objected to continuances before March 2019. "If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251

(1995). On the information provided in our record, Weekly has not demonstrated that a time-for-trial violation occurred.

CONCLUSION

We affirm Weekly's convictions, but we reverse his sentence and remand for the trial court to remove Weekly's unconstitutional prior convictions from his offender score and resentence him considering the corrected offender score.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Lee, C.J.

Veljacic, J.

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