68766-2

68766-2

NO. 68766-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

D'MARCO MOBLEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MONICA BENTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Whether the defendant can show that his convictions should be reversed based on his claim that his trial counsel was constitutionally ineffective during plea negotiations.

2. Whether the defendant can show that the trial court's ruling that the State provided valid race-neutral reasons for exercising a peremptory challenge against juror 91 was clearly erroneous, and that in reality, the exercise of the peremptory challenge was racially motivated.

3. Whether the defendant can show that the trial court abused its discretion in admitting expert testimony regarding the prostitution trade in the Seattle area when case law holds that such testimony is admissible because it is helpful to the trier of fact.

4. Whether the defendant can show that the trial court abused its discretion in denying his motion for a mistrial after he objected to certain testimony of Sergeant Richard McMartin, the trial court struck the testimony, and the jury was instructed to disregard the testimony.

5. Whether a rational trier of fact could have found the defendant guilty of promoting commercial sexual abuse of a minor, as charged in count I.

6. The State concedes that the defendant's convictions on count III (first-degree kidnapping), and counts VI and VII (two counts of first-

degree rape) violate the double jeopardy merger doctrine, necessitating the vacation of the kidnapping conviction.

7. The Supreme Court has previously rejected the argument that utilization of a defendant's prior juvenile court felony convictions in calculating an offender score violates the Sixth Amendment and right to due process. Where the defendant makes no arguments not already considered by the Supreme Court, should this Court reject the defendant claim of error?

8. Should this Court reject the defendant's "cumulative error" argument because he has failed to show multiple errors or substantial prejudice from the alleged errors?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was convicted at trial on the following eight charges:

Count I:	Promoting Commercial Sex Abuse of a Minor
Count II:	Promoting Prostitution in the Second Degree
Count III:	Kidnapping in the First Degree with a Firearm Special Allegation
Count IV:	Robbery in the Second Degree
Count V:	Promoting Prostitution in the First Degree

Count VI: Rape in the First Degree

Count VII: Rape in the First Degree

Count VIII: Unlawful Possess of a Firearm in the First Degree

CP 343-50, 445-48. The defendant received a standard range sentence on each count. Counts III, VI and VII were ordered to be served consecutive to each other, as was the firearm enhancement, and concurrent to all other counts. Thus, the defendant's total term of confinement was 444 months. CP 395-410.

2. SUBSTANTIVE FACTS

This case involves three main victims, AW (aka Jazzy), JB and JJ (aka Mina).

AW (Jazzy), 21 years old at the time of trial, came from a troubled family. 2/14/12 RP[1] 18-22, 36. Her parents were drug addicts, her brother had been taken away from the family, and at the age of 16, AW dropped out of school and left home because she could not continue to deal with her parents throwing everything away. Id. At the age of 17, she was working at Burger King when she turned to a life of prostitution. Id. at 22.

A friend of hers, Jamie, was a prostitute who enticed AW with stories about how much money she could make. Id. at 23. AW was broke

[1] The verbatim report of proceedings shall be cited by date followed by the page number.

and had nobody she could turn to for help. Id. at 24. Her parents were currently on the run in Idaho, after having lost everything. Id. So AW began posting ads on Craigslist and going on "dates." Id. at 24-25.

AW also had a boyfriend, who it ends up, acted as a pimp. Id. at 26-27. He had other girls working for him as well, and had AW start walking the prostitution strips – along Pac Highway South and Aurora Avenue. Id. at 26. The relationship ended when the man went to jail. Id. at 29-30. AW drifted around for a few months before she hooked up with a girlfriend and started posting and walking the streets again. Id. at 30-31, 43-44.

AW met the defendant through another girlfriend and prostitute, Candy. Id. at 43-44. Candy lied about who the defendant was, telling AW that he was just a friend who was going to buy them some food and hang out. Id. at 44. Instead, the defendant, who introduced himself as "Cash," turned out to be a pimp. Id. at 45.

When the defendant came over, he was with another pimp, Wendell Downs, aka "Boom." Id. at 46. The girls were driven to a strip club in Seattle, where Candy was then instructed to walk Denny Way. Id. at 46-47. Later that evening, after the parties had split up, the defendant called AW and talked with her about working for him. Id. at 49.

A few weeks later, the defendant again talked with AW about working for him. Id. at 51. AW was working for another pimp at the time, but she testified that the defendant really seemed to care about her. Id. at 52. A few weeks later, the defendant showed up at a hotel room AW was using to work out of in Tukwila. Id. at 53. He stayed the night and in the morning, AW gave him all her money she had earned and he became her pimp. Id. AW testified that at first the defendant was really nice to her, he wanted to know everything about her and even wanted to meet her parents. Id. at 54-55. This was roughly around October of 2010. Id. at 55.

Shortly thereafter, the defendant took AW to California to work. Id. at 57-60. While there, Vicky Rogers, another prostitute, flew down and joined them. Id. at 57. Rogers would later become the defendant's wife, although she did not testify at trial. Id. at 57; 3/12/12 RP 68; 3/13/12 RP 23. When AW protested that Rogers was joining them, the defendant assaulted her. 2/14/12 RP 65. While in California, the girls worked strips in Oakland, San Francisco, Los Angeles, San Diego and then ended up in Las Vegas. Id. at 61.

Although she wanted to leave, AW said she had nothing and that the defendant still showed an interest in her. Id. at 65-66. All her money had to be handed over to the defendant, to the point where she had to ask

him for money if she wanted to eat. Id. at 66. And if AW did not meet her quota for the day, she had to stay out on the streets walking until she did. Id. at 68. The few times AW actually tried to leave, she was beaten. Id. at 73-74.

While in California, Rogers was arrested for working on one of the strips. Id. at 72. When the group returned to Seattle, Rogers and the defendant were very angry. Id. at 75. When they arrived at a Motel 6, the defendant beat AW, then left with Rogers, telling AW to get to work. Id. at 75. This was approximately December 22, 2010.

About a month later, AW tried to leave again. Id. at 78-79. She was gone for a few months, during which time the defendant repeatedly called her and threatened to kill her. Id. at 79. Finally, AW agreed to come back but only if Rogers was not around and she did not have walk the strips anymore. Id. at 80. The defendant agreed. Id. at 81. AW then started working for the defendant out of hotels in Tukwila and Everett. Id. at 81. This is when AW first met JB.

JB was 22 years old at the time of trial. 2/28/12 RP 92. Her divorced parents are both drug addicts. Id. at 93-94. As a result, she lived for a time with her grandmother in Las Vegas until she was injured in a car accident. Id. at 94. Needing help, she moved to Seattle and lived with

her father and brother while working at various minimum wage retail and fast-food establishments. Id. at 95.

JB turned to prostitution through a friend she had met in Kent who told her she could make $150 an hour. Id. at 97. Her friend posted an ad online for her and JB immediately got some clients. Id. at 98-99. The money was good but JB did suffer from a sense of guilt. Id. at 104.

One day in March, the defendant called JB claiming that he wanted a "date." Id. at 107. When he arrived at the hotel, stereo blasting, JB knew he wasn't a real client. Id. at 107-08. Still, JB talked with the defendant for about 25 minutes. Id. at 110. About a week later, AW called JB and invited her over to the hotel she and the defendant were sharing. Id. at 111. The defendant used AW to help convince JB that he was a wonderful guy. Id.

A few weeks after that, feeling lonely, JB texted the defendant and was invited over to the Ramada Inn where he was staying with AW. Id. at 113-14. AW and the defendant tried to cheer her up. They let her stay the night and said that she could post ads off the defendant's laptop if she wanted to. Id. at 114. The defendant told JB that she had a lot of potential and that she was not ugly. Id.

AW informed JB that she was the defendant's main bitch—the head prostitute. Id. at 116. Both AW and JB had dates that night and both

gave all their money to the defendant. Id. at 116-17. Thus, the defendant became JB's pimp; a person JB described as "a nice guy" who treated her with respect and without violence. Id. at 119, 121-22.

Each day the group would get a hotel room at about 3:00 p.m., and then JB would start working. Id. at 124. She was expected to bring in at least $500 each night. Id. at 133-34. Sometimes she was forced to work until 4:30 in the morning. Id. at 125. JB accepted the fact that she would have to give all her money to the defendant, but she also testified that she cared about him. Id. at 131. One time she didn't feel like working and the defendant let her go home. Id. However, after that, he told her there was money out there to be made and he did not want her to go home again. Id.

During this time period, AW became upset that the defendant was treating JB as well as her. Id. at 136. There were arguments about this which resulted in the defendant beating AW. Id. at 136, 140. On one occasion, the defendant began choking AW in a motel room, so JB went down and sat in her car. Id. at 140. The defendant then came down and put AW in the back seat, hitting her in the face and screaming at her. Id. at 141. When the defendant went back up to the hotel room to get some of his possessions, JB let AW out of the car. Id. at 142. When the defendant returned, he started screaming at JB for letting AW get away. Id. at 143.

A few days later, the defendant left to Tennessee because of a death in the family. Id. at 145. JB felt that she could finally leave the defendant, something she never would have done before out of fear of the defendant's violence. Id. JB then hooked up with AW and the two began working together. Id. at 146. This is also when JB met JJ. Id. at 146, 148. The three girls started working together. Id. The next time JB saw the defendant was at the Red Roof Inn in June. Id. at 149.

JJ (aka Mina) was 18 years old at the time of trial. 2/15/12 RP 120-21. Her father passed away when she was young. Id. at 123. She lived with her mother and her mother's boyfriend in Olympia until the age of 15, when she dropped out of school and moved out of the home because she was being abused. Id. at 124. JJ moved up to Renton and moved in with Boom (Wendell Downs), a man she had met through one of her friends. Id. at 125-26.

Boom soon became JJ's pimp. Id. at 127. Boom told JJ she needed to make some money and, being at a "vulnerable" time in her life, and with no other place to go, she did. Id. at 128-29. Only 16 years old, Boom would drop her off on Denny Way to work with one of his other girls. Id. at 129-31. On a good night, JJ would have anywhere from 8 to 14 clients. Id. at 138. All of the money went to Boom. Id. at 134.

JJ met the defendant one evening while she was driving around with Boom. Id. at 139. At that time, Boom and the defendant were good friends. Id. Sometimes it would be the defendant who would pick her up after she had worked the strip. Id. at 140. Over time, the defendant began trying to entice JJ into working for him. Id. at 143. He would tell her that Boom wasn't a real pimp. Id.

Ultimately, JJ left Boom and started working for herself. Id. at 145. About two or three weeks later, she ran into the defendant, who said he was going to California with a girl named Jazzy (AW). Id. at 148. JJ decided not to go with them because she wanted to get back together with Boom. Id. at 148.

Later, JJ got back together with Boom, but she got arrested, stopped working, and moved back in with her mother. Id. at 149. The defendant then started calling her, telling her that Boom was using her and saying that if she came and worked with him, he could give her "game." Id. at 151. JJ then started walking the Aurora strip and giving some of the money to the defendant. Id. at 151, 155. On one occasion, the defendant pulled out a pocketful of cash and showed it to JJ. Id. at 156-57. The defendant was very aggressive with JJ and she was very scared of him. Id. at 158. She then began working for the defendant full time. Id. On occasion, she would have sex with the defendant—out of fear—in

abandoned apartments along Aurora, after which, she would give him the money she had earned and then she would go back to working the strip. Id. at 159-61. JJ was only 17 years old, a fact that she testified the defendant knew. 2/16/12 RP at 20.

Before JJ met JB, she had already heard about her. Id. at 27-28. The defendant had told her that he had just "knocked" a white girl with blonde hair, meaning she was now his. Id. at 28. Sometime later, JJ got a call from AW, who had just recently left the defendant, and was at a hotel in Olympia with JB. Id. at 27, 29. JJ testified that when she saw AW, she was all beat up. Id. at 30. AW, JB and JJ worked together for a few weeks. Id. at 28-29; 2/28/12 RP 148.

The Red Roof Inn And Subsequent Rapes.

On June 19, 2011, JJ and JB got a room at the Red Roof Inn. 2/16/12 RP 31-32; 2/28/12 RP 151-52. They then posted ads on Backpage. 2/16/12 RP 37. Later, when JJ and JB went downstairs and stepped out of the elevator, they ran into the defendant, who just smirked at the two of them. 2/16/12 RP 42. When JJ and JB got to the parking lot, they took off running to their car. 2/16/12 RP 43. JJ then encouraged JB to talk to the defendant. 2/28/12 RP 155. JB relented and called the defendant, agreeing to talk to him in his car. 2/28/12 RP 156.

While sitting in the defendant's car, the defendant told JB that he missed her and that he had been thinking about her while he was in Tennessee. 2/29/12 RP 12. But JB told the defendant that she did not want to be with him anymore, she wanted to be with her ex-boyfriend, Bill. 2/28/12 RP 156; 2/29/12 RP 8-10. The defendant flew into a rage, choking JB out and calling her a stupid bitch. 2/28/12 RP 156.

At one point, JJ tried to intervene. 2/29/12 RP 14, 18. JB was able to get out of the defendant's car, but when she tried to get into her car, the defendant robbed her of her phone, wallet, car keys and the hotel room keycard. 2/29/12 RP 14. In a panic, JB had JJ call Bill to see if he could come and pick her up. 2/29/12 RP 20. They also called a person they knew as Kyle, a person they thought was the defendant's cousin, to see if he could come down, get the defendant to calm down, and get their stuff back. 2/29/12 RP 21-22.

Vicky Rogers then showed up on the scene and confronted JB. 2/29/12 RP 22. JB had never met Rogers before. Id. JJ intervened and was able to get Rogers to calm down. 2/29/12 RP at 23. Rogers and the defendant then began arguing. 2/29/12 RP 24. Kyle then showed up and everyone went up to the hotel room. 2/29/12 RP 24-25. After a while, the defendant and Rogers left the room. 2/29/12 RP 25. Bill then called and instructed JB and JJ to come outside. Id.

When JB and JJ came out of the elevator, they saw Bill and three of his friends—persons that they did not know, pointing guns at the defendant. 2/29/12 RP 25-26. Bill was telling the defendant to give up JB's possessions. 2/29/12 RP 26. Instead, the defendant said that he was going to beat JB's ass. Id. Bill and his friends then jumped the defendant. Id.

JB was able to grab her keys and one of her cell phones—her other items were not recovered—and run to her car with JJ. 2/29/12 RP 27, 51. Before driving off, JB got out of her car and smashed the window on the defendant's car. Id. JB and JJ ultimately ended up at JJ's father's house. 2/29/12 RP 54-55.

The defendant called JJ's phone repeatedly and threatened that he knew where they were and that he was on his way. 2/29/12 RP 55. He told the girls, "when I aim, I shoot." 2/29/12 RP 64. JB called 911 when they thought they were being shot at but what turned out to be a rock crashing through the front window of the house. 2/19/12 RP 56-58, 64. Peering outside, they could see Roger's car outside and the silhouette of a person they believed to be the defendant. 2/19/12 RP 57, 73-74. JB also discovered that the windows of her car that was parked in the driveway had been broken out. 2/19/12 RP 59. The defendant called into the house

while the police were present, asking JJ "how did you like that." 2/25/12 RP 56.

The next day the defendant called JB multiple times, asking her what she had told the police and whether he had made his point. 2/29/12 RP 74-75. The day after that, JB's phone began "ringing off the hook" with calls from the defendant. Id. at 76-79. The defendant told JB that he did not have a ride and did not have any money, and that he just wanted a ride to his mother's house. Id. at 79. Feeling sorry that he got beat up, JB drove to the Fred Meyer's store in Renton to pick up the defendant. Id. at 82.

When the defendant got into the car, he pointed a gun at JB and told her not to run and to be quiet. Id. at 85. The defendant had JB drive to the Riverside Casino in Tukwila, where they parked. Id. at 86. On the way, the defendant talked to someone on the phone, telling the person, "got the bitch." 3/1/12 RP 51. The defendant ordered JB to wrap a sweater around her face, that he was going to take her somewhere, and that if she cooperated, he would not hurt her. 2/29/12 RP 87.

A few minutes later, a car pulled up. Id. at 88. JB was placed in the trunk. Id. The defendant and an unknown driver then began driving to various locations while demanding that JB provide them with information about Bill. Id. at 91-93. There was a hole in the back seat of the car, a

hole the defendant used to stick the barrel of the gun through and order JB to put her mouth on it. Id. at 93-94. JB believed she was in the trunk for hours. Id. at 94.

At approximately 8:00 the next morning, the defendant took JB out of the trunk and put her in the car. Id. at 101. The defendant had JB perform oral sex on him, but he could not achieve an erection. Id. at 103-04. In anger, the defendant smacked JB and put her back in the trunk. Id. at 104. Later, when the unknown male returned, the defendant took JB back out of the trunk and put her in the car with the male. Id. at 105. She was then instructed to perform oral sex on him, after which she was put back in the trunk. Id. at 105-07. In both cases, JB complied because she feared for her life. Id. at 107-08.

Later, JB heard her car pull up. Id. at 110. The defendant put JB in her car and the two drove to Seward Park in Seattle. Id. at 110. The defendant said that he needed money and he ordered JB to try and arrange for some dates with her regular customers. Id. at 116. The defendant then dropped off JB at a Motel 6 so she could work. Id. at 120, 122. Police, who had been looking for JB overnight, were able to locate JB at the hotel. Id. at 122; 3/7/12 RP 9-25. The defendant was subsequently arrested. 3/6/12 RP 88.

At trial, the defendant testified that he knew AW was a prostitute, that he had an intimate relationship with her, but that he was not her pimp. 3/12/12 RP 113, 115, 117; 3/13/12 RP 81. He admitted at trial that he lied to a detective when he told the detective that he had not known what AW did for a living. 3/13/12 RP 92-93. Phone records showed over 1800 contacts with AW, to which the defendant responded that he knew AW well and that people may call him a pimp in regards to his relationship with AW, but in reality, it was really just two people each providing something to the relationship. 3/13/12 RP 114-15.

At trial, the defendant testified that he knew JJ because she was Boom's girl. 3/12/12 RP 127-28. He said that he assumed she was 18 years old. Id. at 28. Initially, he claimed that he had contact with JJ on only two occasions and that he did not have phone or text message contact with her. Id. at 124-27; 3/13/12 RP 83-84. He denied being JJ's pimp. 3/13/12 RP 138. He admitted that he told a detective that JJ would give him money, but he claimed that he lied when he told the detective this. 3/13/12 RP 89-90. When confronted with phone records that showed 81 contacts with JJ during a short period of time, the defendant professed to have no memory of the contacts. 3/13/12 RP 93.

At trial, the defendant testified that he also knew JB, having met her while hanging out with one of his homeboys. 3/13/12 RP 131. He

professed that he only saw her or contacted her a few times. 3/13/12 RP 131-38. When the defendant was confronted with phone records that showed over 800 contacts with JB, the defendant claimed that he was not specifically asked about these interactions. 3/13/12 RP 99-100.

The defendant admitted that he was at the Red Roof Inn and that he got jumped, but from there, he denied that any of the other events listed above actually occurred. 3/13/12 RP 11-23. After the defendant got jumped, he claimed that he spent the next few days with his wife, Vicky Rogers, at Rogers' mother's house. 3/13/12 RP 25-29. He claimed that the gun he was ultimately arrested with was purchased from Boom after he was jumped. 3/13/12 RP 30-31.

Rebuttal testimony was presented that showed the location of the defendant's cell phone over the time period the defendant was alleged to have kidnapped and raped JB. 3/14/12 RP 65-74. It was shown that the phone travelled to various locations in Kent, Renton and Seward Park in Seattle. Id.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS WITHOUT MERIT.

The defendant contends that his convictions must be reversed because his trial counsel was constitutionally ineffective during plea negotiations. This claim must be rejected. There are no facts in the record that support the defendant's claim, and, in any event, he cannot meet the Supreme Court's test for ineffective assistance of counsel during plea negotiations.

a. Representation Of The Defendant And The Sentencing Hearing.

On June 28, 2011, charges were filed against the defendant. CP 1-8. Defense attorney Jesse Dubow of Northwest Defenders Association was appointed to represent the defendant. CP 565-68. Dubow represented the defendant for approximately three months, until September 14, 2011, when the defendant was given the permission to represent himself and proceed *pro se*. CP 99. Dubow remained on the case as standby counsel. CP 569, 570.

On December 5, 2011, longtime defense attorney Phil Mahoney[2] substituted in as standby counsel for Dubow. CP 570-72. Then, on December 28, 2011, the defendant relinquished his pro se status and

[2]Mahoney has been practicing law for over 40 years. See https://www.mywsba.org/LawyerDirectory/LawyerProfile.aspx?Usr_ID=1292

agreed to have Mahoney undertake full representation of his case. CP 580. The defendant proceeded to trial and on March 20, 2012, he was convicted on the charges listed in section B 1 above. CP 343-50. Sentencing was scheduled for April 20, 2012. CP 573-74.

Prior to April 20, 2012, defense counsel received the Department of Corrections presentence report and the State's presentence report. CP 575-77. Counsel then moved to continue the sentencing hearing until April 27, 2012. Id. The court granted the defendant's motion. CP 578-79. The court also ordered that the defendant submit any briefing and legal arguments to the court and counsel not later than April 24, 2012. Id.

The defendant was sentenced on April 27, 2012. At the sentencing hearing, defense counsel informed the court that he now wanted to raise an issue that he and the defendant had previously discussed. 4/27/12 RP 21. Specifically, he wanted to raise an issue of ineffective assistance of counsel during plea negotiations. No notice had been provided to the court or opposing counsel about the motion. Id. at 24. Counsel also did not provide any briefing or legal authority supporting the motion as required by the court order entered on April 19, 2012. Id. at 22-23; CP 579.

The court ruled that the motion was untimely. Id. at 22. The court indicated that there were no written materials or briefing and there was

also the "quagmire" of not knowing what occurred during the time period when prior counsel represented the defendant, and the time period of when the defendant was proceeding pro se. Id.[3]

Defense counsel then stated that he had a copy of an old memo from the State (dated January 4, 2012), that discussed a proposed plea offer. See CP 491-94. When asked why he had not made a copy for the court or the State, counsel explained, "I had not anticipated making that argument at this time." Id. at 23.

After a recess, and after receiving a copy of the memo, the court told counsel that he had the opportunity to "give me a case," that would illustrate how the defendant's rights had been violated. Id. at 24. Counsel stated that he could not cite any legal authority, but that he wanted to make an offer of proof wherein he would claim his client was misled as to the consequences of being convicted at trial based on the State's plea offer, and that this is why the defendant did not accept the plea deal. Id. at 24. Counsel then referred vaguely to the possibility that some of the counts could be served consecutively. Id. at 24. Counsel did not provide

[3] More than legal briefing would have been required to decide such a motion; factual determinations would have to be made. At a minimum, the State would have sought review/discovery of the non work-product portions of Dubow's and Mahoney's case files. The defendant would have had to waive attorney-client privilege, or the court would have had to enter an order to such effect, so that both attorneys could be interviewed by the State and called as a witness by either the State or defendant. Substitute counsel would have had to be appointed and the defendant would have had to testify and be subject to cross-examination by the State.

an affidavit from the defendant attesting to any facts, nor did he offer the testimony of the defendant. Counsel also did not request a continuance, and neither counsel nor the defendant requested that the court appoint new counsel.

The court did not change its ruling. The court stated that in order to address the matter, the sentencing hearing would have to be delayed and new counsel possibly appointed. Id. at 25. The court refused to change its ruling that the motion was untimely. Id. at 26.

b. The Contingent Proposed Plea Offer.

In the January 4th memorandum, the prosecutor outlined a proposed plea bargain that was, by its express terms (1) contingent upon discussions with the victims and (2) had to be accepted by the close of business -- January 12, 2012. CP 493-94. In the plea offer, the prosecutor outlined the charges the defendant then currently faced, the known prior criminal history of the defendant, the three other pending felony cases the defendant faced, the standard ranges for each offense based on an offender score of nine, and a proposed contingent plea offer.

The prosecutor indicated that the defendant had four prior felony convictions that counted in his offender score. The priors, all juvenile felony convictions, are as follows:

Conviction 1: Violation of the Uniform Controlled Substances Act

Conviction 2: Attempted Residential Burglary

Conviction 3: Assault in the Second Degree Classified as a "violent offense" per RCW 9.94A.030(54)

Conviction 4: Theft in the First Degree

The defendant also had the following pending cases:

Charge 1: Attempting to Elude a Pursuing Police Vehicle

Charge 2: Violation of the Uniform Controlled Substances Act

Charge 3: Unlawful Possession of a Firearm

The following is a list of the seven charges the defendant faced in January of 2012,[4] along with the standard range for each offense as listed by the prosecutor based on an offender score of a nine:[5]

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[4] On appeal, the defendant states that the memo listed the "eight criminal charges" he faced. This is not correct. The defendant apparently missed the fact that the charges the defendant faced in January of 2012 were not the same as the charges he faced at trial. At trial, the defendant faced an additional charge of Unlawful Possession of a Firearm (count VIII), and the State reduced the First-Degree Robbery charge (count IV) to Second-Degree Robbery. CP 445-48, 493.

[5] The prosecutor stated that these were the sentence ranges for each offense "[i]f he is maxed out." CP 493. Under the SRA sentencing grid, the top of the range is reached with an offender score of nine. RCW 9.94A.510.

Ct I: Promoting Commercial Sex Abuse of a Minor
Classified as a "sex offense" and a "violent offense" per RCW 9.94A.030(46) and (54)
Standard range: 240-318

Ct II: Promoting Prostitution in the Second Degree
Standard range: 51-60

Ct III: Kidnapping in the First Degree
Classified as a "serious violent offense" per RCW 9.94A.030(45)
Standard range: 149-198

Ct IV: Robbery in the First Degree
Classified as a "violent offense" per RCW 9.94A.030(54)
Standard range: 129-171

Ct V: Promoting Prostitution in the First Degree
Standard range: 108-120

Ct VI: Rape in the First Degree
Classified as a "sex offense" and "serious violent offense" per RCW 9.94A.030(45) and (46)
Standard range: 240-318

Ct VII: Rape in the First Degree
Classified as a "sex offense" and "serious violent offense" per RCW 9.94A.030(45) and (46)
Standard range: 240-318

All of the standard ranges are accurate for a person with an offender score of nine. See RCW 9.94A.510. Also, for each charge listed as a "serious violent offense," an offender score of nine is reached *without* inclusion of any counts that could conceivably be served consecutively

under RCW 9.94A.589(1)(b), i.e., other "serious violent offenses."[6] For example, in scoring count VI, Rape in the First Degree, the defendant would receive three points for his juvenile convictions,[7] three points for count I,[8] two points for count IV,[9] and two points for counts II and V.[10]

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[6] RCW 9.94A.589, titled "Consecutive or concurrent sentences" provides in pertinent part that:

> (1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.
>
> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

[7] As a "violent offense," the second-degree assault conviction counted as two points, while the other three juvenile convictions counted one-half point each, for a total of three and a half points, rounded down to three. RCW 9.94A.525(9).

[8] Count I, Promoting Commercial Sexual Abuse of a Minor, as a "sex offense," it counts as three points. RCW 9.94A.525(17).

[9] Count IV, Robbery in the First Degree, as a "violent offense," it counts as two points. RCW 9.94A.525(9).

[10] Counts II and V are non-sex, non-violent offenses that count as one point each. RCW 9.94A.525(9).

Thus, without even including his other three pending felony counts on other cases, and the other "serious violent offenses," the defendant's offender score on this count would be a ten.

The prosecutor then indicated that following trial, "***if*** the defendant is maxed out following trial and convicted ***of any rape or the PCSABM*** charge," the State would recommend the high end of the standard range or 318 months, plus the 60 month firearm enhancement, for a total of 378 months. CP 493 (emphasis added). The prosecutor did not indicate what the defendant's sentencing consequences would be if he were convicted on all counts, nor did he make any statement regarding the possibility of consecutive sentences being imposed for the "serious violent offenses" under RCW 9.94A.589(1)(b), if he were convicted on more than one "serious violent offense."

The prosecutor then outlined a potential resolution, stating "we are prepared to discuss the following resolution with your client (final resolution is dependent on reviewing the proposed resolution with the victims)." CP 493. The proposed resolution would have the defendant pleading guilty to the following six counts, with all other pending charges dismissed or not filed:

Ct I: Promoting Prostitution in the First Degree
Standard range: 77-102

Ct II: Promoting Prostitution in the Second Degree
Standard range: 33-43

Ct III: Kidnapping in the First Degree
Standard range: 149-198

Ct IV: Robbery in the Second Degree
Standard range: 63-84

Ct V: Promoting Prostitution in the First Degree
Standard range: 77-102

Ct VI: Rape in the Second Degree
Standard range: 210-280

CP 493. The parties would agree to a recommendation of 210 months. Id.

c. Standard Of Review.

In order to prevail on an ineffective assistance of counsel claim, the defendant must prove that (1) trial counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel's errors the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To show deficient performance, the defendant has the "heavy burden of showing that his attorney made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment."

Strickland, 466 U.S. at 687. If either part of the test is not satisfied, the inquiry need go no further. Hendrickson, 129 Wn.2d at 78.

In reviewing ineffective assistance of counsel claims, a reviewing court begins with the strong presumption that counsel has rendered adequate assistance. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices." In re Elmore, 162 Wn.2d 236, 253, 172 P.3d 335 (2007).

The Supreme Court has recently held that the Sixth Amendment right to counsel extends to the negotiation stage of a case and the consideration of plea offers:

> This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.

Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012). In circumstances where a formal plea offer was extended by a prosecutor and allegedly not relayed to a defendant by his trial counsel, and where the defendant then proceeded to trial and was convicted at a fair trial, a defendant alleging ineffective assistance of counsel must meet certain requirements. These requirements help ensure against late,

frivolous, or fabricated claims made after a trial that led to a conviction with more severe consequences. Id. at 1408-09.

First, a defendant must prove that a formal plea offer was extended to trial counsel and not relayed to the defendant. Id. This is essentially the first part, or performance prong, of the test under Strickland for ineffective assistance of counsel. Id. If this part of the test is proven, a defendant must demonstrate two things to prove prejudice.

First, he must prove that there is a reasonable probability that he would have accepted the plea offer had he been afforded the opportunity to do so. This "requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed." Id. at 1410. To this end, it is necessary to show a reasonable probability that the end result would have been "more favorable by reason of a plea." Id. at 1409. Second, he must prove that there is a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it. Id.

Finally, as a remedy upon proof of such a claim, a defendant is entitled to have the State reoffer the plea agreement. Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376, 1391, 182 L. Ed. 2d 398 (2012). The remedy must "neutralize the taint" of the violation, while at the same time

not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution. Id. at 1388-89.

Here, unlike the situation in Frye, the defendant contends that a formal offer was made, that the offer was in fact relayed to him by his attorney, but that the offer was incorrect in that it did not treat the first-degree rape charges and first-degree kidnapping charge as consecutive sentences when discussing the sentence he potentially faced. He then claims that his counsel relied on the State's error and thus his counsel was constitutionally ineffective because he would have pled guilty otherwise. The defendant's claim fails for multiple reasons.

First, the defendant is incorrect in his claim that the State's memorandum was in error because it did not treat the serious violent offenses as consecutive sentences.[11] Specifically, the defendant contends that "by failing to identify the rape and kidnapping counts as counts that had to be served consecutively, the State underestimated Mobley's

[11] It should be noted that the actual plea offer -- the charges the defendant would have pled to, do not contain any charges that would, by statute, potentially run consecutive to each other, i.e., there were no "serious violent offenses." The only way charges could have been served consecutively is if the court were to impose an exceptional sentence pursuant to RCW 9.94A.535(3); see also State v. Batista, 116 Wn.2d 777, 785-86, 808 P.2d 1141 (1991) (recognizing the trial court's authority to impose an exceptional sentence by lengthening concurrent sentences or imposing consecutive sentences).

maximum sentence by as much as 251 months." Def. br. at 23. This is simply incorrect.

The defendant seems to assume that when the State was outlining potential consequences if he went to trial, the State was providing him with the worst case scenario, the maximum possible sentence if he were convicted on all charges. This is an incorrect reading of the memorandum. The memorandum never discussed the defendant's maximum potential sentence if he were convicted on all counts or multiple rape and kidnapping counts – a situation which would have *potentially* led to consecutive sentences.[12] Rather, the prosecutor gave correct standard ranges for each offense based on the assumption of an offender score of nine, an assumption that did not include scoring or inclusion of the other "serious violent offenses." Additionally, when the prosecutor indicated what his recommendation would be if the defendant were convicted at

[12] When a person has been convicted of more than one "serious violent offense," upon a finding by the sentencing court that the offenses are "separate and distinct criminal conduct," the offenses are served consecutive to each other. RCW 9.94A.589(1)(b). Serious violent offenses that arise out the "same criminal conduct" are served concurrently. RCW 9.94A.589(1)(a) and (b). The phrases "separate and distinct criminal conduct" and "same criminal conduct" are opposites. In re Delgado, 149 Wn. App. 223, 239-40, 204 P.3d 936 (2009) (citing State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999)). "Same criminal conduct," means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). Thus, if "serious violent offenses" arise out of the "same criminal conduct," they are served concurrently, not consecutively.

trial, he indicated what his recommendation would be *if* the defendant was convicted of *one* of the rape charges or the commercial sex abuse of a minor charge. Thus, the basic premise of the defendant's argument fails.

Additionally, after trial, the defendant faced a standard range sentence of 333 to 458 months.[13] The range he potentially faced based on the State's memorandum if the defendant was convicted on one of the rape charges or the promoting commercial sexual abuse of a minor was 300 to 378 months. Thus, the defendant's claim that he would have accepted the plea but for the State underestimating by 251 months his potential sentence is not supported by the record. He cannot show that there is a reasonable probability that the minimal difference in potential penalty would have been so great that he would have accepted a plea rather than going to trial.

Next is the fact that this was a contingent offer, contingent on the date it had to be accepted and contingent of discussions with the multiple victims. This too is a critical point because, as stated in Missouri v. Frye, if there is a question as to whether the State would have canceled the offer

[13] This does not include the first-degree kidnapping conviction (count III), because the State concedes the kidnapping conviction merges with the first-degree rape convictions under the double jeopardy merger doctrine. See section C 6 below.

before the plea was entered, a claim of ineffective assistance of counsel fails. Id. at 1410-11.[14]

In Missouri v. Frye, an offer was made to a reduced charge with a certain time limit to accept the plea offer. However, prior to the hearing where a plea could have been entered, Frye committed another criminal offense. The Supreme Court stated that while Frye could show that he would have accepted the offer had he known about it, there was reason to doubt that the prosecution and the trial court would have permitted the plea bargain to become final. Id. at 1411.

Here, there were two contingencies, time and victim input. As part of the Strickland test, the defendant must prove that his attorney's deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. The defendant cannot show that this potential plea offer would have gone through. It would be pure speculation at this point, insufficient to support an ineffective assistance of counsel claim.

Of even more import is the lack of a factual record. An issue that involves matters outside the trial record will not be considered on direct

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[14] A plea agreement is a contract between a defendant and the State. State v. Talley, 134 Wn.2d 176, 182, 949 P.2d 358 (1998). The State may withdraw from any plea agreement prior to the actual entry of a guilty plea. State v. Yates, 161 Wn.2d 714, 741, 168 P.3d 359 (2007).

appeal. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The proper procedure for raising issues dependent on matters outside the record is by way of a personal restraint petition. McFarland, 127 Wn.2d at 335 (rejecting the defendant ineffective assistance of counsel claim based on matters outside the record); State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10 (1991) ("A criminal defendant's claim of ineffective assistance or representation based upon information not in the record will not be considered in an appeal of the judgment"); State v. Blight, 89 Wn.2d 38, 45-47, 569 P.2d 1129 (1977) (Rejecting defendant's claim because "[w]e may not speculate upon the existence of facts that do not appear in the record" and averments are "not a substitute for evidence").

Here, there are no factual determinations made by the trial court. There was no hearing held. This Court does not know what specific information his trial counsel, Phil Mahoney, gave the defendant. This Court does not know what information his prior counsel, Jesse Dubow, gave the defendant. This Court does not know what conversations took place between the defendant and the prosecutor during the time period the defendant was acting *pro se*. This Court does not know whether the defendant would have pled to any charges as the trial court never made any credibility determinations and no facts were presented to and ruled on by the trial court. In short, any validity to the defendant's claim depends

on matters outside the trial court record. Thus, the defendant cannot prevail here—beyond pure speculation, there are no facts in the record to rule in his favor.

2. THE PROSECUTOR'S PEREMPTORY CHALLENGE TO JUROR 91 WAS CONSISTENT WITH EQUAL PROTECTION PRINCIPLES – THERE IS NO EVIDENCE IT WAS RACIALLY MOTIVATED.

There were two African Americans on the jury venire at the time in question, juror number 80 and juror number 91.[15] Although almost the entire *voir dire* discussion pertained to the jurors' feelings about, and perceptions of, prostitutes and pimps, juror 91 failed to disclose until after the State had completed its portion of *voir dire*, that multiple members of her family -- including her own mother, were prostitutes. The State then exercised a peremptory challenge on juror 91. The State did not exercise a challenge to juror 80, who was ultimately seated on the jury. The defendant now claims his conviction must be reversed because, he asserts, the State's exercise of its peremptory challenge as to juror 91 was racially motivated. This claim is not supported by the record.

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[15] There may have been more African Americans in the jury venire. The record reflects only the number of African Americans that remained in the venire after the court and the parties had already excused a large number of other jurors for hardship and for cause.

a. Batson And Claims Of Purposeful Discrimination.

In Batson v. Kentucky,[16] the Supreme Court addressed the ability and limitations of the trial court in interjecting itself into the jury selection process where there is an allegation of purposeful racial discrimination. The Court recognized that the peremptory challenge system is a necessary and important part of trial by jury, and that peremptory challenges were historically exercised by the parties free from any judicial control and interference.[17] Batson, 476 U.S. at 91 n.15, (citing Swain v. Arizona, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)). However, where there is evidence of purposeful discrimination in the jury selection process, the Court recognized that under the Equal Protection Clause, a trial court must intervene. Id. The Court announced a three-part test that sought to balance the "historical privilege of peremptory challenge free of judicial control," with the Equal Protection Clause that forbids either party from "challeng[ing] potential jurors solely on account of their race." Id. at 89, 91. The Court started with the acknowledgement that "[a]s in any equal protection case, the burden is, of course, on the defendant who

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[16] 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[17] In Washington, the right to exercise a peremptory challenge free from judicial control is also codified by statute. A peremptory challenge is defined as "an objection to a juror for which no reason need be given, but upon which the court shall exclude the juror." RCW 4.44.140; see also RCW 4.44.210.

alleges discriminatory selection of the *venire* to prove the existence of purposeful discrimination." Id. at 93.

First, a party raising such a challenge must make a *prima facie* showing of purposeful discrimination. Id. at 96. To make such a showing, a party must provide evidence that raises an "inference" that a peremptory challenge was used to exclude a *venire* member on account of the member's race. Id. An inference, the Court would later note, "is generally understood to be a conclusion reached by considering other facts and deducing a logical consequence from them." Johnson v. California, 545 U.S. 162, 168 n.4, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (citing Black's Law Dictionary 781 (7th ed. 1999)). An inference is not simply an allegation or a guess.

Second, if, and only if, a party raises an inference of purposeful discrimination, then the burden shifts to the opposing party to provide a race-neutral explanation for challenging the *venire* member. Batson, at 97. Importantly, the reasons given need not rise to the level justifying the exercise of a challenge for cause. Id.

Third, the trial court must then determine whether the challenging party has established purposeful discrimination, i.e., that the exercise of the peremptory challenge was racially motivated. Id. at 98.

b. The Defendant Bears The Burden Of Proving That The Trial Court's Ruling Was Clearly Erroneous.

In this case, even though the defendant never attempted to make a *prima facie* showing of purposeful discrimination, the prosecutor offered race-neutral reasons on his own accord, thus, the only issue necessary for this Court to decide pertains to step number three, the trial court's finding that there were race-neutral reasons to allow the State to exercise a peremptory challenge. See State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (if the prosecutor has offered a race-neutral explanation and the trial court has ruled on the question of racial motivation, the preliminary *prima facie* case is unnecessary) (citing Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

A trial court's decision that a challenge is race-neutral is a factual determination based in part on the answers provided by the juror, as well as an assessment of the demeanor and credibility of the juror and the attorney. Batson, at 98 n.21; Hernandez, 500 U.S. at 365. The defendant carries the burden of proving the existence of purposeful discrimination.

Batson, at 93. The determination of the trial judge is "accorded great deference on appeal," and will be upheld unless proven by the defendant to be "clearly erroneous." Hernandez, at 364.

c. The Facts.

At the beginning of *voir dire*, many jurors indicated that they wanted to be questioned outside the presence of the other jurors in regards to having either a close friend or family member who had been sexually assaulted. 2/7/12 RP 38. Juror 91 was one of the jurors who was questioned individually. Id. at 38, 43-46. This would have been an excellent opportunity for juror 91 to disclose that multiple members of her family were prostitutes, but she did not. Id.

Subsequently, the parties commenced with general *voir dire*, with the State and defense each allowed two 30 minute periods. 2/7/12 RP 10; 2/9/12 RP 55-141. Immediately the discussion turned to the jurors' perceptions of prostitution, including whether television and movies such as Pretty Woman, accurately portrayed the life of a prostitute. 2/9/12 RP

57-91. Beyond saying that "[t]hey [Hollywood] don't have all the facts," juror 91 did not disclose that she had personal knowledge of the world of prostitution. Id. at 57.

The defense then conducted its 30 minutes of *voir dire*, with juror 91 again standing mute in regards to disclosing this critical information about her family. Id. at 76-95. The same is true during the State's next 30 minute round. Id. at 102-41. While juror 91 disclosed that she had aunts and uncles who had been charged with drug crimes, she again failed to disclose that multiple family members were prostitutes. Id. at 130. Additionally, in concluding his last round of *voir dire*, the prosecutor asked if anyone knew of anything that the parties should know about, anything that they did not answer because maybe the question was not asked in the right manner or to the right person. Id. at 133. While multiple jurors responded to this question, juror 91 did not. Id. at 133-41.

Finally, during defense counsel's last round of *voir dire*, juror 91 disclosed that her own mother, three cousins, and two aunts had prostituted themselves. Id. at 144. Besides saying that they got into the trade because of desperation and drugs, defense counsel asked no other question of juror 91 regarding her knowledge of the prostitution trade, her feelings towards her family members in the trade, her feelings about

prostitutes in general, or her biases or prejudices regarding the issue. Id. at 144-45.[18]

At the conclusion of *voir dire*, the prosecutor informed the court that he intended to exercise a peremptory challenge on juror 91. No Batson challenge was raised by the defense; rather, the prosecutor raised the issue on his own accord. Id. at 171. Defense counsel *never* claimed the exercise of the peremptory challenge on juror 91 was racially motivated. Instead, he stated that he found it objectionable because there were only two blacks left on the jury venire. Id. at 173.

The prosecutor then volunteered to put his race-neutral reasons for exercising a challenge on the record. Id. The prosecutor described

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[18] The defendant contends that juror 91 was asked if this would create any bias or prejudice, to which he claims juror 91 responded, "I would be totally fair." Def. br. at 33. This is not accurate. Defense counsel had switched topics. What defense counsel asked juror 91 was whether the fact that because she and the defendant were both black, she would be biased against him because she did not want him to be seen as representing all blacks.

> Defense counsel: One of the things that worries me...is that people may have a reaction against him which would be one of perhaps having a bias, even if subtle, against him because they don't want other people to feel that he represents them. Of course, you're both black Americans.
>
> Juror 91: Right.
>
> Defense counsel: Do you think that you would have that attitude towards Mr. Mobley?
>
> Juror 91: That I would have a bias towards him or –
>
> Defense counsel: Yes, that you would – you would feel somehow you're back in the jury room with all these other jurors and there are very few black persons in this panel ... and that you might feel that you would be biased in considering him because you wouldn't want people to feel that he represented you?
>
> Juror 91: No absolutely not. I would be totally fair (inaudible)

2/9/12 RP 145-46.

juror 91's late disclosure about her family members being prostitutes as a "bombshell." Id. at 175. He found it incredulous that juror 91 did not provide this information sooner or in response to any other question. He found it difficult to understand how juror 91 would not have believed that the information was something important the parties would have wanted to know about when he specifically asked if any juror had any important information that would be important for the parties to know. Id. at 173. The prosecutor added that he did not know juror 91's opinion or biases about women who prostitute themselves. "I absolutely cannot seat a juror," the prosecutor stated, "with that type of experience level, where I know no information about how she thinks about it." Id. Especially, the prosecutor added, when this was the "whole centerpiece of the State's case." Id. at 174.

Again the defense did not point to anything indicating that the exercise of the peremptory challenge was racially motivated. The court then ruled that the State's exercise of a peremptory challenge was proper and that there was "no race-based reasons for her exclusion or challenge by the State." Id. at 175.

The parties then exercised their peremptory challenges to the venire. Id. at 179-81. The State chose to accept juror 80, the other African American on the venire, even though the prosecutor had

challenges left to use. Id. at 179. Juror 80 was seated on the jury. Id. at 193. Juror 91 was excused. Id. at 180.

d. The Defendant's Claim Is Not Supported By The Record.

Here, before the trial court, there was no suggestion, allegation, proof or finding that the challenge as to juror 91 was exercised because of the juror's race. The State provided a race-neutral reason for exercising a peremptory challenge, and the court's finding that the defendant failed to meet his burden of proving purposeful discrimination was sound and should be affirmed.

In State v. Vreen,[19] the defendant exercised a peremptory challenge against the only African American on the venire. Vreen argued that he should have been permitted to use a peremptory challenge because the juror was a pastor, a retired military veteran, and he believed the juror's authoritarian background would lead the juror to favor the State. The trial court found this was insufficient to overcome a prima facie case of a racial motivation based on the challenge to the lone African American juror. The court of appeals disagreed, finding that even if "the trial court's determination that the State made a prima facie showing of discrimination was correct, the defense provided a race-neutral explanation for the

[19] 99 Wn. App. 662, 994 P.2d 905 (2000), aff'd, 143 Wn.2d 923 (2001).

peremptory challenge." Vreen, 99 Wn. App. at 667. Vreen's conviction was thus reversed.

There is no place for purposeful discrimination in selecting a jury. There is also no place for trying to create racially motived reasons where none exist. The defense provides no explanation as to how the exercise of a challenge to juror 91 can be viewed as racially motivated when the prosecutor left on the jury the only other African American in the venire. It would be nonsensical to view the prosecutor's actions here as racially motivated. All that the defendant points to on appeal is the fact that the prosecutor did not seek the court's permission to ask juror 91 more questions after *voir dire* had been concluded. But the defendant cites to no case law that says courts must now treat persons of color differently during the *voir dire* process, that persons of color must be subjected to additional questioning after the *voir dire* process is over, otherwise the juror either cannot be struck, or if the juror is struck, then there must be a finding that the challenge was racially motivated.

There was no motive to strike juror 91 based on her race while leaving a person of the same race on the jury. The prosecutor provided a race-neutral reason to strike juror 91. The defendant simply cannot show that the trial court's decision to allow the State to exercise a peremptory challenge was clearly erroneous.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY ON THE PROSTITUTION TRADE, A SUBJECT OUTSIDE THE COMMON EXPERIENCE OF THE AVERAGE JUROR.

The defendant argues that the trial court abused its discretion in allowing the State to present expert testimony from Sergeant Ryan Long regarding the prostitution trade. He argues that the testimony was cumulative and unfairly prejudicial. This claim should be rejected. The trial court exercised sound discretion in admitting expert testimony on a subject that is outside the common experience of the average juror.

Under ER 702, a witness with "scientific, technical, or other specialized knowledge" may testify at trial if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. The testimony may assist the trier of fact when the testimony "concerns matters beyond the common knowledge of the average layperson and does not mislead the jury." State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004), rev. denied, 154 Wn.2d 1026 (2005).

The decision to admit expert testimony is addressed to the sound discretion of the trial court. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). An abuse of discretion is found only where the defendant can show that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

Both the Washington Supreme Court and this Court have previously held that a trial court exercises sound discretion in admitting expert testimony regarding the general practices of the prostitution trade. State v. Yates, 161 Wn.2d 714, 168 P.2d 359 (2007), cert. denied, 554 U.S. 922 (2008); State v. Simon, 64 Wn. App. 948, 831 P.2d 139 (1991), rev'd in part on other grounds, 120 Wn.2d 196 (1992).

In Yates, the trial court permitted expert testimony on "the general practices of prostitution." Yates, 161 Wn.2d at 765. The Supreme Court upheld the trial court's decision, stating that the "testimony was properly admitted under ER 702." Id. at 766.

In Simon, a promoting prostitution case, the expert testimony in question was the testimony of a police detective with extensive experience investigating prostitution cases who testified "regarding the pimp/prostitute relationship." Simon, 64 Wn. App. at 964. This Court held that the trial court did not abuse its discretion in admitting the evidence because "the average juror would not likely know of the mores of the pimp/prostitute world," and because the detective testified "in general terms" rather than expressing an improper opinion on the defendant's guilt. Id. Such is the case here.

Prior to trial, the defendant raised an objection to the admission of expert testimony to be provided by Sergeant Ryan Long regarding the

culture of the prostitution trade. 2/13/12 RP 61. Counsel claimed that "prostitution is a matter of common knowledge," and therefore expert testimony is not necessary. Id. at 82. The court denied the defendant's motion to exclude the testimony, holding that Sergeant Long was highly qualified, possessed "specialized knowledge" of the prostitution trade, and that the testimony would be helpful to the jury. Id. at 82-85.

Sergeant Long is a 16 year veteran of the Seattle Police Department, having worked both uniformed foot beat and plain-clothes proactive assignments in the high prostitution West Precinct area. Id. at 64-65. In charge of the investigative arm of the Vice Unit for five years, Sergeant Long was a member of the FBI Innocence Lost Task Force and has taught multiple classes on the subject of prostitution. Id. at 64, 72, 75-77. He has testified before Congress, the State legislature and nearly a dozen times in court as an expert witness. Id. During his career, Sergeant Long has interacted with known or suspected prostitutes over 2500 times and investigated over 250 cases involving suspected pimps. Id. at 67-69.

Here, Sergeant Long testified about the general practices of the prostitution trade in the Puget Sound region. He identified the areas of the region where street prostitution is common, the stages of prostitution recruitment, the general terminology used in the trade, and the rules

governing the pimp/prostitution relationship. Id. at 107-26; 2/15/12 RP 18-29.

The defendant argues on appeal that Sergeant Long's testimony was cumulative in that the victims in the case could have provided the same testimony. This argument carries little weight. The victims in this case could only testify from the prospective of their own limited experience of having been drawn into the prostitution trade. They were fact witnesses that the defense claimed were not credible. Further, they could not testify about the reasons, tactics and dynamics used by pimps in bringing young girls into the trade, or as used in this case, getting young girls to move from one pimp to another.

The defendant also claims the testimony was overly prejudicial, that somehow Sergeant Long was vouching for the credibility of the witnesses. But Sergeant Long testified that he did no investigation in this case. 2/15/12 RP at 31. Further, he never opined as to the veracity of the witnesses or the guilt of the defendant. His testimony was properly limited to providing expert testimony that the jurors could use in evaluating the factual testimony related directly to the case.

In addition, the defendant claims that Sergeant Long's testimony was overly prejudicial because he analogized a pimp/prostitute relationship to a domestic violence relationship. Def. br. at 44. Along this

line, he claims that violence was not part of the relationships that existed in this case. Id. The defendant's argument fails for multiple reasons.

If the defendant had an objection to Sergeant Long's use of this particular analogy, he could have raised an objection. He did not. Thus, the issue is waived because use of what the defendant now claims is a prejudicial analogy is a different issue, requiring a different objection, then claiming that the expert testimony was improperly admitted.[20]

In any event, Sergeant Long's limited use of an analogy was apt and useful. He testified that "the most common analogy that I could offer you is the cycle of violence for domestic violence." 2/13/12 RP at 115. He then explained how the pimp/prostitute relationship has a honeymoon phase where the prostitute is showered with affection, followed by a controlling or abusive phase. Id. at 115-21. Despite the abuse, the prostitute will continue to stay with the pimp based on her "need to make him happy," the desire to get "that good, positive feeling back" from "somebody who cares about me." Id. at 115. Intervention usually fails because the victim tells herself that "I must have done something wrong to make him act the way he was acting." Id. at 116. The cycle of domestic

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[20] A party may only assign error in the appellate court on the specific ground of the evidence objection made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985), cert. denied, 475 U.S. 1020 (1986). An objection must be sufficiently specific to inform the trial court and opposing counsel of the basis for the objection and to thereby give them an opportunity to correct the alleged error. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

violence is something much more commonly understood by jurors, and thus, the analogy was a good way to help explain the pimp/prostitute relationship.

Furthermore, the defendant's claim that violence was not a part of the relationships in this case is specious. The defendant was accused of putting a gun in JB's mouth and raping her. This is hardly a non-violent act. Additionally, just some of the testimony of AW demonstrates the falseness of the defendant's claim. AW testified that the defendant initially seemed "nice," that "he cared," but that if she tried to leave him, he would beat her. 2/14/12 RP 52, 73-75. On other occasions, the defendant would threaten to kill her. Id. at 79-80, 95. During one incident, the defendant yanked AW out of a moving car by her hair and then beat her, with AW showing the jury a bald spot on her head where her hair had been ripped out. Id. at 98-99.

Finally, even if the admission of Long's testimony were regarded as an abuse of discretion, the error was harmless. See Yates, at 766. Unless the error in admitting evidence is actually prejudicial, it cannot be grounds for reversal. State v. Bourgeois, 133 Wn.2d 389, 403-04, 945 P.2d 1120 (1997). The rule is that "error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been

materially affected had the error not occurred." Id. (citing State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Id.

Here, given the nature of the charges against the defendant, Long's testimony was relevant and helpful to the jury. Long did not offer any opinion about the guilt of the defendant or the credibility of the State's witnesses, and thus the testimony was not unduly prejudicial. The trial court did not abuse its discretion in admitting Long's testimony.

4. THE DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN STRIKING TESTIMONY THAT HE OBJECTED TO, ORDERING THE JURY TO DISREGARD THE TESTIMONY, AND DENYING HIS MOTION FOR A MISTRIAL.

Testimony was adduced at trial that the defendant found objectionable. The testimony was struck, the jury was told to disregard the testimony, and the defendant's motion for a mistrial was denied. The defendant has failed to prove that the trial court abused its discretion in dealing with the objectionable testimony and in denying his motion for a mistrial.

Sergeant Richard McMartin was one of the team of officers tasked with apprehending the defendant and placing him under arrest. 2/16/12

RP 100-102. The team deployed to the Fred Meyer parking lot in Renton where they waited in unmarked cars for the defendant's arrival. Id. at 102. In answering the question about what the plan was in trying to arrest the defendant, Sergeant McMartin testified that:

> Basically, all we needed to do is see him, and then people would try to move in and arrest him without any issues. Because of known history with him, we expected him to be armed. So we needed enough people to block him in so he couldn't try to escape.

Id. at 102.

When the defendant's vehicle was surrounded by police vehicles, the defendant put his car in reverse and rammed Sergeant McMartin's vehicle. Id. at 106. With guns drawn, officers exited their vehicles and yelled "Police...show your hands." Id. at 109. The defendant reached down between his legs, looked around for a moment or two, and then finally raised his hands. Id. at 109; 3/6/12 RP 133-34. In between the defendant's legs was a fully loaded Russian style Tokarev 25mm handgun. 3RP 95-97.

Sergeant McMartin was then asked if in this type of situation, he was looking for weapons. He responded,

> My experience and training is that anybody can be armed at any time, especially in the criminal – with somebody that has so much criminal history. He was known to have weapons from previous history.

2/16/12 RP at 110. The prosecutor then stopped Sergeant McMartin from answering further. Id.

At the next break, the defendant asked for a mistrial. Id. at 135-36. The court noted that as part of the unlawful possession of a firearm charge, the defendant had entered into a stipulation to be read to the jury that informed them that he had previously been convicted of a "serious offense." [21] Id. at 137-39; 3/12/12 RP 39. It was also noted that the defendant was in fact arrested while in possession of a gun,[22] that the jury had already heard from one witness that the defendant possessed a gun,[23] and would hear further testimony concerning the same.[24] Considering the

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[21] For the charge of unlawful possession of a firearm in the first degree, the State was required to prove that the defendant possessed a firearm after having been previously convicted of a "serious offense." RCW 9.41.040(1)(a). "Serious offense" means a crime of violence, a class B drug offense, second-degree child molestation, incest of a child under age fourteen, indecent liberties, leading organized crime, promoting prostitution in the first degree, rape in the third degree, drive-by shooting, sexual exploitation, vehicular assault, vehicular homicide, class B felony offenses with a finding of sexual motivation, any felony with a deadly weapon verdict, or a pre 1996 comparable offense or comparable federal offense. RCW 9.41.010(18).

[22] The defendant would later testify and admit that he owned the gun found between his legs. 3/13/12 RP 30-31, 38.

[23] AW testified that the defendant had previously shown her that he owned a gun. She further testified that the gun taken into evidence looked like the same gun. 2/14/12 RP 119-20.

[24] JB testified that the defendant pulled a gun on her, threatened to kill her, and made her put the barrel of the gun in her mouth. 2/29/12 RP 85, 93-94. She testified that the gun taken into evidence looked like the same gun the defendant used on her. 3/5/12 RP at 83-84.

evidence that the jury had already heard and was expected to hear,[25] and the vague general nature of the contested testimony,[26] the court stated that it believed any prejudice could be cured by an instruction. 2/16/12 RP at 139-40. The testimony was then struck and the jury instructed to disregard it. 3/13/12 RP 39. The court denied the defendant's motion for a mistrial. 2/16/12 RP 139-40.

As a general rule, a trial judge has wide discretionary powers in determining how to conduct trial and how to deal with irregularities that undoubtedly occur. State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). This is because the trial judge is in the best position to make firsthand observations and determine the appropriate actions to take in any given situation. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986), overruled on other grounds by, State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994). When a trial irregularity does occur, a court has many remedial measures available in its arsenal, with the granting of a mistrial being one of those remedies. However, the granting of a mistrial is a remedy of last resort.

> A mistrial should be granted only when nothing the trial court could have said or done would have remedied the harm done to

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[25] The defendant would later testify and admit that he sold weed and crack cocaine for a living, that he had multiple pending drug cases, and that at the time of the incident there were warrants out for his arrest. 3/13/12 RP 26-27, 105, 110; see also id. at 26-27; 3/12/12 RP 82, 94 (defendant's mother testifying that the defendant knew he had warrant out for his arrest, and the defendant stating that he has had multiple warrants in the past).

[26] Sergeant McMartin did not refer to any particular prior incident or specify any particular prior conviction.

> the defendant. In other words, a mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.

State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983)[27] (citing Gilcrist, 91 Wn.2d at 612)[28] (other citations omitted).

The standard in reviewing the propriety of a trial court's action in dealing with a trial irregularity is an abuse of discretion. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992)[29] (citing Weber, 99 Wn.2d at 166). While reasonable minds might disagree with a trial court's ruling, that is not sufficient to overturn a conviction. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, a defendant must prove that no reasonable person would have taken the position adopted by the trial court. Robtoy, 98 Wn.2d at 42. A trial court's judgment "is presumed to be correct and should be sustained absent an affirmative

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[27] In Weber, a felony flight/eluding case, a State's witness, the officer who stopped Weber after a lengthy pursuit, inappropriately testified – twice – concerning statements made by Weber after he was ultimately stopped. Both statements indicated that Weber was aware that he was being pursued by the officer and that he knew he was in trouble. Weber's motion for a mistrial was denied. Instead, on each occasion, the trial court instructed the jury to disregard the improper testimony. The Supreme Court upheld the trial court's decision, finding that the defendant had failed to prove the trial court abused its discretion in denying Weber's motion for a mistrial. Weber, 99 Wn.2d at 160-66.

[28] In Gilcrist, a first-degree assault case, the first witness called by the defendant threw a cup of water on the jurors. During closing argument, a bomb exploded outside the courtroom. The Supreme Court held that the trial court did not abuse its discretion in denying Gilcrist's motion for a mistrial based on the trial irregularities. Gilcrist, 91 Wn.2d at 611-13.

[29] In Post, a burglary and rape case, a State's witness, the investigating detective, inappropriately testified that Post became a suspect after a person called the police and gave them Post's name. The Supreme Court held that the trial court did not abuse its discretion in denying Post's motion for a mistrial. Post, 118 Wn.2d at 619-21.

showing of error." State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). After all, it is the trial court that is in the best position to evaluate prejudice. Luvene, 127 Wn.2d at 701.

Even if a trial court abused its discretion, it is only errors that actually affect the outcome of the trial that will be deemed prejudicial. Mak, 105 Wn.2d at 701 (citing Weber, 99 Wn.2d at 165).[30] If a trial court has instructed the jury to disregard an irregularity, the jurors are presumed to have followed that instruction. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). A reviewing court must also presume that the jury followed the judge's order to disregard. Weber, at 166. In determining whether a trial irregularity prejudiced a defendant to such an extent that nothing short of a mistrial should have been granted, the court will consider: (1) the seriousness of the irregularity; (2) whether the statement at issue was cumulative evidence; (3) whether the jurors were properly instructed to disregard the remarks; and (4) whether the prejudice was so

[30] In Mak, a mass murder case, the defense called a psychiatrist as a witness. The psychiatrist had also testified in the co-defendant's trial. The prosecutor inappropriately asked the witness if the co-defendant had told him that Mak was the shooter. The trial court sustained an objection to the question. Still, the defendant moved for a mistrial. The Supreme Court held that the trial court did not abuse its discretion in denying Mak's motion for a mistrial, finding that the trial judge was in the best position to determine prejudice, and the defendant could not demonstrate that the trial court had abused its discretion. Mak, 700-01.

grievous that nothing short of a new trial could remedy the error. Mak, at 701.[31]

The defendant fails to show that nothing short of a mistrial should have been granted. To the contrary, the trial court, in the best position to determine the potential prejudice arising from the limited testimony of Sergeant McMartin, determined that a mistrial was not appropriate. A limiting instruction, the court ruled, was sufficient. The trial court was correct. Considering the evidence adduced at trial regarding the defendant's possession of guns and his criminal history, and the limited and general nature of the challenged testimony, there is nothing so egregious as to call into serious question the trial court's discretionary ruling.

5. THERE IS SUFFICIENT EVIDENCE SUPPORTING THE CHARGE OF PROMOTING COMMERCIAL SEXUAL ABUSE OF A MINOR.

The defendant claims that the State's evidence was insufficient to support a guilty verdict on count I, promoting commercial sexual abuse of

[31] The defendant attempts to label the event that occurred here as "misconduct" by "part of the prosecution team." Def. br. at 47. The defendant's attempt to place a more provocative label on the testimony, and his citation to authority, is misguided. As the cases cited by the State show, this analysis is governed by the event, regardless of whether the irregularity came from a State's witness, defense witness, or neither. E.g. Gilcrist, 91 Wn.2d at 613 (a bomb exploded but the jurors "did not know its cause or source"). Further, the cases the defendant cites, Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) and In re Stenson, 174 Wn.2d 474, 276 P.3d 286 (2012) are cases involving discovery issues. In short, these cases stand for the proposition that the prosecutor in imputed with knowing what discovery items are in police custody or control. The cases have nothing to do with trial irregularities.

a minor. His argument is premised on secondary claim, his assertion that the "to convict" jury instruction added an additional non-required, non-statutory element to the crime that the State was required to prove beyond a reasonable doubt. Specifically, the defendant claims that the State was required to prove a non-statutory element that he knew the victim was less than 18 years of age. This argument should be rejected. When read in a commonsense manner, the jury instructions did not add an additional element that the State was required to prove beyond a reasonable doubt. If the defendant believed the jury instructions were not clear on this point, his remedy was to ask for a clarifying instruction.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982).

Circumstantial evidence is equally as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A person is guilty of promoting commercial sexual abuse of a minor "if he or she knowingly advances commercial sexual abuse or a sexually explicit act of a minor or profits from a minor engaged in sexual conduct or a sexually explicit act." RCW 9.68A.101(1). Under the statute, "it is not a defense that the defendant did not know the alleged victim's age." RCW 9.68A.110(3).

It is true that under the "law of the case" doctrine, jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 100-02, 954 P.2d 900 (1998). Thus, the State may assume the burden of proving otherwise unnecessary elements of an offense when the added element is included in the "to convict" instruction without objection. Id.

Here, the definition of the crime instruction read as follows:

> A person is guilty of promoting commercial sexual abuse of a minor if he knowingly advances commercial sexual abuse of a minor or profits from a minor engaged in sexual conduct.

CP 268.

The "to convict" instruction read as follows:

> To convict the defendant of the crime of Promoting Commercial Sexual Abuse of a Minor, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between January 1, 2011 through June 20, 2011, the defendant:

(a) knowingly advanced the commercial sexual abuse of J.J.; or,

(b) knowingly profited from a minor engaged in sexual conduct; and

(2) That J.J. was less than eighteen years old;

(3) That any of these acts occurred in the State of Washington.

CP 269.

The defendant makes no argument regarding the sufficiency of the evidence as to any of the statutorily required elements of the crime. Instead, he reads element (1)(b) as having added the requirement that the State prove that he knew J.J. was under the age of 18.[32] This is not correct.

Jury instructions are read as a whole and in a straightforward and commonsense manner. State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006), abrogated on other grounds by State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011); State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). Rather, instructions are sufficient if they are readily

[32] For purposes of this statute, a minor is any person under 18 years of age. RCW 9.68A.011(5).

understood and not misleading to the ordinary mind. State v. Meneses, 169 Wn.2d 586, 592, 238 P.3d 495 (2010).

Here, the defendant simply asserts that under his reading of the instruction, the *mens rea*, the "knowingly" component of element (1)(b), extends to the victim's age. It does not. The sentence structure of element (1)(b) places the adverb "knowingly," immediately before the verb "profits." Generally, an adverb modifies the word to which it is placed closest. State v. Mohamed, 175 Wn. App. 45, 301 P.3d 504, 506-07 (2013) (citing THE CHICAGO MANUAL OF STYLE § 5.165 (16TH ED. 2010) ("The adverb should generally be placed as near as possible to the word it is intended to modify…Placing the adverb with the word it modifies makes the meaning clear…")).

In Mohamed, the same kind of argument was made as the defendant makes here. Specifically, Mohamed argued that the wording of the indecent liberties statute required that the "knowingly" element applied to more than the State believed it did. Under the statute, a person is guilty of indecent liberties "when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another: … (b) when the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless." RCW 9A.44.100(1)(b). Mohamed argued that the State was

required to prove that he had knowledge that the victim was incapable of consent. Although in interpreting a statute, a court looks to statutory intent as well as the actual language of the statute, in rejecting Mohamed's argument, the first thing the court relied upon was the actual wording of the statute. Mohamed, 175 Wn. App. at 506-07 ("'Knowingly' modifies 'causes.' It does not modify subsection (b), a more remote provision of the indecent liberties statute.").

In contrast, in State v. Shipp,[33] the Court was asked to interpret statutory language that was written in a somewhat different manner. Under the former first-degree promoting prostitution statute, a person was guilty of the offense "if he knowingly: (b) Advances or profits from prostitution of a person less than eighteen years old." RCW 9A.88.070(1) (since amended). The word "knowingly," the Court held, "precedes a colon and modifies everything which follows the colon." Shipp, 93 Wn.2d at 519. Therefore, the Court held that per the language of the statute, the State was required to prove that the defendant had knowledge of the victim's age. Id.

Another case, State v. Rosul,[34] is particularly noteworthy. Rosul was charged with possession of child pornography. He asserted that the

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[33] 93 Wn.2d 510, 610 P.2d 1322 (1980).

[34] 95 Wn. App. 175, 974 P.2d 916, rev. denied, 139 Wn.2d 1006 (1999).

statutory language required proof that he knew the victim's age. Along this line, Rosul proposed a "to convict" jury instruction "which would have required not only that he knowingly possessed visual or printed matter which depicted a minor engaged in sexually explicit conduct, but also that he 'had knowledge that the individuals depicted were minors.'" Rosul, 95 Wn. App. at 179. The court declined to give this instruction, choosing instead an instruction which mirrored the statutory language.

The instruction given by the court "provided that Rosul must have 'knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct....'" Rosul, at 179 n.5. This sentence structure and placement of the word "knowingly" is the exact same as used in the instruction challenged herein. It was also the exact same sentence structure and placement of the word "knowingly" as used in the child pornography statute. The statute provides that "[a] person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class C felony." RCW 9.68A.070.

The court held that knowledge of the victim's age is not an element of the crime of possession of child pornography. Id. at 180-81. Therefore, Rosul's due process rights were not violated by the giving of a "to convict" instruction that did not require that the State prove he knew the age of the victims depicted in the photographic materials. Id. at 180-81.

In order to rule in the defendant's favor here, this Court would have to find that the decision in Rosul is incorrect because both the "to convict" jury instruction and statute in Rosul use the same language and sentence structure as used in the "to convict" jury instruction here. The court in Rosul held that the word "knowingly" did not apply to the victim's age. The defendant asserts just the opposite. There is no support for this argument.

In any event, if the defendant felt the wording of the instruction was unclear, he had a remedy available to him, he could have asked for a clarifying instruction. He did not. "[A] criminal defendant who believes a jury instruction is vague has a ready remedy: proposal of a clarifying instruction." State v. Whitaker, 133 Wn. App. 199, 233, 135 P.3d 923 (2006), rev. denied, 159 Wn.2d 1017 (2007). The failure to propose a clarifying instruction waives review. State v. Fowler, 114 Wn.2d 59, 69, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991); see also State v. Payne, 25 Wn.2d 407, 414, 171 P.2d 227 (1946) (defendant who did not take exception to jury instructions waived claim that they were vague and confusing).

Finally, if this Court determines that the State was required to prove this additional non-statutory element, there was evidence sufficient supporting the element that the defendant knew JJ was a minor.

JJ testified that she was 18 years old at the time of trial. 2/15/12 RP 121. She said that she met Boom and started working as a prostitute when she was 16 years old. Id. at 125, 127, 129. When JJ switched pimps and began working for the defendant, she was 17 years old. 2/16/12 RP 20. JJ testified that the defendant knew how old she was when she was working from him. Id. at 20. In contrast, the defendant testified that he just assumed that JJ was 18 years old. 3/12/12 RP 128. Asked how it was that the defendant knew her age, JJ testified that she thought that Boom told him. 2/16/12 RP 20; 2/22/12 RP 5.

The defendant places great weight on the fact that JJ could not be certain how the defendant found out about her age, but this is not the appropriate question. The question is not *how* he found out, it is whether there is evidence that he knew her age. More specifically, "drawing all reasonable inferences from the evidence in favor of the State and most strongly against the defendant," could a "rational trier of fact" find that the defendant knew JJ's age. Tilton, 149 Wn.2d at 786; Salinas, 119 Wn.2d at 201. The answer to that question is an emphatic "yes." There was direct testimony from JJ that the defendant knew her age. The jury was entitled to place whatever weight to this testimony it deemed appropriate so long as it was rational. To hold otherwise here would be to ignore the standard

of review on appeal and make a credibility determination, a task that reviewing courts do not engage.

6. THE DEFENDANT'S CONVICTIONS FOR FIRST-DEGREE RAPE AND FIRST-DEGREE KIDNAPPING VIOLATE DOUBLE JEOPARDY.

The State concedes that the defendant's convictions on count III (first-degree kidnapping), and counts VI and VII (two counts of first-degree rape) violate the double jeopardy merger doctrine. Therefore, the lesser offense, the kidnapping conviction, must be vacated, along with its corresponding firearm enhancement.

The double jeopardy clause prevents a defendant from being punished twice for the same offense where the punishment has not been authorized by the legislature. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007). In many cases, a defendant's single solitary act may violate more than one criminal statute. It is not a violation of double jeopardy to punish an individual for having committed a single act that violates two criminal statutes, if the punishment has been authorized by the legislature. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (finding no double jeopardy violation where the defendant's single act of intercourse violated both the rape statute and the incest statute – Calle could be punished under both statutes). This is because it is the legislature that has the power to define criminal conduct and assign punishment, and

thus, double jeopardy is only implicated when the court exceeds the authority granted by the legislature and imposes multiple punishments where multiple punishments have not been authorized. Calle, 125 Wn.2d at 776. Therefore, a reviewing court's role "is limited to determining what punishments the legislative branch has authorized," and determining whether the sentencing court has complied with this authorization. Calle, at 776.

The "merger doctrine" is one of the tests used to determine whether the legislature has authorized multiple punishments. State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983); State v. Sweet, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999). The merger doctrine applies in a very specific statutory situation. The merger doctrine:

> ***only applies*** where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State **must prove** not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act [that] is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996) (citing Vladovic, 99 Wn.2d at 413). In other words, merger applies only "where the degree of one offense is elevated by conduct constituting a separate offense." State v. S.S.Y., 170 Wn.2d 322, 329, 241 P.3d 781 (2010). The premise is that this shows the legislature intended the punishment for the

elevated crime to constitute the sole punishment for the commission of the act that violated both statutes. State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005).

Here, the challenged convictions are the exact crimes discussed by the Supreme Court in Vladovic, when the Court was demonstrating how the double jeopardy merger doctrine works. To prove first-degree rape, the statute requires that the State prove that during the commission of the rape, the defendant "kidnaps the victim," "uses or threatens to use a deadly weapon" or "inflicts serious physical injury." RCW 9A.44.040(1)(a)(b) and (c). As charged here in counts VI and VII, to prove first-degree rape, the State was required to prove that the defendant "by forcible compulsion did engage in sexual intercourse with another person named J.B.... ***under circumstances where the defendant kidnapped J.B.***" CP 447 (emphasis added); RCW 9A.44.040(1)(b).

Count III, the first-degree kidnapping charge, was based on the intentional abduction of J.B. over the same time period as the two counts of first-degree rape. CP 446. It is proof of this act of kidnapping that elevated counts VI and VII from second-degree rape to first-degree rape. Thus, under controlling law, the lesser offense -- the kidnapping offense, must be vacated, along with the attached firearm enhancement.

7. THE DEFENDANT'S CHALLENGE TO THE INCLUSION OF HIS PRIOR JUVENILE CONVICTIONS IN HIS OFFENDER SCORE IS CONTROLLED BY SETTLED LAW.

The defendant argues that by the sentencing court using his four prior juvenile felony convictions[35] to increase his offender score and his standard range, his Sixth Amendment right to a jury trial was violated. Over seven years ago, the Supreme Court rejected this same argument. See State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006), cert. denied, Weber v. Washington, 551 U.S. 1137 (2007). The defendant makes no new arguments here.

In Apprendi v. New Jersey, the United States Supreme Court held that "***[o]ther than the fact of a prior conviction***, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (emphasis added). In Blakely v. Washington, the Court clarified that the relevant "statutory maximum" for Apprendi purposes "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or

[35] The defendant's juvenile felony convictions included convictions for second-degree assault (domestic violence), attempted residential burglary, first-degree theft, and VUCSA—delivery. CP 405.

admitted by the defendant," i.e., the top end of the standard range. 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

While the defendant's juvenile convictions are "prior convictions," and thus under Apprendi the existence of those prior convictions need not be proven to a jury, the defendant contends that because they were juvenile convictions that were originally not found by a jury, his Sixth Amendment right to a jury trial here was violated. This is the identical issue resolved contrary to the defendant's position in Weber.

> We hold that prior juvenile adjudications fall under the "prior conviction" exception in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and are not facts that a jury must find under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Weber, 159 Wn.2d at 255. The same claims that are being raised herein were dismissed by the Court.

> In the absence of authoritative instruction from the United States Supreme Court that juvenile adjudications are not prior convictions, and in light of the aforementioned strong state indicators, we hold that juvenile adjudications are convictions for the purposes of Apprendi's prior conviction exception. Therefore, we affirm the Court of Appeals determination that Weber's due process and jury trial rights are not violated by including Weber's juvenile adjudication in his offender score.

Weber, at 264-65. Accordingly, the defendant's prior juvenile convictions fall under the "prior conviction" exception in Apprendi and are not facts that a jury must find under Blakely.[36]

8. THE DEFENDANT HAS FAILED TO SUSTAIN HIS BURDEN IN SEEKING REVERSAL OF HIS CONVICTION PURSUANT TO THE "CUMULATIVE ERROR" DOCTRINE.

The defendant alleges that the cumulative effect of numerous errors deprived him of his right to a fair trial. It is true that an accumulation of otherwise non-reversible errors may deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). However, it is axiomatic that to seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors. Reversal due to cumulative error is justified only in rather extraordinary circumstances. See State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997) (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a

[36] The following cases rejecting the same argument: State v. Mounts, 130 Wn. App. 219, 122 P.3d 745 (2005), rev. denied, 159 Wn.2d 1015 (2007); State v. Stubbs 144 Wn. App. 644, 184 P.3d 660 (2008), reversed on other grounds, 170 Wn.2d 117 (2010), see also State v. Chavez, 163 Wn.2d 262, 180 P.3d 1250 (2008) (rejecting again the argument that juveniles are entitled to a jury trial) and State v. Jones, 159 Wn.2d 231, 149 P.3d 636 (2006) (rejecting argument that the recidivist fact of being on community placement at the time of the crime needs to be found by a jury), cert. denied, Thomas v. Washington, 549 U.S. 1354 (2007).

new trial); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

As addressed above, the defendant has failed to show that any errors occurred in his trial. Further, many of the issues raised by the defendant do not have anything to do with the fairness of his trial, the issues are sentencing and/or pretrial negotiation issues. The defendant has failed to meet his burden under the cumulative error doctrine.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's convictions and sentence.

DATED this 4 day of November, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to (1) David Donnan, the attorney for the respondent, at Washington Appellate Project, 1511 3rd Ave, Suite 701, Seattle, WA 98101, and (2) to Susan Wilk, the attorney for the respondent, at Law Offices of Michael Iaria, PLLC, 1111 3rd Ave, Suite 2220, Seattle, WA 98101 containing a copy of the Brief of Respondent, in STATE V. D'MARCO MOBLEY, Cause No. 68766-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

11-05-13

Date

Done in Seattle, Washington