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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY DEWAYNE PARKER,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 73667-1-I
Kitsap County Superior Court No. 13-1-00597-1

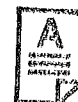
ANSWER TO PETITION FOR REVIEW

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SERVICE	Anthony Dewayne Parker #776122 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay WA 98326	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i> . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 4, 2016, Port Orchard, WA _____ Original e-filed at the Supreme Court; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us
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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney RANDALL A. SUTTON.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the issues raised by Parker, but grant review of the Court of Appeals's ruling granting a reference hearing in its unpublished opinion in *State v. Parker*, No. 73667-1-I (Oct. 19, 2015), a copy of which is attached hereto.

III. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Court of Appeals erred in remanding for a reference hearing on Parker's consolidated personal restraint petition where the evidence before the Court of Appeals clearly showed that there was no factual basis for Parkers suppression claims where the police obtained warrants before searching any of the cell phones?

2. Whether the Court of Appeals properly found trial counsel was not ineffective for not moving to suppress the evidence because (as the Court of Appeals found) counsel was not deficient where the case law at the time of trial did not support Parker's theory, and additionally where the evidence presented to the Court showed that there was no basis to suppress even under present precedent?

3. Whether the Court of Appeals properly found the evidence

was sufficient to prove Parker committed the crimes of first-degree burglary, kidnapping, and unlawful possession of a firearm?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Parker was convicted of first-degree assault, human trafficking, promoting prostitution, burglary, kidnapping, unlawful possession of a firearm, witness tampering, and firearm enhancements, and multiple aggravating circumstances.

On direct appeal, which was consolidated with a personal restraint petition, the Court of Appeal rejected the bulk of Parker's claims. It did, however, order a reference hearing on the issue of whether Johanna Holliday's cell phones were unlawfully seized or searched.

B. FACTS

Johanna Holliday struggled with addiction. 5RP 446. She lost her job, got kicked out of her house, and ended up in Kitsap County Jail. 5RP 446. There, Lorena Llamas suggested that she could stay with Parker if she paid a little rent and took care of his laundry and cooking. 5RP 448. Llamas called Parker and told him Holliday could be "a good asset" and that she would be worth bailing out. 5RP 449. Holliday was bailed out on December 6, 2012. 5RP 451. All she had when she was released was the clothes on her back, \$20 in cash and a dead cell phone. 5RP 451. She met

Parker for the first time that day. 5RP 452.

Parker repeated what he had told her when she was in jail: he wanted to spend a week or so getting to know her so they could bond. 5RP 454. So the first day they just got to know each other and later went to a bar and had a few drinks. 5RP 456. Parker joined her in the bedroom and they had sex. 5RP 456. The rest of the week was pretty low key. 5RP 457.

When Holliday first bailed out, she did not really want to work as a prostitute. However, she was unable to find other work, and Parker told her she could make a lot of money and that they could have a good life together. 5RP 458. He told her he could give her what she needed: money, cars, clothes. 5RP 458.

Holliday started working as a prostitute about a week or two after she was released. 5RP 458. Parker sent pictures of Holliday to a friend who posted an ad on an internet site called Backpage. 458-59. The ad had a phone number. 5RP 463. People would call or text her to set up a time to meet. 5RP 463. The price was usually already set up. 5RP 463.

In the beginning Parker had no issue with how many calls she took. 5RP 467. After about a month, he told her she needed to work more frequently and that it would pay off in the end. 5RP 467. It got to the point where he started offering her incentives. 5RP 467. He would tell

her if she worked every day until the end of the month, he would buy her a car, and then she could have a break. 5RP 467. It never really happened, though. 5RP 467. Within two to four weeks, however, he told her she needed to work every day until they got a car or saved \$5000. 5RP 467.

She would take up to eight calls a day. 5RP 468. She took most of the calls in her bedroom. 5RP 468. Sometimes she would meet the tricks at their hotel rooms. 5RP 469.

The relationship began to change in January. 5RP 469. In the beginning she had a lot of privileges and he would treat her fairly. 5RP 469. He told her that when she “pushed his buttons” if she were any other “she would have had [her] ass beat by then.” 5RP 469. Some of the things that pushed his buttons were showing up late, or telling little lies, or buying pills from his friends, which she was supposed to do through Parker. 5RP 470. He also did not want her having contact with his friends. 5RP 470.

Her drug use increased. She had access to pills through Parker, and began using more than before. 5RP 470. On occasion he would make her do tricks when she was withdrawing before he would give her the pills. 5RP 470. He also controlled how much she could have. 5RP 470.

She only left the house with Parker’s permission. 5RP 471. He would ask where she wanted to go, and sometimes told her no. 5RP 471.

Even if she went with a friend, he would call her after a while and tell her she needed to come home. 5RP 471.

In the beginning, when Parker had friends over, she would hang out with them. 5RP 471. At one point in January, she was talking to one of his friends and Parker became angry. 5RP 471. He told her not to talk to any of his friends anymore. 5RP 471. After that she had to stay in her room with the door locked when they came over. 5RP 471.

She gave all her money to Parker. 5RP 472. If she wanted to spend any of it, she had to steal it from him. 5RP 472. His money was mostly earned by Holliday. 5RP 472. If he caught her spending it he would berate her and call her a dope fiend. 5RP 479.

Holliday was responsible for cleaning the house. 5RP 480. Sometimes she was in withdrawal and could not physically do it. 5RP 480. He would verbally abuse her, call her a “raggedy-ass ho,” dope fiend, worthless, etc. 5RP 480.

In late December and early January, Holliday had court hearings in King County. 5RP 482. She knew Anthony Flewellen through Parker. 5RP 482-83. Flewellen’s nickname was Blacc Jacket. 5RP 483. After one of the hearings, Flewellen texted her and offered to pick her up. 5RP 484. One of her tricks, John, had driven her to court and she had him drop her off in Federal Way. 5RP 484, 490. She told the trick to not say

anything to Parker. 5RP 485. The trick told her she should not go because it would end up bad. 5RP 485. She went anyway and waited at Wal-Mart for Flewellen to pick her up. 5RP 485.

They went to Flewellen's girlfriend Jennifer's house in Renton. 5RP 485. While she was gone, Parker called and texted her, but she did not answer or respond to the texts. 5RP 485. The next morning her phone was off because the bill had not been paid. 5RP 485. Flewellen and Jennifer did not want her to tell Parker she was with them, and would not let her use their phones. 5RP 485. Later in the evening, Flewellen told Parker she was with them. 5RP 485. Holliday returned to Parker's house the next day. 5RP 485.

Holliday asked Flewellen to go inside with her when she got there. 5RP 486. She wanted him to talk to Parker and give him the money she made. 5RP 486. When they arrived around midnight, there were several people at the house and Parker was in their bedroom. 5RP 486.

There were other people in the bedroom. 5RP 486. Flewellen went into the bedroom and Holliday stood behind him. 5RP 486. They talked and Parker told Flewellen it was OK. 5RP 487. Parker asked everyone to leave the room so he could talk to Holliday. 5RP 487. He locked the door and stood in front of it so she could not leave. 5RP 487.

Parker began yelling and hitting her. 5RP 487. She put up her

hands to protect herself. 5RP 487. He told her to put her hands down and take it because she deserved it. 5RP 487. He told her she had screwed up and was being shady and disloyal. 5RP 487. He hit her mainly in the head and face but also in her chest and legs. 5RP 487. She kept telling him she was sorry and begged him to stop hitting her. 5RP 488. It went on for about 10 minutes. 5RP 487. Then he told her to go clean herself up and to go back to the bedroom when she was done and lock the door. 5RP 488.

Afterwards he told her that their relationship should be strictly business. 5RP 489. He told her he did not trust her and did not care about her anymore. 5RP 489. He stopped taking her out of the house or doing anything with her. 5RP 489. She just stayed in the house and took calls. 5RP 489. He also told her not to have any contact with Flewellen or any of his other friends. 5RP 489.

Parker struck Holliday again within about a week. 5RP 490. She was supposed to go to a funeral with Parker, but had been up all night and decided not to go. 5RP 490. She was in withdrawal and Parker told her Flewellen would bring her a pill. 5RP 490. She questioned why in light of Parker's previous instruction not to have contact with Flewellen. 5RP 490. Parker then told her that it was all right if she remained friends with Flewellen. 5RP 490.

After Parker left for the funeral, she called Flewellen, and asked him to drive her to a few calls so she could earn some money for drugs. 5RP 491. After she got as pill they went to Flewellen's house in Bremerton. 5RP 491, 493. Her phone ran out of minutes, so she called Parker from Flewellen's phone and told him she was calling from the 7-Eleven where she was buying a card for her phone. 5RP 491. Parker was already back in Bremerton, and told her to get out of the car and walk home immediately. 5RP 491. Then Parker said he would come get her at the 7-Eleven and she said she was already on the way and hung up. 5RP 491.

Flewellen had already left his house by then. Before he left, Holliday told him that she did not want to stay with Parker because of the way he was treating her. 5RP 492. Flewellen said she could stay with him. 5RP 492. She said she did not want to stay that day because all her belongings were in Parker's house, and she was afraid of what he would do with them. 5RP 492. Flewellen told her she needed to "choose up." She did not make a decision, so Flewellen left and went to Seattle. 5RP 492. She was there at Flewellen's house with Jennifer Prerost and Prerost's eight-year-old daughter. 5RP 492-93. Prerost had worked for Parker in the past. 5RP 492.

Parker figured out that she was at Flewellen's apartment and

showed up and banged on the door. 5RP 493. They did not answer the door or say anything and he kept banging and yelled that he knew she was in there. 5RP 493. He told Prerost that was not going to hurt her and that she better let him in. 5RP 494. Holliday went into Flewellen's bedroom and locked the door, and Prerost let Parker into the apartment. 5RP 494.

Parker broke the bedroom door down. 5RP 494. Holliday was on the floor behind the door and Parker yelled at her to get up. 5RP 495. She was crying and apologizing and begging him not to. 5RP 495. Parker grabbed her by her hair and threw her against the wall. 5RP 496. Holliday wet herself. 5RP 496. Then he smashed her head against the wall several times. 5RP 496. She was on the floor again and he kept hitting her and telling her to get up. 5RP 496. He told her to get out, so she got up and began walking out of the house. 5RP 496. She kept telling him she was sorry and begging him to stop hitting her. 5RP 496. She told him her purse was in the bedroom closet, and he responded that it did not matter, he would get it later. 5RP 497. He told her to get in the car. 5RP 497. There was a woman in the front, so she got in the back. 5RP 497.

When they dropped the woman off, Parker told her to get in the front seat. 5RP 498. She did not want to because she was afraid he would hurt her again. 5RP 499. As soon as she put her seatbelt on, he started hitting her again and banged her head against the side window. 5RP 499.

Parker told her that he was taking her to his “cousin’s” house. 5RP 499, 523. He told her that his friends would do whatever he told them, that they would rape her or kill her if he asked. 5RP 499. She was afraid. 5RP 500. When they got to the house, he hit her and made her bleed. 5RP 500. He apologized and got her a napkin. 5RP 501. Shortly after that he started hitting her again. 5RP 501. He repeated the sequence of being nice and then hitting her several times. 5RP 501.

Parker went into the house and told Holliday to wait in the car. 5RP 501. Parker came back out and told her to come inside. 5RP 502. She said she did not want to because she had wet herself and was embarrassed. 5RP 502. He told her to put on his jacket and they went in. 5RP 502. She had bruises on her face blood dripping from a cut on her eye. 5RP 502. They walked in and Parker told her to clean her “raggedy ass” up in the bathroom. 5RP 502. She went into the bathroom to wash, but he would not let her close the door. 5RP 502. They did not stay long, Parker just said he wanted to tell his friends how awful she was. 5RP 503. Then he took her home. 5RP 503. She thought about running but was afraid of what would happen if he caught her. 5RP 504.

When they got home she changed her pants and lay down on the bed. 5RP 504. He told her she could not sleep because he was not done with her. 5RP 504. He made her sit on the couch while he periodically

berated her and hit her some more. 5RP 504-05. He made her stay up all night while he played Xbox and watched movies. 5RP 505. When she fell asleep he would wake her up. 5RP 505. She did not sleep until Parker fell asleep. 5RP 508.

Parker had a gun. 5RP 506. He kept it under his mattress or in the piano in the hallway. 5RP 506. At one point during that night he went and got the gun. 5RP 506. He put it to Holliday's head and asked her if she wanted to die. 5RP 507. He yelled that she needed to look at the gun while he was pointing it at her. 5RP 507. He struck her with the gun or another object several times, leaving large bumps on her head. 5RP 507.

The next day, he woke her up and told her she needed to go make some money. 5RP 509. She was weak with withdrawal and the injuries and did not fight with him about it. 5RP 509. She did several calls that day. 5RP 510.

During the following week he hit her every day. 5RP 511. On one occasion she bought a pill from one of his friends, who she was not supposed to contact, and Parker found out. 5RP 511. He pushed her down on the bed and began whipping her across the face with a wire hanger. 5RP 512.

Holliday also feared Parker because he told her he was well-placed in a gang, and they would do what he asked, including killing people.

6RP 522. He told her there was nowhere she could go where he would not find her. 6RP 526. After a while she did not even think about leaving because it did not seem like an option. 6RP 527.

Eventually they moved from Llamas's house to a garage apartment that she was told belonged to Parker's mother. 6RP 528.

When he was in custody, Parker told Holliday that she needed to take his gun out from under the bed and put it in a bag in the garage. 6RP 531.

One day Holliday and another girl went to buy some pills and got pulled over by the police. 6RP 532. Detective Heffernan took her aside and talked to her. 6RP 532. He did not arrest her, but wanted information about Parker. 6RP 532. She said she was not comfortable talking about Parker. 6RP 532. Heffernan told her he would let her go if she agreed to talk to him the next day, and let him have the pills she had bought and her cell phone. 6RP 532. She turned over the phone and pills, but did not show up for the meeting. 6RP 532, 534.

When Parker got out of jail, she told him what had happened. 6RP 535. After that, Parker became very "off and on." 6RP 536. He would tell her she was useless and tell her to leave. 6RP 536. He would push her out the front door without her shoes or purse and lock it. 6RP 536. The physical abuse continued as well. 6RP 537-38.

Finally, on April 12, she posted an ad so she could earn some money, which she hoped would placate Parker. 6RP 538. She called a cabbie she regularly used to go to the old house for the call. 6RP 540. Parker thought she was talking to someone else and became enraged and beat her. 6RP 540. Then he made her go the store with him. 6RP 541. There she told him she needed to get to the house because her call was coming. 6RP 541. He let her go, and she called a friend to come and pick her up. 6RP 541.

Her friend took her to the Oyster Bay Inn where there was a room her friend said she could stay in until she figured out what she would do. 6RP 542. She set up some calls so she would have some money. 6RP 542. The first call ended up being a detective. 6RP 542. They arrested her and took her to jail for prostitution and for the drugs from the previous stop. 6RP 543. She subsequently entered a diversion agreement for the charges. 6RP 543. At the time she was arrested, she was using her old phone. 6RP 544. That was seized when she was arrested. 6RP 544.

Jennifer Prerost verified the incident where Parker attacked Holliday at Flewellen's house. 7RP 676-79, 687-88. Flewellen's landlord and her handyman verified that the door had been kicked in. 7RP 737, 8RP 775.

Afterward Prerost lived with Parker and Holliday for about a

month. 7RP 681. Parker kept a gun in the house. 7RP 684. He kept it in case there was any trouble so he could protect them. 7RP 684.

Holliday was pretty naïve when Prerost first met her. 7RP 686. “She didn’t know anything about nothing” when it came to prostitution. 7RP 686.

Parker came to attention of the Bremerton police when they were investigating one of his associates. 8RP 886. They learned he had a prostitute living with him and they attempted to identify her. 8RP 886. They found her in a Backpage ad. 8RP 886. They also listened to the jail calls between Parker and Llamas. 8RP 886. They ultimately identified the prostitute as Holliday. 8RP 886.

On February 11, Detective Rodney Rauback observed Holliday in an apparent drug deal. 8RP 811-12. Holliday was a target because she was associated with Parker. 8RP 793. He and Detective Ryan Heffernan contacted her. 8RP 812. They detained her and Heffernan questioned her. 8RP 813. They recovered a pill and her cell phone from her. 8RP 813. They did not arrest her because they were seeking her cooperation. 8RP 814. She did not meet with Heffernan the next day as she agreed. 8RP 890.

The police subsequently saw a Backpage ad for Holliday. 8RP 781. Sergeant Randy Plumb Plum contacted her, posing as a John and set

up an appointment. 8RP 783. He met her at the Oyster Bay Inn. 8RP 784. Detectives Rauback and Heffernan went to the meeting with him. 8RP 784. She invited him into the room, and after he checked to be sure no one else was there, Plumb opened the door and the detectives came in. 8RP 784. Heffernan took her phone. 8RP 785. They arrested her. 8RP 785. After she was arrested at the Oyster Bay Inn, Heffernan and Rauback interviewed Holliday. 8RP 815. Holliday had bruises on her arms and legs and was very afraid of talking to them about Parker. 8RP 816, 838.

Police then obtained a warrant to search Parker's residence. 8RP 785. Parker refused to come out, so they called the SWAT team because they had information that he had a firearm. 8RP 786-87. Parker was ultimately arrested and the home was searched. 8RP 787. They located a gun in a bag downstairs in the garage area. 8RP 788. The gun had four rounds with it. 8RP 837. The gun was tested and found to be operable. 8RP 873.

V. ARGUMENT

THIS COURT SHOULD GRANT REVIEW BECAUSE PARKER FAILED TO MEET HIS BURDEN OF SHOWING HE WAS ENTITLED TO A REFERENCE HEARING AND THE RECORD AFFIRMATIVELY SHOWS THAT HE IS NOT ENTITLED TO RELIEF.

1. Considerations governing acceptance of review.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:¹

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should decline to accept review because the ordering of a reference hearing meets these standards. Conversely, Parker's claims do not.

2. The evidence before the Court of Appeals clearly showed that there was no factual basis for Parker's suppression claims where the police obtained warrants before searching any of the cell phones.

While it rejected all of Parker's direct appeal claims, the Court of Appeals ordered a reference hearing on the issue of the search of Holliday's phones:

Second, the court shall hold a reference hearing on Parker's

¹ Review of the Court of Appeals resolution of the PRP issues is also governed by this section. RAP 13.5A(a)(1).

claim that J.H.'s cell phones were illegally searched and seized, as *State v. Hinton*, [179 Wn.2d 862, 319 P.3d 9 (2014)] impacts that analysis.

In *Hinton*, the court concluded that the defendant had a privacy interest in his text messages to another person, allowing him to challenge the warrantless search of that person's phone.

On the present record and the present status of briefing, we are unable to determine whether Parker is entitled to relief. Accordingly, we transfer the petition to the superior court for appointment of counsel, a reference hearing, and findings of fact.

Parker, Op. at 27-28 (footnotes omitted).

The Court of Appeals erred because the record established that search warrants were obtained before either of Holliday's phones were searched. The State filed a motion to supplement the appendix to its PRP response before oral argument with copies of these warrants. The proposed appendices clearly showed that Parker's claims that they were searched without a warrant were frivolous. They further showed that *Hinton* has no application to this case.

That leaves only Parker's claim that the police unlawfully seized (as distinct from searching) Holliday's first phone.² However, Parker lacks standing to challenge that seizure since none of the evidence obtained from it pertained to a possessory crime.³ The rights protected by

² The second phone was seized as part of a search incident to arrest. 6RP 543-44.

³ The State does not concede that the phone was unlawfully seized, but the record is insufficient to address that issue.

the Fourth Amendment and article I, section 7 are personal rights that may be enforced by exclusion of evidence “only at the instance of one whose own protection was infringed by the search and seizure.” *Rakas v. Illinois*, 439 U.S. 128, 138, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). To claim automatic standing, a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure. *Jones*, 146 Wn.2d at 332. Parker meets neither of these requirements with regard to the seizure of Holliday’s phone. As such he was not entitled to seek suppression of this evidence on the basis that the phone was unlawfully seized. Since the police properly obtained warrants before searching either of Holliday’s two phones, there was clearly no basis to suppress the information obtained.

A reference hearing is not a substitute for the petitioner’s failure to provide evidence to support his claims. As this Court has stated, “the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations.” *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). “Bald assertions and conclusory allegations will not support the holding of a hearing,” but the dismissal of the petition. *Rice*, at 886, *In re Williams*,

111 Wn.2d 353, 364-65, 759 P.2d 436 (1988). A petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay. *Rice*, 118 Wn.2d at 886.

Here there is more than a mere lack of evidence supporting Parker's claims. The Court of Appeals was provided with evidence that affirmatively refuted them. As such, the Court of Appeals decision directly conflicts with this Court's precedent. Review of the order for a reference hearing should be granted.

3. *The Court of Appeals correctly found that Parker's claims are without merit.*

Parker raises three claims of sufficiency of the evidence. These claims were raised in Parker's Statement of additional grounds, to which the State was not asked to respond. The Court of Appeals correctly found that these claims were without merit, and the State relies on its resolution of these claims. *See Parker*, Op. at 12-15.

Parker also argues that counsel was ineffective for failing to move to suppress information obtained from Holliday's cell phone. As the Court of Appeals correctly noted, *Parker*, Op. at 17-18, 26, counsel was not deficient because for moving to suppress because the trial occurred before this Court's decision in *Hinton*. Under the controlling decision of *State v. Hinton*, 169 Wn. App. 28, 280 P.3d 476 (2012), Parker would not have been entitled to suppression. Moreover, for the reasons discussed

above, Parker has also failed to show prejudice. His petition should be denied.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Parker's petition for review and grant review of the decision to grant a reference hearing.

DATED February 4, 2016.

Respectfully submitted,

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APPENDIX

FILED
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STATE OF WASHINGTON
2015 OCT 19 AM 9:54

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 73667-1-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
ANTHONY DEWAYNE PARKER,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>October 19, 2015</u>
)	

Cox, J. — Anthony Parker appeals his judgment and sentence on convictions of multiple counts of assault, human trafficking, promoting prostitution, burglary, kidnapping, unlawful possession of a firearm, witness tampering, and firearm enhancements. He fails in his burden to show that his trial counsel had actual conflicts of interest. Thus, we reject his ineffective assistance of counsel claim. Further, there is a nexus between his convictions of human trafficking and promoting prostitution and the firearm enhancements. And his statement of additional grounds for review does not warrant relief. Accordingly, we affirm the judgment and sentence in this appeal.

In the consolidated personal restraint petition, Parker asserts multiple claims. With one exception, none requires further consideration. His claim that there was an illegal search and seizure of another's cell phones that violated his

privacy rights in his messages on that cell phone requires appointment of counsel and a reference hearing. Accordingly, we transfer the petition to the superior court for appointment of counsel to represent Parker on the illegal search and seizure issue only. The court shall also conduct a reference hearing pursuant to RAP 16.12, enter findings of fact, and transmit such findings to this court for further action. We otherwise dismiss the petition.¹

The State charged Parker with 11 offenses. Most of the offenses involved J.H. as the alleged victim. Parker allegedly assaulted and kidnapped J.H. and committed the crimes of promoting prostitution and human trafficking while acting as her pimp. These charges were accompanied by firearm allegations.

After a lengthy trial, the jury convicted Parker of all charges. The jury also found by special verdict that he was armed with a firearm. The trial court sentenced him accordingly.

Parker appeals.

He subsequently filed a personal restraint petition. Division Two of this court consolidated his petition for decision with this appeal. As of the filing of this decision, no counsel represents Parker for his personal restraint petition.

INEFFECTIVE ASSISTANCE OF COUNSEL

Parker argues that his counsel provided ineffective assistance of counsel due to two alleged conflicts of interest. We disagree.

¹ We deny, without prejudice, the State's Motion to File Supplemental Appendices to its PRP Response dated September 10, 2015. The State may renew this motion in the superior court for purposes of the reference hearing on the issue of the illegal search and seizure only.

Both the federal and state constitutions provide the right to counsel.² The right to counsel includes the right to effective assistance of counsel.³ This also includes the right to counsel free from conflicts of interest.⁴

The defendant bears the burden to show that an actual conflict of interest adversely affected counsel's performance.⁵ The mere possibility of a conflict of interest does not warrant reversal.⁶ Instead, the defendant must demonstrate an "actual" conflict of interests, a situation where "counsel actively represented conflicting interests."⁷

"Whether the circumstances demonstrate a conflict under ethical rules is a question of law, which is reviewed de novo."⁸

Here, Parker argues that his attorney had two conflicts of interests. Because Parker fails to show that either alleged conflict was an actual conflict of interest, we hold that he fails in his burden to show ineffective assistance of counsel.

² U.S. CONST. amend. VI; CONST. art. I, § 22.

³ Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Crawford, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006).

⁴ State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003).

⁵ Id. at 573.

⁶ Id.

⁷ Id. (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)).

⁸ State v. Reeder, 181 Wn. App. 897, 908, 330 P.3d 786, review granted in part, 337 P.3d 325 (2014) (quoting State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783 (2008)).

Representation of Other Clients

Parker first argues that his counsel's representation of other clients created an actual conflict of interest. We disagree.

Under RPC 1.7(a), "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."^[9]

The legal practice of Parker's defense counsel at trial included estate planning and advice to several non-profits. As part of this practice, counsel recommended that his clients donate to certain charities. One charity that he recommended was a non-profit that Officer Taylor, the State's expert witness at trial, had helped to create. After learning that a different police officer had allegedly embezzled funds from the non-profit, Parker's counsel stopped advising his clients to donate to the non-profit.

Here, the trial court noted that it failed to see how the alleged conflict would be an actual conflict of interest or impede counsel's ability to cross-examine the State's expert witness. In response, Parker's counsel argued that it would create the appearance of a conflict of interest, or the appearance that he

⁹ RPC 1.7(a).

was not vigorously cross-examining the witness. But he conceded that it would not be an actual conflict of interest.

We conclude that Parker's counsel did not have any actual conflict of interest. His description of events fully supports that there was no actual conflict of interest, as does his candid representation to the court. We need not decide whether there was any apparent conflict of interest because that is not the material standard.

None of counsel's clients was connected to the present case. And counsel had advised his clients to stop donating to the non-profit connected to the witness at trial. The fact that he had formerly advised clients to donate money to an organization with which this witness was involved fails to create an actual conflict of interest. There simply is no showing that counsel's representation of other clients had any directly adverse impact on representing Parker.

We note that Parker's counsel extensively cross-examined Officer Taylor at trial. This cross-examination included the non-profit and the investigation into its finances. Thus, Parker cannot show that his counsel was actively representing the interests of his other clients rather than Parker's interests.

Parker argues that his counsel's other clients had "a philanthropic interest in supporting an organization whose primary goal was combating human trafficking." Thus, by representing Parker, counsel was acting against the interest of his clients.

This argument conflicts with both this record and the law. Counsel expressly stated that he advised the other clients against further donations to the nonprofit at issue. Even if we assume that counsel's clients had a general interest in preventing human trafficking, this fails to meet the requirements for an actual conflict of interest under RPC 1.7. Thus, Parker cannot show that his counsel's representation was materially limited by his other clients' interests.

Witness Against Client

Parker also argues that his counsel had a conflict of interest because he could have been called as a witness against Parker. Because this record shows otherwise, we disagree.

Under RPC 3.7, "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." The State may call the defense counsel as a witness only if "counsel's testimony is both necessary and unobtainable from other sources."¹⁰

Here, there was no conflict of interest. Parker's counsel was not likely to be a necessary witness at this criminal trial because the State expressly chose not to call him as a witness.

The alleged conflict of interest rose from Parker's purported witness tampering. The State discovered that Parker had mailed someone on the defense's witness list letters instructing him on what to testify to. The State decided to call this witness in its case-in-chief to introduce these letters.

¹⁰ Regan, 143 Wn. App at 430.

Parker's counsel moved to withdraw, stating that there was "a remote chance" he would be called as a witness against Parker. He indicated that his private investigator had spoken with this witness and written a report. But counsel had not personally spoken with the witness.

In response, the State stated on the record that it did not plan to call either Parker's counsel or his private investigator as witnesses. It noted that it planned to call only the witness to whom Parker sent the letters. The trial court denied the motion.

Nothing in this record shows that the State ever changed its position about calling defense counsel as a witness at trial. Thus, Parker's counsel was not likely to be a necessary witness and never was, in fact, a witness against his client. There was simply no actual conflict of interest.

Additionally, even if the State had wished to call Parker's counsel as a witness, it would have been unable to do so. To call him as a witness, the State would have needed to prove that his testimony was both necessary and otherwise unobtainable. Here, the State presented the testimony of the witness who had received the letters. Thus, Parker's counsel's testimony would not have been either necessary or otherwise unobtainable.

Parker argues that his counsel was either an "unwitting accomplice" and "critical witness," or an "actual accomplice" to the witness tampering. But both claims are incorrect. As explained previously, counsel was not a necessary witness. He was not a witness at all.

Additionally, nothing in the record indicates Parker's counsel was actually involved, or alleged to be actually involved, with the witness tampering. To the contrary, the State noted that it "ha[d] no concerns about [Parker's counsel] being involved in any of this." Parker fails to point to anything in this record to suggest otherwise.

FIREARM ENHANCEMENTS

Parker also argues that the court erred when it added firearm enhancements to his sentences for human trafficking and promoting prostitution. Because there was a nexus between the firearm and the crimes, we disagree.

RCW 9.94A.533(3) imposes a sentencing enhancement if the defendant commits certain crimes while armed with a firearm. A person is "armed" if the weapon is readily accessible and easily available for use, and there is a nexus between the defendant, the crime, and the weapon.¹¹

Whether the defendant was armed is "a mixed question of law and fact."¹² Whether the evidence for a firearm enhancement is sufficient is a legal question reviewed de novo.¹³

For example, in State v. Easterlin, officers found the defendant with a gun on his lap and a controlled substance on his person.¹⁴ In that case, there was a

¹¹ State v. Easterlin, 159 Wn.2d 203, 206, 149 P.3d 366 (2006).

¹² State v. Schelin, 147 Wn.2d 562, 565, 55 P.3d 632 (2002) (quoting State v. Mills, 80 Wn. App. 231, 234-35, 907 P.2d 316 (1995)).

¹³ Id. at 566.

¹⁴ 159 Wn.2d 203, 206, 149 P.3d 366 (2006).

sufficient nexus because a jury could find that he was armed to protect the controlled substance.¹⁵

In State v. Johnson, on the other hand, this court concluded that there was no sufficient nexus.¹⁶ In that case, the defendant was in a bedroom when officers knocked on the door to his apartment.¹⁷ When officers entered, they found him in the hallway.¹⁸ The officers later discovered controlled substances in a bedroom and a gun in the compartment of a coffee table in the living room.¹⁹ This court held that because Johnson could not obtain access to the gun, he was not armed at the time.²⁰

Human Trafficking

Parker first argues that there was no nexus between the crime of human trafficking and the firearm. He is wrong.

Under RCW 9A.40.100, a person commits human trafficking by:

(ii) Benefit[ing] financially or by receiving anything of value from participation in a venture that has engaged in [recruiting or transporting a person, knowing that force will be used to cause the person to engage in a commercial sex act]; and

....

¹⁵ Id. at 210.

¹⁶ 94 Wn. App. 882, 974 P.2d 855 (1999).

¹⁷ Id. at 888.

¹⁸ Id. at 887.

¹⁹ Id. at 887-88.

²⁰ Id. at 894.

[The venture] [i]nvolve[s] committing or attempting to commit kidnapping^[21]

Here, there was a nexus between the crime, the firearm, and the defendant. Parker was charged under this prong, subsection (ii), of the human trafficking statute, because the trafficking involved kidnapping J.H.

Parker used the firearm during this kidnapping. J.H. testified that Parker assaulted her and ordered her to leave the building she was in. J.H. complied, and Parker took her back to their residence. At their residence, Parker continued to assault her. During the assault, Parker pointed the gun at J.H.'s head and asked her if she wanted to die.

Thus, Parker used the gun during J.H.'s kidnapping. Because Parker's human trafficking charge was based on J.H.'s kidnapping, there is a sufficient nexus to the firearm enhancement.

Promoting Prostitution

Parker also argues that the promoting prostitution charge lacked a sufficient nexus to a firearm enhancement. He is wrong again.

Under RCW 9A.88.070,

(1) A person is guilty of promoting prostitution in the first degree if he or she knowingly advances prostitution:

(a) By compelling a person by threat or force to engage in prostitution or profits from prostitution which results from such threat or force.^[22]

²¹ (Emphasis added.)

²² Id.

Here, the morning after Parker assaulted J.H. with the firearm, he woke her up and told her that she “needed to work and make some money and put some money in his pocket.” J.H., who was “weak and exhausted and in pain,” “didn’t fight [Parker’s suggestion].”

Accordingly, the use of the firearm was part of the force or threat of force Parker used to compel J.H. to engage in prostitution. Thus, there was a sufficient nexus to this charge.

Parker argues that there was no nexus because he used the firearm only “to commit the separate offense of second degree assault.” But this argument ignores the fact that the second degree assault was part of the force or threat of force that established the promoting prostitution charge.

Parker also argues that his case is analogous to Johnson. But in Johnson, the defendant never had access to the gun and did not use it, unlike this case. The gun was merely found in his apartment.²³

Here, the record shows that Parker used the gun to assault J.H. as part of the conduct that formed the basis for the promoting prostitution and human trafficking charges. Thus, Johnson is not analogous.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Parker raises multiple arguments in his statement of additional grounds for review. None warrants relief.

²³ Johnson, 94 Wn. App at 887-88.

Sufficiency of Evidence

Parker first argues that insufficient evidence supported several charges against him.²⁴ We conclude that sufficient evidence supported each charge.

Evidence is sufficient when any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.²⁵ When considering a sufficiency challenge, we defer to the jury's determination as to the weight and credibility of the evidence.²⁶ "In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it."²⁷

Burglary

Parker first argues that the State failed to prove one element of burglary—unlawfully entering or remaining in a building.²⁸ He argues that he received permission to enter the building, because an occupant opened the door to let him enter. This argument is unpersuasive.

Jennifer Prerost testified that she was in a house with J.H. when Parker came to the house and began banging on the door. While screaming outside, he threatened to kick in the door, telling Prerost to open the door for him. Parker

²⁴ Pro Se Supplement Brief Pursuant to RAP 10.10 Statement of Additional Grounds at 7-19.

²⁵ State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

²⁶ State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

²⁷ State v. Homan, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

²⁸ Pro Se Supplement Brief Pursuant to RAP 10.10 Statement of Additional Grounds at 8-9.

also told Prerost that she “kn[e]w how he is” and warned her not to “play with him.”

Prerost eventually opened the door. But from this testimony, the jury could have found that Prerost opened the door because of Parker’s threats and that she did not willingly invite him into the house. This is supported by the fact that Prerost testified that she did not welcome Parker into the house and that he did not have her permission to be there. In short, this credibility determination by the jury is not reviewable by this court. Thus, sufficient evidence proves that Parker unlawfully entered or remained in the house.

First Degree Kidnapping

Parker also argues that insufficient evidence supports his conviction for first degree kidnapping. Specifically, he argues that he did not abduct J.H. because she willingly left the house with him. This argument is contrary to the record.

Prerost testified that J.H. “wanted to leave [Parker].” When Parker arrived at the house where Prerost was with J.H., J.H. begged her not to let him in. J.H. was “scared and panicked” and ran to hide in a bedroom. After Parker entered the house, he kicked down the bedroom door. Prerost could hear J.H. crying and Parker hitting her. She then saw Parker “pushing [J.H.] towards the door,” push her into the back seat of his car, and “spe[e]d off.”

With this testimony, the jury could have found that J.H. did not willingly leave with Parker. Rather, she did so because of the use of force or threatened

force. Again, we do not review this credibility determination by the jury. The evidence was sufficient to support the conviction of first degree kidnapping.

Second Degree Assault

Parker next argues that insufficient evidence supports one count of second degree assault.²⁹ That count of assault was based on the intent to commit a felony, namely unlawful imprisonment.

Parker argues that the State failed to prove this crime because the jury instruction for this charge stated that the assault occurred “on or about December 13, 2012 through January 20, 2013.” Parker argues that under this instruction, the State had to show that he imprisoned J.H. for the duration of the 37 days. He is wrong again.

Here, the State identified a specific instance during that range where Parker assaulted J.H. and forced her to stay in her room. The State was not required to prove that either the assault, or the false imprisonment it was intended to achieve, lasted for the duration of the “on or about” period.

Unlawful Possession of a Firearm

Parker also argues that insufficient evidence supports his conviction for unlawful possession of a firearm. Specifically, he argues that the State did not prove that he constructively possessed the firearm.³⁰ The record shows otherwise.

²⁹ Pro Se Supplement Brief Pursuant to RAP 10.10 Statement of Additional Grounds at 11-12.

³⁰ Id. at 12-15.

A person constructively possesses something “that is not in his or her physical custody but is still within his or her ‘dominion and control.’”³¹ One factor courts consider is whether a person had dominion and control over the premises where the contraband was found.³²

Here, the State presented sufficient evidence for the jury to find beyond a reasonable doubt that Parker constructively possessed the firearm. Police found the firearm in the house where Parker lived. Additionally, J.H. testified that Parker instructed her to move the firearm from under his bed to the garage, which she did.

Here, the fact that officers found the firearm in Parker’s house, and that J.H. moved the firearm at Parker’s request, show that he had dominion and control over the firearm. Thus, the State proved that he constructively possessed the firearm.

Witness Tampering

Next, Parker argues that insufficient evidence supported one charge of witness tampering.³³ Specifically, he argues that he did not tell Prerost to change her testimony.

But the record provides evidence from which the jury could find that Parker asked Prerost to change her testimony. The State introduced a recorded

³¹ State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014) (quoting State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)).

³² State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

³³ Pro Se Supplement Brief Pursuant to RAP 10.10 Statement of Additional Grounds at 15-17.

jail call from Parker to Prerost. In the call, Parker never directly asks Prerost to lie or change her testimony. But the jury could have inferred that Parker was attempting to instruct Prerost on how to testify.

Parker stated that he learned Prerost had said that she had witnessed his assault of J.H. Parker told Prerost that she needed to tell the truth and say that none of that had happened.

Later, when Prerost said that she had left the house and “wasn’t even nowhere around” at the time of the assault, Parker replied “I don’t know.” When Prerost reiterated that she had left and wasn’t there, Parker replied “Yeah. You just have—you was there. Nothing happened.” He continued “You know I didn’t do that. You was there with us.”

At trial, Prerost testified that she witnessed Parker break down the door, assault J.H., and push her into his car. Thus, although Parker told Prerost to tell “the truth” and say that nothing happened, the jury could have inferred that Parker was instructing Prerost to lie.

Similarly, the fact that Prerost stated that she wasn’t present, and Parker stated that she was, allowed the jury to find that Parker was instructing Prerost to say that she was present.

Thus, sufficient evidence supported this witness tampering charge.

Promoting Prostitution and Human Trafficking

Parker also argues that insufficient evidence supports his convictions of promoting prostitution and human trafficking. Specifically, Parker argues that the court should have suppressed evidence obtained from allegedly warrantless

searches of J.H.'s cell phones. Parker relies on evidence outside the record on appeal to make this argument. But he raises the same argument in his personal restraint petition. Accordingly, we do not consider this argument any further for purposes of the appeal and address it in the context of his personal restraint petition.

Ineffective Assistance of Counsel

Parker also argues that his counsel provided ineffective assistance by failing to move to suppress evidence found during allegedly warrantless searches of J.H.'s cell phones.³⁴ Because he fails to show that counsel's performance was deficient at the time of trial, we disagree.

The defendant bears the burden of proving ineffective assistance of counsel.³⁵ "[T]he defendant must show that (1) counsel's representation was deficient, that is, it fell below an objective standard of reasonableness and (2) there was prejudice, measured as a reasonable probability that the result of the proceeding would have been different."³⁶

Judicial scrutiny of counsel's performance is "highly deferential."³⁷ We make every effort "to eliminate the distorting effects of hindsight, to reconstruct

³⁴ Id. at 26-29.

³⁵ State v. Humphries, 181 Wn.2d 708, 719, 336 P.3d 1121 (2014).

³⁶ Id. at 719-20.

³⁷ Strickland, 466 U.S. at 689.

the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."³⁸

Here, even assuming officers unlawfully searched J.H.'s cell phones, counsel was not ineffective for failing to move to suppress this evidence. Parker relies on the state supreme court's February 2014 decision in State v. Hinton to argue that he had standing to move to suppress evidence of his messages found in the search of another's cell phone.³⁹ But his trial was in November 2013, prior to the supreme court's decision.

At the time of his trial, Division Two of this court's June 26, 2012 decision in that case was still good law.⁴⁰ And that decision supported the conclusion that Parker lacked standing to challenge the search.⁴¹ Thus, counsel's decision not to move to suppress this evidence was objectively reasonable.

Without a showing of this first prong of the test, there is no need to reach the second prong—the question of prejudice.

Prosecutorial Misconduct

Parker also argues that the prosecutor committed misconduct by knowingly eliciting false testimony.⁴² But while Parker points out some

³⁸ Id.

³⁹ 179 Wn.2d 862, 319 P.3d 9 (2014).

⁴⁰ State v. Hinton, 169 Wn. App. 28, 280 P.3d 476 (2012), rev'd, 179 Wn.2d 862 (2014).

⁴¹ Id. at 35.

⁴² Pro Se Supplement Brief Pursuant to RAP 10.10 Statement of Additional Grounds for Review at 29-31.

inconsistencies in the State's witnesses' testimony, he fails to cite anything in the record indicating that the prosecutor knew this testimony was false. Thus, this argument is unpersuasive.

Gang Evidence

Finally, Parker argues that the trial court abused its discretion when it admitted evidence that he was in a gang.⁴³ He argues that the court failed to balance this evidence's probative value and prejudicial effect before admitting the evidence.

But the trial court balanced the probative value and prejudicial effect when it ruled in limine on this issue. There is no indication in the record that this ruling was tentative and subject to further argument during trial. Accordingly, the court was not required to revisit the matter when Parker renewed his objection at trial.

PERSONAL RESTRAINT PETITION

In his consolidated personal restraint petition, Parker challenges the sufficiency of the charging document. He also claims his counsel was ineffective for several reasons. Finally, he claims the search and seizure of J.H.'s cell phones was illegal.

"When considering a timely personal restraint petition, courts may grant relief to a petitioner only if the petitioner is under an unlawful restraint, as defined by RAP 16.4(c)."⁴⁴ If the alleged error is constitutional, the petitioner must show

⁴³ Id. at 32-35.

⁴⁴ In re Pers. Restraint of Yates, 177 Wn.2d 1, 16, 296 P.3d 872 (2013); accord RAP 16.4(a).

actual prejudice.⁴⁵ If the alleged error is non-constitutional, the petitioner must show “a fundamental defect resulting in a complete miscarriage of justice.”⁴⁶

The petitioner must make these showings by a preponderance of the evidence.⁴⁷

When reviewing a personal restraint petition, appellate courts have three courses of action: “(1) dismiss the petition, (2) transfer the petition to a superior court for a full determination on the merits or a reference hearing, or (3) grant the petition.”⁴⁸

If the petitioner fails to make a prima facie showing of actual prejudice or a fundamental defect, the court should dismiss the petition.⁴⁹ On the other hand, if the petitioner meets his burden to show actual prejudice or a fundamental defect, the court should grant the petition.⁵⁰ The court should transfer the petition to the superior court if “the petitioner makes the required prima facie showing ‘but the merits of the contentions cannot be determined solely on the record.’”⁵¹

⁴⁵ Id. at 17.

⁴⁶ Id. (quoting In re Pers. Restraint of Elmore, 162 Wn.2d 236, 251, 172 P.3d 335 (2007)).

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id. at 18.

⁵¹ Id. (quoting Hews v. Evans, 99 Wn.2d 80, 88, 660 P.2d 263 (1983)).

To rely on allegations outside the existing record, “the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief.”⁵² If this evidence relies on others’ knowledge, the petitioner can use affidavits or other corroborating evidence as to what those witnesses would testify.⁵³

But “[t]his does not mean that every set of allegations which is not meritless on its face entitles a petitioner to a reference hearing. Bald assertions and conclusory allegations will not support the holding of a hearing.”⁵⁴ Instead, the petitioner must state facts with “particularity.”⁵⁵

Here, with one exception, Parker fails to make a prima facie showing that he is entitled to relief.

Charging Documents

Parker first argues that he is entitled to relief because his charging documents were constitutionally defective. We disagree.

Both the federal and state constitutions give defendants the right to be informed of the charges against them.⁵⁶ The Sixth Amendment requires that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of

⁵² Id.

⁵³ Id.

⁵⁴ In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

⁵⁵ Id.

⁵⁶ State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

the nature and cause of the accusation.”⁵⁷ Likewise, our state constitution provides that the accused has the right “to demand the nature and cause of the accusation against him.”⁵⁸

To be constitutional, charging documents must include “all essential elements of a crime, statutory and nonstatutory.”⁵⁹ Essential elements are “those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime.”⁶⁰

When the defendant does not challenge the charging document until after the verdict, courts “more liberally construe[] [the document] in favor of validity.”⁶¹ “Under this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from language within the charging document.”⁶²

To apply this rule, courts use a two-prong test: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging

⁵⁷ U.S. CONST. amend. VI.

⁵⁸ CONST. art. I, § 22.

⁵⁹ State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

⁶⁰ State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting State v. Powell, 167 Wn.2d 672, 683, 223 P.3d 493 (2009)).

⁶¹ State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

⁶² Id. at 104.

document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?"⁶³

Under the first prong, the essential question is "whether all the words used would reasonably apprise an accused of the elements of the crime charged."⁶⁴

The second prong looks to whether the defendant "actually received notice of the charges he or she must have been prepared to defend against."⁶⁵

"It is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges."⁶⁶

Errors in the charging document do not necessarily create reversible error. For example, an "[e]rror in a numerical statutory citation is not reversible error unless it prejudiced the accused."⁶⁷

This court reviews de novo the adequacy of a charging document.⁶⁸

Here, Parker first challenges the sufficiency of his charging documents after his conviction. Accordingly, we construe the charging documents more liberally.

Parker alleges that the charging documents were insufficient for two reasons, both relating to the dates listed on the documents. First, the third

⁶³ Id. at 105-06.

⁶⁴ Id. at 109.

⁶⁵ Id. at 106.

⁶⁶ Id.

⁶⁷ Vangerpen, 125 Wn.2d at 787-88.

⁶⁸ State v. Johnson, 180 Wn.2d 295, 300, 325 P.3d 135 (2014).

amended information incorrectly lists specific dates rather than date ranges. For example, while the original information alleged that Parker committed human trafficking “on or **between** November 1, 2012 and April 12, 2013,” the amended information alleges that Parker committed this crime “on or **about** November 1, 2012 and April 12, 2013.”⁶⁹ The third amended information uses “on or about” rather than “on or between” in 10 of the 11 charges.

Second, Parker argues that the dates listed for human trafficking and promoting prostitution are incorrect. The amended information alleges that these crimes occurred “on or about November 1, 2012 and April 12, 2013.” But Parker points out that J.H. was in custody from November 6, 2012 to December 6, 2012.

In this case, the charging documents reasonably informed Parker of the charges against him. The State is not required to allege the exact date the crime occurred because that is not an element of the crime. RCW 10.37.050(5) requires that a charging document set forth sufficient facts to demonstrate that the statute of limitations has not expired. Unless time is an essential element, the State need not plead anything more specific.

Here, the dates in the charging documents indicated that the statute of limitations had not expired. The fact that they mistakenly indicated two specific dates, rather a range of dates, was not the omission of an essential element. Thus, the charging documents were not defective.

Moreover, Parker cannot show that the charging documents prejudiced his defense. Most of the jury instructions contained language stating that the crimes

⁶⁹ (Emphasis added.)

occurred “through” a pair of dates. One assault instruction stated that the crime occurred “on or about January 1, 2013 and February 2, 2013.” When the jury asked if this date range was also supposed to be “through,” both parties agreed that it was. Thus, Parker’s counsel understood that the State charged his client with committing crimes over a range of days, as his response to the jury’s question demonstrates.

Parker’s argument that the promoting prostitution and human trafficking charges included the wrong date is unpersuasive. The State is not required to allege the exact date the crime occurred. Additionally, the State’s theory of the case was that Parker began to recruit J.H. while she was in custody. Thus, it was not inappropriate for the charging document to include J.H.’s time in custody.

Ineffective Assistance of Counsel

Parker also argues that he received ineffective assistance of counsel.

“[I]f a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice.”⁷⁰

Parker argues that his counsel was ineffective for three reasons. None survives scrutiny.

⁷⁰ In re Pers. Restraint of Crace, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

First, he argues that his counsel should have challenged the sufficiency of the charging documents. Because the charging documents were sufficient for the reasons we already explained in this decision, this claim is not persuasive.

Second, Parker argues that his counsel was ineffective for failing to move to suppress information obtained from J.H.'s cell phones. But as discussed earlier, it was not deficient performance for counsel to conclude under then existing law that Parker lacked standing to challenge the search of J.H.'s cell phones.

Finally, Parker argues that his counsel failed to properly investigate the case. Parker relies on conclusory allegations outside the record to support this claim.

Parker alleges that his counsel failed to investigate his case and states that if counsel had called certain witnesses, the jury would not have found him guilty.⁷¹ Similarly, Parker provided affidavits and signed declarations from potential witnesses stating that they were not called to testify but had information helpful to Parker's case.⁷²

But these statements do not specify with particularity to what these witnesses would have testified. For example, one affidavit merely says that the witness had "valuable information."⁷³ Another affidavit states that the witness's

⁷¹ Personal Restraint Petition, Appendix 1-A.

⁷² Id. at Appendix G.

⁷³ Id.

testimony "could have helped [Parker's] case."⁷⁴ Parker's affidavit also fails to provide any details as to the content of these witnesses' testimony.

Parker also fails to cite anything in the trial record that indicates to what these witnesses would have testified.

Thus, we conclude that Parker relies on conclusory statements, and thus is not entitled to relief or a factual hearing.

Search and Seizure

Finally, Parker argues that the State illegally searched and seized J.H.'s cell phones.⁷⁵ For the reasons that follow, we transfer this petition to the superior court for two things. First, the court shall appoint counsel to represent Parker for his request for relief in the personal restraint petition. Second, the court shall hold a reference hearing on Parker's claim that J.H.'s cell phones were illegally searched and seized, as State v. Hinton⁷⁶ impacts that analysis.

In Hinton, the court concluded that the defendant had a privacy interest in his text messages to another person, allowing him to challenge the warrantless search of that person's phone.⁷⁷

On the present record and the present status of briefing, we are unable to determine whether Parker is entitled to relief. Accordingly, we transfer the

⁷⁴ Id.

⁷⁵ Personal Restraint Petition at 12-14; Pro Se Supplement Brief Pursuant to RAP 10.10 Statement of Additional Grounds at 17-26.

⁷⁶ 179 Wn.2d 862, 319 P.3d 9 (2014).

⁷⁷ Id. at 865.

petition to the superior court for appointment of counsel, a reference hearing, and findings of fact. The findings shall be transmitted to this court for further action.

The superior court's findings of fact should include, without limitation:

1. A specification of all evidence on J.H.'s cell phones to which Parker's asserted privacy interest extended;
2. Whether such evidence was admitted at trial; and
3. If not admitted, whether such evidence led to other evidence that was admitted at trial.
4. A specification of what evidence admitted at trial, independent of that listed in paragraphs 1 to 3, supported Parker's convictions.

We affirm Parker's judgment and sentence for the direct appeal. We dismiss his personal restraint petition to the extent of all claims except for the illegal search and seizure claim. With respect to that claim, we transfer the petition to the superior court for appointment of counsel and a reference hearing on that claim only. Thereafter, the court shall enter findings of fact and transmit them to this court for further action, all pursuant to RAP 16.12.

COX, J.

WE CONCUR:

Trickay, J.

Dwyer, J.

The Court of Appeals
of the
State of Washington
Seattle

RICHARD D. JOHNSON,
Court Administrator/Clerk

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October 19, 2015

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CASE #: 73667-1-I

State of Washington, Respondent v Anthony Dewayne Parker, Appellant
Kitsap County, Cause No. 13-1-00597-1

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm Parker's judgment and sentence for the direct appeal. We dismiss his personal restraint petition to the extent of all claims except for the illegal search and seizure claim. With respect to that claim, we transfer the petition to the superior court for appointment of counsel and a reference hearing on that claim only. Thereafter, the court shall enter findings of fact and transmit them to this court for further action, all pursuant to RAP 16.12."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

No. 73667-1-I
Page 2 of 2

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

LAM

Enclosure

OFFICE RECEPTIONIST, CLERK

To: Randall A. Sutton
Subject: RE: State v Anthony Parker 92547-0 State's Response to Petition for Review

Received 2/4/16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Randall A. Sutton [mailto:RSutton@co.kitsap.wa.us]
Sent: Thursday, February 04, 2016 4:56 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: State v Anthony Parker 92547-0 State's Response to Petition for Review

Please see the attached document.

Case name: State v. Anthony Parker
Case number: 92547-0
Name of the person filing the document: Randall Avery Sutton
Phone number of the person filing the document: 360-337-7211
Bar number of the person filing the document: 27858
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